LAW OFFICES
CASEY CIKLIN LUBITZ MARTENS & O'CONNELL
A PARTNERSHIP INCLUDING PROFESSIONAL ASSOCIATIONS

LINDA DICKHAUS AGNANT, P.A.
BRUCE G. ALEXANDER, P.A.
JERALD S. BEER, P.A.
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PHIL D. O'CONNELL, P.A.
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MATTHEW N. THIBAUT, P.A.
DEAN VEGOSEN, P.L.
GARY WALK, P.A.
JOHN R. YOUNG, P.A.

PHILLIP D. O'CONNELL, SR. (1907-1987)

OF COUNSEL
MICHAEL J. MONCHICK, P.A.
MICHAEL J. KENNEDY, P.A.
KEVIN D. WILKINSON, P.A.

515 NORTH FLAGLER DRIVE, 20TH FLOOR
WEST PALM BEACH, FLORIDA 33401-4343
TELEPHONE: (561) 832-5900
FACSIMILE: (561) 833-4209

August 24, 2010

VIA ELECTRONIC TRANSMISSION

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Proposed Rule Change Amendments to Discovery Guide and Rules 12506 and 12508 of the Code of Arbitration Procedure of Customer Disputes
SEC File No.: SR-FINRA-2010-035

Dear Ms. Murphy:

This letter is to provide comment on proposed amendments to the Discovery Guide and related rules of the Financial Industry Regulatory Authority, Inc. ("FINRA") Code of Arbitration Procedure. By way of background, Richard L. Martens of our firm has been actively involved in litigation and arbitration of securities customer disputes for twenty-five years, which includes the era, pre-McMahon,[1] when federal statutory fraud claims were decided in court, not in arbitration. We draw from our varied backgrounds and our combined experience of more than eighty years with both court litigation and arbitration, including arbitration through the forums and procedures of the National Association of Securities Dealers ("NASD") and New York Stock Exchange ("NYSE"), in providing these comments.

General Comment – Elimination of Allegation-Specific Lists

The proposed change makes "each item on the Lists (with a few exceptions) presumptively discoverable in every customer case" regardless of the customer's allegations or the respondents' defenses. It appears that this proposed change has the potential to cause more discovery disputes than

[1] Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332 (1987).

the current allegation-oriented system. If it is not clear that allegations frame relevancy (as clearly implied in the current Discovery Guide), the parties may have to engage in motion practice to exclude Discovery Guide Items that are irrelevant to the parties' allegations.

General Comment – Electronic Files

The Notice of Filing of Proposed Rule Change Amendments ("the Notice") states that "FINRA considers electronic files to be documents within the meaning of the [Discovery] Guide." It is imperative that this statement be clarified to (1) exclude the massive volume of embedded electronically stored information ("ESI"), including "metadata," that follows an electronically stored "document," and; (2) that production need not be in the subject electronically stored document's native format,"[2] but instead may be made by printed "hard" copy, PDF, or other static image format. ESI document production is threatening to paralyze litigants in court with its extremely high costs of production and the extraordinary time needed to gather, organize, review and analyze. For example, often a third-party document review company is required to organize the production, which must be reviewed to avoid production of non-party (other customer) information as well as other non-responsive documents. The clarification suggested above will avoid arguments within individual arbitrations over whether the phrase "electronic files" mandates federal court-style ESI discovery.

General Comment – Confidential Documents

Where a party requests confidential treatment for a document produced in discovery, there is very little burden on the party receiving the document to actually treat the document as confidential. In actual practice, it simply means that the parties and their law firms will not circulate the document to other law firms and will dispose of the document when the arbitration is over. The list of extra factors proposed in the Notice fails to account for this de minimus burden, an omission that suggests that it is not relevant to a determination of confidential treatment of documents where the parties cannot agree. Thus, confidentiality, which should be a fairly routine matter to agree upon, may be used by one side as a bargaining chip.

Proposed List 1, Item 2

The Notice proposes that "all advertising materials sent to customers ... that refer to the securities and/or account types that are at issue" should be presumptively discoverable. This proposal will create a problem in process of producing these documents. It will be unduly burdensome to review these documents (commonly referred to as "statement stuffers") to see if they relate to the "account types" at issue. The term "account type" having no discernable definition or parameters, the firms will likely have to produce all statement stuffers sent during the tenure of the customer's relationship with the firm. In addition, the vast majority of these stuffers will have no relevance to any issue in dispute. If

[2] "Native format is the 'default format of a file,' access to which is 'typically provided through the software program on which it is created." Aguilar v. Immigration and Customs Dept., 255 F.R.D. 350, 353 n.4 (S.D.N.Y. 2008).

a customer asserts that he or she was introduced to, or purchased, a security based on an advertisement, he or she can make a request for it. Moreover, all advertisements are reviewed before they are ever sent to the customer for compliance with the securities laws and regulations. The burden of this proposal far outweighs the benefit.

Proposed List 1, Item 3

The Notice proposes that documents "evidencing investment or trading strategies utilized or recommended in the claimants' accounts ... and any supervisory review of such strategies" should be presumptively discoverable. We believe that this proposal lacks definition to make it workable. Does it require production of only those documents utilized by the associated person(s) at issue and the supervisor(s) at issue or does it require production of every document evidencing the same strategy utilized by the claimants regardless of the origin of the document? For example, will a firm be required to search all of the files of all of its offices and employees for documents evidencing an "asset allocation" model of investing, regardless of whether the claimant(s), associated person(s) at issue, or supervisor(s) at issue ever saw the asset allocation document? This proposal is simply too vague, lends itself to an over-expansive interpretation, and should not be adopted as drafted.

Proposed List 1, Item 5

The Notice proposes that "sales materials and performance or risk data" "prepared or used by the firm relating to the transactions or products at issue" should be presumptively discoverable. Although this proposal has some definition from the experience of the "old" List 1, Item 5, the added documents may arguably include large categories of documents from across an entire member firm and its employees. In our opinions, this proposal is also too vague – it provides no guidance to the arbitrators.

Proposed List 1, Item 13

The Notice proposes to add supervisory documents regarding supervision of the associated person(s)' other customers' accounts to the lists of presumptively discoverable documents. This proposal should not be adopted. The supervisory documents of the other customers will relate to their investment objectives, risk tolerances, net worth, ages, and communications with the broker(s) and the supervisor(s). Accordingly, the relevance of these documents to the claimant-customer(s)' dispute is tenuous at best.

In addition, important privacy concerns are implicated. Unless redacted, the supervisory documents of the other customers will publish the other customers' personal and private financial information to the claimant and his attorneys and the attorneys' staff. Further, the documents produced may open up the arbitration to a series of mini-arbitrations within the primary arbitration, and the issues raised by the other customers' supervisory documents may subject those other customers to unwanted subpoenas for testimony at the arbitration regarding their personal and private financial information. We strongly urge that this proposal be rejected.

Proposed List 1, Item 16

The Notice proposes to require firms and associated persons to produce "all investigations, charges or findings by any regulator" for the associated person's alleged wrongful behavior similar to that alleged in the claimant/customer's Statement of Claim, and the firm's responses thereto. This proposal simply promises to another dispute-within-a-dispute to the issues of the subject arbitration. Testimony will be taken relating to the regulatory investigation of another (unproved) matter, not the issue before the arbitration panel.

Proposed List 1, Item 20

The Notice proposes to require firms/associated persons to produce documents showing the extent to which the associated person recommended the same securities to other customers. Requiring production of these documents will imply that they are relevant to prove that the security at issue was improperly sold to the claimant-customer. The potential for unfair prejudice outweighs any perceived benefit.

We urge the Commission to consider the foregoing. Please do not hesitate to call upon us if we may provide any assistance.

Sincerely,

Richard L. Martens
Jason S. Haselkorn
Patricia M. Christiansen
Charles L. Pickett