Re: Comment to Proposed Update of FINRA Discovery Production Lists
SR-FINRA-2008-024

I am Richard Stephens, an attorney headquartered in Boca Raton, Florida, who represents only claimants in arbitrations, primarily FINRA arbitrations. I am also on the Chairman roster of FINRA, and a former attorney with the U.S. Securities & Exchange Commission in Washington, D.C., in both the Enforcement Division and the Division of Investment Management. I am thoroughly familiar with the FINRA Document Production Lists, having extensively experienced them over the past ten years since their inception in September 1999. I have reviewed the proposed changes to the Lists and see some problems that I feel compelled to call to your attention for remedial action.

1. The proposal to eliminate the footnote to the heading for List 1 is a serious mistake.

One of the biggest problems that I experience in almost every FINRA case is the respondent's pervasive use of non-party subpoenas to get documents from non-parties that are usually of little or no relevance, but are used to create massive binders of material that FINRA arbitrators usually accept "for what it is worth". I cannot begin to describe the countless hours of writing legal memoranda and briefs to fight unwarranted and abusive non-party subpoenas, and having hearings prolonged by irrelevant drivel from non-party subpoenas. **The only salvation, to keep subpoenas within reasonable constraints, is to alert the Chairman to the <u>footnote to List 1 for non-party subpoenas</u>, with FINRA guidance that: "In addition, the arbitration chairperson may use the Document Production Lists as guidance for discovery issues involving non-parties". This guidance for non-party subpoenas is <u>not</u> found in Rules 12505 through 12514. The Rule proposal, however, in discussing the elimination of the footnote says that "this information is covered in the Customer Code's subpoena and discovery rules (Rules 12505 through 12514". That is <u>not true</u>! Without this footnote, or its guidance on non-party subpoenas expressly incorporated into the Rules, it will be a "wild west" show, with no guidance constraining non-party subpoenas. Elimination of the footnote is a huge mistake, and will result in endless motions and filings, and prolonged hearings, for no good reason.**

2. List 1(6) seeks to modify language as follows: "all customer complaints alleging conduct of a similar nature to that alleged in the Statement of Claim against the associated person, redacted to prevent the disclosure of nonpublic personal information of that customer. **There are serious problems with the existing language that persists in the revision, and requires modification.**

The phrase "similar complaints" is so abused by respondent firms that it has become meaningless and very harmful to claimants. Some firms feel that, if a customer complaint about unauthorized trading is not the identical date and the identity security and the identical number of shares, for one customer compared to another, that absurdly is not a "similar complaint". Or if a customer alleges "unsuitability" for the month of July, and another customer alleged it for the month of August, that absurdly is not a "similar" complaint. **The word "similar" should be eliminated so that *any* complaints are discoverable instead of being concealed under irrational "interpretations" that have been going on for a long time**. By the way, the word "similar" appears in other List items, and is subject to the same abuse, requiring more clarification or elimination of the term.

3. List 2 changes to five years from three years the customer's obligation to produce income tax returns, other brokerage statements and net worth statements. The change from three years to five years for these materials will substantially lengthen arbitrations and increase the number of binders presented at arbitrations, which are already the source of complaints from arbitrators. In addition, it will intimidate claimants from ever filing arbitrations, with the remote relevance of the extra two years outweighed by the customer's feeling that they are subject to irrelevant inspections of their personal lives .

For example, when I get a client who complains about an unauthorized trade that occurred last month, he thinks FINRA arbitration is "off the wall" and overly invasive for requiring him to give three years worth of his personal tax returns that have nothing to do with the unauthorized trade. **If FINRA insists on going with this five-year period, it should <u>not</u> be under a "presumptively discoverable" standard, since arbitrators view that standard as compulsory. A five-year period that becomes automatic in FINRA arbitration is a bad idea.**

4. List 4(3) seeks to modify an item to state: "2) All exception reports, supervisory activity reviews, activity concentration reports, active account runs and similar documents produced to review for activity in customer accounts relating to the associated person(s) and/or the customer's account(s) at issue that were generated not earlier than one year before or not later than one year after the transaction(s) at issue." **FINRA desperately needs to modify the language "relating to the associated person(s)" to add "…for all customers…", to clarify the item.**

Brokerage firms have been routinely ignoring the plain language of the item which requires "supervisory activity reviews… relating to the associated person(s) and/or the customer's account" to pretend that the words "associated person(s) do not exist; and many arbitrators have gone along with this

misinterpretation. *If* the supervisory reviews, etc. were solely for the claimant's account, the words "associated person(s)" are superfluous and should be eliminated if not intended. As I understand the item, any supervisory reviews during the period should be produced; for example, if a supervisor discussed unauthorized trading with the associated person on a different account that same day, that supervisory review is critical for viewing by a claimant relating to why that supervisor was negligent in not also being alert to unauthorized trading in the claimant's account.. Right now, without further clarification by FINRA, claimants are routinely *not* getting that intended documents because the phrase is not specific enough. It desperately needs to be clarified that the reviews, etc for associated persons is not limited to the claimant's account.

5. Full commission runs should be a standard item, and not just for excessive trading or a more limited version for the List on unsuitability. Full commission runs are needed in virtually every case, especially unsuitability and unauthorized trading, or a claimant cannot receive a fair hearing.

For example, whether the broker engaged in other trades in the same security for other customers on the same day, and whether it was marked solicited or unsolicited, are major factors in the analysis of an unauthorized trade, yet the Lists does not automatically require the full commission run. For unsuitability cases, where a broker marks tickets "unsolicited" as a routine, there must be a review of the full commission run to see if he was doing the same thing for other customers as well. This tool is invaluable for my analysis and arbitrator findings. **There should be full commission runs as presumptively discoverable in every arbitration without having to fight "tooth and nail" for it.**

6. The repeated permission by FINRA for brokers to redact "customer names" is a mistake and sends the wrong message to arbitrators. It will be viewed as guidance from FINRA not to permit other customer names in any event, which will prevent major frauds (*a la* Madoff) from being uncovered, contrary to the intent of President Obama and the SEC.

The legal standard in Florida and many other places in the USA for customer personal information is a **balancing test of the need for the customer information versus the right of privacy**. **There must be a FINRA guidance to arbitrators about redacted customer names saying that the arbitrator may consider ordering the unredacting if the need outweighs the customer right of privacy**. Otherwise, FINRA will be inviting the concealment of major frauds and Madoff-type situations and throw away Fed Rule Evid. 404(b) about fraudulent intent derived from similar frauds. These other customers may be needed as witnesses, but their identities are being irrationally concealed from a claimant.

Thank you for reviewing my comments, and I hope that you implement them to create a better arbitration forum.

/S/
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