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March 30, 2009

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

RE: Amendments to Discovery Guide in FINRA Arbitrations
SR-FINRA-2008-024

Dear Ms. Murphy:

I am writing concerning the Proposed Rule Change and Amendment No. 1 Thereto by Financial Industry Regulatory Authority, Inc., Relating to Amendments to the Discovery Guide to Update the Document Production Lists.

By way of introduction I am a practicing attorney admitted to practice before the United States Supreme Court as well as the Supreme Courts of Nevada and California. I have been engaged in the practice of law since 1993 primarily representing the victims of investment fraud.

By my estimates I have brought well over 500 investment related matters to conclusion via FINRA arbitrations, trials in state and federal courts and through settlement. I serve as a FINRA arbitrator and am chairman qualified. I also serve as a pro temp District Court Judge in Clark County, Nevada.

No doubt you have received many thoughtful responses from members of both sides of the "arbitration bar." Rather than revisit plowed ground, I want to focus on just three changes; the expansion to five years from three of the requirement that customers produce tax returns and other account statements; the requirement that a customer produce loan agreements (both contained in List Two,) and the deletion of the requirement that a firm produce tape recorded telephone conversations and messages (List One.)

I join my esteemed colleagues in PIABA who make the point that under the new proposed discovery guide the primary question of whether a broker honored the "know your customer" and "suitability" "rules" will be lost. This is because the new discovery guide requires production of documents and information that may not have been relevant to the underlying relationship, and therefore did not factor into a determination on making investment decisions. Furthermore, without explanation the new proposed discovery guide expands the period of time a customer must disclose financial information such as tax returns and other account statements from three years to five years.

To a person, all of my clients question why they are required to disclose tax returns and financial information in this process. Many of them were sold unregistered securities by associated persons who engaged in prohibited “outside business activities.” As you no doubt know, the sale of unregistered securities is prohibited, and is, in effect, a strict liability offense. As such, a customer’s state of mind, let alone his financial history is totally irrelevant. Even in a garden variety suitability case, if the customer’s stated objective is conservative income, what relevance is an account from five years ago? The case should focus on whether the stated objective was met. A customer may change his or her investment objectives over five years, especially as he or she ages. In many cases, one account is considered a nest egg account, while an older, much smaller account could be the product of a windfall, and therefore a different objective could apply.

These distinctions are lost under the new proposed discovery guide. What FINRA is essentially saying to the arbitrators is "don't look at the facts in this case; instead put the customer’s financial life on trial." And many defense attorneys do just that. I have seen skillful advocates spend hours going over client tax returns, as if they were IRS auditors. The result is as expected; the arbitration panel’s focus shifts away from the issues in the claim, and they improperly consider information that was never a factor in the broker-client relationship.

Likewise the new requirement that customers produce loan agreements for the five year period prior to the first transaction in the account. There is no legitimate reason to require production of these documents other than to put the customer’s financial life on trial.

The other change that I believe harms the process is the deletion in List One that the associated person/firm produce tape recordings of conversations between the customer and the firm and its agents. Curiously, the customer is still required to produce such recordings in List Two. In my experience it is far more likely that a FINRA firm is taping conversations than is the customer. In fact, many regulatory sanctions require firms to tape record customer conversations. What better source to know whether a customer approved a transaction, whether a misrepresentation was made, or even whether a customer struggled to understand a financial strategy than the actual conversation. It is troubling to me that the party most likely to be in possession of such pertinent information is now not presumptively required to turn it over, while a customer is so required.

There are many more examples in the proposed new guide that evidence what I consider a strong bias in favor of the industry, and against the public customer. I encourage you to strongly consider the points made by Scott Shewan, president elect of PIABA in his comment letter on the subject.

In conclusion I believe the expansion from three to five years of production of tax returns and other account statements in List Two is unduly burdensome and unfair. Likewise the requirement of the production of loan agreements. Finally, the deletion of the requirement that the firm produce tape recordings in List One seems contrary to the goal of holding a fair hearing.

I thank you for the opportunity to comment.

Very truly yours,
(Electronically signed)
Dave Liebrader