COMMENTS TO PROPOSED UPDATE OF FINRA
DISCOVERY PRODUCTION LISTS

I am Royal Lea, a lawyer in private practice in San Antonio, Texas. I occasionally represent public customers in FINRA Dispute Resolution arbitrations. I also am on the roster of FINRA public arbitrators.

These are my comments on the proposed changes:

In new items 1 and 2 in List 2, the change to require the customer to produce five (5) years of financial statements and income tax returns in *all* cases is unfair for customers. The customer's returns and financial statements have no relevance in many cases. Even in suitability cases, if the firm or associated person did not rely on information in tax returns or financial statements in analyzing the recommendation(s) in dispute, the returns and financial statements have no relevance. As the Commission knows, suitability is measured by what the firm and associated person did know or believe about the customer at the time of the recommended transaction, not by what they didn't know or believe at that time. If the firm didn't already have the customer's income tax return or financial statement when it recommended a trade, the information doesn't matter. In unauthorized trading and failure-to-execute cases, the customer's tax returns have no bearing on anything.

Requiring customers to produce three (3) years of their tax returns and financial statements is bad enough. The old list items really seemed designed to induce many customers considering making a complaint not to file a claim. The proposed new items aggravate that problem.

New item 12 in List 2 is unfair. Why are customer's loan documents unrelated to her brokerage account presumptively discoverable in all cases? Why is a car loan file or application presumptively discoverable in a churning case or a failure to execute case? Does the fact that a customer cannot afford to pay cash for her car or her home—or that she applied for a student loan—necessarily have some bearing on whether a security recommended to her five years later was suitable? Or to whether she did or did not authorize a particular purchase or sale of a security five years later? Or to whether an equity index annuity was a suitable recommendation by the firm to her? Does the Commission believe that all retail investors who have car loans are more likely than those without car loans to be sophisticated? To be unsophisticated? What logical or empirical basis is there for drawing any meaningful conclusion in any category of FINRA case from the fact that a person has a car loan, a student loan, or a home mortgage?

If the firm does not have information in a loan application when it recommends a security, then the information is not relevant in analyzing the suitability of the recommendation. Even if there turns out to be a discrepancy between the information the firm had and what is in a loan application, the firm was still obligated to recommend based on the information it did have, not on what it did not have.

Relevance to what a firm recommended to a customer does not seem to be the basis for this new item on customer loans. So is the purpose of the new item to allow firms to try unfairly to fish for information to harass customers who assert claims? Or to try to impeach customers with irrelevant discrepancies between the information the firm did have and what is in the loan documents? If so, this is further confirmation of the general unfairness of FINRA arbitrations for customers.

New item 1 in List 3 is an improvement. But it should apply in suitability and misrepresentation/omission cases as well. Many of the same circumstances and factors that make the new item 1 appropriate in excessive trading cases apply with equal force in other cases. Isn't excessive trading really just quantitative unsuitability? There really is no reason not to include this item in other kinds of claims as well.

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