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April 3, 2009

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

Re: File Number SR-FINRA-2008-024

Dear Ms. Morris:

The Investor Rights Clinic at Pace University School of Law, operating through John Jay Legal Services, Inc. ("PIRC"), welcomes the opportunity to comment on FINRA's proposed rule change to amend its Discovery Guide and update the Document Production Lists. PIRC is a law school curricular program in which J.D. students, for academic credit and under close faculty supervision, represent individual investors of modest means in arbitrable securities disputes. For the past decade, PIRC has represented small investors in numerous arbitrations, and has learned firsthand the burdens that current discovery obligations can place on our clients.

While we support FINRA's proposed amendments to the extent they enhance the fairness and efficiency of the arbitration process, we oppose them to the extent they place additional burdens on investors of modest means. We describe in detail below our views as to the positive impacts of the proposed rule changes and then turn to some of the perceived negative impacts. Additionally, we address in detail our concern that the proposed new lists improperly treat Compliance Manuals as confidential when current law does not protect most of those manuals as confidential.

I. PIRC Supports Those Proposed Amendments That Enhance Customers' Access to Information

First, we support FINRA's efforts to provide customers with increased access to relevant materials from respondent brokerage firms. Courts agree that the arbitration

process must be fundamentally fair in order to uphold awards.[1] Recently, we conducted an empirical study of the perceptions of fairness of parties to securities arbitration which was sponsored by the Securities Industry Conference on Arbitration (SICA). The SICA study revealed that the majority of customers surveyed (62.62%) either disagreed or strongly disagreed with the notion that the arbitration process was fair.[2] The study also revealed that only 39.76% of customers surveyed either agreed or strongly agreed that the discovery process enabled them to obtain the information needed for a hearing.[3] In contrast, 56.12% of all others surveyed (including corporate representatives of member firms, associated persons, and lawyers) either agreed or strongly agreed with this notion.[4] These findings suggest that customers are more frustrated than other groups with their limited access to relevant documents during discovery. Simply stated, if parties cannot obtain critical information in discovery, then the process is not only perceived as unfair, it is unfair.

Some of the proposed amendments to the Document Production Lists properly address these concerns by adding new documents deemed presumptively discoverable for customers. For example, Proposed List 1, Item 1 would require member firms to produce the "account record information for the customer," which contains information that the broker recorded about the customer such as the customer's annual income, net worth, and account objectives, and also indicates whether the record has been signed by the associated person responsible for the account and approved or accepted by a principal of the firm. Proposed List 1, Item 4 would require member firms to produce a new category of relevant documents: "all documents evidencing any investment or trading strategies utilized or recommended in customer's account, including, but not limited to, options programs, and any supervisory review of said strategies." Additional amendments that enhance customers' access to relevant information – such as new List 4, Items 4, 5, 7 and 8, and new List 12, Items 1-5 -- will contribute to the fairness of the arbitration process.

II. PIRC Supports Those Amendments That Enhance the Efficiency of the Discovery Process

The Supreme Court recognizes that arbitration provides a forum where parties can resolve disputes and not be burdened by the costs and delays that exist in the litigation process, many of which stem from extensive discovery.[5] We therefore support the amendments that help promote this important policy goal of arbitration. For example, current List 2, Item 3 requires that customers produce "copies of all documents the customer received from the firm/Associated Person(s) … including monthly statements, opening account forms, confirmations, prospectuses, annual and periodic reports, and

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[1] *See, e.g.,* Bowles Fin'l Group, Inc. v. Stifel, Nicolas & Co., Inc., 22 F.3d 1010, 1012-13 (10th Cir. 1994) ("Courts have created a basic requirement that an arbitrator must grant the parties a fundamentally fair hearing, expressing the requirement in various forms.").

[2] *See* Jill I. Gross and Barbara Black, *Perceptions of Fairness of Securities Arbitration: An Empirical Study* (Feb. 6, 2008), *available at* SSRN: http://ssrn.com/abstract=1090969, at 45.

[3] *Id.* at 32. An additional 18% of customers responded that they did not know whether the discovery process enabled them to obtain the information necessary for a hearing. *Id.*

[4] *Id.*

[5] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 278 (1995).

correspondence." Proposed List 2, Item 3 eliminates mandatory production of account statements and confirmations if the customer stipulates to having received them and only requires customers to produce statements or confirmations with handwritten notations on them or which are in any way non-identical to those sent by the firm. These proposed amendments eliminate significant time and cost burdens in the discovery process.

We also support the amendments that eliminate the alternative method under which member firms or associated persons can produce materials they prepared relating to the transactions or products at issue (referenced in Current List 7, List 9, and List 13, Item 1). Instead of actually producing these materials, the member firm under this alternative procedure can provide the customer with a list of these materials from which the claimant would identify what documents he or she wants the firm to produce. Upon further request by the claimant, the respondent is required to provide any documents that the claimant identifies on the list. We support the elimination of this alternative method because it creates time delays in the discovery process and burdens customers.

III. PIRC Supports Those Proposed Rule Changes That Provide for Greater Clarity for Customers

We support all proposed amendments that clarify the language in the Discovery Guide and Document Production Lists rendering them more understandable for all parties involved and updating them to apply to current practices in the securities industry. For instance, the Proposed Rule Change replaces the term "Compliance Manual(s)" in Current List 1, Item 9 (renumbered List 1, Item 7) with "manuals and any updates thereto," and replaces the term "compliance department" with "firm." These revisions add specific language to ensure that member firms are aware that they are required to produce all manuals, not just compliance manuals, and all bulletins issued, not just those issued by the firm's compliance department. This greater specificity makes it difficult for member firms to feign ignorance as to what they are actually required to produce.

We also support the simplification of the language and sentence structure in Current List 5, Item 3 (renumbered List 4, Item 3) in accordance with FINRA's plain language initiative. We support such amendments because we believe that if the customers have a fuller understanding of the Discovery Guide and Document Production Lists they will be ensured greater fairness in an arbitration hearing and in discovery specifically.

Finally, we support amendments in the Proposed Rule Change that update the Document Production Lists to meet the current practices of the securities industry. For instance, a proposed revision to Current List 11, Item 1 (renumbered List 9, Item 1) replaces the term "order ticket" with "memorandum of order" to reflect the current use of various order management systems by FINRA member firms. It is important that the only viable forum for securities arbitration adapt along with the changes in the securities industry, and therefore we support such amendments.

IV. PIRC Opposes Those Proposed Amendments That Enhance Customers' Discovery Burdens

PIRC has grave concerns about new burdens certain proposed amendments may place upon customers. On behalf of our clients, PIRC routinely complies in good faith with all discovery obligations imposed by FINRA rules and does not game the system. Thus, we believe the additional burdens will disproportionately and harshly impact our population of clients.

In particular, PIRC strongly opposes increasing the time period for which the customer will be responsible for producing documents. List 2 – "Documents to be Produced in All Customer Cases by Customer" – includes three such changes. Under the proposed changes, List 2, Item 1 will require that the customer produce all personal and business tax returns for a period beginning five years prior to the first transaction at issue in the arbitration, as opposed to a three year period under the current rules. Similarly, List 2, Item 2 will require the customer to produce statements of his or her assets and liabilities for a period beginning five years prior to the first transaction at issue in the arbitration, as opposed to a three year period under the current rules. Again, proposed List 2, Item 4 will increase the time period from three to five years for which customers have to produce account statements reflecting investments with firms other than the respondent firm in the pending arbitration.

PIRC opposes these changes because of the potential that they will serve as an obstacle to customers seeking to recover damages from brokerage firms, and could discourage customers from pursuing legitimate claims against their brokers. In some cases, when combined with FINRA's eligibility rule, customers may be required to produce documents up to eleven years old. The evidentiary value of this information is not apparent, does not appear to further the goal of discovery in any respect, and is not necessary to improve the discovery process. Rather, increasing the period of time for which the customer is required to produce documents only serves to make the arbitration process more arduous and intimidating to customers who want to pursue valid claims against their brokers. For the types of customers that PIRC typically represents -- unsophisticated investors of limited resources who are often elderly or speak only limited English, making the arbitration process more arduous and intimidating is especially inequitable.

Additionally, PIRC opposes the proposed changes that would require customers bringing a claim against their broker to produce materials from *any source* under List 8, Item 1 and List 10, Item 1. PIRC is concerned with the strategic and privacy ramifications resulting from this proposed rule change. Materials generated from consultations with third party experts, when used solely for the purpose of consultation in instances where the expert was not being asked to testify at arbitration, should remain undiscoverable.

V. PIRC Opposes Any Presumption That Compliance Manuals are Confidential

Requests from brokerage firms to keep documents (particularly compliance manuals) confidential have generated controversy. In *Miller v. Smith Barney, Harris Upham & Co.,*[6] the district court rejected the defendant firm's attempt to withhold from production as confidential its compliance manuals. Rather, the court held that they were not privileged because they "were not prepared for this particular litigation, and are not privileged as work product, nor are they within the realm of the attorney-client privilege, since they do not constitute legal opinions."[7] More recently, other courts have reaffirmed the vitality of this ruling.[8] Since courts agree that compliance manuals do not fall under any legal privilege, the Proposed Rule Change should go further in stating that member firms are prohibited from automatically withholding access to compliance manuals on the grounds of confidentiality and until customers sign a confidentiality agreement.

Conclusion

PIRC welcomes the proposed changes to the extent that they improve the customers' access to relevant information during the arbitration process and allow for a more efficient process. PIRC is concerned, however, about the burdens certain proposed changes may have on customers, particularly those of modest means, and we urge the SEC to hesitate before approving any rule change that imposes additional obstacles to customers in pursuing their statutory and common law rights.

Thank you for providing us with the opportunity to comment on these proposed rule changes. Please do not hesitate to contact us if you have any questions regarding these comments.

Respectfully Submitted,

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Student Intern

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[6] 1986 U.S. Dist. LEXIS 28787 (S.D.N.Y. Feb. 27, 1986).
[7] *Id.* at *18-20.
[8] *See* Hartford Life Ins. Co. v. Bank of Am. Corp., 2007 U.S. Dist. LEXIS 61668, *15-18 (S.D.N.Y. Aug. 21, 2007) (rejecting defendant firm's claim that a document that was part of a corporate due diligence manual was privileged and holding that it was "not protected by the attorney-client privilege because it does not reveal any of the client's… confidential communications with its counsel"); In re Sulfuric Acid Antitrust Litig., 235 F.R.D. 407, 430 (N.D. Ill. 2006) (describing compliance manuals as being "often merely a compendium of policies and rules, which by definition neither reveal client confidences nor constitute the giving of legal advice and thus are outside the scope of the attorney-client privilege, whether viewed broadly or narrowly").