

**Barry D. Estell**  
**ATTORNEY AT LAW**  
**6140 Hodges Drive**  
**Telephone (913) 722-5416    Mission, Kansas 66205    Facsimile (913) 384-6092**  
**bestell@kc.rr.com**

---

April 3, 2009

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Re: File No. SR-FINRA-2008-005

Dear Ms. Murphy:

I am a lawyer who has represented investors in NASD and FINRA arbitration since 1993. Whenever I start to believe there is no way the securities industry can make its arbitration forum more biased and unfair to its customers, FINRA present us with a new outrage. This is another such example. FINRA has taken a biased and unfair document, meant to limit production of relevant evidence by member firms to defrauded investors and proposes one even worse.

### **INTRODUCTION**

I repeat the statistical information in the PIABA comment letter that a defrauded customer has a less than 40% chance of recovering 30% of the damages he or she would be entitled to as a matter of law in a courtroom and less than 50% chance of collecting that.<sup>1</sup> This is a seriously flawed forum and discovery abuse is one of the major factors denying customers a fair hearing. Making the Discovery Guide requirements part of the Code of Arbitration Procedure has had, in my experience, little effect. Member firms ignore the Code and FINRA is far more afraid of its members than the SEC. That should change.

FINRA's proposal notes that the 1996 Arbitration Policy Task Force recommended that, "Automatic production of essential documents should be required for all parties . . ." The original Discovery Guide 99-90 failed to make the process "automatic" and customers are routinely denied essential documents in most cases. I have attached a portion of a discovery abuse report prepared in 2004 showing the abusive objections of one major Wall Street firm which refused to produce even the most basic documents or cooperate in any manner in most cases. The objections are all identified by case number and documented. I have no current cases against the firm, but the tactics were almost universal and are still the rule rather than the exception by most member firms.

---

<sup>1</sup> All the information needed to quantify damages, awards, settlement amounts and collectability are in the possession of FINRA which has steadfastly refused to make it available to academic researchers or the public in general. A secret forum is a corrupt forum.

## **A BETTER GUIDE**

There is already a list of documents essential in every case where a broker's or brokerage firm's conduct is in question. The essential documents are mandated by SEC Rule 17a-3, amended on October 25, 2001 and effective on May 2, 2003. Broker/dealers are required to keep and maintain most relevant records at the branch office or be able to promptly produce the records at the branch.<sup>2</sup> The following records are deemed by state securities commissioners as absolutely necessary to conduct a routine examination; they should in all cases be available to defrauded customers who have suffered ascertainable losses. The mandatory nature and maintenance of these records would negate member firm's favorite objection of overly broad and burdensome. The documents without which a customer can not get a fair hearing in every case along with the SEC rule requiring them are as follows:

**Office Records:** 17a-3(g), 17a-3(h), and 17a-4(k) require that the firm keep current as to each office the books and records listed below that reflect the activities of the office as well as records of the persons who can explain the information in the records listed below. Brokers often provide records out of context with impenetrable codes without explanation and customers should have access to someone who can be required to explain those documents.

**Memoranda Of Brokerage Orders And Dealer Transactions:** Rule 17a-3(a)(6) is the only record of original entry which shows who entered an order, the terms and conditions, the time of execution, when the order was received and whether discretionary authority was exercised. In most over-the-counter transactions, especially in 2<sup>nd</sup> and 3<sup>rd</sup> tier FINRA firms, the broker normally sets his own mark-up or commission independent of any standard commission schedule. This is in every case relevant. In cases where the firm acts as principal, it is also the only way to discover the spread, which is a cost to the customer in addition to the mark-up or mark-down. To limit these documents to only unauthorized trading cases is to withhold relevant information in other type cases.

**Associated Person Compensation Records:** Rule 17a-3(a)(19) requires that a record be maintained showing each purchase and sale of a security attributable to an associated person for compensation purposes. It includes the amount of compensation and all agreements pertaining to the relationship between the broker/dealer and the broker. This is relevant in every case. Member firms object to this simple required document in every case because it is one of the few documents which identify what the broker is doing in other accounts. Cross reference pages, another source, are subject to being removed from the lists under the FINRA proposal.

Having full commission runs for the entire time a customer maintained an account with a brokerage firm is both necessary for the presentation of the customer's case and as a defense against broker perjury. It is quite common for a broker to mark one or many orders as "unsolicited" and deny any responsibility for a recommendation as a defense. Commission runs may add credibility to this claim if the Claimant's purchase is an isolated instance, but it will tend to refute such a defense if 13 other

---

<sup>2</sup> See NASD publication New and Amended Recordkeeping Requirements Checklist, Frequently Asked Questions About the Amendments to Broker/Dealer Books and Records Rules under the Securities Exchange Act of 1934.

customers also purchased the same security, all marked unsolicited. Without commission runs in every instance, the brokers are free to claim that they were simply an order filler with no input into the purchase or sale decision. A customer can not get a fair hearing without it, the records are required and should be produced in every case. There are claimant lawyers with years of experience that have never seen a real commission run, only the phony customer only runs created solely for arbitration, but NASAA knows better and state regulators have access in every inspection.

Additionally, in a boiler room case, the records of all the representatives in a given branch is compelling evidence that churning is the firm's only business. There are far too many boiler rooms which FINRA seems incapable of regulating and the defrauded customers should have a fair opportunity to demonstrate their true business practices.

**Associated Person Complaint Records:** Rule 17a-3(a)(18)(i) provides a record of each written customer complain and not the self-serving rationalization that registered persons are allowed to file with the CRD. Customers should be provided the full complaint file and not simply those that the member considers "similar" which to member firm lawyers normally means identical as to time, place, age and other attributes which eliminate all "similar" complaints.

**Customer Account Records:** Rule 17a-3(17) requires all the information upon which a representative and his supervisors determined that any recommendation to a customer was suitable. This should be basic.

It is a sign of FINRA's member bias and contempt for customers that the entire emphasis of its amendments is to disclose ever more customer information for an ever longer period hoping to find something to embarrass the customer or attack his credibility using unrelated and irrelevant documents. Post-claim suitability determinations are not suitability determinations at all. Rather they are simply an effort on the part of FINRA to enable its members to conduct a wide ranging search for anything it can find to embarrass or intimidate a customer with the temerity to file an arbitration claim. Any documents or information needed to make a recommendation has to be on the record prior to making the recommendation, not after the complaint has been filed. Only if a customer disputes the financial information on the customer account forms should that customer's other financial records or tax returns have any relevance to the arbitration. They are otherwise not at issue and FINRA's repeated statements that broad and detailed records of the customer's financial history are important to arbitrators are an entirely cynical and abusive practice. FINRA is telling its arbitrators to blame the victim if they want to continue as an arbitrator, a practice which has succeeded too well.

There are other required office records that might come into play such as **Communications Supervision Records:** Rule 17a-3(20) identifying the procedures for principal approval of customer and associated person communications or **Responsible Principal Records:** Rule 17a-3(a)(22) which requires a record listing each person responsible for establishing compliance policies and procedures, but the required records listed above for memoranda of orders, compensation records, complaint records, and customer account records must be required in every case for a customer to receive a fair hearing.

One of the worst abuses is for the written supervisory procedures. Member firms hate to produce these documents, Morgan Stanley was found to have withheld them for years, but it took a court case to do it, not FINRA. Part of the problem is that members are given the option of determining “relevant” sections of the compliance manuals. They always take a very narrow view. The manuals are a complete work and often cross reference to other sections. The manuals should be required in their entirety in every case. The pulling apart and redaction is far more “burdensome” than just producing the manual which is in every office.

A related abuse is to claim that compliance manuals are “proprietary” and “confidential” which is nonsense. Each firm is required to structure its manuals based on its own unique structure and business. Just this week I received a manual five months after it was first due. The panel granted a confidentiality motion because Respondents claimed them to be proprietary. The manual at issue was an off-the-shelf copy from a third-party company which retained all rights to it. When a member gets a confidentiality order on compliance documents, or most other “required” documents, the odds of the customer getting the real documents or all of them is substantially reduced. Member firms should be required to produce documents in every case without redaction or selection. Only if manuals are widely disseminated will firms feel any compunction to actually follow them.

Finally, it is a really, really bad idea for FINRA or anyone else to order solid citizens who have been victimized by a Florida or New York boiler room to give those firms even more personal documents concerning bank accounts and insurance policies and real estate transactions and mortgages. Many of these are criminal enterprises and the principals often (although not often enough) go to jail. To give them increasing amounts of personal financial information entirely unrelated to the original transactions is an invitation for identity theft and a second criminal career should FINRA ever get around to barring them from the securities industry.

### **SUMMARY**

FINRA arbitration is biased, expensive, time consuming and steadily moving to a pervasive motion practice in which the customers always lose.<sup>3</sup> The amendments to the Discovery Guide seek to make that worse for the customers. The Commissioners, even those directly responsible for this sorry state of affairs, should direct FINRA to return to the planning phase and return with a fair and equitable Discovery Guide which puts customers on a level playing field at hearing if they are fortunate to draw a panel which cares anything about the evidence, a entirely different problem with the forum.

---

<sup>3</sup> FINRA Dispute Resolution has made state blue sky laws completely irrelevant because arbitrators are trained and encouraged to ignore them. No statutory award has ever been made in the two states in which I practice in 20 years. With customers receiving, at best, 30% of damages the only thing at issue in FINRA arbitration is how bad the customer will lose in the 70% to 100% range.

## DOCUMENT PRODUCTION LISTS

### General Objections

There is no provision for general objections in the Code of Arbitration Procedure or the Discovery Guide. The Code provides that requests must be specific and relate to the matter in controversy. There is no such requirement for objections. However, the Discovery Guide states that a party “may object to the production of any document,” and that if any party objects to any document, “objections should set forth the reasons the party objects to producing the documents.” The plain language appears to preclude general objections that may or may not apply to documents which may or may not exist. If a party objects to a specific document, it should identify that document and provide a specific objections. Common objections by Morgan Stanley from the attached examples are listed below.

Morgan Stanley objects to each of the requests to the extent:

1. any portion of any request or any purported instruction or definition seeks to impose obligations greater than those imposed by the Arbitration rules of the NASD;
2. protected by any other applicable (unspecified) privilege;
3. protected by any other applicable privilege such as the right of privacy;
4. otherwise immune from discovery;
5. otherwise immune or protected from discovery or disclosure;
6. other evidentiary privilege;
7. confidential or confidential information;
8. sensitive documents;
9. sensitive and confidential financial information;
10. commercially sensitive information relating to Morgan Stanley’s business, internal policies, procedures, programs and/or guidelines;
11. investigative information and/or consulting experts privilege;
12. self-evaluation privilege;
13. not within their possession, custody or control;
14. encompass any time period other than that during which Claimant maintained an account at Respondent and conducted the trading at issue;
15. exceed matter in controversy and therefore impose undue burden, hardship, oppression and expense upon Respondents;
16. seek cumulative documents; will only produce documents sufficient to disclose requested information;
17. conditioned on Claimants production;
18. any request for documents which “relate to”, or “relating to” a subject matter;
19. documents have been filed with public agencies or are obtainable from some source other than respondent;
20. vague and ambiguous, burdensome and oppressive;
21. information to which claimant not entitled to require inappropriate expense;
22. call for the production of “all documents;”
23. documents created before or after the relevant time period;
24. documents that were created after the Statement of Claim was filed;
25. request is outside the scope of discoverable documents pursuant to NTM 99-90; or well beyond the scope of permissible discovery, as defined by NTM 99-90.
26. documents destroyed in World Trade Center on September 11, 2001;
27. documents created after Claimants commenced this proceeding;

28. to extent purports to encompass any time period other than that during which Claimants maintained accounts at Morgan Stanley and conducted trading at issue;
29. that exceed the matter in controversy and therefore impose undue burden, hardship oppression and expense upon Respondents;
30. expressly conditioned upon reciprocal cooperation and production by Claimants;
31. to be produced at a mutually convenient time (not the time set by rule);
32. to extent impose undue burden, hardship, oppression and expense;
33. to extent equally available to the propounding party;
34. object to inclusion of Broker X within definition of “associate person” as not having “substantial involvement” in claimant’s account and will limit responses to Broker Y;

**COMMENT:** The General Objections are perhaps the most pernicious of the standard dirty tricks utilized by Morgan Stanley as well as other NASD member firms. Without identifying a specific document, a Respondent may withhold responsive documents, regardless of their substantive value as evidence. The Claimant is not aware that the documents exist, what objection or privilege is being claimed, and has no opportunity to challenge the objection. If Morgan Stanley determines that relevant compliance department documents containing the details and scope of a fraud would hurt its defense, it may secretly designate them as burdensome, confidential, sensitive or self-investigative, and the documents vanish without specific objection and without disclosing to the arbitrators that the document exists. There is no opportunity for claimant to ask the panel for a determination of the relevance, privilege or confidentiality.

Perhaps the most offensive general objection is the claim of “self-investigative” privilege or “other applicable” (but unspecified) privilege, or “privileges” such as the right of privacy or “otherwise immune or protected” from discovery or disclosure. Most of these privileges, self investigative for example, are not commonly recognized, have never been approved by a federal appeals court and are not commonly recognized in the context of securities litigation by federal district courts. Morgan Stanley simply withholds whatever relevant, responsive documents required by the Discovery Guide it doesn’t want the panel to see without comment based on undisclosed privileges and protections that would not normally be allowed in a legal setting. Even within the industry-friendly confines of its captive litigation forum, this is outrageous.

### **General Limitations**

Document production is limited to the following:

1. documents in their possession at the time production is made;
2. will not undertake a continuing obligation to update;
3. will not commit to produce all documents at address designated by claimant;
4. will not prepare a privilege log, identify documents no longer in Respondents’ possession, custody or control, or; manner in which documents were disposed.
5. based on information known to those to whom Morgan Stanley has assigned the responsibility of gathering documents.
6. expressly reserve the right to use any documents which may be subsequently uncovered;
7. Specific objections and responses to the individual requests incorporate and do not waive general objections and limitations.

**COMMENT:** This series of limitations allows Morgan Stanley to “ethically” destroy documents prior to “the time of production,” refuse to identify privileges, documents

withheld or when destroyed and assign the task to summer interns or temporary employees who can be counted on to be ignorant of what documents do or do not exist. This almost guarantees an incomplete production of required documents.

#### LIST 1 : TO BE PRODUCED IN ALL CUSTOMER CASES

- 03-07587: No objections, but reserves the right to object to certain categories at a later time.

1) All agreements with the customer, including, but not limited to, account opening documents, cash, margin, and option agreements, trading authorizations, powers of attorney, or discretionary authorization agreements, and new account forms.

- 03-08275: Subject to foregoing general objections.

**COMMENT:** Morgan Stanley conditions all responses to general objections but normally will produce documents that the customer has already seen and might have retained.

2) All account statements for the customer's account(s) during the time period and/or relating to the transaction(s) at issue.

- 03-08275: Subject to foregoing general objections.

**COMMENT:** Morgan Stanley refuses to provide the broker or office copy of the account statements which may have additional information such as commissions on individual transactions and a cumulative commission total for the year.

3) All confirmations for the customer's transaction(s) at issue. As an alternative, the firm/Associated Person(s) should ascertain from the claimant and produce those confirmations that are at issue and are not within claimant's possession, custody, or control.

- 03-00123 Object that it is duplicative of account statements.
- 03-08275: Subject to foregoing general objections.

**COMMENT:** Morgan Stanley conditions all responses to general objections but normally will produce documents that the customer has already seen and might have retained.

4) All "holding (posting) pages" for the customer's account(s) at issue or, if not available, any electronic equivalent.

- 02-02593: No response.
- 02-04998: Require confidentiality stipulation;
- 02-07298: Limits to "electronic."
- 03-00123 Object that it is duplicative of account statements.
- 03-08275: Subject to foregoing general objections and limited to BKD pages for claimant's accounts.
- 04-01650: Limits to "electronic."

**COMMENT:** Holding pages also broadly include "cross reference" pages, however, which indicate how many other customers of an individual broker own the same stock and when purchased. These are almost never produced and their existence denied because they might provide substantive evidence of other customers purchasing the same stock at

the same time when the broker claims the customer's purchase was isolated and unsolicited.

5) All correspondence between the customer and the firm/Associated Person(s) relating to the transaction(s) at issue.

- 02-02593: No response.
- 02-07298: Limit to "between Claimant & Respondent."
- 03-07840: Limited to extent "available."
- 03-08275: Subject to foregoing general objections.
- 04-01650: Limit to "between Claimant & Respondent."
- 04-00415: Object to any electronic communications as overly broad and unduly burdensome.
- 04-03003: E-mails unavailable as a result of September 11, 2001.
- 04-03747: E-mails prior to October 9, 2001 unavailable as a result of September 11, 2001.
- 04-03685: Limits production to correspondence between Claimant and named Respondents relating to specific transactions at issue.

**COMMENT:** Morgan Stanley insists that all e-mails were destroyed in the World Trade Center. As cases from that period work through the system, the more general objections are more troublesome. Morgan Stanley specifically limits its responses to named respondents so that if the customer wrote the individual financial advisor or office manager and it is damaging, the letter can be withheld if those individuals are not named as a Respondents. By limiting the response to the specific transactions at issue it can withhold documents concerning general investment objectives and suitability issues.

6) All notes by the firm/Associated Person(s) or on his/her behalf, including entries in any diary or calendar, relating to the customer's account(s) at issue.

- 02-04998: Objects as vague and overbroad.
- 02-07298: Limited to day-timer only, otherwise vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 03-02735: Objects on basis of general objections as well as unduly burdensome, and not relevant.
- 03-07840: Limited to extent "available"
- 03-08275: Subject to foregoing general objections.
- 04-00415: Subject to the general objections and specifically object to any electronic communications as overly broad and unduly burdensome.
- 04-01650: Limited to day-timer only, otherwise vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy

**COMMENT:** Morgan Stanley limits the response to the day-timers which can be routinely edited, reviewed, and filled with self-serving entries after the fact. It refuses to provide electronic notes which have safeguards against after-the-fact dating and e-mail records which are original entries also more difficult to falsify.

7) All recordings and notes of telephone calls or conversations about the customer's account(s) at issue that occurred between the Associated Person(s) and the customer (and any person purporting to act on behalf of the customer), and/or between the firm and the Associated Person(s).

- 02-04998: Objects as vague, not specific and overly broad.



- 02-07298: Limited to day-timer only, otherwise vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy.
- 03-02735: Limited to notes by associated person and object on grounds set forth in the General Objections, and further as overbroad, unduly burdensome, not relevant.
- 03-08275: Subject to foregoing general objections and further object the request is overbroad as to time.
- 04-01650: Limited to day-timer only, otherwise vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy.

**COMMENT:** Morgan Stanley limits the response to day-timers which can be routinely filled in after the fact. In dealing with documents that it knows the customer has not yet seen, it finds these items, identified by SICA, approved by the SEC and adopted by the NASD, vague, overly broad, unduly burdensome, ambiguous, and seeking private information, etc. After five years of the Discovery Guide, Morgan Stanley, like all the major firms claims to still have no idea what is required of it.

8) All Forms RE-3, U-4, and U-5, including all amendments, all customer complaints identified in such forms, and all customer complaints of a similar nature against the Associated Person(s) handling the account(s) at issue.

- 02-02593: objects entirely as not relevant and information destroyed in World Trade Center
- 02-04998: Objects as confidential client and proprietary information that is not relevant, but will produce a CRD.
- 02-07298: Objects to complaints as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 03-00123: Object that other customer complaints are overly broad, unduly burdensome, irrelevant, vague, not specific and do not relate to the matter in controversy.
- 03-02735: Object to customer complaints and any information concerning supervisors based on general objections as well as overbroad, unduly burdensome and not relevant.
- 03-04130: Other than RE-3, U-4 and U-5, and subject to general objections and limitations object to the request as vague and ambiguous, overly broad, unduly burdensome, improperly requires speculation and not related to the matter in controversy.
- 03-07840: Limited to CRD
- 03-08275: Subject to foregoing general objections and further objects the term "similar nature" is vague and ambiguous, not related to the subject matter of this matter, is overbroad as to time, is unduly burdensome, not reasonably calculated to lead to admissible evidence, and seeks documents that are equally available to the propounding party and agrees to limited production of CRD Report and R#-3 form.
- 04-01650: Objects to complaints as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 04-03003: Limited to those firm determines to be "similar" and object that all other are overly broad, not related to the matter in controversy and violates the privacy rights of third parties.
- 04-03747: Limited to those firm determines to be "similar" and object that all other are overly broad, not related to the matter in controversy and violates the privacy rights of third parties.

- Sears: Objects as a violation of privacy rights of Financial Advisor's and unnamed third parties. Demands secrecy agreement.

**COMMENT:** This is an example of the insidious bait and switch where the firm offers the NASD CRD instead of the designated forms. The NASD CRD is extremely limited in what it discloses; far more than a CRD from a state and doesn't include most customer complaints. In addition, even though it could simply withhold all relevant documents as "not similar," Morgan Stanley often makes the exception explicit. In this case it may withhold documents because complaint A was for a 70 year old man and complaint B was for a 60 year old woman; not similar even though they concern the same suitability claim for the same stock by the same broker in the same week. Morgan Stanley claims extremely broad privacy rights, unsupported by any written policy, for its other customers who have also complained.

9) All sections of the firm's Compliance Manual(s) related to the claims alleged in the statement of claim, including any separate or supplemental manuals governing the duties and responsibilities of the Associated Person(s) and supervisors, any bulletins (or similar notices) issued by the compliance department, and the entire table of contents and index to each such Manual.

- 02-02593: Object proprietary, confidential, internal documents; produce index only to selected manuals & demand confidentiality agreement
- 02-04998: Objects that the request is for documents not related to the controversy, is overly broad and beyond the scope of the Discovery Guide, but will produce the Table of Contents and Index from selected compliance manual.
- 02-07298: Table of contents only to selected manuals, demands confidentiality agreement; otherwise objects to complaints as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 03-00123: Object that the request seeks confidential proprietary information and trade secrets and is overly broad, unduly burdensome, irrelevant, vague, not specific and do not relate to the matter in controversy.
- 03-00889: Demand confidentiality stipulation and will provide table of contents for Branch Manager's Manual and Compliance Guide to extent firm feels they are relevant but makes no mention of compliance procedures manual or compliance updates.
- 03-02735: Limits to section on suitability and table of contents and index to a selected manual (one out of three) and otherwise objects on the grounds of the General Objections and as overbroad, unduly burdensome and not relevant.
- 03-04130: Subject to general objections and after execution of an acceptable confidentiality agreement will produce a Table of Contents from the Branch Managers Manual and the Account Executive Compliance Guide from which Respondents will produce relevant requested portions. Otherwise object to the request as vague and ambiguous, overly broad, unduly burdensome, and not related to the matter in controversy.
- 03-04984: : Object as over broad, unduly burdensome and not calculated to lead to admissible evidence, but will produce the table of contents and index for a compliance manual subject to a confidentiality agreement.
- 03-05643: Objects to "Compliance Department Procedures Manual," "Administrative Policy Manuals," "Branch Office Manager Supervisor's Guides," "Account Executive Compliance Guides," Morgan Stanley Funds Multi-class

Manuals” as vague, overbroad, unduly burdensome and not calculated to lead to admissible evidence as well as confidential and proprietary. Objects to other manuals on the same basis but agrees to provide tables of contents for selected (but not all) manuals subject to confidentiality stipulation.

- 03-07840: Table of Contents only for selected manuals with demand for confidentiality stipulation
- 03-08275: Subject to foregoing general objections and further objects that it requires Respondents to speculate as to what claimant’s counsel deems “related to the claims alleged in the statement of claim, but after execution of a confidentiality agreement, will produce a Table of Contents from the FA Compliance Guide and Branch Managers Manual.
- 04-00415: Subject to the general objections and after execution of a confidentiality agreement, will produce a Table of Contents from the Branch Managers Manual and the Account Executive Compliance Guide from which Respondent will produce relevant portions. Otherwise, object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy
- 04-01650: Table of contents only to selected manuals, demands confidentiality agreement; otherwise objects to complaints as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 04-03003: Object that the request seeks confidential documents without adequate protection. Demands confidentiality stipulation to produce incomplete index of some manuals and no bulletins.
- 04-03747: Object that the request seeks confidential documents without adequate protection. Demands confidentiality stipulation to produce incomplete index of some manuals and no bulletins.
- 04-03685, Sears: Object as confidential documents without adequate protection. Demands confidentiality stipulation to produce incomplete index of some manuals and no bulletins.

**COMMENT:** One of the top items which Morgan Stanley refuses to produce in almost all instances. Even when ordered to do so, it refuses to produce relevant sections of “all” manuals or bulletins or updates of the manuals. The normal tactic is to offer a table of contents to claimant and agree to produce “relevant” sections selected from that document by Claimant. It doesn’t produce a table of contents for all of its manuals, however, and no index of periodic bulletins. If claimants plays this game, they have automatically agreed to forego the third to half of compliance material for which they are not provided a table or index. Morgan Stanley will then argue over the sections requested from the incomplete indexes and argue endlessly about the relevance of those. The confidentiality requirements are to prevent claimants from comparing production in order to be able to request documents missing from the tables of content. Compliance manuals are not confidential and the NASD’s encouragement of arbitrator orders to the contrary is extremely harmful to the investing public. Relevant sections of compliance manuals should be available to be attached to statements of claim in order to promote a meaningful hearing of the facts.

10) All analyses and reconciliations of the customer’s account(s) during the time period and/or relating to the transaction(s) at issue.

- 02-02593: Agreed to responsive non-privileged documents without identifying documents or privilege
- 02-04998: Objects as requesting privileged information.

- 02-07298: Agreed to non-privileged “profit and loss analyses” without identifying documents or privilege. Objects to other analysis as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 03-00123: Limits production to documents previously provided to Claimant and objects that additional documents do not relate to the matter in controversy and would likely be privileged.
- 03-02735: Objects on the grounds of the General Objections and as overbroad, unduly burdensome and not relevant.
- 03-04130: Subject to general objections and limitations will produce non-privileged profit and loss analysis only. Object to any additional documents as vague and ambiguous, improperly requires the Respondents to speculate as to documents being sought and not related to the matter in controversy.
- 03-04984: Limited to those created during relevant time account at Morgan Stanley.
- 03-07840: Limited to extent “available”
- 03-08275: Subject to foregoing general objections.
- 04-00415: Subject to the general objections and additionally object that the request is overly broad and unduly burdensome.
- 04-01650: Agreed to non-privileged “profit and loss analyses and reconciliations” without identifying documents or privilege. Objects to other analysis as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 04-03685: Agreed to non-privileged “profit and loss analyses” without identifying documents or privilege.

**COMMENT:** This is another case of limiting the response to only documents which are not useful, usually the profit and loss analysis which claimant has already done in order to file the claim. Supervisory and compliance reviews and analysis done during the relevant period are withheld as a matter of course. Customer commission to asset ratios and other routine management analysis is almost never produced.

11) All records of the firm/Associated Person(s) relating to the customer's account(s) at issue, such as, but not limited to, internal reviews and exception and activity reports which reference the customer's account(s) at issue.

- 02-02593: Objects as overbroad, unduly burdensome, oppressive not relevant but will produce non-privileged documents.
- 02-04998: Objects as seeking information protected by privilege.
- 02-07298: Limits to customer activity reports that reference Claimant's accounts; otherwise objects as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 03-00072: Object as overbroad, oppressive, harassing, unduly burdensome, irrelevant but willing to produce internal reviews and activity reports that refer to Claimant account.
- 03-02735: Limits to associated person and Claimant and otherwise objects on the grounds set forth in the General Objections and as overbroad, unduly burdensome and not relevant.
- 03-04984: Object that the request is vague, overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence.
- 03-07840: Limited to extent “available”
- 03-08275: Subject to foregoing general objections and further object that the request is overbroad and unduly burdensome.

- 04-00415: Subject to the general objections and limited to the specific trade complained about, otherwise object as vague, ambiguous, overly broad, unduly burdensome and improperly requires speculation as to which documents are sought.
- 04-01650: Limits to customer activity reports that reference Claimant's accounts; otherwise objects as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 04-03003: Limit to copies of customer activity reports that reference Claimant's account only. Beyond that, object that the request is vague and ambiguous, overly broad, unduly burdensome and not related to matter in controversy.
- 04-03747: Limit to reports that reference Claimant's accounts; otherwise object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 04-03685: Limit to reports that reference Claimant's accounts; otherwise object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.

**COMMENT:** Morgan Stanley limits its production to a limited number of reports restricted to the customer accounts in preparation for List 5, #2 which requires the production of all activity reviews and exception reports concerning the Financial Advisor. It is a preemptory objection because Morgan Stanley will go to extraordinary lengths to avoid producing documents detailing other (often many other) red flags being generated by the typical rogue broker involved in multiple arbitrations.

12) Records of disciplinary action taken against the Associated Person(s) by any regulator or employer for all sales practices or conduct similar to the conduct alleged to be at issue.

- 02-04998: Objects as overly broad and not related to the matter in controversy.
- 02-07298: Objects as overly broad and not related to the matter in controversy
- 03-00123: Limited to disciplinary action in connection with Claimant's account only and objects that any additional request is "a desperate fishing expedition" and overly broad, unduly burdensome, irrelevant, not specific and do not relate to the matter in controversy.
- 03-04130: In addition to general objections and limitations Respondents specifically object to this request as overly broad and not relevant.
- 03-04984: Object that the request is vague, overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence.
- 03-07840: Limited to extent "available"
- 03-08275: Subject to foregoing general objections and further objections of not relevant, vague and ambiguous, and overbroad, there are not responsive documents.
- 04-01650: Objects as overly broad and not related to the matter in controversy
- 04-00415: Subject to the general objections will produce documents related to the single customer incident only and objects to any other documents as vague and ambiguous, overly broad, unduly burdensome and improperly requires Respondents to speculate as to which documents are sought.
- 04-00415: Object as vague, ambiguous, overly broad, unduly burdensome and improperly requiring speculation as to which documents are sought.

**COMMENT:** Morgan Stanley consistently claims to have no idea what this request means and insists on limiting the response to claimant. Even when ordered to produce the

documents, it can choose to interpret the request as for similar conduct as an alternative to “all” sales practices (its an either or request) and find none of the other disciplinary action is similar, there being a difference in age, gender, state of residence, karma, or something.

### LIST 3 : **CHURNING**

1) All commission runs relating to the customer’s account(s) at issue or, in the alternative, a consolidated commission report relating to the customer’s account(s) at issue.

- 02-02593: Objects not relevant, proprietary, confidential Claimant’s commissions only.
- 03-08275: Subject to foregoing general objections.
- 04-01650: Limits to Claimant commissions, otherwise objects as vague, overly broad and unduly burdensome.
- 04-03685: Object as confidential and subject to a confidentiality agreement.

**COMMENT:** See List 5, Request #1.

2) All documents reflecting compensation of any kind, including commissions, from all sources generated by the Associated Person(s) assigned to the customer’s account(s) for the two months preceding through the two months following the transaction(s) at issue, or up to 12 months, whichever is longer. The firm may redact all information identifying customers who are not parties to the action, except that the firm/Associated Person(s) shall provide at least the last four digits of the non-party customer account number for each transaction.

- 02-02593: Objects as not relevant, over broad, burdensome, oppressive, proprietary, confidential.
- 03-00123: Object that the request is overly broad, unduly burdensome and harassing, irrelevant, vague, not specific and do not relate to the matter in controversy.
- 03-08275: Subject to foregoing general objections and further object that the request is not related to the subject matter of this action nor reasonably calculated to lead to discovery of admissible evidence and is **unintelligible** in that claimant has never identified the “transactions at issue” in this action.
- 04-01650: Objects as vague and ambiguous, overly broad, unduly burdensome, not related to the matter in controversy.
- 04-00415: Subject to the general objections and additionally as overly broad and unduly burdensome.
- 04-03685: Object as violating Financial Advisor’s privacy rights and subject to confidentiality agreement will produce records only as they pertain to Claimant’s account.

**COMMENT:** This is another request where Morgan Stanley professes not to understand, going so far as to call it “unintelligible.” One wonders how the SEC could have understood it. It is also a preemptive objection to List 5, #1 which requires compensation of any kind which Morgan Stanley routinely refuses to produce.

3) Documents sufficient to describe or set forth the basis upon which the Associated Person(s) was compensated during the years in which the transaction(s) or occurrence(s) in question occurred, including: a) any bonus or incentive program; and b) all compensation

and commission schedules showing compensation received or to be received based upon volume, type of product sold, nature of trade (e.g., agency v. principal), etc.

- 02-02593: not relevant, over broad, burdensome, oppressive, proprietary, confidential
- 02-04998: Objects as overly broad and not related to the controversy, beyond the scope of the Discovery Guide and seeking confidential and proprietary information.
- 03-00123: Object that the request is overly broad, irrelevant, vague, not specific and do not relate to the matter in controversy.
- 03-08275: Subject to foregoing general objections and further object that the request is not related to the subject matter of this action nor reasonably calculated to lead to discovery of admissible evidence and is **unintelligible** in that claimant has never identified the “transactions at issue” in this action.
- 04-01650: Objects as vague and ambiguous, overly broad, unduly burdensome, not related to the matter in controversy.
- 04-03685: Object as violating Financial Advisor’s privacy rights and confidentiality of documents, but subject to confidentiality agreement will produce some, but not all documents requested.
- 04-00415: Subject to the general objections and additionally as overly broad and unduly burdensome.

**COMMENTS:** Morgan Stanley also characterizes this request as “unintelligible” because it is a comprehensive statement of compensation of Associated Persons which would encompass branch office managers as well as Financial Advisors. It is also a peremptory objection to the more common unsuitability claim of List 13, #2.

#### LIST 5 : **FAILURE TO SUPERVISE**

- 03-07587: No objections, but reserves the right to object to certain categories at a later time; requires a confidentiality agreement prior to producing documents concerning compensation

1) All commission runs and other reports showing compensation of any kind relating to the customer’s account(s) at issue or, in the alternative, a consolidated commission report relating to the customer’s account(s) at issue.

- 02-02593: Object not relevant, proprietary, confidential; will produce reports showing revenue from Claimant’s account only
- 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide, but will provide documents that show commissions in Claimant’s account.
- 02-07298: Commission run microfiche at World Trade Center
- 03-00123: Limited to Claimant’s accounts only and objects that any additional request is overly broad, irrelevant, not specific and does not relate to the matter in controversy.
- 03-02735: Limit to basis for compensation; object to additional documents on basis of general objections and as vague, overbroad, unduly burdensome and not relevant.
- 03-04130: Subject to general objections and limitations will produce redacted commission runs only.
- 03-07840: Limited to extent “available”
- 03-08275: Subject to foregoing general objections.

- 04-01650: Limited to commissions paid by Claimant only; otherwise objects as vague, overly broad and unduly burdensome.
- 04-03003: Limit to commissions from Claimant's account only after confidentiality stipulation. Otherwise object the request is vague and ambiguous, overly broad, unduly burdensome, not related to the matter in controversy, violates broker's privacy rights and seeks confidential documents without adequate protection.
- 04-03747: Limit to commissions in Claimant's accounts only with confidentiality stipulation; otherwise object as vague and ambiguous, overly broad, unduly burdensome, not related to the matter in controversy, violates broker's privacy rights and seeks confidential documents without adequate protection.
- 04-03685: Object as seeking confidential documents without adequate protection. Subject to confidentiality agreement, will produce some records.

**COMMENT:** All commission runs are one of the top categories that Morgan Stanley uniformly refuses to provide. It prefers the alternative, a consolidated report showing only commissions paid by the individual claimant. It has gone to the extreme of claiming that all commission runs were destroyed at the World Trade Center for cases predating September 2001. They have even claimed it for accounts opened after 9/11, the subject of a Wall Street Journal story. Without a full commission run showing activity in other customer accounts, the securities purchased and sold and the frequency of the trading, a Claimant can not get a fair hearing. Denied commission runs and with Morgan Stanley claiming that cross reference records do not exist, a financial advisor can claim the trades were not recommended and entirely the customer's idea even though twenty other customers made the same trades on the same days. A consolidated commission report showing only the customer's trades is worthless and it is Morgan Stanley's goal in each and every case except those where the trading is in only one account where the commission runs miraculously appear. A claimant deserves to see what a broker was doing in other accounts just as the broker is entitled under the Discovery Guide to see what the customer was doing at other brokerage firms.

2) All exception reports and supervisory activity reviews relating to the Associated Person(s) and/or the customer's account(s) that were generated not earlier than one year before or not later than one year after the transaction(s) at issue, and all other documents reflecting supervision of the Associated Person(s) and the customer's account(s) at issue.

- 02-02593: Object overbroad, unduly burdensome, oppressive not relevant.
- 02-04998: Objects as overbroad, not related to the controversy and beyond the scope of the Discovery Guide, but will provide documents that relate to Claimant's account only.
- 02-07298: Limit to CAR's that reference Claimant; otherwise object vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 03-00123: Limited to Claimant's accounts only and objects that any additional request is "a desperate fishing expedition" and overly broad, unduly burdensome, irrelevant, not specific and do not relate to the matter in controversy.
- 03-02735: Object on grounds of general objections, and overbroad, unduly burdensome and not relevant.
- 03-04130: Subject to general objections and limitations will produce customer activity reports relating to Claimant's accounts only and object to further documents as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.



- 03-07840: Limited to extent “available”.
- 03-08275: Subject to foregoing general objections and further object as vague, ambiguous, **unintelligible**, overbroad, and unduly burdensome.
- 04-01650: Limit to CAR’s that reference Claimant; otherwise object vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 04-03003: Limited to customer activity reports that reference Claimants’ accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 04-03747: Limited to customer activity reports that reference Claimants’ accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 04-03685: Agree to produce responsive documents referring to Claimant only and not to the Associated Person.

**COMMENTS:** Morgan Stanley limits its production to a limited number of reports restricted to the customer’s accounts when the request is for those concerning the associated person. All exception reports and supervisory reviews is highly relevant evidence of failure to supervise a broker. All responsive documents must be produced as substantive evidence that the broker had other (perhaps many other) accounts also showing high turnover and other indicia of abuse requiring supervisory review. Claimants should have a view of the financial advisor’s other problem accounts to the same extent that Morgan Stanley has the right to see all claimants other brokerage accounts with other firms.

3) Those portions of internal audit reports at the branch in which the customer maintained his/her account(s) that: (a) focused on the Associated Person(s) or the transaction(s) at issue; and (b) were generated not earlier than one year before or not later than one year after the transaction(s) at issue and discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the statement of claim.

- 02-02593: Object overbroad, unduly burdensome, oppressive not relevant
- 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide, and further seeks attorney client or work product privileged information.
- 02-07298: Limit to reports that reference Claimant; otherwise object vague and ambiguous, overly broad, unduly burdensome, violates self-evaluative privilege, is invasive of employee privacy and not related to the matter in controversy
- 03-00123: Limited to Claimant’s accounts only and objects that any additional request is “a desperate fishing expedition” and overly broad, unduly burdensome, irrelevant, not specific and does not relate to the matter in controversy.
- 03-04130: Subject to general objections and limitations will produce copies of internal audit reports to the extent they reference Claimant. Beyond that object to further documents as vague and ambiguous, overly broad, unduly burdensome privileged, invasive of privacy of Morgan Stanley employees and not related to the matter in controversy.
- 03-04984: Object as vague, overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence.
- 03-08275: Subject to foregoing general objections and further object as vague, ambiguous, **unintelligible**, overbroad, and unduly burdensome.

- 04-01650: Limit to reports that reference Claimant; otherwise object vague and ambiguous, overly broad, unduly burdensome, violates self-evaluative privilege, is invasive of employee privacy and not related to the matter in controversy
- 04-00415: Limited to the transaction in question and subject to general objections, otherwise object as vague, ambiguous, overly broad, unduly burdensome and improperly requiring speculation as to which documents are sought.
- 04-03003: Limited to internal audit reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, unduly burdensome, invades attorney-client and **self-evaluative privilege**, is invasive of the privacy of Morgan Stanley employees and is not related to the matter in controversy.
- 04-03747: Limited to internal audit reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, unduly burdensome, invades attorney-client and **self-evaluative privilege**, is invasive of the privacy of Morgan Stanley employees and is not related to the matter in controversy.

**COMMENT:** This is a continuation of Morgan Stanley's tactic of limiting production of documents which are presumptively discoverable. The request itself is excessively limited and Morgan Stanley refuses to comply with even this reduced demands. There is no recognized self-evaluative privilege and Morgan Stanley and the other brokerage firms should not be allowed to create it as a matter of NASD common law. The Supreme Court allowed forced arbitration on the condition that it protect investor's statutory rights. Allowing privileges unknown to federal courts in securities cases violates those rights.

4) Those portions of examination reports or similar reports following an examination or an inspection conducted by a state or federal agency or a self-regulatory organization that focused on the Associated Person(s) or the transaction(s) at issue or that discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the statement of claim.

- 02-02593: Objects as overbroad, unduly burdensome, oppressive not relevant
- 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide, but will provide documents that relate to Claimant's account.
- 02-07298: Limit to reports that reference Claimant; otherwise object vague and ambiguous, overly broad, violates self-evaluative privilege, is invasive of employee privacy and not calculated to lead to admissible evidence.
- 03-00123: Limited to Claimant's accounts only and objects that any additional request do not relate to the matter in controversy.
- 03-02735: Limit to actual disciplinary action taken by regulator or employer; otherwise object based on general objections and as overbroad, unduly burdensome and not relevant.
- 03-04130: Subject to general objections and limitations will produce reports to the extent they reference Claimant. Beyond that, object to further documents as vague and ambiguous, overly broad, invasive of the privacy of Morgan Stanley employees and not calculated to lead to the discovery of admissible evidence.
- 03-04984: : Object as overbroad, unduly burdensome and not calculated to lead to admissible evidence, but will produce the table of contents and index for a compliance manual subject to a confidentiality agreement.

- 03-08275: Subject to foregoing general objections and further object as vague, ambiguous, **unintelligible**, overbroad, and unduly burdensome.
- 04-00415: Subject to the general objections and limited to the one trade in question, otherwise object as vague, ambiguous, overly broad, unduly burdensome and improperly requires speculation as to which documents are sought.
- 04-01650: Limit to reports that reference Claimant; otherwise object vague and ambiguous, overly broad, violates self-evaluative privilege, is invasive of employee privacy and not calculated to lead to admissible evidence.
- 04-03003: Limited to reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, invades the privacy rights of third parties and is not reasonably calculated to lead to the discovery of admissible evidence.
- 04-03747: Limited to reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, invades the privacy rights of third parties and is not reasonably calculated to lead to the discovery of admissible evidence.
- 04-03685: Object as a violation of Financial Advisor's privacy rights or those of third parties. Subject to confidentiality agreement, will produce some records.

**COMMENT:** Once again, Morgan Stanley limits its response to a single account which is contrary to the plain wording of the request which already provides ample weasel room with its limitation to "similar" behavior which Morgan Stanley would not recognize without an exact DNA match between customers.

LIST 7 and LIST 9: **MISREPRESENTATION/OMISSIONS  
NEGLIGENCE/BREACH OF FIDUCIARY DUTY**

Copies of all materials prepared or used by the firm/Associated Person(s) relating to the transactions or products at issue, including research reports, prospectuses, and other offering documents, including documents intended or identified as being “for internal use only,” and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents that contains sufficient detail for the claimant to identify each document listed. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

- 02-02593: Objects as overbroad, unduly burdensome, oppressive not relevant
- 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide.
- 02-07298: Limits to prospectuses, research reports or other offering documents if Claimant can identify the sources of RR’s recommendation. Otherwise objects as overly broad, unduly burdensome, not specific and not related to the matter in controversy.
- 03-00123: Limited to documents previously provided to Claimant and objects that any additional request is overly broad, vague, irrelevant, not specific and do not relate to the matter in controversy.
- 03-04130: Subject to general objections and limitations will produce copies of materials provided to Claimant and research files maintained by the broker. Beyond that, object as overly broad, unduly burdensome and not related to the matter in controversy.
- 03-04984: Object as overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence, however, if Claimant identifies securities or transactions alleged to be unsuitable or unauthorized, Morgan Stanley will **consider** producing research reports.
- 03-07587: No objections, but reserves the right to object to certain categories at a later time
- 03-07840: Limit production to research reports and prospectuses to the “extent available”
- 03-08275: Subject to foregoing general objections and further object that the request is **unintelligible**.
- 04-01650: Limits to prospectuses, research reports or other offering documents if Claimant can identify the sources of RR’s recommendation. Otherwise objects as overly broad, unduly burdensome, not specific and not related to the matter in controversy.
- 04-03003: Limited to reports, prospectuses (or other offering documents) relating to proprietary mutual funds at issue within their possession, custody or control; otherwise object to the request is overly broad, unduly burdensome, and seeks information not specific or related to the matter in controversy
- 04-03747: Object as overly broad, unduly burdensome and not specific or related to the matter in controversy, but if Claimant identifies specific companies or funds, Respondents will meet and confer regarding the list and if tailored to Respondents satisfaction, will endeavor to collect and deliver “tailored” documents.
- 04-03685: Object as overly broad and unduly burdensome, but if Claimant identifies specific transactions, products or securities at issue that is reasonably tailored to Respondents satisfaction, will produce prospectus if one would have

accompanied securities and company specific research reports. Beyond that, object as overly broad and not reasonably calculated to lead to admissible evidence.

**COMMENT:** Morgan Stanley consistently refuses to provide the basis for its recommendations. Instead it requires the claimant to identify documents upon which claimant may have relied but which he or she has no idea exist. Respondents thereafter are free to withhold whatever documents Claimant can not identify, most importantly the “For Internal Use Only” sales aides which the Financial Advisors so often use instead of actually reading a prospectus or research report or broker notes from morning sales calls.

#### LIST 11: **UNAUTHORIZED TRADING**

1) Order tickets for the customer’s transaction(s) at issue.

- 02-04998: Objects as unduly burdensome.
- 03-00123: Object that the request is duplicative and redundant of the account statements, irrelevant and unduly burdensome.
- 03-04984: Objects as overbroad, unduly burdensome and not calculated to lead to admissible evidence.
- 03-08275: Subject to foregoing general objections, “There are no responsive documents. Respondents do not “order tickets.” Respondents use an electronic system.
- 04-00415: Object that Respondents do not use order tickets.
- 04-01650: Agree to produce electronic equivalent (“TARs”) when Claimant identifies transactions at issue. (TARs are not electronic equivalent.)
- 04-03747: **Order tickets do not exist.**
- 04-03685: Respondents state that they do not use paper order tickets.

**COMMENT:** Morgan Stanley consistently denies that order tickets exist even though they are required to be prepared and preserved by SEC Rule 17a-3(6) and Rule 17a-4(b)(1). They are allowed to do this because the Discovery Guide uses the commonly understood vernacular “order ticket” instead of the official term “memorandum.” These records are made and preserved in electronic form prescribed by the SEC as Morgan Stanley and its outside counsel are fully aware. Statements to the contrary are pure fraud which arbitrators are trained to accept without question or critical thought. It should be an embarrassment to the NASD that its members firms routinely deny the existent of required records.

2) Copies of all telephone records, including telephone logs, evidencing telephone contact between the customer and the firm/Associated Person(s).

- 02-07298: Ordered to produce, but didn’t.(Order #4)
- 03-00123: Objects that the request is an unreasonable burden and will agree only to produce notes of phone calls.
- 04-00415: Object as overly broad, unduly burdensome.
- 04-01650: Objects to anything other than Day-timer notes as vague, ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 03-04984: Objects as overbroad, unduly burdensome and not calculated to lead to admissible evidence, however if Claimants will identify the relevant telephone numbers, will consider the burden and expense.
- 03-08275: Subject to foregoing general objections.

- 04-03685: Request a list of phone numbers, whereupon will undertake a reasonable search to see if records exist.
- 04-03747: Object as overly broad, unduly burdensome and not related to the matter in controversy.

**COMMENT:** Once again, Morgan Stanley objects to any substantive documentary evidence which narrows the scope of its defense and purports to find it overbroad and unduly burdensome.

3) All documents relied upon by the firm/Associated Person(s) to establish that the customer authorized the transaction(s) at issue.

- 03-04984: Objects as vague, overbroad, unduly burdensome and not calculated to lead to admissible evidence.
- 03-08275: Subject to foregoing general objections and further object the request is **unintelligible** claimant has never identified the “transactions at issue.”
- 04-00415: In addition to the general objections, object as vague.

**COMMENT:** SICA, the NASD and SEC composed a request that Morgan Stanley and its outside counsel still finds, after five years, too vague and unintelligible to be applicable.

#### LIST 13: **UNSUITABILITY**

1) Copies of all materials prepared, used, or reviewed by the firm/Associated Person(s) related to the transactions or products at issue, including but not limited to research reports, prospectuses, other offering documents, including documents intended or identified as being “for internal use only,” and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

- 02-02593: Objects as overbroad, unduly burdensome, oppressive not relevant
- 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide.
- 02-07298: Limits to prospectuses, research reports or other offering documents if Claimant can identify the sources of RR’s recommendation. Otherwise objects as overly broad, unduly burdensome, not specific and not related to the matter in controversy.
- 03-00123: Limits production to documents previously provided to Claimant and otherwise objects as overly broad, vague, irrelevant, not specific and does not relate to the matter in controversy.
- 03-04130: Subject to general objections and limitations will produce copies of prospectuses provided to Claimant and research files maintained by the broker. Beyond that, object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 03-04984: Object as overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence, however, if Claimant identifies securities or transactions alleged to be unsuitable or unauthorized, Morgan Stanley will **consider** producing research reports.

- 03-07587: No objections, but reserves the right to object to certain categories at a later time; requires a confidentiality agreement prior to producing documents concerning compensation
- 03-07840: Limited to extent “available.
- 03-08275: (#28) Subject to foregoing general objections and further object as not relevant, overbroad, and equally available to claimant but agree to limit to “an exemplar of a brochure that would have been available to Claimant.”
- 04-01650: Limits to prospectuses, research reports or other offering documents if Claimant can identify the sources of RR’s recommendation. Otherwise objects as overly broad, unduly burdensome, not specific and not related to the matter in controversy.
- 04-03003: Limited to reports, prospectuses (or other offering documents) relating to proprietary mutual funds at issue within their possession, custody or control; otherwise object to the request is overly broad, unduly burdensome, and seeks information not specific or related to the matter in controversy
- 04-03747: Object as overly broad, unduly burdensome and not specific or related to the matter in controversy, but if Claimant identifies specific companies or funds, Respondents will meet and confer regarding the list and if tailored to Respondents satisfaction, will endeavor to collect and deliver “tailored” documents.
- 04-03685: Object as overly broad and unduly burdensome, but if Claimant identifies specific transactions, products or securities at issue that is reasonably tailored to Respondents satisfaction, will produce prospectus if one would have accompanied securities and company specific research reports. Beyond that, object as overly broad and not reasonably calculated to lead to admissible evidence.

**COMMENT:** Unsuitability is the most common claim made and relevant documents engender the most objections. Morgan Stanley consistently refuses to provide the basis for its recommendations, usually denying a recommendation has been made. Instead it requires the claimant to identify documents which he or she has no idea exist. Respondents thereafter are free to withhold whatever documents Claimant can not identify, most importantly the “For Internal Use Only” sales aides which the Financial Advisors so often use. Morgan Stanley further prefers to place the onus on Claimants to justify why they purchased a security denying that public customers have the legal right to rely on a registered investment professional but are instead required to conduct their own due diligence and be responsible for their own research decisions.

2) Documents sufficient to describe or set forth the basis upon which the Associated Person(s) was compensated in any manner during the years in which the transaction(s) or occurrence(s) in question occurred, including, but not limited to: a) any bonus or incentive program; and b) all compensation and commission schedules showing compensation received or to be received based upon volume, type of product sold, nature of trade (e.g., agency v. principal), etc.

- 02-02593: Objects as not relevant, over broad, burdensome, oppressive, proprietary, confidential
- 02-07298: Limits to redacted commission runs; otherwise objects as vague and ambiguous, overly broad, unduly burdensome, and not related to the matter in controversy.
- 03-00123: Object that the request is overly broad, irrelevant, not specific and do not relate to the matter in controversy

- 03-04130: In addition to the general objections and limitations, object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 03-04984: Object as overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence, however, if Claimant identifies securities or transactions alleged to be unsuitable or unauthorized, Morgan Stanley will **consider** producing research reports.
- 03-05643: Objects to “Morgan Stanley Financial Advisor Compensation, Benefits and Recognition Programs Booklets” and “MSDW Employee Handbooks” as vague, overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence as well as confidential and proprietary.
- 03-07840: Limited to general booklet on compensation.
- 04-01650: : Limits to redacted commission runs; otherwise objects as vague and ambiguous, overly broad, unduly burdensome, and not related to the matter in controversy.
- 04-03003: Following confidentiality stipulation, will produce documents limited to compensation for transactions at issue; otherwise object the request violates broker’s privacy rights, is overly broad, unduly burdensome, not related to the matter in controversy, and seeks to impose the obligation to produce confidential documents without adequate protection.
- 04-03685: Object as violating Financial Advisor’s privacy rights and confidentiality of documents, but subject to confidentiality agreement will produce some, but not all documents requested.
- 04-03747: Following confidentiality stipulation, will produce documents limited to compensation for transactions at issue; otherwise object the request violates broker’s privacy rights, is overly broad, unduly burdensome, not related to the matter in controversy, and seeks to impose the obligation to produce confidential documents without adequate protection.

Morgan Stanley also characterizes this request as “unintelligible” because it is a comprehensive statement of compensation of Associated Persons which would also encompass branch office managers. The incentives and disincentives for selling or not selling different products has been amply demonstrated by the states in the sale of proprietary mutual funds. Morgan Stanley Financial Advisors were rewarded for proprietary fund sales with expense reimbursement checks and officer managers with bonus payments. The basis for all associated persons’ compensation (Financial Advisors and branch office managers) is basic information without which customers can not receive a fair hearing. It is presumptively discoverable in all suitability cases and produced in almost none.