COHEN GOLDSTEIN
CGP&G
PORT & GOTTLIEB LLP

Robert C. Port, Esq.
Direct Dial: (678) 775-3550
rcport@cgpglaw.com

April 3, 2009

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

Re: Comment on File No. SR-FINRA-2008-024
Amendments to the Discovery Guide

Dear Ms. Murphy:

I am an attorney in Atlanta, Georgia, and my practice areas include the representation of public customers in securities arbitrations. I write to express my concerns about certain proposed amendments to the Discovery Guide. My concerns relate to proposed changes to List 2, Items 1, 2, 4, 12, and 13.

FINRA suggests that the changes proposed to these Items "would provide parties with a broader understanding of a customer's financial status during the relevant period" (comments on proposed changes to Items 1 and 2); "would ensure that other parties to the matter have a more complete understanding of the customer's investing history" (comments on proposed changes to Item 4); and "may provide evidence relating to the customer's financial status, including, for example, information on net worth, assets, and liabilities" (comments on proposed changes to Item 12).

These expanded production requirements utterly disregard the basic teaching of the "Suitability Rule" or "Know Your Customer Rule" (FINRA Rule 2310): that the critical inquiry in evaluating the actions of the firm and its registered representatives is an analysis of ***what they knew at the time of the transaction***:

> "In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer ***upon the basis of the facts, if any, disclosed by such customer*** as to his other security holdings and as to his financial situation and needs." (Emphasis added).

The Rule has long been required to require that a registered representative "make a customer specific determination of suitability and tailor . . . recommendations to the customer's financial

profile and investment objectives." F.J. Kaufman & Co., 50 S.E.C. 164, 168 (1989). Consistent with that fundamental requirement, the SEC has concluded, for example, that "a customer's prior transactions are not relevant in a suitability determination." District Business Conduct Committee No. 7 v. Vaughn, No. CO7960105, 1998 NASD Discip. LEXIS 47 (NAC, Oct. 22, 1998), citing In re Klein, Exchange Act Release No. 37835 (October 17, 1996). See also, In re Hellie, 50 S.E.C. 611(1991) (prior transactions are irrelevant in suitability determination).

If gaining "a broader understanding of a customer's financial status during the relevant period" or obtaining "a more complete understanding of the customer's investing history" or developing "evidence relating to the customer's financial status, including, for example, information on net worth, assets, and liabilities" was not deemed critical by the firm or representative at the time of the transaction, then it has no place in a subsequent evidentiary inquiry evaluating the bona fides of the firm or its representative in recommending that transaction. Simply stated, whatever documents or information the firm/registered representative may want to use in an arbitration proceeding relating to the propriety of the recommendation ought to be limited to the information they possessed or knew contemporaneously with that transaction. If the litany of documents (and the information contained therein) that FINRA now proposes to be "presumptively discoverable" were indeed critical to the investment decision, the firm/registered representative should have (and could have) acquired that data ***before*** the transaction at issue. Indeed, the fact that such inquires were not made would itself be relevant in evaluating compliance with Rule 2310.

These proposed changes would allow defense counsel for the firm and registered representative to rummage, unfettered, through five (5) years of Claimant's past financial history looking for facts upon which they hope to construct a defense. As another commentator has observed, an aggrieved customer should not have to submit to a "financial colonoscopy" to have their claim adjudicated. (Comments of Seth E. Lipner, March 18, 2009). Any information about Claimant's financial condition which was not known at the time of the transaction at issue is irrelevant and inadmissible in support of any effort by the firm/registered representative to justify their actions. I urge FINRA to reject any effort to allow this broad ranging and intrusive post-hoc inquiry.

Finally, I observe that the federal securities laws and regulatory scheme reject the concept of "caveat emptor" and, instead, as a matter of public policy, require full disclosure and a high standard of business ethics in the securities industry. In the words of the Supreme Court, the goal is "to substitute a philosophy of full disclosure for the philosophy of caveat emptor." Affiliated Ute Citizens v. United States, 406 U.S. 128, 151 (1972), quoting SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963). The types of disclosures proposed to be required of investors who

challenge the decisions made by their financial advisors run counter to that fundamental policy decision. They facilitate an arbitration process where the investor is under attack for not knowing better than to rely on their financial advisor, who of course strongly encouraged the investor to place complete faith and trust in them. That result is contrary to the spirit of the federal securities laws, and does little to encourage investor faith and confidence in the financial industry.

Very truly yours,

Robert C. Port

RCP/jmp