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Via Electronic Mail comments@sec.gov

Nancy M. Morris, Secretary
United States Securities & Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: SEC Release NO. 34-59534; SR-FINRA-2008-024.

Dear Secretary Morris:

My firm regularly represents investors in arbitrations before the Financial Industry Regulatory Authority ("FINRA") and has done so for many years. I write to offer comments on FINRA's recently-proposed amendments to the Discovery Guide and appreciate the opportunity to do so.

I. General Comments

In general, I agree with most of the substantive comments already offered by my colleagues at the plaintiffs' bar. I also agree that many proposed amendments to the Discovery Guide are decidedly anti-investor, which I think is bad policy at a time when the growing consensus demands that investors deserve (and will get) more accountability, more transparency, and more equitable treatment by both industry *and* regulators. Anything less than that kind of result with amendments to the Discovery Guide, I submit, will only undermine the overall integrity of the arbitration process, and more importantly, diminish the public's confidence in the arbitration process's ability to achieve fair results.

If the SEC approves the proposed amendments, I am convinced that in the short run, investors will be discouraged from pursuing meritorious arbitrations, and in the long-run, that disillusioned investors will demand the freedom to avoid arbitration sponsored by a self-regulatory organization like FINRA because investors will accurately perceive that one cannot get a fair hearing.

In addition to proposing several flawed amendments, the proposed Discovery Guide fails to address shortcomings in the existing Discovery Guide.

II. Specific Comments

My specific comments address: (A) proposed amendments; and (B) current problems that the proposed amendments fail to address.

A. Proposed Amendments.

1. List 1—Guidance for Third-Party Subpoenas. The proposal eliminates guidance for scope of third-party subpoenas. Currently, the footnote for List 1's heading provides important guidance regarding the permissible scope of third-party subpoenas. The current footnote informs panels that "[i]n addition, arbitration chairpersons may use the Document Production Lists as guidance for discovery issues involving non-parties."

The proposal would eliminate that guidance by eliminating the footnote. If this guidance (or limitation) on third-party discovery is removed, parties will be free to significantly increase the volume and cost of pre-hearing discovery. If this guidance is removed, arbitration chairpersons will have no standards to guide them on the scope of third-party discovery.

The guidance that this footnote provides should be retained or incorporated into the appropriate rule because, contrary to what the proposal says, this guidance does not currently exist elsewhere

2. List 2, Item 8—Recordings of Calls With Broker. Perhaps no one aspect of the proposal better exemplifies the proposal's pro-industry approach than the one regarding recordings of phone calls. The proposal would require customers to produce all recordings of phone calls with brokers that the customer made or possesses. Yet the proposal would not also require the same of respondents. Rather, the proposal, as it now stands, would allow respondents to pick and choose what recording the respondents will produce. We submit that this is cannot be justified, and that, if adopted, will only add to a perception that the arbitration process is intended to burden the customer and benefit the industry—a perception that the Commission should not foster.

3. List 2, Items 1, 2, and 12—Five Year Period For Records. As many comments have highlighted, these provisions are invasive, particularly new Item 12, which would require claimants to identify loans guaranteed or applied for in the five years before the first transaction identified in the Statement of Claim. The proposal would impose this requirement without regard for the type of claim. Also, as many comments have highlighted, these proposed provisions might require claimants to produce 11 years' worth of financial records. The relevancy of 11 year-old tax records, for example, to a 1 year-old selling away case exceeds the bounds of what would be permitted in civil litigation. Generally, as the Commission is aware, discovery in civil litigation is limited to information reasonably calculated to lead to the discovery of admissible evidence. How 11 year-old tax records would do that in a civil litigation over selling away presents a difficult matter to explain or justify.

The Commission should reject these proposals because, quite simply, they add substantially to the burden and expense of arbitration. Further, I suspect than many claimants could not even produce 11 years' worth of records.

B. Problems Unaddressed In the Proposed Amendments.

1. <u>Confidentiality Standards Should Be Adopted</u>. Citing confidentiality concerns, the industry frequently withholds internal documents of several types including, but not limited to, manuals and compliance documents. Unfortunately, no FINA-sanctioned standard for confidentiality now exists. Thus, parties and panels lack guidance about what information should (and should not) be treated as confidential. The absence of such guidance often causes what would otherwise be unnecessary objections to discovery requests, motions practice, conferences, and delay.

2. <u>List 1—Item 8: Expungements Should Be Disclosed</u>. Item 8 continues to require respondents to produce Forms RE-3- U-4, and U-5. Unfortunately, these forms often are incomplete because, before 2008, some proceedings and settlements were expunged from those forms. Expungement for Forms RE-3- U-4, and U-5 have been restricted since 2008. For disclosure to be complete, we submit that expunged matters must also be disclosed. Such disclosure does not detract from the main benefit of expungement. That is so because expungment's main (and intended) benefit runs to the representative in obtaining employment. Further, disclosure of expunged matters could the subject of a confidentiality order, if FINRA employed a defined and workable standard for confidentiality. *See supra.*

III. Closing Comments

If the current proposal is merely revised, the current proposal will remain the working basis for whatever revised proposal results. The problem with that is that the likely result of using the current will be less of the same: an amended Discovery Guide that unfairly favors the industry, along with the attendant and inevitable result of decreased investor confidence in the arbitration process.

Truly yours,

Scott L. Silver

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