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ASSOCIATED OFFICE
LOS ANGELES

March 20, 2009

Elizabeth M. Murphy
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number SR-FINRA-2008-024
Proposed Rule Change to FINRA Discovery Guide

Dear Ms. Murphy:

We have had the pleasure and privilege of representing investors in NASD and FINRA sponsored securities arbitration matters for the past 17 years. We dedicate ourselves to assisting investors to recover losses as a result of broker misconduct. We take our work seriously and don't undertake representation unless we are convinced that a genuine wrong has been committed.

Over the years, FINRA proposed various rules to modify its arbitration procedures for customer disputes. This time FINRA proposes to modify its "Discovery Guide" which provides lists of presumptively discoverable documents which must be exchanged by the parties without the need of going through a formal discovery process.

We have participated in many discovery conferences both prior to the advent of the Discovery Guide and in the ten years since its approval and wish to share our comments with you about the proposed revisions to the Discovery Guide.

In theory, the Discovery Guide appears to capture much of the much vaunted "efficiency" of an alternative dispute resolution process. In practice, the Discovery Guide has not done much to change how brokerage firms, associated persons, and their counsel often abuse the arbitration system. For the last 10 years, almost every customer case we handled involved one or more protracted discovery battles created by the Respondents refusing to produce documents considered presumptively discoverable by the Discovery Guide.

The proposed modifications greatly expand an already invasive examination of a Claimant's financial and personal history beyond that which even has a modicum of relevancy. In exchange, a Claimant will receive a few more documents from Respondents related only to specific types of claims, if asserted. There is a disappointing lack of reciprocity in some of the more draconian revisions. In every case, both sides seek to learn about the financial wherewithal, motivations, and experiences of the other. For example, if a Claimant is required to produce his tax returns or account statements for five years prior to the first investment, it only goes to follow that the broker should also be required to produce the same. The information is just as relevant to one side as the other regarding the financial wherewithal, experience, knowledge, and motivations.

We recognize that there are some minor claim-specific changes which require brokerage firms to produce a few more documents, particularly the Proposed List 12. We laud FINRA for addressing the surge in "product" cases especially as they related to variable annuities and high-yield bond funds.

On balance, the proposed revisions worsen an already unfair situation for any individual investor in exchange for very little back from the brokerage industry. Our position is these proposed revisions require substantial comment from practitioners on both sides and the entire matter referred back to FINRA for further consideration. Below are some initial concerns we have with the proposed revisions.

Concerns with List 1 – Documents to Be Produced by the Firm/Associated Persons

The proposed changes to the list of documents to be produced by the "Firm/Associated Person" are inadequate and at times unfair to Claimants.

Of the many one-sided changes, the worst is the removal of the requirement of the firm to produce account statements – how else could a Claimant perform an analysis of his or her account without these documents? All too often a Claimant does not have all of their account statements. They get lost, mislaid, misfiled, or otherwise are not available. The brokerage firm is required to maintain these records. To force Claimants to make a special request for these critical documents adds an unnecessary burden.

The removal of the requirement for the brokerage firms to produce the holding (posting) pages is also harmful. The holding pages or the "blotter" provide valuable and relevant insight into the overall "book of business" a broker services, specifically, in cases involving issues of whether a security at issue was solicited or unsolicited, if the security was purchased in other of the broker's customers' accounts on the same date, and the commissions paid on the transactions.

The removal of the requirement of the brokerage firms to produce any recorded telephone calls harms Claimants. One only needs to consider for a moment why the brokerage industry wanted this change to see the harm. Several well-known firms record phone conversations with their clients. These recordings are often some of the very best evidence of what was actually said between the broker and the Claimant compared to what happened to the accounts. Amazingly, the proposed revisions still require the Claimant to produce any recording he or she made. Why is there now a proposed lack of reciprocity? It makes no sense. With any audio recording both sides' recordings should be considered presumptively discoverable.

<u>Item 9</u> revises the scope of documents regarding the exception and supervisory activity reviews. This Item is very helpful, although firms already object to producing such documents. However, we ask one word in the paragraph be changed. The word "similar" should be removed and the word "other" inserted in its place. This will require the brokerage firm to produce all of the documents it relied upon in conducting any review of a Claimant's account rather than leave the matter open to pedantic interpretations of "similar".

Finally, we propose that the commission runs for the Associated Person be considered presumptively discoverable in every case. Often, the broker's sole motivation for wrongdoing is related to earning commissions in the form of excessive trading, recommending certain securities over others, or by generating wrap fees for "managing" the account and either doing nothing or engaging in an inappropriate amount of trading to justify the fees. The commission runs are already required to be kept in an easily accessible location in each branch for the regulators. There is no burden to Respondents in producing the same to Claimant in each and every case.

Concerns with List 2 – Documents to Be Produced By Customer

The proposed changes to List 2 significantly increase the set of documents to be produced by the Claimant. Taken in their totality, these revisions appear to be an after-the-fact effort by the Respondents to "know your Claimant."

When a client opens an account with a brokerage firm, the firm is required to "know its client" by FINRA rules. Typically, firms require a client to answer a page or two of questions about their financial status. All too often this information is completed by the Associated Person and is riddled with inconsistent if not incorrect information. These forms accomplish very little in terms of providing relevant information about the customer. Nonetheless, the mere completion of the forms gives the Associated Person and brokerage firm carte blanche to start making trades.

Only after a complaint is made do the brokerage firms perform an after-the-fact financial strip-search of any client who dares complain about how they were abused. Said another way, if the Claimant's detailed financial information was not important to the firm when the Claimant entrusted his or life savings to the firm, why is it important only after the Claimant complained?

To meet the stated goal of investor protection, it would make more sense that the firms be required to collect this detailed and often times picayune information up front when a client opens an account to truly "know their client." However, that is a different letter for a different time.

For now we will focus on the Items enumerated in List 2. The revisions to this List make the financial strip-search even more painful without increasing the likelihood of discovering any additional relevant documents form the Claimant.

Item 1 addresses Claimant's tax returns. Most surprisingly is the increase in the number of tax returns which must be produced. The new rule now requires five years from the first transaction rather than three. Ultimately, what does a Claimant's tax situation five years prior to the initial transaction have to do with any case? The relevancy of a person's financial status five years before the first transaction is minimal at best.

Worse, under this new rule the entire tax returns have to be produced rather than just pages 1 and 2 from the Form 1040 and Schedules B, D, and E. This puts a further burden and cost on Claimants to produce additional information with little or no relevancy to the dispute.

Footnote 2 to the List Item is shocking. In situations where the Claimant is a closely held corporation, partnership, trust, LLC, or ERISA plan, this new item gives the Respondent the ability to ask for the tax return(s) of individuals and entities not even personally involved in the dispute!! This is simply the brokerage industry seeking a novel way to punish a representative for bringing a Claim on behalf of an organization or legal entity. The privacy implications alone in this situation are staggering and this footnote will only create more disputes rather than less.

In addition, why are the Associated Person's tax returns not considered fair game? How the broker earned his money and invested it would certainly be a great way to compare his personal knowledge to the actions he recommended for the Claimant. It would teach Claimants' counsel the broker's personal investment philosophy, his level of sophistication, and ultimately whether the broker was following the same advice as he was dispensing.

Item 2 asks for the Claimant's financial statements going back five years from the date of the first transaction rather than three. Again, the relevancy of the financial status of a Claimant five years prior to the first transaction is minimal at best.

Item 3 is an embarrassment as it requires the Claimant to produce his or her account statements back to the brokerage firm; however there is no reciprocal rule for the brokerage firm to produce account statements. It appears this Item addresses the brokerage industry's concern whether a Claimant wrote on his or her account statements. However, List 2, Item 7 already requires Claimant to produce any such notes. Further, the brokerage firm is already required to retain all its client's account statements. Thus, Item 3 can be seen for what it truly is, another attempt to discourage arbitration complaints by increasing the Claimant's discovery burden.

A copy of the broker's account statements would be very helpful to Claimant in determining what the broker was doing for himself compared to how he was advising Claimant. We recommend the proposed Discovery Guide make production of the account statements reciprocal for both sides.

Item 4, requiring production of Claimant's other brokerage account statements, is problematic for two reasons:

First it requires Claimant to automatically give authorization to the Respondent(s) to request private financial information from Claimant's other brokerage firms despite the fact Claimant is already required to produce the information. This "authorization" accomplishes nothing but to further punish the Claimant by exposing his or her private confidential documents to a second, unmerited level of scrutiny by the Respondents. Plainly, if Respondents do not believe the Claimant was honest in producing his or her documents, the subpoena powers given to the arbitration panel give the Respondent the remedy it needs.

Secondly, the proposed change extends the period of time from three years to five years. A Claimant's financial activity five years prior to the first transaction at issue is of virtually no relevant value.

Again, a copy of the broker's account statements would be very helpful to a Claimant in determining what the broker was doing for himself compared to how he was advising Claimant. We recommend the proposed Discovery Guide make production of the "other brokerage account statements" reciprocal for both sides for the same time periods.

Item 8, regarding telephonic recordings, fails in reciprocity. Under the proposal only the Claimant would be required to produce his or her recordings of any telephone call. The brokerage firm would not be required to do the same. This makes no sense whatsoever. Certainly we agree Claimant should be required to produce such recordings, but fairness dictates the brokerage firm be required to produce its recordings, too.

Item 9 broadens the scope of correspondence sent or received by a Claimant from correspondence with the Respondent(s) to correspondence sent to anyone under the sun. This item puts attorney-client privileged documents at issue. There is no way any attorney would produce such privileged documents. The fact Item 9 tries to run around this crucial privilege is unacceptable. Without a doubt it will lead to additional unnecessary discovery disputes. This is particularly concerning when the arbitrator deciding such disputes may not be an attorney or well-versed in deciding issues of privilege.

Item 11 is mind-boggling in that it now makes confidential settlement agreements from prior matters presumptively discoverable. This makes no sense. When parties settle a matter and require its confidentiality, there are often penalties for disclosing the terms of the agreement. If a Claimant is forced to reveal the terms of a settlement agreement, he or she is then exposed to the penalties for such a revelation. If settlement agreements are going to be considered fair game, the other party or parties to such an agreement should be given notice and allowed to be heard prior to any ruling on the matter.

Item 12 adds a requirement the Claimant produce a broad range of loan documents. This is an unacceptable addition to the Discovery Guide. As written this Item requires Claimants to produce every loan document for five years prior to the first transaction at issue. This will require the Claimant to produce credit card applications; car loan applications; personal loan applications; line-of-credit applications; student loan applications for themselves and possibly other family members; and more. The relevancy of such information is questionable at best.

This proposed Item will simply be used by the Respondents' attorney(s) to delve deep into the details of a Claimant's financial situation, far deeper than is appropriate to resolve a dispute about a securities matter in order to find minor details with which to assault a Claimant's credibility and integrity.

On top of this new burden, the Claimant would also be required to authorize the lenders to produce such documents to the Respondents. What does this required authorization accomplish? It allows Respondents to double up on seeking the same information without a subpoena for no meaningful purpose except to abuse a Claimant's privacy. This is a travesty designed solely to make a Claimant think twice about the discomfort and burden he or she will have to suffer in order to seek redress.

If Respondents are wedded to spelunking so far in the past of each Claimant's financial history, then it should only be appropriate Claimant be able to do the same with the broker and his supervisor(s), particularly as the issues of credibility and honesty are equally applicable to both sides.

In addition, considering the regulatory and criminal histories of some of the brokers brought to arbitration, the risk of identity theft for the Claimant is very real. There is no benefit to subjecting a victimized individual to the risk of a second round of abuse by requiring the production of loan documents.

This Item should never have been proposed much less considered for inclusion in the revisions of the Discovery Guide.

Item 13 broadens the scope of presumptively discoverable documents for trustees beyond that which is relevant in a given dispute. This proposed Item requires a trustee to reveal all of the accounts which he or she has trading authority. A trustee has a fiduciary duty to act in the best interest of a trust and follow its requirements. Each trust is different and has different goals and likely different plans to accomplish those goals. Requiring a trustee to reveal private, confidential information about other trusts is wholly inappropriate. Furthermore, since each trust is different, there is no relevancy to comparing the different trust accounts.

In addition, the grantors and beneficiaries of the other trusts have privacy interests which must also be considered before simply requiring production of such documents. If this Item is going to be included in the Discovery Guide, it is crucial the privacy concerns of these third-parties be addressed in any final version of the Discovery Guide.

Concerns with List 5 – Documents to Be Produced by the Firm/Associated Persons for Claims of Failure to Supervise

The re-written list of items considered to be presumptively discoverable for failure to supervise claims omits a critical class of documents which exist in the current list of items. In the current Item 2, a brokerage firm is required to produce "...all other documents reflecting supervision of the Associated Person(s) and the customer's account(s) at issue."

The new list narrows the scope of presumptively discoverable supervision documents to "[a]ll exception reports, supervisory activity reviews, activity concentration reports, active account runs, and *similar documents* produced to review for activity in customer account(s) at issue..."

The problem here is industry attorneys narrowly define "similar" documents, sometimes down to the very forms, dates, or persons conducting the reviews. Simply put, it is rare a "similar" document is ever produced without an order from the Panel. Keeping the original language of "all other documents" will make such gamesmanship much more difficult and will result in hopefully fewer battles on this point.

Concerns with List 11 - Documents to Be Produced by the Firm/Associated Persons for Claims of Unsuitability

Proposed List 11 addresses the class of documents to be produced by Respondents when the Claimant makes a claim of unsuitability.

FINRA requires a broker to conduct a two-part "reasonable basis suitability analysis" when he or she sells any structured product such as a high-yield bond fund.

The first part of the reasonable basis suitability analysis is to review the product or security to be certain it is suitable for investment. The second part of the analysis requires the broker be certain the investment is suitable for the client. Documents related to both steps of this analysis are critical to any claim of unsuitability.

As to the first step, suitability for investment, the firm and broker(s) must carefully review and understand the terms and conditions of the product being offered. The firm and its broker must understand the nature of the product, as well as the potential risks and rewards associated with the product. All documents produced or provided by the firm to the Associated Person in relation to the given investment(s) are critical for any suitability claim. How the firm and Associated Person viewed the product or security may go a long way for an arbitration panel to decide whether the firm or broker violated its obligations. This is especially true in the recent surge in claims related to high-yield bond funds sold by firms such as Morgan Keegan and Charles Schwab. In these cases it is becoming clear that many of the brokers represented the funds to be cash alternatives or having very low risk profiles but no idea the true nature of the products they were selling.

As to the second step, determining whether the investment is suitable for the specific client (now Claimant) the firm and its broker(s) must examine a variety of factors, including the customer's financial status, the customer's tax status, the customer's investment objectives, and any other information that the firm uses or considers reasonable to use in making recommendations to that customer. Again any documents used by the broker in making these determinations should be considered presumptively discoverable.

In both steps there is a class of documents excluded in the new lists. That class is documents present at the firm and available to the broker for review. These documents are often "internal use only" documents which were generated by the firm but not used by the broker in making his or her suitability determination. These unused, but available, documents should be considered presumptively discoverable as they go to the organization's knowledge of the product(s) and Claimant.

Conclusion

In fairness, there likely will never be a Discovery Guide to which Claimants' counsel and Respondents' counsel will ever consider acceptable to both sides. Ultimately, counsel will object where they find issue with the production of presumptively discoverable documents.

What must be kept in mind at all times are the victims of the bad brokers, poor supervision, and malfeasance which are endemic to so very much of the securities industry. The brokerage firms mandate arbitration to keep the dispute out of the public eye and away from sympathetic jurors for a reason. If their practices were exposed the public outrage would likely force sweeping changes to how firms conduct their business. In the silent vacuum of arbitration, Claimants' rights to discovery are severely curtailed. The types of discovery abuses which occurred prior to the creation of the discovery guide still occur. They will continue to occur after any revision. However the revisions proposed here open the already abused Claimants to a longer more invasive round of burdensome, costly, and oppressive document discovery for of documents which have no relevance to Claimants' claims or Respondents' defenses.

We ask the SEC to expand the comment period to 90 days to allow practitioners on both sides to have more time to fully comment about their concerns regarding the revision of the Discovery Guide. After the review period finishes, please refer this matter back to FINRA for further refinement. A better job can be done for both sides than what is proposed here.

Thank you for your consideration.

Respectfully,

JONATHAN W. EVANS

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