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August 20, 2010

VIA FEDEX

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

Re: File Number SR-FINRA-2010-035
Proposed Rule Change to Amend the FINRA Discovery Guide ("Rule Change")

Dear Ms. Murphy:

I am writing to comment on the above-referenced Rule Change. Our firm primarily represents securities firms and associated persons in arbitrations brought by customer claimants and has had significant experience with the current FINRA Discovery Guide. The Rule Change proposes some helpful revisions and this letter is not meant to be overcritical of FINRA's efforts. Though this letter does not express the opinion of my firm or its clients, I suggest for your consideration that there are some proposed revisions in the Rule Change that will seriously and unfairly burden securities firms and their lawyers without achieving any increase in fairness to claimants.

I. Presumptive Discoverability of All List Documents

By consolidating all of the Discovery Guide lists into two more-or-less mandatory lists, the Rule Change makes all documents on the prior lists presumptively discoverable. This greatly expands the scope and number of presumptively discoverable documents. While the Rule Change continues to suggest that the parties and the arbitrators "retain their flexibility in the discovery process" and arbitrators can "order that parties do not have to produce certain documents on the Lists in a particular case," the practical effect will be that greater numbers of questionably relevant documents will need to be produced.

This is because "presumptively discoverable" is not a defined term with respect to the Rule Change nor is it defined in reported cases generally. Black's Law Dictionary (8th ed. 2004) defines a multitude of "presumptions" including:

"absolute presumption"
"conclusive presumption"
"conditional presumption"
"irrebuttable presumption"
"mandatory presumption"
and other presumptions sounding more and less binding

Which of these presumptions apply? The most helpful Black's definition states that: "A presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption." But, while this may appear to be helpful in technically defining the parameters of the presumption of discoverability and the flexibility of the arbitrators and parties, the practical effect of shifting the burden is to make it very likely that all the documents on the lists will have to be produced. At least with a greater number of separate document lists tied to different legal theories, the old Discovery Guide provided some argument, based on relevance, against discovering certain types of documents.

Given that one of the major grounds for vacating arbitration awards is the failure of arbitrators to admit evidence, it is highly unlikely that the presumption of discoverability will be overcome by any party opposing discovery. Thus, the Rule Change with its consolidation of lists greatly enlarges the scope of presumptive discoverability and likely increases the burden of discovery in all cases.

II. Cost or Burden of Production

FINRA is to be commended for adding a provision allowing an objection to the cost or burden of production of documents. However, as with the issue of presumptive discoverability, the Rule Change does not provide any guidance to the arbitrators on weighing the cost or burden against the "need for the document." Again, without such guidelines, the "trump card" will be the Arbitrators' tendency to be guided by the principle of permitting discovery and use of evidence to avoid a ground for vacatur. In sum, only in cases of extreme cost or burden and extreme low relevance will Arbitrators be likely to bar discovery of the requested documents.

III. Activity in Other Customers' Accounts

The Rule Change will require members and associated persons to produce supervisory documents relating to other non-party customers. It is difficult to see the purpose of such documents beyond allowing claimants to put in unfairly cumulative evidence which may result in the Arbitrators entering an award, even partially because of events involving non-parties. This will increase the necessity of the Arbitrators to decide whether other customers' complaints have any merit or applicability and should be considered by the Arbitrators in making an award. This has the potential of resulting in myriad "cases within a case" as the Arbitrators and the parties

sort through the validity of other customer complaints involving persons not before the Arbitrators. "Deciding one case at a time" – which is what Arbitrators generally cite when barring the production or admission into evidence of other customer complaints – will likely be rendered impossible by allowing discovery of other customer complaints. Even if discoverability does not equate to admissibility at hearing, it is unlikely that such documents will be kept out of evidence in most cases. The restriction in the Rule Change to documents related to "allegations made in the Statement of Claim" is likely meaningless because of the compendious character of some claims and the vague open-endedness of others. Given the liberality of discovery, it will be hard to convince Arbitrators that documents are not in some way related to the claim allegations.

IV. Commission Runs

The Rule Change does not limit discoverable commission and compensation runs to those related to transactions involving the claimants. As with activity in other customers' accounts, it is difficult to see how this is anything but an attempt to have cases decided cumulatively on the basis of evidence not relevant to the claims before the Arbitrators. Perceived "patterns" in compensation will also be the subject of "cases within a case" which will either prolong and complicate the hearing or irritate the Arbitrators – none of which is congruent with the fair and streamlined procedure that arbitration is meant to be.

V. Claimant Tax Returns

The Rule Change proposes to clarify the requirement that claimants produce certain tax records. Expanding the enumeration of schedules and worksheets to be produced is helpful but the Rule Change should clarify the requirement that claimants produce "income tax returns . . . identical to those . . . filed with the Internal Revenue Service" means that such documents should be copied in the order and form filed with the IRS, with no omissions.

VI. Claimant Copies of Account Statements

Claimant copies of account statements can be among the most valuable sources of evidence for use by respondents at hearing. The Rule Change calls for production of only those statements and confirmations "with hand-written notations" or "which are not identical to those sent by the firm." However, permitting such discretion in production allows too great a measure for error or intentional non-disclosure. Indeed, the bare facts that a claimant keeps all of his/her statements or throws all of them out can be evidence in certain cases. Seeing handwritten notations *in situ* is part of their significance and can be as important for the claimant to show at hearing as for the respondents.

I appreciate FINRA's continuing efforts to refine its Discovery Guideline and the opportunity to be part of the amendment process. I and my firm would be happy to respond to any questions or comments by SEC or FINRA relating to the views above.

The views expressed herein are not those of our clients or firm but reflect my experience and my firm's experience in arbitrating thousands of cases over the last couple decades.

Very truly yours,

MILLER CANFIELD, P.L.C.

By _____
Thomas R. Cox

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