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The Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Proposed Discovery Guide Revisions (SR-FINRA-2010-035)

This comment is submitted in opposition to the proposed revised Discovery Guide (SR-FINRA-2010-035) (the "Proposed Discovery Guide"). My comments are based upon thirty years of experience handling and supervising thousands of FINRA arbitrations as a litigation attorney and Director of Litigation at Shearson Lehman Brothers (1980-1993), a founding partner in a law firm that represents investment firms in securities arbitrations (1994-present), and a member of the FINRA National Arbitration and Mediation Committee (1991-1993 and 2002-2004). I have also successfully argued two seminal United States Supreme Court cases related to the arbitration of federal securities law claims (*Shearson v. McMahon* and *Rodriquez v. Shearson*) and testified in Congressional hearings on securities arbitration reform.

OVERVIEW

A Discovery Guide is useful only if it advances the overriding goals of securities arbitration *for all parties*; namely, fair and just resolution of claims without the delay and excessive cost of litigation. The Proposed Discovery Guide unduly complicates the discovery process and fails to advance these goals.

BACKGROUND

It is axiomatic that the securities arbitration process exists to provide a fair and cost-effective alternative to a litigation system that often fails parties because of its burdensome costs and delays. Justice delayed is justice denied. Securities arbitration

achieves its worthy goals by expediting discovery, avoiding unnecessary discovery, and providing experienced and trained arbitrators who can identify the relevant documents in each case based upon its unique facts and issue reasonable and binding discovery rulings as early in the process as possible.

THE CURRENT DISCOVERY GUIDE

The current Discovery Guide is a ten-year failed experiment that sought to expedite the exchange of "List" documents and information considered "presumptively" relevant for designated categories of claims. The goal was to discourage unnecessary motion practice and provide parties an opportunity to evaluate and settle their claims before engaging in formal discovery. These noble goals were never realized because:

1. Arbitrators often treat the current Discovery Guide "Lists" as "conclusive" rather than "presumptive."

Although the current Discovery Guide (like the Proposed Discovery Guide) informs arbitrators that they are not bound by the "Lists" of presumptively discoverable documents, arbitrators are often reluctant to deviate from them. This leads to the perceptions that FINRA is involved in making discovery determinations rather than the arbitrators, and that the participants in a particular arbitration have no meaningful input regarding the discovery that is appropriate for their particular case.

2. Investors rarely comply with the current Discovery Guide.

Many investors completely ignore their obligations to produce documents under the current Discovery Guide. The remainder generally makes only piecemeal production of documents, and not within the prescribed time frame.

3. The current Discovery Guide is not enforced in an evenhanded manner.

Arbitrators rarely sanction investors for failing to comply with the current Discovery Guide. On the other hand, Investment firms have been subjected to SEC and FINRA regulatory sanctions, as well as arbitrator-imposed sanctions, for non-compliance.

4. The current Discovery Guide Lists are unnecessarily complicated and unsatisfactory for all parties.

Investors and investment firms routinely object to producing documents called for by the current Discovery Guide Lists and in virtually every case serve document and information requests, including more expansive requests relating to subjects already covered by the Lists. The result is overlapping and duplicative productions that increase the time and cost of discovery for the parties.

In fact, the current Discovery Guide Lists are so cumbersome that for some time now our law firm's practice has been to stipulate with investor counsel whenever possible to waive all List production obligations and to have the parties simply incorporate any List requests within their general document and information requests. The fact that our firm is usually successful in obtaining such stipulations is perhaps the best evidence that the current Discovery Guide does not work for either investors or investment firms.

THE PROPOSED DISCOVERY GUIDE

The Proposed Discovery Guide is Fundamentally Flawed

The Proposed Discovery Guide does not address these fundamental flaws in the current Discovery Guide. Furthermore, by reducing the Lists from fourteen to two and requiring *all* documents to be produced in *every* case regardless of the type of claims asserted, the Proposed Discovery Guide virtually ensures that the parties will be forced to produce documents irrelevant to a particular case, the result being that discovery in general will be more burdensome, drawn-out and expensive for both investors and investment firms. As an extreme example, under the Proposed Discovery Guide there is a presumption that both the investor and investment firm will have to produce all of the documents on their respective lists even in a case where the investor alleges nothing more than a single unauthorized trade.

The fact that the Proposed Discovery Guide advises arbitrators that they are not required to follow it and can fashion their own discovery directives adds little to similar language in the current Discovery Guide that has proven to be ineffective. There is nothing in the Proposed Discovery Guide that would lead an experienced practitioner to conclude that investors will suddenly begin complying with it or that arbitrators will suddenly begin enforcing it against investors.

If anything, the Proposed Discovery Guide is more complicated than and micro-manages the discovery process to an even greater extent than its predecessor. It enforces rather than eliminates the perception that discovery is being managed by FINRA instead of the arbitrators. In fact, since the Proposed Discovery Guide is even more exhaustive than its predecessor, it actually increases the likelihood that arbitrators will view its Lists as "conclusive" rather than "presumptive."

The Proposed Discovery Guide also imposes onerous production and deadline burdens on investment firms that will be at best difficult and at worst impossible to comply with in certain cases. An inevitable consequence is that investment firms will feel constrained to settle otherwise meritless cases because of the discovery costs inherent in defending against such claims. Small broker-dealers will be especially burdened by this presumably unintended consequence. The investor with a relatively simple case will be forced to comply with and respond to the expanded Lists. This is not what the parties bargained for when they agreed to arbitrate securities disputes.

The Proposed Discovery Guide is also flawed in its attempt to micro-manage discovery in claims related to specific products. In addition to the problems discussed above, there is a fundamental flaw in including product-related List items in that the Proposed Discovery Guide will become outdated almost immediately as new products are created. I believe the better practice is to leave discovery related to specific, unique products to the arbitrators and not attempt to deal with them in a Discovery Guide.

Certain Proposed Discovery Guide "List 1" Documents are Particularly Onerous

Certain of the "presumptively discoverable" "List 1" documents in the Proposed Discovery Guide to be produced by investment firms and associated persons in *all* cases are particularly onerous and burdensome.

Item "2" calls for the production of correspondence sent to the customer relating to the "accounts or transactions at issue," "including, but not limited to, documents relating to asset allocation, diversification, trading strategies, and market conditions; and all advertising materials sent to customers of the firm that refer to the securities and/or account types that are at issue." Investors often assert generalized claims with respect to wrongdoing related to their entire account(s) for the life of the account(s), sometimes going back many years. In addition to being incredibly burdensome, it may be impossible for the typical investment firm to obtain all of these documents in timely fashion, as presumably they will be found in various places throughout the firm. The requirement is unduly burdensome to firms as part of a presumptively discoverable Discovery Guide List.

Item "5" calls for the production of all materials prepared, used or provided to customers related to the "transactions or products at issue", including research reports, sales materials, prospectuses, and other offering documents, including documents intended or identified as being for "internal use only." This requirement places an impossible burden on firms faced with broad, generalized pleadings covering long time periods, and are not appropriate for presumptively discoverable Discovery Guide Lists. To the extent these documents are relevant they can be included in the investor's discovery requests.

Item "13(b)" is incredibly onerous. Where the investor alleges a failure to supervise, the firm is required to produce "all exception reports, supervisory account reviews, concentration reports, active account runs, and similar documents produced to review for activity in customer accounts handled by associated persons and related to the allegations in the Statement of Claim..." While the language of this item is not entirely clear, it appears to call for the production of all of these documents for unrelated third party customer accounts. A claim of "failure to supervise" is included in virtually every case, and it would be difficult to imagine a more burdensome, irrelevant requirement than to require the production of all of these documents in every case on the expedited basis required by the Proposed Discovery Guide. There is no place for such overbroad

requirements in any Discovery Guideline; to the extent this information is relevant to a particular case, it can be the subject of a discovery request.

Item "20 (a)" is also incredibly onerous. It appears that all an investor has to do is simply allege solicited trading activity, and the firm is then required to produce itemized lists of every trade done in every one of the associated person's accounts, listing whether each trade is solicited or unsolicited and the gross and net commissions generated from each trade. If the Proposed Discovery Guide was enacted, these documents would have to be produced on an expedited basis in every case where the investor alleges solicited trading activity, regardless of what allegations of wrongdoing were asserted with respect to his account activity. Such a production is onerous, unduly burdensome and undoubtedly irrelevant in most cases, should never be included in a presumptively discoverable Discovery Guide, and are more properly the subject of discovery requests in the normal discovery process. Including this and other similarly broad and irrelevant "Items" in presumptively discoverable Lists is also bad policy effect because it encourages vague, generalized pleadings in cases of dubious merit in an attempt to extract a settlement from an investment firm (especially a small firm) seeking to avoid expensive discovery requirements.

Item "21 (a)" which requires production of all compensation agreements and schedules between the associated person and the firm, in all cases, regardless of the nature of the claim, is similarly inappropriate and absolutely unnecessary.

Item "22" which requires production of specific documents if the claim contains allegations regarding insurance products that contain a death benefit is not an appropriate item for a presumptively discoverable Discovery Guide. Such an "Item" opens the door for additional items pertaining to other specific products that are more appropriately the subject of standardized discovery requests, not presumptively discoverable lists.

A PROPOSAL FOR A SIMPLIFIED, WORKABLE DISCOVERY GUIDE

The Proposed Discovery Guide will fail because it makes the current Discovery Guide more exhaustive and burdensome (mandating the accelerated production in every case of documents that are clearly not relevant in every case) while ignoring the inherent defects discussed above that caused the current Discovery Guide to fail. This simply makes no sense in an arbitration process intended to be simple and cost-effective, especially where there is already in place a procedure for document and information requests. As a practical matter, the Proposed Discovery Guide will create additional work and expense for everyone and encourage frivolous claims.

A better policy objective is to simplify the discovery process in a manner designed to encourage early case evaluation and settlement. This would necessarily involve reducing (not increasing) the presumptively discoverable documents lists to include only documents that are both relevant in the vast majority of cases and whose

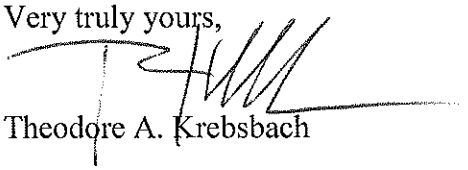
accelerated production would increase the likelihood of early settlement. Of course, these lists would have to be enforced in a timely basis and even-handed fashion.

In my experience, most investor cases have a suitability component that mandates a verifiable determination of the investor's income, net worth and investment sophistication and history. Most investment firms could make a preliminary evaluation of the merits of these claims after it reviewed the investor's complete tax returns, and account documents (including those containing the investor's investment objectives) and monthly account statements from the other investment firms where the investor maintained accounts. There is little or no burden to the investor to produce these documents as his attorney should have already obtained and reviewed some or all of them prior to filing the claim. Investment firms also routinely sign confidentiality agreements to address any privacy concerns. In the event the investor does not have the documents in his possession, he can simply obtain them from his accountant or sign consent forms so they can be obtained directly from the other brokerage firms without even requiring a resort to the subpoena process.

Similarly, the documents needed by most investors from brokerage firms include monthly account statements, account documents (including those identifying financial data and investment objectives), correspondence, documents reflecting the firm's supervision over the account(s) in issue, and related compliance manual sections.

In my opinion, the production of this relatively small group of documents during the early stages of each case would result in many cases settling earlier, and would be a substantial improvement over the delays and confusion that I believe will result from the Proposed Discovery Guide. The standard discovery process would continue to be available for those cases that could not settle after these documents were exchanged. The current Discovery Guide has proven unworkable and the Proposed Discovery Guide only adds to its problems. The time has come for a greatly simplified Discovery Guide, uniformly enforced, that focuses on a small number of documents designed to have a disproportionately large impact. The current trend of focusing on large numbers of documents that apply to a small number of cases is unworkable and antithetical to the legitimate goals of the arbitration process.

Very truly yours,



Theodore A. Krebsbach

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