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ASSOCIATED OFFICE
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August 24, 2010

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

Re: File Number File No. SR-FINRA-2010-035
Comment Letter - 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 18 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.

The FINRA Arbitration Discovery Process Is Broken

After our letter last year, and fighting another year's worth of discovery battles, our office has come to the conclusion that the discovery process in FINRA arbitration is broken. No revision to the Discovery Guide's "presumptively discoverable" lists of documents will fix the problem.

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 failed to change how brokerage firms, associated persons, and their counsel abuse the arbitration system. For the last 11 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.

Despite warnings to member firms such as NASD Notice to Members 03-70, reminding firms they have a good faith obligation to participate in the discovery process and produce documents, we rarely ever see full and complete responses to the Discovery Guide Lists. Rather, we still see general objections and meaningless specific objections, lacking even the vaguest description of the types of documents which exist, to almost every List Item.

Worse is when we see promises from member firms that "non-objectionable" documents "will be produced." What on earth does that mean? We only find out after "meeting and conferring" and filing a discovery motion.

Another frequent abuse is the promise "Respondents will produce responsive documents" but the documents are never produced despite repeated reminders and requests.

This year we are seeing member firms using a new tactic. Most offices, ours included, now scan and produce documents on CD-ROM. Member firms are now producing their documents in electronic format with levels of security that range from prohibiting searching the document text up to and including prohibiting even printing the documents! In many cases, while the documents can be printed, the security on the documents is so restrictive that a password has to be entered each time an electronic file is opened. Some firms have found ways to hinder if not prohibit computerized searches for terms and phrases within the electronic documents. In one case our office has against Morgan Stanley, rather than reduce the security on their document production to allow us to conduct electronic searches, Morgan Stanley sent us almost 40,000 pages of documents, their entire electronic document production, for our office to scan. While we use just this one firm as an example, it is not the only one to implement these silly policies.

All of these obstructionist responses destroy the vaunted "efficiency" of the arbitration process. The so-called "fairness" of the mandatory forum is thwarted in each case Respondents make their meritless objections.

This new Discovery Guide offers no improvement in limiting the battles since it still invites rote objections: "...parties can still urge that certain documents should not be discoverable." Every firm, from the remaining wire houses to the smallest mom and pop brokerage firm, will still object to providing relevant discoverable documents.

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It simply is not in a member firm's interest to produce the documents which allow Claimants to make their case. Until the phrase "presumptively discoverable" is replaced with "mandatory production," Claimants will have to fight each List Item, propound their own discovery, and fight the discovery battle in each and every case.

The Changes to Respondents' List Hurts Claimants

Shockingly, the account statements, order tickets and supervisory documents are still missing on the proposed list of presumptively discoverable documents Respondents must produce! Why? Why is FINRA, the self-regulatory organization for the brokerage industry, removing some of the most critical documents necessary in almost every case?

In most cases, Claimants do not have a full set of their account statements. That means a complete profit and loss analysis cannot be completed. How can a Claimant calculate his or her damages without account statements?

In many cases the order tickets provide critical information about whether transactions were solicited or unsolicited, contain marks and information which do not appear on computerized reports, and include time stamps often at odds with the times the actual transactions were processed.

In almost every case, supervision is a critical issue, about what the member firm and its supervisors knew about the client, the account, and the associated person's business conduct. Respondents hate producing their supervisory documents for those very reasons - their poor supervision is exposed to scrutiny!

The exclusion of these items makes the proposed Discovery Guide unacceptable.

The Changes to Claimants' List Punishes Claimants and Prevents Them From Even Filing Claims

We join our fellow Claimants counsel objecting to a massive new "strip search" or "financial colonoscopy" forcing individuals to reveal their entire financial histories to the very same member firm and associated persons who committed the wrongs resulting in the arbitration claim.

Most pernicious is that many of the new List Items do not set a time-frame for the range of responsive documents which must be produced.

Rather than go through each List Item, we have singled out three of the more obnoxious List Items for review:

List 2, Item 15 proposes that a Claimant must produce all “documents relating to claimants' other investment opportunities.” If a Claimant was presented with an “investment opportunity” fifty years ago, how is that relevant to the broker selling an unrelated investment which devastated Claimant's retirement savings?

In one current case, a member firm continues to seek documents for every financial seminar (an investment opportunity) our client attended without regard to the date of the seminar. Our client is in his mid-90s, and was sold scads of proprietary high-risk structured products such as reverse convertibles in the last seven years. We produced responses going back three years *prior* to the first investment at issue. In hopes of terrorizing an old man by making him search high and low, the member firm still keeps pushing this point.

Under this new List Item, every Claimant would be required to search for and produce every document he or she possessed for any “investment opportunity” without regard to its temporal, much less factual, relevancy.

By excluding a reasonable time-frame for determining the scope of responsive documents FINRA is inviting a discovery battle in each and every case!

List 2, Item 9, sees the FINRA staff broadening the scope of responsive documents and tripping over the attorney client privilege (and other privacy privileges). This new List Item requires the Claimant to produce correspondence he or she may have had with *anyone* regarding the account(s) or investment(s) at issue. There is no limitation to the term “anyone.” Does “anyone” include Claimant’s attorney? Did FINRA even consider the attorney-client privilege issues when broadening this List Item? Another question is why is this List Item not reciprocal on the member firms and associated persons? Reciprocity is only fair. If FINRA wants Claimants to waive privilege, the member firms should be forced to do the same.

List 2, Item 12, requires trustees to breach their duty of confidentiality to the trusts they manage when the trust(s) have nothing to do with the dispute at issue. That means every Claimant who is a

trustee of an unrelated trust has to make the hard decision whether to vindicate his or her rights at the expense of breaching a fiduciary duty. While such a List Item will reduce the number of claims, it does so by discriminating against a class of individuals. This proposed item is simply unacceptable.

Conclusion

Ultimately, any list of presumptively discoverable documents needs to be reasonably related to each specific dispute, with a reasonable, relevant time-frame created for each class of responsive documents, with reciprocity on both sides. The current set of proposed List Items is not acceptable and should be rejected outright.

At this point, we would prefer to keep the current Discovery Guide with all its problems or do away with the Discovery Guide and go back to quarrelling over each document request (since it is no different than the current situation).

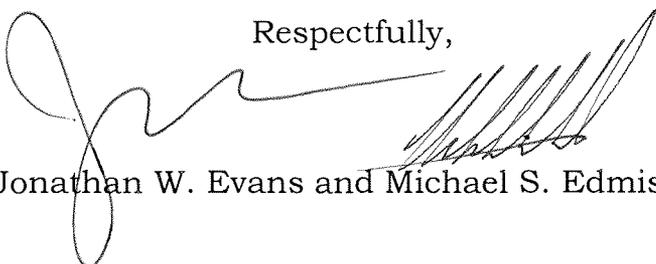
The proposed Discovery Guide must also be rejected since FINRA'S administrative staff injected its opinion into what documents are relevant in every dispute. The staff's opinion, while well-meaning, is too harmful to Claimants. Arbitrators all too often use the Discovery Guide Lists to determine the scope of relevant discoverable documents to a dispute. In every case where the Discovery Guide is determined to be the only set of relevant documents, arbitrators will preliminarily limit the scope of relevant evidence which will be heard. With Respondents' obligations so reduced, Claimants in those cases will never stand a chance.

The proposed revisions deny Claimants their fundamental due process rights by exposing them to a longer, more invasive round of oppressive discovery while limiting Respondents' discovery obligations, thus curtailing Claimants ability to prove their claims.

For these reasons we respectfully request the proposed rule change be denied.

Thank you for your consideration.

Respectfully,



Jonathan W. Evans and Michael S. Edmiston