



Office of General Counsel

Fax: 215.665.0824

August 24, 2010

Via e-mail – rulecomments@sec.gov
Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-1090

Re: File No. SR-FINRA-2010-035
Proposed Amendments to the FINRA Discovery Guide

Dear Ms. Murphy:

Janney Montgomery Scott LLC (Janney) appreciates the opportunity to comment on the proposed amendments to the FINRA Discovery Guide.¹ While Janney commends FINRA's efforts to improve upon the arbitration process, Janney has serious concerns that the fundamental purpose of the Discovery Guide (e.g., to ensure that relevant material is exchanged in an efficient manner) is no longer evident. One of Janney's primary concerns is that the proposed amendments are too broad in a number of respects and require the production of documents deemed "presumptively discoverable" without any demonstration by the opposing party that the documents are indeed relevant or that they could lead to relevant information.

In addition, Janney is also concerned that the Discovery Guide's decree as to which documents are "presumptively discoverable" fails to address a basic tenet of the discovery process ---- proportionality. Proportionality considerations suggest limitations be imposed in the discovery process when "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues."² Unfortunately, although the Discovery Guide purports to provide arbitrators and the parties with flexibility in the discovery process, the mere suggestion that all document categories are still presumptively discoverable is fundamentally unfair.

Finally, Janney is concerned with the addition of new production categories that do not contain enough definition and clarification to avoid problems of vagueness and inconsistency.

¹ Notice of Filing of Proposed Rule Change Amendments to the Discovery Guide and Rules 12506 and 12508 of the Code of Arbitration Procedure for Customer Disputes, Release No. 34-62584; File No. SR-FINRA-2010-035, available at <http://edocket.access.gpo.gov/2010/pdf/2010-18999.pdf>.

² Fed. R. Civ. P. 26(b)(2)(C)(iii). While neither state or federal rules of civil procedure are followed in the FINRA arbitration and discovery process, the general tenets or principles of discovery, including the balancing tests, should be considered. These balancing tests are particularly important in the FINRA dispute resolution process, as it has been a forum that is touted for its efficiencies, both in terms of total litigation time and the costs associated with litigating.

With these primary concerns in mind, Janney advocates that the Discovery Guide not be adopted as presented and that specific edits be made which will address Janney's primary concerns and preserve the Discovery Guide's intended goal of mutual production of relevant documents. While there are additional concerns with the proposal, Janney believes that it is more productive to narrow the focus of this comment to only a select few document production lists.

List 1, Item 2

List 1, Item 2 requires the member firm to provide all "advertising materials sent to customers of the firm that refer to the securities and/or account types that are at issue." In a significant majority of customer arbitrations, Janney has experienced the common dilemma of attempting to identify precisely which securities, products or behaviors are "at issue." In Janney's experience, Statements of Claim are written so broadly and generically that every security ever maintained in the customer's account is "at issue." To compound matters, a customer's account may contain several hundred securities or investment products. This may make it nearly impossible to identify firm-wide "advertising materials." Many firms may not have intricate tracking or indexing systems to be able to readily identify advertising materials regarding a specific product or account type. And, even if firms would have appropriate cataloguing systems that facilitated the identification of firm-wide "advertising materials," the resources (human and monetary) required to collect the documents may become astronomical and not take into consideration the primary issues in an arbitration proceeding.

Even more problematic is the requirement that all advertising material, regardless of whether it was sent to, relied on by the customer or sent by the customer's registered representative, is required to be identified, collected and produced. As an illustration, advertising material regarding a specific stock or mutual fund at issue sent by a Boston financial advisor to a client serviced by that Boston financial advisor would have to be identified, collected and produced in an arbitration proceeding involving a Pittsburgh financial advisor and a client serviced by that Pittsburgh financial advisor.

At a minimum the SEC should limit this Item to require *only* the production of advertising material received by or relied upon by the Claimant, as identified in the Statement of Claim. Any additional requirements to search for, identify and collect firm-wide advertising is simply overbroad and unduly burdensome.

List 1, Item 5(a)

Under Item 5(a), the member firm is required to produce "all research reports, sales materials, performance or risk data, prospectuses and other offering documents." While the intent of this document production category is likely to require the production of "point of sale" disclosure documents or materials, the category provides no such clarifying limitations or guidance. Instead, a plain language interpretation could be read so broadly as to even require the production of credit and risk assessments on certain investment products or securities held by a Claimant, even if those assessments or documents were not generated at the point of sale or for years after the investments were purchased by Claimant.

Indeed, after the 2008 market decline, many firms engaged in credit and risk analyses on products and investments that were significantly impacted by the unprecedented market decline. These types of post-sale analyses of performance or risk assessments should not fall within the scope of this document production category and the language should be amended to clarify that the scope and time period is limited to those “point of sale” documents, assessments and disclosures.

List 1, Item 9

Item 9 requires firms to produce all “writings reflecting communications between the associated persons assigned to the customers’ accounts at issue during the time period at issue and members of the firm’s compliance department relating to the securities/products at issue and/or the customers’ accounts.” A common problem identified previously is that most Statements of Claim do not specifically identify a security or product at issue. As such, identifying and collecting documents referencing a communication regarding “the securities/products at issue” is sometimes an impossibility. However, even if the “securities/products at issue” are identifiable, it would be extremely difficult and unworkable to identify specific compliance department personnel who may have had a conversation or took notes of a conversation. A firm like Janney has had dozens of compliance personnel over the recent past and does not maintain records in a system that would be searchable by security or product. As such, an undertaking requiring such a search would be overly burdensome, if not nearly impossible.

List 1, Item 10

Item 10 requires firms to provide not only all publicly available Central Registration Depository (CRD) complaint records (Form U4, Form U5 and DRP), but also *all* complaint records. The production of *all* complaints would require non-sales practice related complaints and operational complaints (e.g., account fees, commission charges, etc.) to be produced. Read literally, Item 10 even requires the production of expunged complaints. These new production requirements would add more complaint data to categories of documents that FINRA deems “presumptively discoverable,” without any showing by the Claimant that the documents are necessary, relevant or anything other than prejudicial. List 1, Item 10 should be modified to require only the production of publicly disclosed sales practice complaint records which are of a similar nature. Anything beyond this production is prejudicial to the Respondent and should not be mandatory production unless Claimant can demonstrate that the probative value of the dissimilar complaints outweigh their prejudicial effect.

List 1, Item 18

List 1, Item 18 (and the corresponding Claimant's List 2, Item 18) requires that Respondents automatically produce any documents received by a third party, regardless of whether those documents were received pursuant to a subpoena. This new category would seem to include documents obtained through an attorney's own work product efforts and through no efforts or undertaking by the opposing party. Documents obtained through third party sources (e.g., FOIA requests or documents provided informally by non-party witnesses) would have to be produced, even if the documents would not be used at the arbitration. To be fair, a party should only be entitled to those documents obtained in response to a subpoena or those documents which have been obtained through a party's efforts, not the efforts of others. Accordingly, the SEC should limit this production list to require only the production of third-party documents received pursuant to a subpoena.

List 1, Item 20(a) & (b)

One of the most troubling new requirements under the proposed Discovery Guide is the requirements set forth in List 1, Items 20(a) and 20(b). These Items mandate the automatic production of *other* customers' historical trading information, including trading data of the associated person, when there is a claim related to "solicited" trading activity. Rarely, if ever, do Claimants file arbitration claims on trades that they acknowledge were "unsolicited" trades and the overwhelming majority of all Statements of Claim involve allegations of "solicited" trading activity. If the proposed Discovery Guide were approved, detailed historical trading information of the associated person would have to be produced in every case on an expedited basis, without any allegation by the Claimant to establish its relevance. It is fundamentally unfair to have all historical trading data of unrelated customers deemed "presumptively discoverable" by FINRA. It is not difficult to imagine that arbitrators, with their limited training, will view this irrelevant historical trading data, now presumed conclusive evidence because it is "presumptively discoverable," as prejudicial to the Respondent simply because of FINRA's categorization. To be fair, these categories of documents should be removed from the *mandatory* production lists. They are more appropriately the subject of *routine* discovery requests and should be produced only if relevant to Claimant's allegations or if ordered to be produced by an Arbitration Panel upon a showing of relevance by Claimant.

List 1, Item 21(a)

List 1, Item 21(a) mandates the production of all compensation information of the associated person, including commission, bonuses and deferred compensation awards. It is difficult to understand why an associated person's overall compensation structure is relevant to a single customer's (Claimant's) allegation. In limited circumstances and depending on allegations, the associated person's overall compensation or financial means may be relevant (e.g., allegations of selling away or sharing in profits/losses with a customer). However, in the vast majority of cases, the allegations simply do not warrant the production of this information, absent a demonstration of relevancy by the Claimant. A common justification for the proposal, as espoused by the Claimants' bar, is that Respondents should be treated the same as Claimants,

since in all cases, Claimants have to produce tax returns, account statements and other documents demonstrating their net worth/financial sophistication in all cases. The comparison fails to take into account, however, that the legal defenses to “suitability” claims require that Respondents demonstrate that the investments were suitable based on the Claimants’ investment objectives, sophistication and financial wherewithal. As such, these categories of personal financial documents are wholly relevant to Respondents’ defenses to the typical allegations. Requiring the production of these documents by Respondents, on the other hand, without a demonstration of relevance by Claimants, will simply perpetuate the retaliatory arguments espoused by the Claimants’ bar.

In its current form, the proposed Discovery Guide does little to address the fundamental flaws in the current Discovery Guide and the FINRA arbitration discovery process. While FINRA’s attempt to reduce the Lists from fourteen to two creates an appearance that document categories have been limited or reduced, the reality is that all categories of documents now need to be produced in *every* case, regardless of the allegations. In addition, most categories have been enhanced to now require the production of multiple additional categories of documents. The burdens that the proposed Discovery Guide places on Respondents and member firms are expensive and almost indescribable, especially for smaller institutions like Janney that do not have a large in-house staff of litigation forensic specialists or intricate systems in place to archive and electronically search for documents created and stored throughout the entire firm’s system.

Janney strongly encourages the SEC to reject the current proposals and encourage FINRA to re-visit its proposed changes. Any amendments, at a minimum, *must* address the flawed “presumptively discoverable” standards created by FINRA, the lack of definitions or clarification in the lists and the proportionality principles that should be adhered to in any discovery forum, whether court or arbitration.

Thank you for giving Janney Montgomery Scott the opportunity to comment on the proposed amendments to the Discovery Guide. If you have any questions regarding this comment, please do not hesitate to e-mail me at cchelko@janney.com or call me at 215-665-6484.

Best regards,



Carrie L. Chelko
Deputy General Counsel
Litigation/Corporate Affairs