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**VIA ELECTRONIC MAIL (rule-comments@sec.gov)**

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

Re: Comment Letter on Proposed Rule Change Amendments to the Discovery Guide and Rules 12506 and 12508 of the Code of Arbitration Procedure for Customer Disputes (File Number SR-FINRA-2010-035)

Dear Ms. Murphy:

I appreciate this opportunity to comment on FINRA's proposed amendments to the Discovery Guide, as published in the *Federal Register* on August 3, 2010 (the "Proposal"). I have for a number of years represented brokerage firms and associated persons in customer arbitrations. While I welcome several of the changes in the Proposal, a number of them are ill advised. I therefore write to oppose the Proposal which, if adopted, would not only substantially increase a respondent's burden to produce potentially irrelevant documents and information, but would also decrease a customer's obligation to produce relevant discovery. I focus on those points that I believe particularly onerous. These comments are, of course, my personal views and do not necessarily reflect the views of my clients.

**I. Reduction of Lists**

I believe that this is misguided. Multiple lists for different causes of action are a useful guide to both the parties and the arbitrators with regard to the documents to be produced. Far from mechanically overlaying the lists onto the claims as alleged in a Statement of Claim, multiple lists have the virtue of directing the parties to the most pertinent documents for a particular type of claim and providing important guidance to the arbitrators. Moreover, I have found that, at least in my practice, the claimant and respondent tended to generally agree on the application of a particular list. The result was that in many of my arbitrations there were no or few discovery disputes. By essentially making all documents presumptively discoverable in all cases, it practically guarantees that in every case a respondent will have to file a motion to eliminate certain categories of documents that may not be relevant. Given the fact that arbitrators, particularly non-attorney arbitrators, equate "presumptively discoverable" with "is

required to be produced" the respondents are placed in a difficult and inequitable position. The proposed change not only guarantees more work for the arbitrators and more expense for the parties, but also greatly increases the prejudice to respondents.

## **II. Vagueness of "Supervisory Review"**

List 1, No. 3. The list now requires production of "any supervisory review" of strategies utilized or recommended in the customer's account. It is unclear whether supervisory review refers to the strategy as applied to the account or the supervisory review that goes into the formulation of the firm's overall strategy. For example, if a particular firm suggests in a client publication that the price of gold may rise and a broker suggests the purchase of gold futures to a client, how much detail and background must be provided to substantiate the initial suggestion in the firm publication? I would suggest that this significantly, and unnecessarily, expands the depth to which claimants can dig through firm files and diverts the panel's attention away from the primary focus it should have on the account of the customer.

## **III. Electronic Files**

Electronic Files. The Proposal sweepingly says that "Electronic files are 'documents'". This apparently small change has enormous consequences. The body of law, particularly in federal court, dealing with the preservation and production of electronic files is large and rapidly expanding. The issue of spoliation of evidence, for example, has been the subject of numerous court decisions and articles by commentators. The penalties for failing to produce electronic documents or for failing, in certain circumstances to *preserve* electronic documents, are severe. None of this framework or its protections have been imported into the proposed FINRA rules. While parties are generally familiar with the production of emails, the wholesale definition of documents to include electronic documents, without providing a suitable framework of guidance and protection as the federal courts have done, is unwise.

## **IV. Managerial Review**

List 1, Item 7. According to FINRA's comments to the Proposal this appears to require a firm to produce notes evidencing supervisory compliance or managerial review of the claimant's accounts or trades for the period at issue. The problems with this standard is the vagueness of "managerial review" and the fact that if there only a handful of transactions at issue, it will require the production of far more documents than are reasonably relevant.

## **V. Expansion of Telephone Record Discovery**

List 1, Item 8. FINRA's comments to Item 8 sensibly state that producing recordings of telephone calls is labor intensive, expensive and difficult for firms "unless the claimants are able to specify telephone calls, date and time, provide the name of a person the claimants spoke to at the firm, and/or specify the trade placed during the conversation." While this statement in the

comments appears sensible, it is nowhere to be found in the actual text of Item 8. If claimant does want particular recordings, he should be required to specify the date, time and the name of the persons involved and/or the trade placed during the conversation.

#### **VI. Expansion of Discovery Into the Accounts of Other Clients**

List 1, No. 9. Requiring the production of writings reflecting communications between the associated person assigned to the claimant's account and the firm's compliance department relating to the securities at issue and/or the claimant's account is entirely too broad. Writings related to the account are reasonable but by expanding the required production to the securities at issue, the burden is exponentially increased. Moreover, communications from compliance to the associated person with regard to securities may well involve communications relating to the accounts of other customers.

List 1, Item 13. Expanding the production to include not only activity in the claimant's accounts but also to cover other customers' accounts is unwarranted. Such a drastic expansion will necessarily detract the panel from deciding the case based on the claimant's account. Rather, the panel will be detoured into examination of other customers' accounts. There will inevitably be hearings within hearings, and such a requirement will not only multiply the amount of documents but the number of witnesses and the number of discovery challenges heard by the panel.

#### **VII. Expansion of Discovery Into Customer Complaints**

List 1, Item 10. Production of *all* customer complaints against the associated persons is both burdensome, unnecessary, and prejudicial to the associated person, even if confined to three years prior to the first transaction at issue. (And too often claimants urge that all transactions are at issue). There is a very real possibility that the associated person will be tarred with a prior customer complaint having nothing to do with the complaint at issue in the proceeding. The panel will again be detoured into the facts of other claims against the associated person. Understandably, the associated person will attempt to defend himself against the prior claims, thus prolonging the arbitration and distracting the panel from their primary focus of what transpired in the claimant's account. The requirement to produce prior customers' complaints should be limited to similar complaints. If there are abuses of this standard by respondent firms, such as claiming that a prior unsuitability claim is not similar because it involved a different security, then that should be handled by sanctions from the arbitrators or referrals to FINRA. Those firms that comply with standard and reasonable discovery procedures should not be penalized by a few instances of discovery abuse.

### **VIII. Expansion of Discovery of Manuals**

List 1, Item 11. The expansion of "Compliance Manuals" to "Manuals and all updates thereto", and the expansion of the compliance department to the "firm" is unwarranted. I have rarely, if ever, seen a circumstance where there was relevant information outside of the compliance manual. The requirement that *all* manuals in *all* parts of firm be produced along with bulletins, updates, etc., would require a very significant increase in a firm's burden with little or no expectation that the claimant would receive anything of relevance.

### **IX. Expansion of Compensation Items**

List 1, Item 20. The additional requirement that the firm and associated person produce a record of all compensation, monetary and non-monetary, including but not limited to monthly commission runs for the associated person who handled the claimant's account, is unwarranted. FINRA notes that they will impose this additional production only in claims related to solicited trading activity, but this ignores the fact that most claimants always claim that the activity was solicited. FINRA's proposed limitation is in practicality no limitation at all.

Please contact me if you would like to discuss these comments or have any further questions. Thank you for your consideration.

Respectfully,



Stanley Yorsz

SY/smp