BRESSLER, AMERY & ROSS

A PROFESSIONAL CORPORATION

17 State Street • New York, NY 10004
212.425.9300 • fax 212.425.9337
www.bressler.com

Dominick F. Evangelista
Member

devangelista@bressler.com

August 24, 2010

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

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

Re: Proposed FINRA Rule Change Relating to Amendments to the Discovery Guide and Rules 12506 and 12508 of the Code of Arbitration Procedure for Customer Disputes File No.: SR-FINRA-2010-035– Comment Letter/ SEC Release No.34-62584.

Dear Ms. Murphy:

This letter is submitted in response to the Securities and Exchange Commission's request for comments concerning the Financial Industry Regulatory Authority, Inc.'s ("FINRA") proposed rule change relating to amendments to the Discovery Guide contained in SEC Release No.34-62584.

I am a member of Bressler, Amery & Ross, P.C., and head of the firm's Securities Practice Group, which focuses on representing financial institutions, broker-dealers, investment advisors and registered individuals in litigation, arbitration and regulatory matters. A substantial part of our firm's practice is dedicated to customer arbitration and, as such, we have extensive experience with the Discovery Guide and issues relating to discovery in arbitration proceedings. We appreciate the opportunity to comment on FINRA's proposed rule, and wish to highlight a few concerns raised by the proposed amendments.

The proposed Discovery Guide substantially expands the types of documents to be produced that typically have nothing to do with the Claimant or the transactions that are usually at issue in the arbitration proceeding. For the reasons set forth below, this expansion should be removed due to the irrelevant nature of the documents to be produced and the substantial burden

that compliance would impose (List 1, Items 13 and 20). In addition, the proposed Discovery Guide also fails to include and require the production of highly relevant documents by the Claimant. Moreover, as currently drafted the proposed Discovery Guide will create a bifurcated and duplicative process for financial institutions to obtain highly relevant documents relating to the Claimant from other securities or financial firms (List 2, Item 4).

Comments to Proposed List 1, Item 13

First, we would like to comment on proposed List 1, Item 13. For cases alleging failure to supervise, the proposal seeks to expand the production of documents to other unrelated customer accounts of the associated person, including the production of all exception reports, supervisory activity reviews, concentration reports, active account runs and similar documents. This expansion is overbroad, unduly burdensome and inappropriate. In a case where the Claimant has alleged that the firm failed to supervise the associated person assigned to the Claimant's account, the only relevant supervision is that of the associated person who serviced the Claimant and as that supervision relates to the Claimant's account at issue.

Not only does the Claimant lack standing with respect to the firm's supervision of the associated person as it relates to other customers' accounts, but supervisory documents concerning other unrelated accounts are not probative of whether the firm supervised the associated person with respect to Claimant's account. A firm could very well have failed to adequately supervise an associated person with respect to certain customer accounts but adequately supervised the associated person with respect to Claimant's account, and vice versa. The production of the supervisory documents concerning the associated person's other customers will not assist the Panel in deciding whether or not the firm adequately supervised the associated person with respect to the Claimant's claims as they relate to the Claimant's account. In fact, the supervision (either adequate or inadequate) in other unrelated customer's accounts has the chance of skewing the Panel's determination of supervision with respect to the Claimant's account. Specifically, would a history of adequate supervision in other customer accounts be evidence that supervision was therefore *per se* adequate in the instant case? Or in a vice-versa situation be *per se* proof of inadequate supervision? In both instances the parties would vociferously argue to the contrary and likely such objections would be sustained. Thus, if supervision of other accounts fails to establish a valid conclusion as to the instant matter what purpose would such discovery serve other than to make discovery too costly and force settlement of cases that should otherwise be arbitrated. With production of only the supervisory records that relate to Claimant's account(s) at issue, the Panel will have the necessary documents to determine whether or not the associated person was adequately supervised with respect to the specific claims before it. The proposed amendment will create the concern that the Panel reached its conclusion due to the supervision of the associated person in connection with other accounts that are not at issue.

Moreover, the proposed Guide requiring that all exception reports, supervisory activity reviews, concentration reports, active account runs and similar documents be produced for the associated person's other unrelated customer accounts will do nothing more than allow Claimant the opportunity to claim discovery abuses and place an unwarranted burden on the firm. The Guide would require the firm to search for supervisory documents for every single account to which the associated person is assigned. The firm would first be required to determine the accounts to which the associated person was assigned at the time, which could be up to six years earlier (the eligibility period for arbitration claims). Next, the firm would have to determine what supervisory documents exist for each client account for at least a 24 month period (assuming only one transaction is at issue). The firm would then be required to collect and review each such supervisory document. Importantly, the proposal of limiting production to reviews that relate to the allegations in the Statement of Claim would not reduce this burden as the firm would still be required to undertake each of the above mentioned steps in order to determine whether or not the supervisory documents relate to Claimant' specific allegations which in many instances are boiler plate type claims containing no specific factual allegations other than "failure to supervise" or "unsuitability".. Lastly, the firm would be required to redact[1] and produce the responsive documents. This burden is magnified by the likelihood that many customers maintain multiple accounts within a household. The time required to collect, review, prepare and produce these documents creates a substantial burden on the firm, a burden that is not justified given the lack of relevance these documents will have to the Panel's determination of the Claimant's claims.

Given the lack of relevance, coupled with the burden imposed to search for and produce those documents, List 1, Item 13 should be limited to the production of exception reports, supervisory activity reviews, concentration reports, active account runs, and similar documents concerning the activity in the Claimant's account(s) as related to the allegations in the Statement of Claim or for those transactions specifically delineated or referred to in the Statement of Claim.

Comments to Proposed List 1, Item 20

Second, we would like to comment on Proposed List 1, Item 20. This proposal would expand the scope of the Guide to require the production of documents concerning or relating to other customers who are not parties to the arbitration where the investment by the Claimant was a solicited transaction. In our experience, the central issue in the vast majority of customer initiated arbitrations is the suitability of an investment(s). In a suitability case, the Panel must determine if the investment was appropriate given: (1) the customer's financial status; (2) the customer's ability to understand the investment; (3) the customer's investment objectives and risk tolerance; and (4) such other information used or considered to be reasonable by the firm or associated person in making a recommendation(s) to the customer. Compensation information,

[1] It should be noted that proposed List 1, Item 13 does not provide for the redaction of information concerning customers who are not parties the arbitration, whereas proposed List 1, Item 20 does.

which must specifically include information concerning the investments made by other customers, will have no bearing on suitability cases where the transaction at issue was solicited, i.e. the vast majority of cases.[2]

Although this information will surely provide the Panel with evidence regarding the extent to which the associated person recommended securities to other customers, that fact has no bearing on whether the investment at issue was suitable for the Claimant. The fact that an associated person recommended an investment to more than just the Claimant is not probative of anything, especially with a popular investment. For instance Cisco common stock, which had an average daily volume of more than 59,000,000 shares over the past 3 months, could have been recommended to many customers' of an associated person. However, that fact alone is not probative of whether any single recommendation to a specific customer was suitable as that determination is made on a case-by-case basis after evaluating the specific relating to the customer to whom the recommendation was made.

Even if it were argued that such information is probative of whether the associated person is recommending the same investment to other customers regardless of whether or not it is suitable for them, that argument is unavailing. Without more information about the customer, the other customer's transactions offer no insight to whether or not the Claimant's investment was suitable. Plainly, the Panel would also need to know substantial additional information regarding each of the other customers, such as the customers' financial status, risk tolerance, investment objectives and such other information used or considered to be reasonable by the firm or associated person in making recommendations to the customer. Even if such additional documents were produced, the Panel would then be required to review the suitability of the investments made by customers who have no involvement or relevance in the arbitration proceeding. This would effectively turn the arbitration proceeding into a series of mini-trials in order to flesh out the appropriateness of other customers' purchases. In order to properly do so the confidential information about the other customers would, by necessity, need to be revealed thus vitiating the protections of redaction and, in so doing, violate customers' legal expectations of privacy. Clearly trying the issue of the suitability of investments made by other customer's would consume an undue amount of time and compromise the privacy of unrelated customer information for little or no probative value.

As such, the Guide should not be amended to include the production of documents concerning other customers who are not parties to the arbitration where the investment by the Claimant was a solicited transaction. Alternatively, if the amendment is included in the Guide, it should be limited to cases in which there is a dispute about whether or not the transaction(s) at issue were solicited.

[2] This information is relevant where there is a dispute concerning whether the transaction was correctly identified as unsolicited.

Comment on Proposed List 2, Item 4

Lastly, we would like to comment on Proposed List 2, which addresses documents the Claimant should produce in arbitration proceedings. FINRA is proposing to amend List 2, Item 4, which requires the Claimant to produce account statements for accounts maintained at securities firms other than respondent(s) firm for the three (3) years prior to the first transaction at issue in the Statement of Claim through the date the Statement of Claim was filed. The proposed amendment would allow the Claimant to provide written authorization allowing the firm to obtain account statements, nothing more, directly from other securities firms instead of providing copies of the statements.

We believe Item 4 should be further amended so that the authorization to be signed by the Claimant includes documents reflecting the Claimant's, net worth or financial status, risk tolerance and investment objectives for accounts maintained at other securities firms, such as new account related documents, client profile documents and letters confirming the Claimant's stated investment objectives and risk tolerance. Documents reflecting the Claimant's risk tolerance and investment objectives are among the most relevant and probative pieces of evidence in any arbitration.

These documents are not currently part of the Discovery Guide, but they are often obtained pursuant to non-party subpoenas directed to other securities firms with which Claimants maintained accounts. While proposed Item 4 would obviate the need for subpoenas to obtain account statements, it leaves a void with respect to critically important documents that reflect the Claimant's financial status, investment objective and risk tolerance. The amendment as drafted will create a bifurcated and duplicative process for the firm: first, the firm will need to seek Claimant's authorization to obtain account statements and forward those authorizations to other securities firms; second, pursuant to FINRA's rules, the firm will seek to issue subpoenas to those same securities firms to obtain the other relevant documents such as new account forms, client profiles and correspondence confirming the Claimant's investment objective and risk tolerance.

Even more problematic is the fact that non-inclusion of documents showing the Claimant's risk tolerance and investment objectives in List 2, Item 4, may result in the Claimant opposing the firm's requests for the issuance of subpoenas seeking them, under the argument that FINRA deems those documents not discoverable or irrelevant as evidenced by their specific exclusion in the Guide. The inclusion, on the other hand, would largely reduce the firm's resort to subpoenas and subsequent litigation over the scope of such subpoenas. There is minimal additional burden on third party firms in producing these documents, and they are invariable highly probative, giving the parties and the Panel a more comprehensive view of the Claimant's goals and tolerance for risk.

We believe the concerns raised herein are significant, and that our suggestions contribute to streamlining and facilitating the discovery process. Our hope is that these observations will enable FINRA to amend the proposed Rule. We look forward to discussing the issues we have addressed in this letter with FINRA staff members, if that would be helpful.

Very truly yours,

Dominick F. Evangelista

DFE:mam