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August 24, 2010

VIA E-MAIL (rule-comments@sec.gov)

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

Re: File No. SR-FINRA-2010-035
Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by Financial Industry Regulatory Authority, Inc., Relating to Amendments to the Discovery Guide to Update the Document Production Lists

Dear Ms. Murphy:

We are writing to express our concern regarding certain aspects of the above-referenced rules. By way of background, our firm has handled well over a thousand cases defending brokerage firms and registered representatives in arbitrations and related litigation brought by customers.

Our main concern with the proposed changes to the Document Production Lists is that the changes are inconsistent with the general purpose for and spirit of arbitration – to decrease costs and time associated with litigating disputes. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 594 (2008) ("[T]he arbitration process may be more expeditious and less costly than ordinary litigation . . ."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614, 628 (1985) (A party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.") The current Document Production Lists are functioning adequately, although this letter does discuss some of their deficiencies. However, none of the deficiencies in the current Document Production Lists are resolved or addressed by the proposed changes. The current Document Production Lists are preferred to the proposed changes because such changes impose additional, unnecessary burdens on brokerage firms and claimants alike by requiring that in every case, the parties produce documents that are largely irrelevant. Further, the proposed changes impose additional burdens on brokerage firms without imposing comparable burdens on claimants, and without requiring claimants to produce basic documents that are relevant in every case. These proposed changes will be costly to brokerage firms, will slow down the arbitration process for all parties, and will add little, if anything, to the quest for truth which should be the ultimate purpose of the arbitration process.

The current Document Production Lists are divided based on the claims at issue in each case for an important reason: certain categories of documents are only relevant to certain

claims. Forcing brokerage firms and claimants to produce documents pursuant to every Discovery Production List in every case is burdensome and unlikely to lead to relevant evidence. Doing so will increase the cost for both parties and will slow down the arbitration process without providing any clear benefit. For example, requiring brokerage firms to produce documents pursuant to Proposed List 1, Item 7 regarding "supervisory, compliance, or managerial review of the customers' accounts or trades" is irrelevant if claimant is not alleging a claim for failure to supervise against the brokerage firm. Requiring firms to search for, produce, or review these documents eliminates the benefits of arbitration. It does not lead to relevant evidence, it slows down the process, and it increases the costs to all parties.

There are several other specific, proposed changes to the Document Production Lists that are burdensome and require brokerage firms to produce documents that are irrelevant. For example, Proposed List 1, Item 13 would expand documents produced by brokerage firms in regard to supervision claims to include "all exception reports, supervisory activity reviews, concentration reports, active account runs, and similar documents produced to review for activity in customer accounts handled by associated persons" beyond the account(s) at issue. Activity in other accounts does not evidence the activity or what occurred in the claimant's account(s) at issue, making it irrelevant. Even if another account was mishandled by the registered representative, that fact is irrelevant to the current case. *See* Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."); Notes of Advisory Committee on 2006 amendments ("Nothing in the amendment is intended to affect the scope of Rule 404(b). While Rule 404(b) refers to the 'accused,' the 'prosecution,' and a 'criminal case,' it does so only in the context of a notice requirement. The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.").[1] Beyond relevance, such documents would be costly and burdensome for brokerage firms to produce considering there are registered representatives who may handle thousands of customer accounts. Requiring brokerage firms to search each and every account and produce all reports in every case (which then seemingly obligates claimants to review such voluminous records for the proverbial needle in the haystack) is unreasonable.

[1] As noted in The Arbitrator's Manual published by The Securities Industry Conference on Arbitration in August 2007, "[t]he strict rules of evidence applied in a court of law are not usually used in arbitration. This does not mean that the arbitrators should accept everything presented to them. The evidence should relate to the case . . . [T]he key consideration is fairness. While the Federal Rules of Evidence do not as a general matter govern the conduct of arbitration proceedings, the rules of evidence do, however, often provide good, practical guidance on what evidence is probative."

Another burdensome proposed change is Proposed List 1, Item 20 which would require brokerage firms to produce a record of all compensation, monetary and non-monetary, including, but not limited to, monthly commission runs for the associated persons who handled the claimants' accounts." It further requires that the record "reflect the securities traded, dates traded, whether the trades were solicited or unsolicited, and the gross and net commission from each trade." There are few, if any, brokerage firms that are able to compile this information other than manually. Brokerage firms cannot push a button and have this information immediately available. It would require persons to separately compile each type of information requested. Not only would it be burdensome to compile and largely irrelevant to claimant's claims, but the time period proposed, "three months before and ending three months after the trades at issue," is too broad since anything that occurred before or after the transactions at issue is irrelevant.

Despite the onerous burdens placed on brokerage firms, the proposed changes have several deficiencies and still fail to require claimants to produce basic documents, which would be relevant in any arbitration. These shortcomings contradict what the arbitration process, at its core, is meant to do: discover the truth. *See United States v. Scheffer,* 523 U.S. 303, 329 (1998) ("Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice.") (citation omitted) (quotations omitted). For example, the proposed Document Production Lists do not require claimants to provide account opening documentation from other brokerage firms. The documents are relevant because claimants often assert that their account opening documents were filled out incorrectly and that their investment objectives and risk tolerance are more conservative than the documents evidence, despite having signed such documents. Requiring claimants to produce account opening documents from other brokerage firms (or to request copies from such firms if the claimants do not have possession of them) would lead to full disclosure and ultimately to the truth, and does not impose an undue burden on claimants.

Another important deficiency that must be addressed is that the proposed Document Production Lists do not require claimants to produce full tax returns. Although requiring claimants to now produce Schedule A is a step in the right direction, brokerage firms are still deprived of full disclosure as claimants are not required to produce, among other things, Schedule C. Schedule C is important because it evidences the business income and loss of business entities including partnerships and joint ventures. The proposed Document Production Lists also fail to require claimants to produce any tax return forms beyond form 1040, such as form 1065, which evidences the return of partnership income. These documents are relevant and evidence the business acumen and sophistication of a claimant. Moreover, in many cases,

claimants raise concerns about taxes or tax implications resulting from certain transaction. Only with complete tax returns can the parties and arbitrators evaluate such claims.

In closing, the proposed Discovery Lists impose unreasonable burdens on both brokerage firms and claimants by requiring the parties to produce documents from all current Document Production Lists, regardless of the claims at issue. The proposed rules also impose additional, unnecessary, and costly burdens on brokerage firms, while failing to impose comparable burdens on claimants, and without requiring claimant to produce relevant and discoverable material.

Thank you for the opportunity to share our views with you. Should you or the Commission have any questions or desire any additional information, please feel free to contact us.

Very Truly Yours,

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