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*Via e-mail: rule-comments@sec.gov*

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F. Street, NE,  
Washington, DC 205499-1090

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

Dear Ms. Murphy:

Our law firm, Keesal, Young & Logan (“KYL”), regularly represents broker-dealers and other parties in FINRA arbitrations. We appreciate the opportunity to comment on the proposed amendments to the Discovery Guide (“Guide”). We appreciate the ongoing efforts to improve the FINRA arbitration discovery process, but write to express significant concerns regarding the proposed amendments to the Guide.

Specific problematic issues raised by the proposed amendments will be discussed further below, but our significant concerns generally relate to: (1) increased burdens related to “presumptively discoverable” documents without regard to the relevance of the documents to the particular case at issue, (2) the presumptive discovery of information regarding the accounts of third-parties (non-Claimant customers), (3) the needless expansion of production of Associated Person compensation information in all cases (i.e., non-“churning” cases) without regard to potential relevance, (4) the failure to require presumptive production by Claimants of documents reflecting their risk tolerance and investment objectives, and (5) the vagueness of certain terms that will increase the burdens of production and/or associated motion practice.

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

We respectfully submit that the proposed amendments are fundamentally unfair because they will increase the production burdens imposed upon broker-dealers without regard to relevance to the particular case at issue. As you know, under the existing Discovery Guide, Claimants are already able to seek *all* of the documents made “presumptively discoverable” in the amendments, subject to the rulings of the Chairperson familiar with the issues raised in the case before him/her. Decisions regarding the production of these types of documents should be left to the sound discretion of FINRA-trained Chairpersons who understand the nature of the cases to which they are individually assigned.

### **The Introduction to the Discovery Guide Demonstrates that Potentially Irrelevant Documents Which are Burdensome to Produce are on the Amended Lists**

In the introductory paragraphs, the proposed amendments provide that “a party may object to producing a document on a List because of the cost or burden of production.” The introduction further provides that arbitrators should resolve such objections by considering whether or not “the document is relevant or likely to lead to relevant evidence.”

The introduction thus demonstrates that the proposed amendments put “the cart before the horse”; they make “presumptively discoverable” documents that the Guide itself acknowledges *may not* in fact be relevant or “likely to lead to relevant evidence.” This is a telling acknowledgment and demonstrates an unfair shifting of burdens to broker-dealer Respondents in the discovery process.

### **List 1, Request 2 is Vague and Imposes Undue Burdens**

List 1, Request (regarding, among other things, “all advertising materials sent to customers of the firm that refer to the securities and/or account types that are at issue”) calls for the production of documents fitting the vague term “advertising materials” sent to other (*non-Claimant*) customers regarding the securities and/or account types that are at issue. Considering the volume of services and products full-service broker-dealers offer — all of which can be said to reflect “securities or account types” — the scope and meaning of this Request is exceptionally vague.

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With regard to separately “managed” accounts, for example, the Request could be read as calling for every internal document relating to an investment manager's investment approach used for the Claimant's account. If the Claimant used a particular option or annuity strategy, what would the broker-dealer Respondent have to decide is “presumptively discoverable?” This unnecessary addition to the Discovery Guide should be omitted, and related issues should be left to the sound discretion of the arbitration Chairperson of a particular case.

### **List 1, Request 3 is Vague and Imposes Undue Burdens**

List 1, Request 3 (regarding “investment or trading strategies”) calls for the production of “[a]ll documents evidencing any investment or trading strategies utilized or recommended in customer's account, including, but not limited to, options programs, and any supervisory review of such strategies.” This request is extremely vague and presents significant difficulties. Because of the volume of services and products full-service broker-dealers offer — all of which can be said to reflect “investment or trading strategies” — the scope and meaning of this Request is very vague. The problems with this request mirror those referenced in the heading above.

### **List 1, Request 5 is Vague and Calls for the Production of Irrelevant Documents**

The proposed amendments provide in List 1, Request 5 for the production of “all materials the firm and/or associated persons prepared or used and/or provided to the customers relating to the transactions or products at issue . . . .”

The problem with this request is that it appears to call for the production of any and all documents that any employee of the firm ever “prepared” regarding a “product” at issue, regardless of whether the Claimant (or “similarly situated” investor) was ever intended to be the recipient of such a document. As drafted, any communication/document prepared by *any* employee of the firm regarding, for example, a given mutual fund, would have to be located and provided to the Claimant regardless of the reason the document was created, the time in which it was created, or the nature of its intended audience. Further, because such documents may have been prepared with specific customers as the intended

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audience, the firm would have the burden of taking additional steps (and incurring additional expenses) to protect the privacy of such other customers.

### **List 1, Request 9 is Vague and Calls for the Production of Irrelevant Documents**

The proposed amendments provide in List 1, Request 9 for the production of “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.”

The problem with this request is that it appears to call for the production of any and all communications regarding “securities/products” at issue without regard to whether or not the communication relates to the Claimant(s). Thus, communications about non-customer accounts are expressly called for, regardless of the actual nature of the communication. The request appears to call for the search – *in every case* – of all communications by the broker with the compliance department about the same “product” (itself a vague term<sup>1</sup>) regardless of whether the communication relates solely to a non-Claimant and regardless of the context of that communication. This clearly impinges on non-Claimants’ rights to privacy without necessarily resulting in the production of relevant material.

### **List 1, Request 20 Calls for the Production of Irrelevant Documents and Imposes Undue Burdens**

Request 20 calls for the “presumptive” production in “all customer cases” relating to “solicited trading activity” of extensive documentation relating to the compensation of the associated person and his/her trading history in all customer accounts, regardless of whether or not the claims at issue justify the production of such information. The production of this type of material was traditionally — and appropriately — limited to cases involving claims of excessive trading.

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<sup>1</sup> If the claim relates to a specific annuity or mutual fund, are *all* communications about *any* annuity or mutual fund about the same “product”?

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Other customers' transactions are arguably relevant only if the brokerage firm claims that the customer (not the broker) directed the trading activity in the account. If the brokerage firm so claims, then production of commission runs which show whether the same securities purchased in claimant's account were also purchased at or about the same time in other customer accounts, would be enough to allow Claimant's counsel to attempt to prove that the broker (not the Claimant), directed the securities transactions at issue. The production of additional, separate records that show whether other customer trades were entered as "solicited" or "unsolicited" is not necessary for this purpose. Forcing brokerage firms to produce thousands of pages of voluminous additional records beyond commission runs (which they must redact to remove customer names) would impose an undue burden and result in huge amount of unnecessary expenses. This burden is not justified when compared to the slight probative value of information showing whether other customer trades were entered as solicited or unsolicited and considering the fact that production of this type of "collateral" material would lead inevitably to mini-trials regarding trading in third-party accounts.

**List 1, Request 21(a) Calls for the Production of Irrelevant Documents and Imposes on Brokers' Rights to Privacy**

Proposed Request 21(a) calls for the production in all customer cases of, among other things, private information related to the broker(s)' bonus plan and deferred compensation arrangements with the brokerage firm, without regard to whether or not this private information is relevant to the allegations in the Statement of Claim. This unnecessary, mandated impingement on the broker's right to privacy is completely unwarranted.

**There is No Requirement that Claimants Produce Documents Reflecting their Risk Tolerance and Investment Objectives**

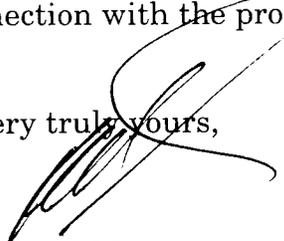
Documents reflecting Claimants' risk tolerance and investment objectives (e.g., documents such as new account documents and "investor profiles" relating to other investment accounts) are relevant in virtually every customer arbitration. Inexplicably, these types of documents are not listed as documents Claimants should be presumptively required to produce. We respectfully submit that this oversight should be corrected.

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Thank you for your attention to the forgoing comments, which we ask the Commission to consider carefully in connection with the proposed amendments to the FINRA Discovery Guide.

Very truly yours,



Kelly J. Moynihan

(KYL\_SF512377)