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August 24, 2010

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

Re: File Number SR-FINRA-2010-35
Proposed Rule Change to Amend the FINRA Discovery Guide

Dear Ms. Murphy:

I appreciate the opportunity to make comments on the proposed changes to FINRA's Discovery Guide. I am an attorney whose practice is dedicated entirely to investor disputes in arbitration and state and federal court. I am also a member of the Public Investor Arbitration Bar Association, on its Board of Directors, and its incoming President. Ultimately, I support the proposal, for I believe it is a step in the right direction; however, despite this support, I do emphasize that it still falls short of leveling the playing field in a dispute resolution forum forced upon those who want to participate in our financial markets.

On the one hand, the additions and clarification to the presumptively discoverable production from Wall Street is welcome, long over due, and much needed; however, on the other, the increased scope of presumptively discoverable investor production is unwarranted and cannot be justified especially in the wake of the recent meltdown caused in large part by the creative financial engineering of Wall Street. As the Commission is undoubtedly aware, much of the current securities arbitration and litigation focuses on structured finance and products ("Products"). Unfortunately, despite this awareness, none of the proposed changes incorporates or distinguishes traditional suitability claims from the Product claims. Of course, the unwarranted broadening of claimant production is even more troublesome in misrepresentation/omission product cases wherein the financial status of the claimant is not even relevant. Allowing this type of discovery in Product cases unnecessarily attempts to contort and twist every case into a suitability claim. Unfortunately, many arbitrators, especially non-attorneys, have become so indoctrinated with this type of discovery that every case turns into a suitability claim. This situation is fundamentally unfair and is, in effect, supported by the proposed changes to claimant production.

Perhaps the most troubling aspect of the proposed changes to claimant production is that many of them allow for after-the-fact suitability analyses. Ultimately, this allowance will encourage these irrelevant, retrospective defenses of respondent firms. For example, List 2, Item 15 includes "all materials received or obtained from any source relating to...other investment opportunities." The "opportunities" language and the lack of an apparent timeframe are ridiculously broad and will undoubtedly include investments not even consummated or relevant. I would like to see this expansive language restricted via a time frame and scope. Particularly the timeframe should, at the very least, surround the transactions at issue, just as the respondent's obligations are limited, and no further. Similarly, List 2 Item 1 "tax returns" and List 2 Item 2 "loan applications" are not limited to cases where the claimant's financial status is an issue.

Even if the claimants' financial status is an issue, it is the responsibility of the member firms to acquire this information before making recommendations to its customers. The post transaction financial examination contorts Wall Streets' duties at the time of the recommendation or advice and turns the "test" for a claim's viability into whether the claimant had other resources and, therefore, could afford to lose the investment. There is no balancing test between an investor's ability to afford the losses and FULL Disclosure. Without question, full disclosure is vital, and many of the proposed changes dilute and cloud whether an investor, wealthy or not, was provided all material information. I encourage FINRA to make a distinction in the type of claim submitted by the investor.

As my comments draw to a close, I would like to make one last general recommendation. The specification of timeframes for many of the new additions to the claimant list would also be beneficial in evening the disparity in the burden of discovery between respondent firms and claimant customers. When reading the guide, one begins to notice a stark difference in the chronological dictates of the two proposed lists. Many of the items required in the respondent list are specifically limited to one year prior to the transactions at issue; whereas, the majority of claimant documents need to be produced for a timeframe spanning anywhere from three years prior to the transactions at issue to the very origin of the claimant's documented financial life. This disparity in favor of member firms should be resolved, and any requests for documents post the transactions at issue must be eliminated.

Once again, I would like to express my gratitude for being able to convey my thoughts to the Commission. Overall, I am greatly encouraged by the new guide's expansion of retail investor protections and believe it should be adopted. As importantly, I also believe that a new task force be created to analyze how the recent Product cases should be treated in the discovery process. Another decade should not go by before comments are accepted.

Respectfully,

Peter Mougey