

BRADFORD D. KAUFMAN, ESQ.
Direct Dial: (561) 650-7901
E-Mail: KaufmanB@gtlaw.com

August 24, 2010

VIA ELECTRONIC SUBMISSION

Elizabeth M. Murphy
Secretary
SECURITIES AND EXCHANGE COMMISSION
100 F Street, NE.
Washington, DC 20549-1090
Email: rule-comments@sec.gov

**Re: Comments on Proposed Changes to FINRA Discovery Guide;
File No. SR-FINRA-2010-035**

Dear Ms. Murphy:

I am writing to voice my comments regarding the proposed changes to FINRA's Discovery Guide. In general, I applaud FINRA's efforts to update and modernize the Discovery Guide to address the significant developments that have taken place in the law, arbitration, and the securities industry over the past decade. At the same time, however, I am concerned that the proposed changes will not effectively remedy the practical deficiencies I have observed first-hand when working with Discovery Guide ever since its implementation in 1999. Moreover, in their current form, the proposed changes to the Discovery Guide may give rise to new grounds for confusion and abuse if adopted, which would frustrate the spirit and goals of FINRA arbitration. Among other things, the revised Discovery Guide now appears to leave open the possibility that firms could be required to produce broad categories of documents relating to the supervision of the associated person generally, regardless of whether those documents have any actual bearing on the customer's accounts at issue.

By way of background, I have been an attorney for nearly 25 years. During that time, my practice has focused almost exclusively on representing firms and individuals in the financial services industry. Indeed, over the course of my career, I have represented dozens of major broker/dealers in all aspects of their business, including traditional litigation in state and federal court as well as arbitrations. In addition, I have defended both securities class actions and shareholder derivative claims and have appeared as counsel in securities cases in most of the Federal Circuit Courts in the United States as well as before the United States Supreme Court. I have also appeared on behalf of clients in regulatory proceedings, arbitrations and administrative actions before the Financial Industry Regulatory Authority, New York Stock Exchange, National Association of Securities Dealers, Commodities Futures Trading Commission, National Futures

ALBANY
AMSTERDAM
ATLANTA
AUSTIN
BOSTON
CHICAGO
DALLAS
DELAWARE
DENVER
FORT LAUDERDALE
HOUSTON
LAS VEGAS
LONDON*
LOS ANGELES
MIAMI
MILAN**
NEW JERSEY
NEW YORK
ORANGE COUNTY
ORLANDO
PALM BEACH COUNTY
PHILADELPHIA
PHOENIX
ROME**
SACRAMENTO
SHANGHAI
SILICON VALLEY
TALLAHASSEE
TAMPA
TOKYO**
TYSONS CORNER
WASHINGTON, D.C.
WHITE PLAINS
ZURICH**

Association, American Stock Exchange, Philadelphia Stock Exchange and Securities and Exchange Commission.

I now Co-Chair the National Securities Litigation Group for Greenberg Traurig, an international law firm with approximately 1,800 lawyers and more than 30 locations. The Greenberg Traurig National Securities Litigation Group is comprised of attorneys working in offices across the country, whose backgrounds and experiences representing clients in the securities industry mirrors my own (and in some cases even exceeds it). The National Securities Litigation Group has represented market-leading broker/dealers in cases that have gone to final award or judgment in literally thousands of securities arbitrations and has specifically tried well over 1,000 FINRA arbitrations to verdict (involving amounts in controversy ranging from \$200 to over \$200 million) throughout the country.

I am providing you with this background so that you will understand that my comments regarding the proposed changes to FINRA's Discovery Guide come from the perspective of someone who is an active practitioner in the world of securities arbitration and who must live and work with the rules set by FINRA every day. For the most part, I have found FINRA's rules to be helpful for the clarity they provide to parties and arbitrators and for their practical application to the real world situations typically encountered in arbitration. Unfortunately, it has also been my experience that the language employed in FINRA's Discovery Guide to describe the categories of presumptively discoverable documents sometimes lacks the clarity and practicality that is the bedrock of FINRA's rules. Indeed, some of the categories are written in a way that leaves them open to vastly different interpretations by claimants and respondents (including some interpretations with which it is almost impossible to comply), while other categories appear at times to misapprehend the capabilities of a modern broker/dealer to identify, locate, and produce certain documents without having to expend considerable labor, time, expense -- which, as discussed below, far outweigh any usefulness or relevance of the documents at issue.

Most claimants attorneys that I have had the fortune to work with have recognized that disputes over the Discovery Guide's application should be governed by common sense and a rule of reasonableness. They have also understood that parties in arbitration must work together to navigate through the procedural aspects of discovery so that they can more quickly get to the substantive issues regarding their respective claims and defenses.

From time to time, however, I have encountered attorneys who have sought to exploit the Discovery Guide's deficiencies by attempting to manufacture mountains out of discovery molehills in the hope of forcing respondents to settle on unfavorable terms or else face mounting litigation expenses. Other attorneys I have encountered have improperly sought to take advantage of the Discovery Guide's deficiencies to obtain personal information about a firm's other clients who are not parties to the arbitration (to solicit them as potential clients) or its proprietary business information which has no bearing on an investor's particular claims (to explore new potential bases for filing unrelated

claims). And still other attorneys have sought to gain some perceived tactical advantage in the eyes of the arbitrators by attempting to impose unrealistic, overly broad, and burdensome interpretations on the Discovery Guide and then complaining loudly when the firms have issues attempting to comply with such impossible interpretations.

Many of the problems of the Discovery Guide arise from the simple fact that discovery obligations and capabilities are “asymmetrical” and different for individuals and firms. As a result, even when a firm has no objections to a particular request and wants to produce responsive documents, it still requires more guidance and clarity than is currently provided by the Discovery Guide (or by the proposed changes to the Discovery Guide) in order to know which documents it should in fact produce and how it should fashion a reasonable search for those documents.

This problem is further compounded when a request requires the production of documents relating to the supervision of the associated person generally and is not limited to documents relating only to the customer’s accounts. In particular, the following requests are especially problematic:

List 1, Request No. 13(b): For claims alleging failure to supervise, 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 and related to the allegations in the Statement of Claim that were generated not earlier than one year before or not later than one year after the transactions at issue.

List 1, Request No. 14: Those portions of internal audit reports for the branch in which the customers maintained accounts that: (a) focused on associated persons or the accounts or transactions at issue; and (b) were generated not earlier than one year before or not later than one year after the transactions at issue, and discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the Statement of Claim

List 1, Request No. 17: Those portions of examination reports or similar reports following an examination or an inspection conducted by any regulator (state, federal or a self-regulatory organization) that focused on the associated persons’ or the customers’ accounts or transactions at issue or that discussed alleged improper behavior in the branch against other individuals similar to the conduct alleged in the Statement of Claim, for the period one year before the transactions at issue through the filing of the Statement of Claim.

Each of these requests could be construed to require firms to produce broad categories of documents relating to the supervision of any and every account handled by the associated person (as opposed to just the claimant’s accounts at issue). *See* List 1 Request No. 13(b) (requiring the production of supervisory documents relating to the “review for activity in customer accounts” not limited to the claimant’s accounts at issue); List 1, Request No.

14 (requiring the production of internal audit reports that “focused on associated persons . . . at issue” regardless of whether those reports relate to the claimant’s accounts at issue); and List 1, Request No 17 (requiring the production of examination reports that “focused on associated persons . . . at issue” regardless of whether those reports relate to the claimant’s accounts at issue).

While List 1, Request No. 13(b) contains language that ought to limit it to only those documents that are “related to the allegations in the Statement of Claim,” this limitation is arguably illusory because it still leaves open the question of what is “related to” the allegations in the Claim. It would seem logical that only those documents that concern the claimant’s specific allegations should be responsive. Nevertheless, it is conceivable that an aggressive attorney could argue that any documents that involve conduct similar to what is alleged in the Claim are “related” to the allegations in the Claim (indeed, I have encountered such arguments in the past). By such logic, if a Claim alleges unsuitability, then any documents that relate to issues of suitability would be responsive to Request No. 13(b) -- regardless of whether those documents in fact pertain to the claimant’s accounts at issue.

As a practical matter, it is not uncommon for a financial advisor to have hundreds of clients; nor is it uncommon for each of those clients to maintain multiple accounts (I have come across many situations where a customer has had twenty or more accounts). As a result, a request for all documents related to the supervision of the associated person and the manner in which he serviced any of the accounts he handled (as opposed to just the claimant’s accounts at issue) could effectively require a firm to locate and produce documents relating to thousands of accounts -- most of which would have absolutely nothing whatsoever to do with the claimant’s accounts at issue.

More importantly, documents concerning accounts maintained by other customers are inherently irrelevant. They will not shed any light on the information that was specifically provided to the claimant prior to the transaction at issue, nor will they shed any light on the specific investment decisions that the claimant made. Instead, such documents will serve only to distract the arbitrators from the real issues in this case. In addition, it would be unnecessarily invasive of other customer’s privacy rights to require a firm to produce documents which pertain to other individuals who are not a party to the dispute at bar and who have every reason to believe that their financial affairs will be kept private and confidential.

The Discovery Guide should make clear that only those documents that specifically relate to the customer, accounts, transactions, or investments at issue are presumptively discoverable. Moreover, in light of the fact that the Discovery Guide contains a number of categories which purport to encompass “all documents” that pertain to a particular subject, the Guide should also include guidance in its introductory section making clear that the interpretation of its itemized production categories should be governed by common sense and a general rule of reasonableness. To the extent that other documents

may be relevant a customer's particular claims, parties are always free to pursue those documents by serving additional requests under Rule 12507 of the FINRA Code of Arbitration Procedure for Customer Disputes.

At the end of the day, the Discovery Guide is intended to further the goals of arbitration - i.e., to provide parties with an expeditious and inexpensive forum to resolve their disputes -- by reducing the excessive procedural jousting that can sometimes overwhelm a contested litigation. To that end, the Discovery Guide provides a very simple baseline for discovery so that the parties can minimize the discovery battles they will need to fight before they can turn to the substance of their claims and defenses. The only way the Discovery Guide will be able to succeed in its goal is if the guidance it provides is clear, unambiguous, and leaves no room for abusive or unreasonable interpretations.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Bradford D. Kaufman' with a stylized flourish at the end.

Bradford D. Kaufman, Esq.

WPB382,310,345.3 999903.997140