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

RE: SR-FINRA-2010-035 Proposal to Amend the Discovery Guide

Dear Secretary Murphy:

The Cornell Securities Law Clinic (the “Clinic”) welcomes the opportunity to comment on the Rule Proposal (the “Proposal”) of the Financial Industry Regulatory Authority (“FINRA”) to amend the Discovery Guide. The Clinic is a Cornell Law School curricular offering in which law students provide representation to public investors and public education as to investment fraud in the largely rural “Southern Tier” region of upstate New York. *See*, <http://securities.lawschool.cornell.edu>.

As set forth below, while the Clinic generally supports the Proposal, we strongly urge the SEC to use this review process to fulfill the SEC’s mission of protecting public investors, by mandating changes in the Proposal which would make the FINRA arbitration forum a more level playing field for public customers.

The SEC Must Take Control Of The Discovery Guide Update Process

By our letter dated June 27, 2009, the Clinic vigorously opposed FINRA’s prior proposal (SR2008-024) to update the Discovery Guide Lists. It is now over a year later, and we still are discussing the update process.

The Clinic supports the current Proposal because the modifications to the existing Discovery Guide, on balance, are marginally favorable. We do so reluctantly, however, because we are disappointed that the current Proposal fails in numerous ways to address specific issues and creates other issues. *See, e.g.*, Comments of Public Investors Arbitration Bar Association; Steven B. Caruso; and Stephen Krosschell. Some of these items (see discussion below, for example, as to Proposed List 2, Item 15) must be addressed before approval is granted.



We do not question FINRA's good intentions, but FINRA's process of trying to reach consensus among various constituencies is not working as to the Discovery Guide. The Discovery Guide has become the proverbial horse designed by committee.

The time has come for the SEC to take a more active role to fulfill its mandate of protecting public investors. We ask that the SEC, in evaluating the comments, not simply accept or reject the Proposal; a rejection would mean another year of delay. Rather, we ask that the SEC proactively determine what changes should be made in the Discovery Guide as a part of the review and approval process, and mandate that FINRA make such changes through amendment and a prompt approval process.

The SEC Must Restore Balance To Discovery

We will not repeat all of the specific issues raised by other commenters.

Rather, we emphasize that the Proposal continues what we believe to be a very negative trend in FINRA arbitration in which customers have almost their entire financial lives opened to scrutiny for almost any claim brought, while for the most part (with some narrow exceptions), Associate Persons and Member Firms need only produce documents and information limited to the specific transactions, accounts and parties at issue. Almost no personal financial information is required to be disclosed by the Associated Person, even though the Associated Person's financial motivation often is a central issue in the case.

This imbalance has a serious chilling effect on the willingness and ability of public customers – who typically have fewer resources than Member Firms – to pursue claims. While a customer can object to the Discovery Guide Lists, the reality understood by anyone who practices in this area is that arbitrators frequently defer to the Discovery Lists.

The Discovery Guide, both presently and as proposed, has a further chilling effect in requiring that public customers produce documents, among other things, regarding their businesses (e.g., Proposed List 2, Item 1) and trust relationships (Proposed list 2, Item 12), even where those entities have nothing to do with the dispute at issue. These requirements put public customers in a potential conflict situation, where they are required to disclose information in their personal case which implicates businesses and trusts in which other persons have an interest and right to privacy.

There also are glaring time discrepancies in the Discovery Lists; for example commission runs for Associate Persons need only be produced for the period three months before and after the trades at issue (Proposed List 1, Item 20) whereas customers must produce a wide range of documentation (e.g., personal and business tax returns, financial statements, etc.) for a period three years prior to the first transaction at issue through the filing of the Statement of Claim (Proposed List 2, Items 1, 2, 4).

In perhaps the most egregious example (which we presume was a mere authoring error), Proposed List 2, Item 15 requires the production of “all materials the customer received from any source relating to other investment opportunities” even if not securities investments and without any time limitation. This Item must be corrected prior to approval.

The Discovery Guide Should Be Improved, Not Be Eliminated

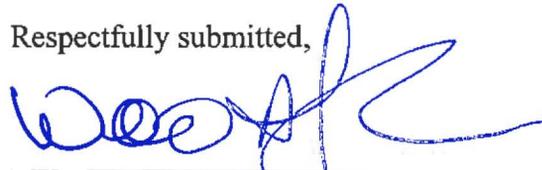
We believe that a balancing of the Discovery Guide would be more helpful than an elimination of the Discovery Guide, as some commenters have suggested.

The problem is not that there is a Discovery Guide, but that the Discovery Guide (both presently and as proposed) is far too intrusive into the financial lives of public customers regardless of the nature of the case, while needlessly protecting potentially relevant information in the possession of the Associate Person and Member Firm.

Conclusion

While we support the Proposal, we ask that the SEC mandate changes which specifically and comprehensively balance the scope of presumptively discoverable documents on Lists 1 and 2. The process of updating the Discovery Guide has gone on long enough, and should be brought to a prompt and just conclusion consistent with the SEC’s mission of protecting public investors.

Respectfully submitted,



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