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VIA EMAIL - **RULE-COMMENTS@SEC.GOV**

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

Subject: File No SR-FINRA-2010-035

Dear Ms. Murphy:

I write to comment on the proposed changes to the Discovery Guide by the Financial Industry Regulatory Authority ("FINRA").

While the proposed Discovery Guide's introduction is well served in directly addressing the need for arbitrators to weigh "the cost or burden" of production, the proposed introduction stops short of a crucial point: that arbitrators should also consider cost-shifting when a document is produced. This is a key point for arbitrators. If a set of documents pass the initial test mentioned by FINRA's proposed introduction (*i.e.*, the documents' relevance outweighs the burden of their production), that should not be the end of the arbitrators' consideration. If a set of documents meets this initial inquiry, an arbitrator should *then* consider which party should bear the burden of that production and to what extent. When discovery burdens are unevenly allocated and when arbitrators lack the tools to equitably allocate those burdens, then the party who does not bear as high of a burden—often, the customer—has an incentive to push for excessive discovery because that party (1) does not bear the burden and (2) may be able to use burdensome discovery orders as leverage in forcing firms to make the economically rational decision to settle non-meritorious claims simply to avoid discovery costs that may exceed the amount at issue. Needless to say, such situations undermine both the fairness and efficiency of this forum.

Respondent's Production

- Proposed List 1, Item 3: The proposed revisions need to add "if any" regarding "asset allocation, diversification, trading strategies, and market conditions" so that it doesn't imply

there always would be responsive communications regarding "asset allocation, diversification, trading strategies, and market conditions."

- Proposed List 1, Items 7 and 9: Correspondence with compliance department. The proposed revisions should recognize that there could be privilege issues, as there may be legal personnel in compliance department to which attorney/client privilege would attach.

- Proposed List 1, Item 11: Copies of all complaints against the broker. Complaints that are not related to issues raised in the Statement of Claim are irrelevant and prejudicial, and the production of these documents could lead to the unintended result that customers will put on mini-trials about other, unrelated, issues from other complaints against the associated person. Additionally, the production of responsive documents implicates privacy concerns.

- Proposed List 1, Item 11: All "manuals" or updates from the firm is overbroad and vague and could potentially include manuals from different business lines that have noting to do with the supervision of the customers' accounts. The Item should be directed towards Compliance Manuals (as in current List 1, item 9), which address the supervision and handling of customer accounts. If there is a real concern as to firms' characterizing certain manuals as something other than "compliance manuals" (which should not be a problem given FINRA's reviews of such materials), then the answer is not to require the production of *all* manuals and updates for the entire firm. Rather, the focused means of addressing that "problem" would be to require to make presumptively discoverable manuals and compliance materials that address the issues in the case at issue.

- Proposed List 1, Item 16: The terms "investigations, charges or findings by any regulator" must be limited. This is a dramatic change of the current rule, and the inclusion of mere allegations and unproven charges can be extremely prejudicial, which clearly outweighs any minimal probative value found in unproven allegations. In addition, the prejudicial effect of disclosure of ongoing investigations outweighs any probative value of the document or information.

- Proposed List 1, Item 21: The production of compensation agreements with brokers should be limited to churning cases, the only cases where such agreements are even arguably relevant.

Claimants' Production

- Proposed List 2, Item 2: The proposed revisions should add that claimants may be required to create financial statements. Production of such documents actually moves case along, and reduces the time necessary to elicit the same information through testimony at hearings.

- Proposed List 2, Items 2 and 4: The proposed stipulation as to having received statements simply allows too much room for abuse. There is no way to monitor compliance with the

requirement to produce statements that contain notations, other than through a time consuming *in camera* examination by the arbitrators. Claimants' counsel should already be in possession of all account statements in order to properly prepare a statement of claim, thus there is little or no burden associated with production of same.

• Proposed List 2, Item 11: Customer-claimants should be required to produce all complaint correspondence they sent to the firm or associated person and any responses they received from the firm or associated person. Such documents can be relevant to numerous issues in an action (such as when a customer became aware of alleged issues in their account, or when the firm notified the customer of certain facts). Not requiring the production of these documents would allow a customer to deny sending complaints containing admissions or receiving responses that may have put the customer on notice of disputed facts. Additionally, complaint correspondence (especially if the complaint was not recent) may be difficult for the firm or associated person to locate due to the passage of time. Finally, the complaint correspondence carved out from this rule is both the most likely to be relevant to the issues involved in the arbitration and unlikely to be voluminous or difficult for customers to produce.

The revisions should also recognize that practically all settlement agreements are confidential. The proposed "two-step" process for getting confidential settlement agreements will require additional panel hearings. The better solution is simply produce the agreements subject to a confidentiality order.

Thank you for your consideration of these comments. Please contact me if you have any questions concerning the foregoing.

Sincerely,

SUTHERLAND ASBILL & BRENNAN LLP

/s/

S. Lawrence Polk

SLP/dtw