Comments of Eliot Goldstein on SR-FINRA-2010-035

August 25, 2010

Elizabeth M. Murphy
Secretary
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303

Re: SR-FINRA-2010-035 – Proposed Rule Change to FINRA Discovery Guide

Dear Ms. Murphy:

I am writing to comment on the changes proposed by SR-FINRA-2010-035. The proposed revision to the FINRA Discovery Guide, while containing certain improvements and enhancements over the existing Guide, is both severely flawed and unfair to Claimants in numerous respects and should not be adopted as written.

My perspective is of one who has worked as a securities and financial services attorney in the Washington, D.C. area for more than 25 years. I have served as Senior Enforcement Counsel for the SEC, as Assistant Director of Enforcement for a federal bank regulatory agency, and, in private practice, as a federal court-appointed Receiver and Claims Administrator for the SEC in securities fraud cases. Although the majority of my practice in recent years has involved representing public investors in securities arbitrations, I have also had substantial experience on the industry side, including representing brokerage and investment advisory firms, individual brokers, and serving as the General Counsel for a major financial services firm.

I am in agreement with the comment letter submitted on August 15, 2010 by Prof. Seth Lipner, supported by other commentators, that the cookie-cutter approach to discovery using lists of documents that are deemed by FINRA to be presumptively discoverable in every case is grossly flawed. The rules as written are geared toward point of sale disputes at the broker and branch level and completely ignore a claimant's need for documents above that level in numerous other types of cases.

For example, in cases involving misleading or fraudulent investment "products" such as the "100% Principal Protected Notes" and other structured products currently under investigation by the SEC and at issue in hundreds of FINRA arbitrations, the products at issue were typically devised, crafted, underwritten, and marketed by very senior level personnel at the brokerage firm, not by the client's broker or his or her branch manager. The Discovery Guide

"lists" are of little or no value in these and numerous other kinds of cases that do not fit within the narrowly-prescribed FINRA pigeon holes.

More fundamentally, FINRA, a fee-based membership organization for the brokerage industry serving as a supposed neutral, should not be engaged in the business of influencing discovery determinations to be made by the arbitrators.

In the event a revised Discovery Guide is to be adopted, I support the comments made by PIABA as to why the various specific proposed discovery request items should be accepted or modified. To those comments, I add the following with regard to the issues I find the most troubling:

1. Although the discovery guide emphasizes that the document production lists are intended to serve as a floor and not a ceiling as to what should be produced, the reality is that many arbitrators adopt the lists as gospel and are reluctant or unwilling to go beyond those lists even when doing so is clearly warranted. In my experience, counsel for respondents reinforce this false notion in almost every case with both general and specific objections stating that some or all of claimant's document requests should be denied because they are "outside the scope of the FINRA Discovery Guide."

   The FINRA rules should therefore explicitly provide that an objection on such grounds, which is directly contrary to the spirit and letter of the discovery guide provisions, shall mandate the imposition of an <u>automatic</u> monetary fine (e.g., $3000) for each discovery request to which such objection is made. I believe that would put an immediate end to this insidious practice.

2. The most offensive aspect of both the current and proposed Discovery Guide are the requests that deem Claimant's personal and business tax returns and loan documents to be presumptively discoverable in every FINRA arbitration irrespective of the nature of the claim or the lack of relevancy. Claimants should not have to endure this kind of invasion of privacy and intimidation as a starting point for filing a FINRA arbitration. These request items also often involve the invasion of privacy of a spouse or former spouse who are non-parties to the arbitration (e.g., where joint tax returns are sought).

   As in court civil litigation, the production of an aggrieved investor's tax records should be the rare exception, reserved only for appropriate cases where such records are absolutely necessary, rather than the presumed rule in every instance.

3. Incredibly, under the proposed revisions of the Discovery Guide, a

customer's account statements and trade confirmations at the respondent brokerage firm are no longer listed as presumptively discoverable. This proposed change is beyond the pale. I can think of no documents more clearly relevant and discoverable in nearly all securities arbitrations, and less burdensome to produce, than the customer's own account statements for the relevant period.

In my experience, many investors do not have a complete set of account records for every single month of the account in question. The brokerage firms do have them and they can produce them at the touch of button. Obviously, a complete set of the customer's account statements are needed in most cases, among other reasons, in order that all trades in and out can be viewed and accurate damages calculations can be performed.

This proposed rule revision is even more outrageous when contrasted with the documents that claimant is obliged to produce to respondent. Under the proposed revisions, respondent is entitled to invade claimant's privacy by seeking production of irrelevant tax returns and business records but respondent is not obliged to produce the Claimant's own account statements at issue? This bizarre dichotomy exemplifies just how out of balance the proposed revisions are and explains why investors continue to have reason to question the fairness and integrity of the FINRA arbitration process.

4. The battles that are fought every year in thousands of FINRA arbitrations over the issue of production of brokerage firm compliance and supervisory procedures manuals are a ridiculous and expensive waste of time that must end once and for all.

   The brokerage firms must be required to produce these documents in full, without requiring a draconian confidentiality agreement, without objection, without redaction, and without delay. Production of these manuals, which nearly all firms maintain on easily reproduced discs, should be required to be made within 30 days of the filing of respondent's Answer, together with a separate disc listing by name and year all of the firms compliance and supervision manuals, bulletins, amendments, and updates during the relevant period. The revised rule should provide that the respondent firm's failure to provide this information within this time period shall mandate the imposition of an <u>automatic</u> fine of $5000 and an additional fine of $1000 per day for each additional day of delay in production.

5. The "relevant time period" for the parties' discovery requests must be consistent for both sides. With respect to numerous discovery items, the time scope for respondent's production is limited in time scope to just the time period in which the transactions occurred. At the same time, however, the time scope for claimant's presumed discovery production

obligations as to certain discovery requests is unlimited. This disparity in treatment is wholly unacceptable.

Thank you for your consideration. If you have any questions or require any additional information, please feel free to contact me at (301) 613-1987.

Respectfully yours,

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