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September 24, 2010

Via E-Mail To Rule-Comments@Sec.Gov

Elizabeth M. Murphy, Secretary
Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: **File Number SR-FINRA-2010-035**
Proposed Amendments to the Discovery Guide and
Rules 12506 and 12508 of the Code

Dear Ms. Murphy:

This letter is to provide our thoughts and comments on the proposed changes to the Discovery Guide and the related Code provisions. Our comments reflect nearly four decades of active involvement in financial services litigation, including experience with panels in hundreds of arbitrations (some settled, others to a full award) in discovery issues since the current Discovery Guide was promulgated in 1999.

GENERAL OBSERVATIONS

A. The proposed amendments aggravate a fundamental issue permeating the original Guide, and perhaps any guide. While some minimal “baseline” regarding discovery may be deemed appropriate, the original Guide constituted an *intrusion* into the prehearing discovery process and the documents identified in it inevitably became the “default” ruling by many, if not most arbitrators. The very presence of a document in the “presumed” category vests it with a seeming importance or relevance that is frequently lacking in fact or logic in the case at hand.

B. We question the addition of numerous items and the expansion of the number of documents covering the same topic. The amendments’ introductory language, which cautions arbitrators to consider early on the relevance of even presumed

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documents in light of the respondent firm's business model or limited nature of its services is commendable.¹ But the very need for such a cautionary comment illustrates the very problem: The broad expansion of presumptively produced documents foists upon the respondent firms in virtually every case the *affirmative burden* of explaining to the panel why such documents are irrelevant or non-existent or burdensome. Instead of avoiding or diminishing the need for discovery motion practice, the amended guide will without question greatly increase the number of such motions without any perceived offsetting benefit.

C. Another positive feature of the original Guide has been diluted significantly in the amendments. Whereas the existing Guide identified specific documents – those which reasonable counsel on both sides would agree to be the most likely source of relevant information – the amendments have moved to the more burdensome and mostly redundant terminology of “all documents ...” relating to a given topic. This is an open invitation to abuse and imposes an extraordinary, if not impossible burden of inquiry and production on respondent firms, which we will address via specific examples in the individual items discussed later in this letter. The sheer size of many respondent firms, whether measured in registered reps, revenue and/or branch offices, across this nation and beyond, makes even the inquiry process burdensome. Ponder the impact of an internal request for “any and all written documents pertaining to mortgage-backed securities” to see impossibility of full compliance. And this approach constitutes the very type of pretrial document discovery that arbitration is supposed to be not about.

D. The amendments' efforts to minimize the extraordinary burden of the documents added to the presumptive category by document type or time limitations directed to the transactions or products “at issue” is well intentioned, but in the vast majority of cases this is illusory. Most cases do not involve only a few “targeted events” like an unauthorized trade or an isolated “allegedly unsuitable” trade. Many pleadings

¹ We respectfully submit that, if this portion of the amendments proceed, that clearing firm and prime brokerage firms be added to the examples expressly listed.

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complain in the nature of “stewardship”, challenging the entire portfolio mix, overall risk exposure, generic suitability and even asset allocation. In these cases, every position in the account(s) is “at issue” and every security is “fair game”.²

E. Lastly, there is a disturbing lapse in the rigor of the standard for “required production”. As noted earlier, the original Discovery Guide referenced specific documents used in the industry which were reasonably expected to contain information relevant to the case. It did not use the litigation rationale of “possibly leading to relevant information”. The current Discovery Guide’s documents *contained* relevant information and needed no justification. On the other hand, the explanation of several of the proposed amendments contain the phrase “which may be relevant or lead to relevant information” on several occasions. It would be counterproductive in the extreme for the test for production be diluted by a criteria as broad and loose as “might lead to relevant evidence”. Such a standard would effectively call for the production of anything and everything and constitute the proverbial (and abhorred) “fishing expedition” and continue the frustrating march of arbitration to becoming more and more like the litigation process it was designed to avoid.

SPECIFIC ITEMS

PROPOSED LIST ONE

Item 1: To the extent the additional information described is not already in the existing presumptive documents, further documents that contain further information specified in the amendment are appropriate. But at least with regard to the new information documents, and perhaps in regard to the entire Item 1 as now contemplated, there should be a restatement of the introduction’s cautionary words: “Except where the

² We note that the leading claimant’s counsel’s bar association’s 2001 Practice Guide re Discovery In [at that time] NASD Proceedings emphasized how asserting claims very broadly and generally would tactically result in the opportunity for correspondingly broader discovery requests to firms.

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information does not exist or is not required by the limited nature of the services provided by the respondent firm, ...”.

Item 2: We applaud the removal of confirmations from the presumptive list. Especially with an active account over a long period of time, that production is laborious and expensive. In nearly four decades of trying retail investor cases, we have experienced less than a half dozen occasions where the information on a confirmation was important. And if that occasion arises, the few confirmations needed can be sought. While the removal of monthly statements from the presumptive list will save some trees, other than cases where multiple large accounts are involved over a significant time period, the savings are not necessarily substantial. At a minimum, defense counsel will always need a set to determine what happened and copying another set for production is concededly not a burden.

On the other hand, the presumed production of every document ever transmitted by the firm to the customer imposes enormous burden and expense with no perceived benefit. To be clear, our comments are not directed at “point of sale” or “recommendation” documents between the associated person and the customer. Our concern is the burden, if not impossibility, of recreating years of generic pieces that were included with monthly statements or otherwise sent to the customers, such as new product descriptions, investment “newsletters” (and other irrelevant items that merely report someone’s point of view concerning the market, the economy or the benefits of specific products). Qualifying this item to the “types of securities or accounts at issue” provides no meaningful relief when the vast majority of accounts “at issue” are either individual, joint or IRA and the securities “at issue” are within global challenges to “common stock” allocations or sector emphasis over the entire portfolio. By their very definitions, mass mailings are generic and are not “customer specific” and the fact that some market guru may have recommended a different stock or strategy six years ago in a newsletter does not mean the claimant should have done the same. Neither logic nor

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fairness warrants requiring firms to track down and produce a copy of every such item merely to enable a pointless argument to be made.

Item 3: The key problem here is the ambiguous term “investment or trading strategies”, which hopefully is intended at something more specific than, for example, something as broad as asset allocation. We agree that where some formulized approach to investing, such as an option writing or option ratio strategy was proffered via some documentation, those documents should be produced. But absent a much clearer and more limiting definition of a “strategy”, this topic should be handled outside of the presumptive production list and by way of supplemental discovery requests in those relatively few cases that really warrant it. The present text would include far more general issues such as laddering in a bond portfolio, mere ratios between common stocks and bonds, and even the use of margin, all of which are generally, if not constantly, the subject of written thoughts within and without the firm. Automatic production of “all” such materials across the board would be both wasteful and fruitless, and burdensome with no purpose.

Item 4: We have no comment regarding this expanded requirement regarding materials supporting the customer’s authorization of trades.

Item 5: This group of documents poses significant burden unless it is clarified. It seems intended to reach only certain targeted securities or products “at issue” and seeks “all materials ...” within the firm. The opportunity for mischief, however, is the use of very expansive language. Where all of the investments in an account are challenged under a suitability/mismanagement claim, this request would require production of every document over a multi-year period that so much as mentioned by name any of the securities in the claimants’ account, including every research report or commentary or even a prospectus for a security not purchased by the claimant. There is no limitation that the document was sent to the customer or even read by the associated person. That burdensome effort and broad scope should not be inflicted in all cases.

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Item 6: We have no objection to the proposed expansion of Item 6. We see no principled reason to limiting memorializations of contacts with the customer to only one account “at issue” among possibly several maintained with the respondents.

Item 7: We agree that, in addition to surveillance appearing in the exception reports regarding a claimant’s accounts, any related notes, memos or written communications should be produced. However, we believe that only the portion of such reports that pertain to the claimant’s account(s) should be produced. Most such reports are run for the whole firm, then broken down by the branch, and they contain all (i.e. numerous) accounts that are flagged for attention and follow-up under whatever parameters the firm has set. A single report may cause accounts to be flagged for follow-up for very different reasons. And some of that criteria may result in an account reappearing for several months. There is no reason for the entire report for each month, which can run nearly a hundred pages for a large branch, to be produced, especially given the need to redact account privacy data every month for literally every one of the accounts other than the claimant.

Item 8: We believe this item should be removed from the presumptive list and relegated to being addressed on a per case basis. As the explanatory text acknowledges, producing recordings or even records of telephone calls “is labor intensive, expensive, and difficult for firms ...”. While the amendment tries to alleviate this burden by making it transaction-specific, that result impacts only a small minority of cases where the Claim targets a small number and specific transactions. It provides no relief where a broker’s “stewardship” over a protracted period of time is being challenged or the frequency of contact is seriously at issue. And the ultimate information will be of dubious value where a significant portion of telephonic communications occurred via cell phone where “per call” records are no longer the norm in billing.

Item 9: We have no comment regarding this additional item regarding supervision.

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Item 10: We would ask a re-thinking on the presumptive production of these items along the following lines. There should be no presumption of production of U-4's, U-5's and RE-3's unless it reflects a substantial and relevant item regarding an associated person whose conduct is at issue. The present text seems to require production of the documents with respect to any associated person who handled or dealt with the account at issue at any point in time, even if only one associated person's conduct has been specified in the Claim. And even where such a "ding" exists, production should not be presumed where it is distant in time and insignificant by any reasonable standard. We acknowledge that such a limitation, no matter how well intended, poses a judgment call, such as when dealing with generic allegations asserting in knee-jerk fashion "fraud, gross negligence, negligence and unsuitability", all in regard to an otherwise appropriate portfolio that lost value between 2007 and 2009 as the Dow Jones Industrial Average sank from 14,208 to 6,440. But that decision-making should not result in the pendulum swinging fully the other way with production deemed automatic in every case. Claimants also already have considerable information via BrokerCheck.

Item 11: We agree that written materials relating to traditional "sales practice" compliance and supervisory procedures, if they are to be presumptively produced, should be defined by the topical subject matter, and not governed or restricted by the failure to use the word "compliance" in the manual's title. On the other hand, broadly worded claims, such as those invoking generic "suitability" or "improper margin", should not implicate *on a presumptive basis* other workaday business materials such as "operations" or "credit department" manuals, simply because of the possibility that some provision or reference therein touches tangentially upon some aspect of the claimant's stated grievances.

Many firms no longer utilize traditional hard copy manuals, instead utilizing web-based intra-nets that allow easy cross-referencing of topics by computer mouse clicks. These materials are not in the same linear format as a printed, hard copy text would be. In many such firms the indices to a given topic (e.g. "margin accounts") unleash a torrent

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of unnecessary and irrelevant information (new accounts, age requirements, who can't have one, margin calculations, processing a margin call) when only one or two might be responsive. The problem with such an index is that every potentially responsive item has to be opened and reviewed and a judgment made as to whether that particular online text is "relevant" to some aspect of the claim. "Labor intensive" does not begin to describe the burden.

Finally, the inclusion on the presumptive list of "follow-up" newsletters, bulletins and memos poses significant burdens unless a firm has a meticulous index of each such internal document, broken down by every topic it contains. Manual review of hard copy, usually generated monthly or quarterly, going back several years should not be required in the first instance as a presumed document in every case.

Item 12: To the extent such documents were created during the course of the account relationship with the firm, we do not object to these documents be added to the presumptive list. We would ask that two cautionary remarks being added to the text. With monthly statements deleted from the presumptive list, this requirement should not effectively reinstate them simply because some firms have P&L data on the statements in regard to the overall portfolio or to individual positions. Such monthly statements should remain exempt. Secondly, it should also be expressly stated that this item is not intended to encompass calculations or analyses after the customer has lodged a complaint and the work product and "in anticipation of litigation" or comparable privileges arguably apply.

Item 13: We believe that this request causes an extremely high and totally undue burden on respondent firms, with very little likelihood relevant evidence to be achieved. As we read it, in addition to producing those portions of exception reports that reflect an appearance by a claimant's account(s) and any related follow-up writings (see our comments to Item 7), this item would make presumptive the production of every exception report published by the firm in hard copy (even where the original reports were electronic) for a period of multiple years *even if the claimant's account never appeared*

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on any of them simply because a “failure to supervise” allegation was asserted. These reports are normally generated for the entire firm, then broken out “per branch” and they are not necessarily broken out “per RR” but often by account number, numerical sequence or possibly by some measure of potential importance depending upon the parameters used to flag an account for follow-up. Just a quick example: a complaining customer’s account of five or six years duration book-ended by twelve months before and twelve months afterward would presumptively require production of eighty such reports, which in a medium to large size branch office could run each in the vicinity of a hundred pages. To what end? The reports themselves will reflect only that the branch manager received them or had access to them and that a surveillance system existed at the firm. The cartons of paper produced would inform neither claimant’s counsel nor the panel how diligently the manager followed up on any of these items, all of which is frankly irrelevant where the only real issue is his supervision of the associated person in regard to the claimant’s account in the case at hand.

That FINRA proposes to limit production to the type of “allegations made” in Claims provides no real relief. Even putting aside the wide spread propensity to plead broadly and in multiple categories, the exception reports as generated are by and large not fine-tuned by topic. An account appears on the monthly report for any one or more criteria set within the firm’s computers. We are aware of no firm that has its branch managers first review a pile of “suitability” exception reports, and then turn to a set of “over-concentrated” exception reports.

Item 14: As we read Item 14 (not proposed to be changed), production of portions of internal audit report for a branch are required (a) if it focused on the associated person *or* the [claimant’s] transactions at issue, *and* (2) was generated not before or after one year after the transactions at issue, *and* (3) discussed alleged improper behavior at the branch “against other individuals” similar to what the Claim alleges. Seemingly, all three conditions need be met. Clearly, an internal report discussing the associated person involved in the Claim in regard to *comparable conduct* may be

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appropriate, although not perhaps presumed,³ as opposed to say some ministerial or clerical shortcoming. But the alternative test of comparable “improper behavior” within the branch on the part of others is simply too ambiguous to be workable, much less fair and reasonable. It is one thing for an audit to note a high level of concentration of a volatile and low-priced security in the accounts of one or two RR’s using margin aggressively, where claimant’s account and claims fall right into that scenario. On the other hand, if the case at hand alleges “suitability” there isn’t a branch of any large brokerage firm anywhere in the country that won’t have periodic “suitability” issues and claims from time to time. (One can only estimate the number of “suitability” claims asserted as the stock markets swooned and the national economy suffered over the past few years.) To discuss “suitability” claims in other accounts in different contexts with the current claimant’s “suitability” allegation is an essentially impossible and certainly meaningless endeavor. Such other discussion should not trigger any, *much less presumed*, production.

Item 15: We have no comment regarding disciplinary actions actually undertaken against the involved associated person.

Item 16: The last sentence of FINRA’s text should be made the first. The words “expand the scope of documents” regarding the associated person’s disciplinary history severely understates the seriousness of this item’s implications. We have no issue with regulatory findings, (although they should be qualified if a valid appeal is pending), or with any formal charges along with the associated person’s responsive pleading. But there should be no required production of regulatory investigation documents, including inquiries and requests for information from regulators, whether informal or via subpoena.

³ While our comments primarily address the extraordinary breadth of the newly “presumed produced” documents and challenge many of the items on a “importance vs. effort and expense” basis, the time frame for presumed production can be daunting in many cases. A customer account relationship for five years, book-ended by an additional year on the front or back, results in possibly seven branch audits, each of which must be reviewed manually simply for the possibility that the involved associated person’s name appears at any point. That is an extraordinary effort to be expended in every case in the first few weeks or months.

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And under no circumstances should the firm's responses to regulators be required *presumptively* in pre-hearing discovery. A regulatory investigation is nothing more than a factual inquiry that may or may not result in further action. Regulators have extraordinarily expansive authority to inquire and to probe, and claimants' counsel should have no right to piggyback the broad efforts of a regulatory agency or other governmental body, the scope of whose inquiry neither the panel nor FINRA knows about. Just one example of the burden is where hundreds of accounts may be involved over many years, the voluminous production of monthly statements, possibly confirmations and other account documents and trading runs is not only oppressively burdensome initially, but the necessary redaction of confidential customer information (a process not applicable to the documents going to the regulator) is simply enormous. Until a regulatory agency *reaches conclusions and starts a course of action*, its entire regulatory file, comprised largely of responsive information provided by the member firm, should not be ordered cloned and produced to claimant's counsel.

Item 17: Our comments here in regard to regulatory investigations and those by state or federal agencies is identical to that set forth in our comment regarding Item 14 with respect to the firm's own internal audits. The problem is not the findings or discussion concerning the associated person and/or the transactions "at issue", but the hopelessly ambiguous additional criteria regarding purported "improper behavior" in the branch ... "similar to the improper conduct alleged in the Statement of Claim." Of what relevance is one customer's experience a year or two earlier at the same branch if a different associated person was involved?

Item 18: As FINRA's text notes, the present Code calls for the production of documents obtained by any party in the course of the proceeding by virtue of duly authorized and served subpoena, a process governed largely by provisions within the Code. This item would expand that obligation to documents obtained "at any time during the case" from any source simply because a party or his counsel asked for them. *This should not be permitted under any circumstances*, if for no other reason than it

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eviscerates the attorney work-product privilege for both sides. As written, it reaches documents we may retrieve from a courthouse, documents concerning a third party or witness that we download from the internet, and documents we might seek from colleagues within and without the legal profession. The proposed item would include information we might receive regarding prospective panel members. It certainly seems to include transcripts of prior testimony of a prospective expert simply because we asked someone for it during the course of a case, and we would be required to turn it over whether or not we intended it for use at any point. Any issue of “fairness” is already and amply covered by the twenty-day prehearing disclosure of intended exhibits. There is no principled reason that our adversaries have access to every writing we receive via our “request” in the course of our preparation and of course we have no entitlement to the comparable papers sought and received by opposing counsel.

Items 19, 20 and 21: This is also an area where the “default” of presumed production will be manifestly unfair in many instances, primarily because it is governed by the naked and untested allegations in the Statement of Claim, even where the underlying facts are clearly to the contrary, but not available to be shown until later. In addition to the many non-commission based compensation arrangements noted elsewhere herein, we have handled purported “churning” and “excessive trading” cases on behalf of firms who offer only “self-directed” accounts where the purportedly “excessive” trades were entered by the complaining customer via the firm’s website by clicking a mouse and where the only human interaction was an occasional telephonic request by the claimant for a commission adjustment based upon his trading volume. As presently worded, documents relating to the compensation and the compensation plan description of every associated person who ever fielded a telephone call from this claimant would presumptively be required to be produced merely because the word “churning” appeared in the Claim.

The main problem with the proposed items as worded is not where they apply and the relevant documents exist (although we have some comments on that below), but in

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the many instances where the compensation arrangement simply does not fit the scenario upon which these three items are predicated. At a minimum, an introductory and qualifying conditional phrase along the following lines should be added up front: “Unless the associated person(s) compensation is predicated substantially on bases other than per transaction commissions, ...” Additionally, the item might invite, as an alternative to production, a brief text explanation of the bases of the associated person’s compensation in order to accelerate an understanding of why monthly commission printouts for hundreds of accounts over possibly many years either do not exist or are irrelevant to the claims asserted. We have represented firms which do not allocate customer accounts to specific representatives (e.g. where inter-personal customer dealings occur through call-in centers and retail service sites), where compensation is predicated upon “asset gathering” (where there is no financial incentive to promote one common stock, bond or mutual fund over another), and other “personal service” benchmarks. Since there is no single alternative arrangement to the “commission charged” compensation model upon which these presumptive documents are predicated, we would suggest that a presumptive request expressly not apply to such arrangements and that respondent firms and associated persons in that situation simply so state and let discovery into compensation issues, if any remain, proceed on a non-presumptive basis as the circumstances warrant.

Finally, absent a real scenario where the transaction(s) at issue could conceivably have been predicated upon an inappropriate financial incentive or objective by the associated person, there is no principled reason for there to be a presumed or “default” production of either the amount of annual compensation or the components when those considerations do not in some meaningful way implicate the transactions complained of. It frequently happens that compensation “motives” are alleged in a baseless effort to “demonize” the representative with no factual support. If the compensation plan is identical with respect to investments in “growth” mutual funds as it is for “balanced” funds, whatever the merits of a claimant’s assertion that he should have been in one or

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the other, the representative's compensation is clearly not implicated in the decision no matter how vile his motives are pleaded. His income and the components of it should not be "fair game" for discovery at all, much less on a presumptive basis.

The compensation records presumed to be produced also present an enormous burden, even for commission-based plans. If a complainant's account duration with the firm was five or six years, the production would entail nearly a hundred separate commission runs, each containing every separate trade as a line item, even for months for which the claimant made no trade. Of what possible relevance are thousands of line items (virtually all of which have to be redacted for customer privacy), especially the breakout of the "gross and net commission for each trade". The proposed item's limitation that this information be provided only for "solicited trades" is illusory. While commission runs may possibly specify whether a trade was solicited or not, the run itself consists of all the trades effected by the broker.

Nor is it clear why the commission run information regarding the associated person's accounts is required. To the extent there is any issue as to the associated person's own trading in the subject securities or otherwise, those issues can be more accurately and easily addressed by resort to the associated person's monthly statements.

Item 22: We have no comment regarding this new item.

We applaud the deletion of holding pages and order tickets from automatic presumptive production in every case. It will save much money, effort and trees.

PROPOSED LIST TWO

Item 1: This item (customer's monthly statements) exemplifies our concern regarding the "default" status that the Guidelines have achieved. We are frankly less concerned with the scope (and would even trade some of the scope presently here) if there were *express language* making it clear that the "look back" limitation – currently

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three years – is just for the presumptive production and is not in any way meant to be a limitation on requiring production of investment records and tax returns from earlier years where the circumstances warrant and/or where a reasonable case to do so has been presented. Without that language, the “default” of three years is the *de facto* norm that panels frequently are loathe to go beyond. Someone who spent a career on Wall Street trading equities could have retired four years ago, liquidated all his stocks and gone to municipal bonds issued by the state of his residence, and then claim he was a retired person living on a fixed income with no ability to understand or appreciate the risks of an unfortunate small investment in a tech stock. His past is blocked. We are not suggesting that the presumed scope be larger, only that the door to a greater look back be expressly open.

Item Two: Where the claimant has no responsive documents, we feel it is hardly an imposition for some sort of assets/liabilities/net equity representation (a/k/a “balance sheet”) to be created, especially where suitability and/or economic status has been implicated in the Claim.

Item Three: We believe the elimination of monthly statements from the presumed discovery list should be conditioned on the nature of the case to where production would be meaningless such as where a single transaction or event (a check withdrawal) is at issue. Where general “stewardship” issues are asserted over the account’s duration, presumptive production should remain. And if statements are removed from the presumptive discovery, to avoid the argument that “FINRA rules do not require production”, the text should include an express statement that the respondent may still request them and upon request, they should be produced absent compelling reasons not to.

Item Four: We agree with the elimination of confirmations from the presumed production to include confirmations from accounts at other firms. We disagree that the default position regarding other accounts should only be that a customer authorize release

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of the information via subpoena. If the customer represents that he no longer has possession or access to such records, that event should be the predicate for resort to subpoena. There is no principled reason for customers making claims against a brokerage firm to be relieved of the obligation of providing photocopies of clearly relevant materials where they possess the documents or they are in the control of their lawyers or accountants.

Item Five: We have no comment expanding the description of relevant documents.

Item Six: In fairness, and in light of our earlier comments in regard to List One, Item 12, we believe the text should expressly state that, unless intended for use in the arbitration (in which case it will be produced under the 20-day Rule), this item is not intended to reflect analyses and accountings prepared after the events that have been complained of at the initiative of claimant's counsel or by anyone after the events at issue assisting claimant in determining what had happened in the course of considering whether an action should be undertaken.

Item Seven: We have no comment with regard to the clarifying text.

Item Eight: We have no comment regarding this item.

Item Nine: As presently stated, this would include correspondence by claimant or on his or her behalf in preparation of the assertion of the claim and even by claimant's counsel. We believe the request is properly limited to "ordinary course" communications, and not after the events evaluations and assessments, and especially not materials governed by the work product and/or anticipation of litigation privileges.

Item Ten: We have no comments regarding Item 10.

Item Eleven: We agree with FINRA's proposed clarifying language that does not limit the panel's prerogatives with respect to "confidential" settlements.

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Item Twelve: We have no comments regarding Item 12.

Item Thirteen: We agree with the expansion of the scope to documents relating to the investments at issue (as opposed to simply relied upon in making the investment), but we also believe that the intended scope should not include post-loss inquiry documents that are part of a review either by the claimant or anyone on his or her behalf concerning the nature of the investments after losses have been sustained and in connection with the possibility of seeking legal redress.

Item Fourteen: We have no comments regarding Item 14.

Item Fifteen: We have no objection to this additional item, but we feel its scope, for the reasons we set forth in our comments to earlier List Two Item Thirteen, be limited to documents received prior to the when losses were sustained and not include later efforts at analyzing what occurred and whether they were the result of possible misconduct.

Item Sixteen: Only for purposes of clarity, the text presently suggests that “a copy” be produced which might be deemed to be conditioned upon a resume already in existence. If there is in fact none, the creation of one should be required.

Item Seventeen: While we do not object to the additional information standing alone, it would seem more practicable to specify that the “resume” in Item Sixteen include information regarding educational background as well as work experience history.

Item Eighteen: In fairness, and for the serious reasons set forth in our comments to List One, Item 18, we do not believe that production should be required, on a presumed or any other basis, of documents obtained by either side from third parties informally “by request”. Such a requirement unavoidably and improperly intrudes upon

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each side's separate case preparation and each side's work product privilege in regard to his or her attorney's efforts.

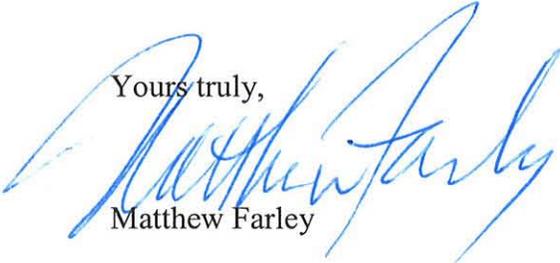
Item Nineteen: We have no comments regarding proposed new Item 19.

While we very much appreciate FINRA's desire to eliminate items for efficiency and redundancy considerations, the elimination of Items 11 and 13 on current List 2 from the presumptive list will most certainly result in their automatically being included in the firm's follow up requests. As to mitigation efforts, it is not clear that the documents, if any, will be in most instances only at the respondent's firm. In any event, the two items are not burdensome and their continued presence on the resumed list should be reconsidered.

* * *

We thank the Commission and FINRA for the opportunity to share the foregoing thoughts.

Yours truly,


Matthew Farley

MF/gs