

February 8, 2011

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

Re: File No. SR-FINRA-2010-035 – Proposed Rule Change to Amend the Discovery Guide and to Make Other Conforming Changes to Rules in the Customer Arbitration Code; Response to Comments and Partial Amendment No. 1

Dear Ms. Murphy:

The Financial Industry Regulatory Authority, Inc. (“FINRA”) hereby responds to the comments received by the Securities and Exchange Commission (“SEC”) with respect to the above rule filing. In this rule filing, FINRA is proposing to revise the Discovery Guide (“Guide”) to expand the guidance FINRA gives to parties and arbitrators on the discovery process and to update the Document Production Lists (“Lists”). The proposal includes conforming changes to Rules 12506 and 12508 of the Customer Code.¹

The SEC received 55 comments on the proposed rule change.² Of the 55 comments, 15 commenters support the proposal with further modifications,³ 36

¹ See Securities Exchange Act Rel. No. 62584 (July 28, 2010), 75 FR 45685 (August 3, 2010) (File No. SR-FINRA-2010-035).

² Comments were submitted by Richard A. Stephens, Esq., dated August 6, 2010 (“Stephens comment”); Seth E. Lipner, Esq., Baruch College, Member, Deutsch & Lipner, dated August 15, 2010 (“Lipner comment”); Leonard Steiner, Esq., dated August 16, 2010 (“Steiner comment”); Robert C. Port, Esq., dated August 19, 2010 (“Port comment”); Steven M. McCauley, Esq., dated August 19, 2010 (“McCauley comment”); Steven B. Caruso, Esq., Maddox Hargett & Caruso, P.C., dated August 20, 2010 (“Caruso comment”); Diane Nygaard, Esq., dated August 20, 2010 (“Nygaard comment”); Ryan K. Bakhtiari, Esq., Aidikoff, Uhl and Bakhtiari, dated August 20, 2010 (“Bakhtiari comment”); Thomas R. Cox, Esq., Miller, Canfield, Paddock and Stone, PLC., dated August 20, 2010 (“Cox comment”); Steven J. Gard, Esq., dated August 22, 2010 (“Gard comment”); John W. Shaw, Esq. Berkowitz Oliver Williams Shaw & Eisenbrandt LLP, dated August 23, 2010 (“Shaw comment”); Stephen Krossschell, Esq., Goodman & Nekvasil, P.A., dated August 23, 2010 (“Krossschell comment”); David P. Neuman, Esq., Stoltmann Law Offices, P.C. dated August 23, 2010 (“Neuman comment”); Theodore A. Krebsbach, Esq., Krebsbach and Snyder, P.C., dated August 23, 2010 (“Krebsbach comment”); Eric G. Wallis, Esq., Reed Smith LLP, dated August 23, 2010

("Wallis comment"); Herb Pounds, Jr., Esq., dated August 23, 2010 ("Pounds comment"); Alan S. Brodherson, Esq., dated August 24, 2010 ("Brodherson comment"); Joseph Terry, dated August 24, 2010 ("Terry comment"); Mark James, dated August 24, 2010 ("James comment"); Jonathan W. Evans, Esq., and Michael S. Edmiston, Esq., Law Offices of Jonathan W. Evans & Associates, dated August 24, 2010 ("Evans and Edmiston comment"); G. Kirk Ellis, Esq., dated August 24, 2010 ("Ellis comment"); Jason R. Doss, Esquire, dated August 24, 2010 ("Doss comment"); Jenice L. Malecki, Esq., Malecki Law, dated August 24, 2010 ("Malecki comment"); Frances Ruby, dated August 24, 2010 ("Ruby comment"); Carrie L. Chelko, Esq., Janney Montgomery Scott LLC, dated August 24, 2010 ("Chelko comment"); Raymond W. Henney, Esq., Honigman Miller Schwartz and Cohn LLP, dated August 24, 2010 ("Henney comment"); Jonathan Kord Lagemann, Esq., dated August 24, 2010 ("Lagemann comment"); Brian N. Smiley, Esq., Smiley Bishop & Porter, LLP, dated August 24, 2010 ("Smiley comment"); Stanley Yorsz, Esq., Buchanan Ingersoll & Rooney PC, dated August 24, 2010 ("Yorsz comment"); Dominick F. Evangelista, Esq., Bressler, Amery & Ross, P.C., dated August 24, 2010 ("Evangelista comment"); Michael N. Ungar, Esq., Kenneth A. Bravo, Esq., Joseph S. Simms, Esq., and Jill Y. Coen, Esq., Ulmer & Berne LLP, dated August 24, 2010 ("Ulmer & Berne comment"); Barry D. Estell, Esq., dated August 24, 2010 ("Estell comment"); Richard A. Lewins, Esq., dated August 24, 2010 ("Lewins comment"); Robert M. Rudnicki, Esq., Raymond James Financial, Inc., dated August 24, 2010 ("Rudnicki comment"); Lee H. Schillinger, dated August 24, 2010 ("Schillinger comment"); Paula D. Shaffner, Esq., Stradley Ronon Stevens & Young, LLP, dated August 24, 2010 ("Shaffner comment"); Kelly J. Moynihan, Esq., Keesal, Young & Logan, dated August 24, 2010 ("Moynihan comment"); Richard L. Martens, Esq., Jason S. Haselkorn, Esq., Patricia M. Christiansen, Esq., Charles L. Pickett, Esq., Casey Ciklin Lubitz Martens & O'Connell, dated August 24, 2010 ("Casey Ciklin comment"); Peter J. Mougey, Esq., dated August 24, 2010 ("Mougey comment"); Rob Bleecher, Esq., dated August 24, 2010 ("Bleecher comment"); Scott R. Shewan, Esq., President, Public Investors Arbitration Bar Association, dated August 24, 2010 ("PIABA comment"); Bradford D. Kaufman, Esq., Greenberg Traurig, dated August 24, 2010 ("Kaufman comment"); William A. Jacobson, Esq., Associate Clinical Professor, Cornell Law School, and Director, Cornell Securities Law Clinic, dated August 24, 2010 ("Cornell comment"); S. Lawrence Polk, Esq., Sutherland Asbill & Brennan LLP, dated August 24, 2010 ("Polk comment"); John Cronin, Vermont Securities Director and Chair, NASAA Arbitration Project Group, dated August 25, 2010 ("NASAA comment"); Theodore M. Davis, Esq., dated August 25, 2010 ("Davis comment"); Eliot Goldstein, Esq., Law Offices of Eliot Goldstein, LLP, dated August 25, 2010 ("Goldstein comment"); Richard M. Layne, Esq., dated August 26, 2010 ("Layne comment"); Royal B. Lea, Esq., dated August 27, 2010 ("Lea comment"); Keith L. Griffin, Esq., Griffin Law Firm, LLC, dated August 27, 2010 ("Griffin comment"); Patricia Cowart, Esq., Chair, SIFMA Arbitration Committee, dated September 10, 2010 ("SIFMA comment"); Gail E. Boliver, Esq., dated September 16, 2010 ("Boliver comment"); Scott C. Ilgenfritz, Esq., Johnson, Pope, Bokor, Ruppel & Burns, LLP, dated September 24, 2010 ("Ilgenfritz comment"); Matthew Farley, Esq., Drinker Biddle & Reath LLP, dated September 24, 2010 ("Farley comment"); and Kathy A. Besmer, dated November 6, 2010 ("Besmer comment").

³ See the Caruso, Bakhtiari, Cox, Pounds, Doss, Malecki, Smiley, Lewins, Rudnicki, Mougey, PIABA, Cornell, SIFMA, Boliver, and Ilgenfritz comments.

commenters oppose the proposal,⁴ and four commenters address specific aspects of the proposal without expressing a position on whether the SEC should approve the proposed rule change.⁵ FINRA appreciates the thoughtful comments submitted to the SEC and is proposing several revisions in response to the comments. The proposed rule text, as amended by this filing, is attached.

As stated in its rule filing, for over six years FINRA worked closely with its constituents, including investor and industry representatives, arbitrators, and attorneys that handle investor claims at securities arbitration clinics, to develop the current proposal. The proposed Guide is comprised of language that was discussed at length with these constituents and crafted to balance the parties' discovery needs with the goal of keeping FINRA arbitration efficient and cost effective. Therefore, FINRA is limiting, for the most part, additional revisions to the proposed rule change to those that add clarity and/or guidance to the proposal. If the SEC approves the proposed rule change, FINRA will establish a Discovery Task Force under the auspices of FINRA's National Arbitration and Mediation Committee⁶ that will review substantive issues relating to the Guide on an on-going basis, with an eye towards keeping the Guide current as products change and new discovery issues arise.⁷ FINRA would convene the Task Force approximately six months after implementing the revised Guide in order to allow practitioners time to gauge the efficacy of the new Guide.

FINRA addresses a number of comments relating to the Guide's introduction and Lists below.

⁴ See the Lipner, Steiner, Port, McCauley, Nygaard, Gard, Shaw, Neuman, Krebsbach, Krosschell, Brodherson, Terry, James, Evans and Edmiston, Ellis, Ruby, Chelko, Lagemann, Yorsz, Evangelista, Ulmer & Berne, Estell, Schillinger, Shaffner, Moynihan, Casey Ciklin, Blecher, Kaufman, NASAA, Davis, Goldstein, Layne, Lea, Griffin, Farley, and Besmer comments.

⁵ See the Stephens, Wallis, Henney, and Polk comments.

⁶ The National Arbitration and Mediation Committee is a majority public committee made up of attorneys who represent investors, attorneys who represent brokerage firms, arbitrators, and mediators.

⁷ In its comment, PIABA urged the SEC to adopt the proposed rule change stating that "the proposed Guide will better protect investors' rights during the arbitration process, potentially discourage abusive tactics, and instill greater public confidence in the FINRA arbitration process." PIABA also stated that in the future, it hoped FINRA would regularly review the Guide with a view to its constant improvement.

Guide Introduction

Arbitrator Discretion – Commenters expressed concerns that arbitrators may adhere strictly to the Lists when making discovery decisions and may not use the flexibility the Guide provides to them.⁸ FINRA wants arbitrators to be aware of the flexibility they have when asked to decide discovery disputes. Therefore, FINRA proposed revisions to the introduction which state that in addition to being able to order production of documents not provided for by the Lists, arbitrators can order that parties do *not* have to produce items on the Lists. FINRA also added guidance on how arbitrators should handle objections based on cost or burden of production. In response to the commenters' concerns, FINRA is proposing an additional amendment to the introduction that would state that arbitrators must use their judgment in considering requests for documents beyond those contained in the Lists and may not deny document requests on the grounds that the documents are not expressly listed in the Guide. In addition to expanding the language in the Guide, if the SEC approves the proposed rule change, FINRA will revise the Arbitrator's Reference Guide, which is posted on the FINRA website, to include a discussion on how arbitrators should use the new Guide. FINRA will also update its arbitrator training materials to ensure that FINRA makes arbitrators aware of the revisions. Finally, FINRA will offer training on the revised Guide in a workshop that FINRA will post as an audio file on its website after the SEC approves the proposed rule change.

Firm Business Models/Customer Claims – The Guide contains two Lists, one enumerating documents to be produced by firms/associated persons, and one enumerating documents to be produced by customers. In the proposed rule change, FINRA added language to the introduction stating that parties and arbitrators should recognize that not all firms have the same business models and that certain items on the Lists may not be relevant in a particular case when the firm's business model (e.g. full service firm, discount broker, or online broker) is taken into consideration. In response to the proposal, commenters requested that FINRA add "clearing firm" to the parenthetical which cites examples of business models.⁹ FINRA agrees that adding "clearing firm" to the parenthetical would be helpful to parties and arbitrators and is proposing to amend the parenthetical as suggested. FINRA is also proposing to replace the phrase "be relevant in" with the phrase "apply to" because "apply to" more precisely conveys the meaning of the sentence. Finally, commenters asked for new language indicating that items on the Customer List may not apply in a particular case depending on the claims asserted.¹⁰ FINRA believes that adding this guidance

⁸ See the Lipner, Krebsbach, Evans and Edmiston, Shaffner, Bleacher, Griffin, Henney, NASAA, Yorsz, Goldstein, and Farley comments.

⁹ See SIFMA and Farley comments. The Farley comment also asked FINRA to add "prime-brokerage firm" to the parenthetical. FINRA believes that adding "clearing firm" to the parenthetical will add sufficient clarity for the Guide's users and is not proposing to add "prime-brokerage firm" at this time.

¹⁰ See PIABA and Caruso comments.

regarding customers makes sense, and is proposing to make the suggested amendment.

Electronic Files – In the proposed rule change, FINRA included language stating that electronic files are “documents” within the meaning of the Discovery Guide. Commenters asserted that FINRA should include additional guidance concerning electronic files.¹¹ FINRA understands that issues relating to electronic discovery are becoming more prevalent and intends to recommend that the Discovery Task Force include the topic on its agenda. However, FINRA is not proposing any additional revisions concerning electronic discovery at this time.

Privilege – Several commenters raised concerns that List items might require production of privileged documents.¹² One commenter asserted that parties raise objections based on unspecified or unrecognized privileges.¹³ Based on these comments, FINRA believes that additional guidance on privileges would be helpful to parties and arbitrators and is proposing to add language to the introduction to state that parties are not required to produce documents that are otherwise subject to an established privilege, including the attorney-client privilege and attorney work product doctrine.

Enforcing Document Production – Commenters raised concerns about arbitrators enforcing the discovery rules, including imposing sanctions for party failure to comply with discovery rules.¹⁴ FINRA believes that the appropriate places to address the arbitrators’ duty to enforce discovery requirements are the Code of Arbitration Procedure and FINRA’s training materials. FINRA trains arbitrators concerning the discovery rules and available sanctions. To reinforce the training, FINRA included a discussion in the revised Arbitrator’s Reference Guide (to be posted to FINRA’s website in the coming weeks), which addresses discovery obligations and discusses sanctions.

¹¹ See Yorsz and Martens comments.

¹² See Krosschell, Pounds, Evans and Edmiston, Schillinger, PIABA, Polk, Layne, SIFMA, Farley, and Chelko comments.

¹³ See Estell comment.

¹⁴ See the Krebsbach, Lewins, PIABA, and Boliver comments.

Document Production Lists

Eliminating the Guide – Several commenters asserted that FINRA should eliminate the Guide.¹⁵ FINRA disagrees with the commenters. Experience with the current Guide since its inauguration in 1999 indicates that document production Lists help parties obtain the documents they need to develop a case. FINRA believes that the proposed rule change, which incorporated user feedback after years of experience with the Guide, will improve the discovery process for customers and firms/associated persons.

Production Burden – Several commenters asserted that document production under the Guide is burdensome to investors.¹⁶ Others raised concerns about the burdens imposed on firms/associated persons.¹⁷ FINRA created the Guide to facilitate the exchange of the kinds of documents that parties routinely sought during discovery and that arbitrators regularly ordered produced. The proposed revisions reflect experience gained over the years since FINRA implemented the Guide. FINRA acknowledges that balancing the desire to provide parties with the documents they need to prepare their cases with a desire to minimize production burdens is challenging. But based on years of experience with the Guide and constituent feedback, FINRA believes that the proposed rule change strikes the appropriate balance.

Two List Format – Several commenters objected to FINRA consolidating the Lists from 14 claim-specific lists to two Lists (one for firms/associated persons and one for customers) citing, among other objections, additional production burdens and the potential for producing documents that are not needed in every case.¹⁸ FINRA proposed the consolidation in response to customer representatives suggesting that FINRA eliminate the Lists for specific types of claims since customers are not required to plead causes of action under the Customer Code.¹⁹ Along with consolidating the Lists, FINRA proposed expanding the guidance it gives to

¹⁵ See the Lipner, McCauley, Gard, Terry, Evans and Edmiston, and Bleecher comments.

¹⁶ See the Lipner, McCauley, Neuman, Krebsbach, James, Evans and Edmiston, Doss, Ruby, Smiley, Estell, Mougey, Bleecher, NASAA, Davis, Layne, and Ilgenfritz comments.

¹⁷ See the Cox, Krebsbach, Chelko, Evangelista, Ulmer & Berne, and Farley comments.

¹⁸ See the Port, Cox, Shaw, Krebsbach, Brodherson, Chelko, Yorsz, Shaffner, Martens, Ulmer & Berne, and SIFMA comments.

¹⁹ In 2008, FINRA filed a proposed rule change with the SEC to update the Guide (SR-FINRA 2009-024). FINRA subsequently withdrew the filing and began working on a new proposal. FINRA incorporated many of the suggestions made in the comment letters into the new proposal, including the suggestion that FINRA consolidate the lists.

arbitrators in the Guide's introduction on how to handle discovery issues so that arbitrators understand that they may tailor the Guide to unique circumstances that arise in arbitration cases. FINRA believes the consolidation will better serve forum users and will ultimately reduce the number and limit the scope of disputes involving document production.

Time Periods/Scope of Production – Several commenters objected to the time periods specified in List items.²⁰ Investor and industry representatives that collaborated with FINRA on the proposed rule change considered each List item on its own merits and discussed, over several meetings, the time periods for each item. Given the effort that went into determining appropriate time periods for production, FINRA is not proposing to amend any of the time periods in the proposed rule change. The Discovery Task Force may choose to revisit the time periods for production of certain documents after forum users have gained experience with the revised Guide.

Product Cases – Several commenters raised concerns that the Guide does not sufficiently address claims that assert a flaw in a specific security, or “product.”²¹ One commenter believes that the Guide should not address specific products.²² FINRA believes that product cases are an appropriate subject for the Discovery Task Force and intends to suggest that the Task Force consider the topic.

Distinguishing Customer Parties from Other Customers – Commenters asked FINRA to revise the List items to distinguish between customers that are parties to the case and other firm/associated person customers.²³ FINRA believes that making such a distinction in List items would add clarity to the Guide. Therefore, FINRA is proposing to amend the preamble to the Lists to state that, throughout the Lists, FINRA will refer to customers that are parties to an arbitration case as “customer parties” and other firm/associated persons’ customers as “customers.”

²⁰ See Stephens, Caruso, Krosschell, Pounds, Evans and Edmiston, Smiley, Ulmer & Berne, Estell, Rudnicki, Shillinger, Shafner, Mougey, PIABA, Cornell, Davis, Goldstein, Layne, SIFMA, Boliver, and Farley comments. Commenters asserted, among other objections, that time periods were too short, or too long, or were not consistent between customers and firms/associated persons.

²¹ See the Lipner, Baktiari, Malecki, Mougey, and Goldstein comment.

²² See Krebsbach comment.

²³ See SIFMA and Rudnicki comments.

Accounts or Transactions at Issue – In several items in the Guide, the firm/associated person is required to produce documents relating to the accounts or transactions at issue.²⁴ FINRA is proposing to expand the guidance concerning these items by amending them to require production of items relating to the claims, accounts, transactions, or products or types of products at issue.

Proposed Revisions to Individual List Items

In addition to the amendments proposed immediately above, FINRA is proposing a number of revisions that are specific to individual items on the Lists.

List 1 – Documents the Firm/Associated Persons Shall Produce in All Customer Cases

List 1, Item 2 – As filed, this item requires production of all correspondence sent to customers or received by the firm/associated persons specifically relating to the accounts or transactions at issue including, but not limited to, documents relating to asset allocation, diversification, trading strategies, and market conditions; and all advertising materials sent to customers of the firm that refer to the securities and/or account types that are at issue. (Unless separately requested, the firm/associated persons need not produce confirmation slips and monthly statements.) FINRA is proposing to make several changes to this item that clarify the language and expand the guidance to parties and arbitrators. Pursuant to the proposed amendment, the item would require production of all correspondence sent to the customer parties or received by the firm/associated persons relating to the claims, accounts, transactions, or products or types of products at issue including, but not limited to, documents relating to asset allocation, diversification, trading strategies, and market conditions; and all advertising materials sent to customers of the firm that refer to the products and/or account types that are at issue or that were used by the firm/associated persons to solicit or provide services to the customer parties. (In addition, if requested, the firm/associated persons shall produce confirmation slips and monthly statements. Even if not requested, the firm/associated persons must produce confirmation slips and monthly statements that have handwritten notations or that are not identical to those the firm sent to the customer parties.)

List 1, Item 4 – Currently, for claims alleging unauthorized trading, the Guide provides that firms/associated persons must produce order tickets for the customers' transactions at issue. FINRA proposed to delete this requirement stating that production of order tickets is burdensome and evidence relating to whether the claimants authorized a particular transaction would be produced under proposed List 1, Items 4, 6, and 8. Several commenters objected to the deletion stating, among other things, that order tickets provide evidence of whether a trade was solicited or unsolicited, whether a trade was reviewed and approved by

²⁴ See List 1, items 2, 7, 9, 11, 12, 13, and 17.

supervisory personnel, and the time that an order was entered.²⁵ FINRA finds the comments persuasive, and is proposing to amend the item to restore the requirement that firms produce order tickets for the customer parties' transactions at issue in cases alleging unauthorized trading. FINRA believes that the arbitrators can effectively address issues of burden on a case by case basis.

List 1, Item 5(a) – As filed, this item requires production of all materials the firm and/or associated persons prepared or used and/or provided to the customers relating to the transactions or products at issue, including research reports, sales materials, performance or risk data, prospectuses, and other offering documents, including documents intended or identified as being "for internal use only." FINRA is proposing to provide additional guidance to parties and arbitrators by amending the item to include copies of news articles or outside research.²⁶

List 1, Item 6 – As filed, this item requires production of all notes the firm/associated persons made, including, but not limited to, entries in any diary or calendar, relating to the customers and/or the customers' accounts or transactions at issue. FINRA is proposing to clarify this item by amending it to require production of all notes the firm/associated persons made relating to the customer parties and/or the customer parties' claims, accounts, transactions, or products or types of products at issue, including, but not limited to, entries in any diary or calendar, relating to the claims or products at issue.

List 1, Item 7(a) – As filed, this item requires production of all notes or memoranda evidencing supervisory, compliance, or managerial review of the customers' accounts or trades therein for the period at issue. FINRA is proposing to amend this item to expand the guidance provided to parties and arbitrators by requiring production of all notes or memoranda evidencing supervisory, compliance, or managerial review of the customer parties' accounts or transactions therein or of the associated persons assigned to the customer parties' accounts for the period at issue.

List 1, Item 14 – As filed, this item requires production of portions of internal audit reports for the branch in which the customers maintained accounts that "focused on" associated persons or the accounts or transactions at issue. FINRA is proposing to add clarity to this item by replacing "focused on" with "concern."²⁷

²⁵ See the Stephens, Caruso, Nygaard, Krosschell, Evans and Edmiston, Schillinger, Layne, and Pounds comments.

²⁶ See Estell comment relating to news articles or outside research.

²⁷ See Estell comment relating to the term "focused on."

List 1, Item 15 – As filed, this item requires production of records of disciplinary action taken against associated persons by any regulator or employer for all sales practice violations or conduct similar to the conduct alleged in the Statement of Claim. FINRA is proposing to add clarity to the item by including the same parenthetical reference to “state, federal or self-regulatory organization” that FINRA uses in other items in the Guide referencing regulators.

List 2 – Documents the Customer Parties Shall Produce in All Customer Cases

List 2, Item 1 – As filed, this item (relating to customer tax documents) states that customers may redact information relating to medical and dental expenses and the names of charities on Schedule A unless the information is related to the allegations in the Statement of Claim. The statement is followed by language indicating that income tax returns must be identical to those that were filed with the Internal Revenue Service. To add clarity to the item, FINRA is proposing to move the sentence indicating that tax returns must be identical so that it appears immediately above the statement permitting redaction of the returns.

List 2, Item 4 – This item concerns the customers’ accounts at firms that are not parties to the matter. FINRA is proposing to add clarity to the item by distinguishing between non-party firms and party firms.

List 2, Item 8 – This item relates to telephone records. In the proposed rule change, FINRA stated that it is not proposing any substantive changes to the item. That statement requires clarification.²⁸ In the current Guide, customers are required to produce certain documents relating to telephone records only when alleging unauthorized trading. In the proposed rule change, customers would be required to produce those documents in every case. Therefore, FINRA is indeed proposing more than a ministerial change – to require production of the enumerated documents in every case.

List 2, Item 17 – As filed, this item requires production of documents showing the customers’ complete educational and employment background or, in the alternative, a description of the customers educational and employment background if not set forth in resumes produced under item 16. FINRA is proposing to clarify this item by revising it to require production of any existing description of the customer parties’ educational and employment background if not set forth in resumes produced under item 16.

²⁸ In its comment, PIABA questioned whether there was an error in the rule text of List 2, Item 8(b) because it did not limit production to claims alleging unauthorized trading.

List 2, Item 19 – This item concerns insurance products that provide a death benefit. As filed, it requires customers to produce all insurance information received from an insurance sales agent or securities broker relating to such insurance. FINRA is proposing to add clarity to the item by deleting the reference to “insurance” before “information.”

Typographical Errors

FINRA is proposing to correct the following typographical errors:

- replace “social security” with “Social Security” (initial capitalization) throughout the Guide;
- in List 1, Item 10, add “the” before “filing” and “s” to the last “customer” referred to in the item;
- in List 1, Item 17, delete the apostrophe after “persons”;
- in List 1, Item 18 and List 2 Items 4, 5, 6, and 7, delete the reference to “respondent” before firm/associated persons because the firm/associated person may be a claimant in the matter; and
- in List 1, Item 20(b), replace “this” before “claim” with “the.”

FINRA believes that the proposed revisions to the Guide will improve the arbitration process for all forum users and requests that the SEC approve the proposed rule change.

If you have any questions, please contact me by telephone at (212) 858-4481 or email at margo.hassan@finra.org.

Very truly yours,

Margo A. Hassan
Assistant Chief Counsel
FINRA Dispute Resolution

ATTACHMENT

TEXT OF PROPOSED RULE CHANGE

Proposed new language is underlined; proposed deletions are in brackets.

DISCOVERY GUIDE

This Discovery Guide and Document Production Lists supplement the discovery rules contained in the FINRA Code of Arbitration Procedure for Customer Disputes (“Customer Code.”) (See Rules 12505-12511.)

No requirement under the Discovery Guide supersedes any record retention requirement of any federal or state law or regulation or any rule of a self-regulatory organization.

The Discovery Guide, including the Document Production Lists (Lists), serves as a guide for the parties and the arbitrators. While the parties and arbitrators should consider the documents described in the Lists presumptively discoverable, the parties and arbitrators retain their flexibility in the discovery process. Arbitrators can: order the production of documents not provided for by the Lists; order that parties do not have to produce certain documents on the Lists in a particular case; and alter the production schedule described in the 12500 series of rules. Where additional documents are relevant in a particular case, parties can seek them in accordance with the time frames provided in the 12500 series of rules. A party may object to

producing a document on a List because of the cost or burden of production. If the party demonstrates that the cost or burden is disproportionate to the need for the document, the arbitrators should determine if the document is relevant or likely to lead to relevant evidence. If the arbitrators determine that the document is relevant or likely to lead to relevant evidence, they should consider whether there are alternatives that can lessen the impact, such as narrowing the time frame or scope of an item on the Lists, or determining whether another document can provide the same information. Arbitrators must use their judgment in considering requests for additional documents and may not deny document requests on the grounds that the documents are not expressly listed in the Discovery Guide.

Nothing in the Discovery Guide precludes the parties from voluntarily agreeing to an exchange of documents in a manner different from that set forth in the Discovery Guide. FINRA encourages the parties to agree to the voluntary exchange of documents and to stipulate to various matters. The fact that an item appears on the Lists does not shift the burden of establishing or defending any aspect of a claim.

Only named parties must produce documents pursuant to the guidelines set forth herein. However, non-parties may be required to produce documents pursuant to a subpoena or an arbitration panel order to direct the production of documents (see Rule 12513). In addition, the arbitrators may use the Lists as guidance for discovery issues involving non-parties.

Parties and arbitrators should recognize that not all firms have the same business operations model and certain items on the Lists may not [be relevant in] apply to a particular case when the firm’s business model (e.g. full service firm, discount broker, clearing firm, or online broker) is taken into consideration. In addition, certain items on the Customer List may not apply to a particular case depending on the claims asserted. Absent a written objection or party agreement, the parties shall exchange documents on the Lists within the time frames set forth in the Customer Code. Parties should raise any objections to the production of documents, based on an established privilege, in accordance with the time frames for objections set forth in the Customer Code.

Electronic files are “documents” within the meaning of the Discovery Guide. The arbitrators shall decide any dispute that arises concerning the form in which a document will be produced.

Confidentiality

If a party objects to document production on grounds of privacy or confidentiality, the arbitrators or one of the parties may suggest a stipulation between the parties that the documents in question will not be disclosed or used in any manner outside of the arbitration of the particular case, or the arbitrators may issue a confidentiality order. When deciding contested requests for confidentiality orders, arbitrators should consider the competing interests of the parties. The party asserting confidentiality has the burden of establishing that the documents in question require

confidential treatment. In deciding questions about confidentiality, arbitrators should, taking into account the facts of a particular case, consider factors such as the following:

1. Whether the disclosure would constitute an unwarranted invasion of personal privacy (e.g., an individual's [s]Social [s]Security number, or medical information).
2. Whether there is a threat of harm attendant to disclosure of the information.
3. Whether the information contains proprietary confidential business plans and procedures or trade secrets.
4. Whether the information has previously been published or produced without confidentiality or is already in the public domain.
5. Whether an excessively broad confidentiality order could be against the public interest or could otherwise impede the interests of justice.
6. Whether there are legal or ethical issues which might be raised by excessive restrictions on the parties.

Privileged Documents

Parties are not required to produce documents that are otherwise subject to an established privilege, including the attorney-client privilege and the attorney work product doctrine. The arbitrators shall not issue an order or use a confidentiality agreement to require parties to produce documents otherwise subject to an established privilege, including attorney work product.

Affirmation in the Event that There Are No Responsive Documents

If a party responds that there are no responsive documents in the party's possession, custody, or control, the customer or the appropriate person in the brokerage firm who has knowledge, upon the request of the party seeking the documents, must: 1) state in writing that the party conducted a good faith search for the requested documents; 2) describe the extent of the search; and 3) state that, based on the search, there are no requested documents in the party's possession, custody, or control. In appropriate cases, the arbitrators may order *a party to provide* such affirmations regarding discovery requests for documents beyond those contained in the Discovery Guide.

No Obligation to Create Documents

Parties are not required to create documents in response to items on the Lists that are not already in the parties' possession, custody, or control.

Admissibility

Production of documents in discovery does not create a presumption that the documents are admissible at the hearing. A party may object to the introduction of any document as evidence at the hearing to the same extent that a party can raise any other objection at an arbitration hearing.

Document Production Lists

Throughout the Lists, FINRA refers to customers that are parties to an arbitration case as “customer parties” and other firm/associated persons’ customers as “customers.” [This] The Guide provides separate Lists for firms/associated persons and for customer parties. For ease of reference, throughout the Lists, the terms “customer parties,” “customers,” “documents,” “associated persons,” “accounts,” “claims” and “transactions” include the singular terms “customer party,” “customer,” “document,” “associated person,” “account,” “claim” and “transaction,” respectively. In addition, unless otherwise specifically stated, the term “firm” refers to a firm that is a party to the arbitration case.

* * *

DOCUMENT PRODUCTION LISTS

LIST 1

Documents the Firm/Associated Persons Shall Produce in All Customer Cases

- 1) (a) The account record information for the customer parties, including the customer parties’ name, tax identification number, address, telephone number, date of birth, employment status, annual income, net worth, and the account’s investment objectives.
- (b) All documents concerning the customer parties’ risk tolerance.

(c) All agreements with the customer parties, including, but not limited to, account opening documents and/or forms; cash, margin, option, and discretionary authorization agreements; trading authorizations; and powers of attorney.

2) All correspondence sent to the customer parties or received by the firm/associated persons [specifically] relating to the claims, accounts [or] transactions, or products or types of products at issue including, but not limited to, documents relating to asset allocation, diversification, trading strategies, and market conditions; and all advertising materials sent to customers of the firm that refer to the [securities] products and/or account types that are at issue or that were used by the firm/associated persons to solicit or provide services to the customer parties. ([Unless separately] In addition, if requested, the firm/associated persons [need not] shall produce confirmation slips and monthly statements. Even if not requested, the firm/associated persons must produce confirmation slips and monthly statements that have handwritten notations or that are not identical to those the firm sent to the customer parties.)

3) All documents evidencing any investment or trading strategies utilized or recommended in the customer parties' accounts, including, but not limited to, options programs, and any supervisory review of such strategies.

4) For claims alleging unauthorized trading, all documents the firm/associated persons relied upon to establish that the customer parties authorized the transactions at issue,

[and] all documents relating to the customer parties' authorization of the transactions at issue, and all order tickets for the customer parties' transactions at issue.

5) (a) All materials the firm and/or associated persons prepared or used and/or provided to the customer parties relating to the transactions or products at issue, including research reports, sales materials, performance or risk data, prospectuses, [and] other offering documents, and copies of news articles or outside research, including documents intended or identified as being "for internal use only."

(b) All worksheets or notes indicating that the associated persons reviewed or read such documents.

6) All notes the firm/associated persons made relating to the customer parties and/or the customer parties' claims, accounts, transactions, or products or types of products at issue, including, but not limited to, entries in any diary or calendar, relating to the claims or products at issue [customers and/or the customers' accounts or transactions at issue].

7) (a) All notes or memoranda evidencing supervisory, compliance, or managerial review of the customer parties' accounts or [trades] transactions therein or of the associated persons assigned to the customer parties' accounts for the period at issue.

(b) All correspondence between the customer parties and firm/associated persons relating to the customer parties' claims, accounts, [or] transactions, or products or

types of products at issue bearing indications of managerial, compliance, or supervisory review of such correspondence.

8) All recordings, telephone logs, and notes of telephone calls or conversations about the transactions at issue that occurred between the associated persons and the customer parties (and any person purporting to act on behalf of the customer parties), and/or between the firm and the associated persons.

9) All writings reflecting communications between the associated persons assigned to the customer parties' accounts at issue during the time period at issue and members of the firm's compliance department relating to the securities/products at issue and/or the customer parties' claims, accounts or transactions.

10) All Forms RE-3, U-4, and U-5 and Disclosure Reporting Pages, including all amendments, for the associated persons assigned to the customer parties' accounts at issue during the time period at issue, redacted to delete associated persons' [s]Social [s]Security numbers, all customer complaints identified in such forms, and all customer complaints filed against the associated persons that were generated not earlier than three years prior to the first transactions at issue through the filing of the Statement of Claim, redacted to prevent the disclosure of non-public personal information of the complaining customers.

11) All sections for all of the firm's manuals and all updates thereto relating to the claims alleged in the Statement of Claim for all years in which the Statement of Claim alleges that the conduct occurred, including separate or supplemental manuals governing the duties and responsibilities of the associated persons and supervisors, all bulletins (or similar notices) the firm issued for all years in which the Statement of Claim alleges that the conduct occurred, and the entire table of contents and index to each such manual or bulletin. In responding to this request, the firm must provide a list of all of its manuals and bulletins which may contain directives related to the conduct, claims, or product or types of products at issue in the claim.

12) All analyses and reconciliations of the customer parties' accounts prepared during the time period at issue, including, without limitation, those relating to reviews of the customer parties' claims, accounts [or] transactions, or the product or types of products at issue.

13) (a) All exception reports, supervisory activity reviews, concentration reports, active account runs and similar documents produced to review for activity in the customer parties' accounts related to the allegations in the Statement of Claim or in which the claims, transactions, products or types of products at issue are referenced or listed.

(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.

14) Those portions of internal audit reports for the branch in which the customer parties maintained accounts that: (a) [focused on] concern 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.

15) Records of disciplinary action taken against associated persons by any regulator (state, federal or self-regulatory organization) or employer for all sales practice violations or conduct similar to the conduct alleged in the Statement of Claim.

16) All investigations, charges, or findings by any regulator (state, federal or self-regulatory organization) and the firm/associated persons' responses to such investigations, charges, or findings for the associated persons' alleged improper behavior similar to that alleged in the Statement of Claim.

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 customer parties' claims,

accounts or transactions, or the product or types of products 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.

18) All documents related to the case at issue that [respondent] the firm/associated persons received by subpoena under Rule 12512 or by document request directed to third parties at any time during the case.

19) For all transactions at issue in the Statement of Claim, documentation showing the compensation, gross and net, to the associated persons for such transactions. In the event accounts at issue are the subject of fee arrangements that are not based on remuneration per trade, a record showing compensation earned by period on the accounts.

20) (a) For claims related to solicited trading activity, a record of all compensation, monetary and non-monetary, including, but not limited to, monthly commission runs for the associated persons, listing the securities traded, dates traded, whether the trades were solicited or unsolicited, and the gross and net commission from each trade. The firm shall provide this information for a period of time beginning three months before and ending three months after the trades at issue in the customer parties'[s] accounts.

(b) The firm may redact names and other non-public personal information concerning customers who are not parties to [this] the claim, but should provide sufficient information to identify: (1) the non-party customers' accounts, including the last four digits of the non-party customers' account numbers; (2) the associated persons' own and related accounts, including the last four digits of the associated persons' account numbers; and (3) the type of account (IRA, 401(k), etc.).

21) (a) A record of all agreements pertaining to the relationship between the associated persons and the firm, summarizing the associated persons' compensation arrangement or plan with the firm, including:

- Commission and concession schedules;
- Bonus or incentive plans including those relating to deferred compensation;
and
- Schedules showing compensation received or to be received based upon volume, type of product, nature of trade (*agency v. principal*), etc.

(b) To the extent that compensation is based on factors other than remuneration per trade, the method by which the compensation was determined.

22) If the Statement of Claim includes allegations regarding an insurance product that includes a death benefit, the firm and/or associated persons must provide all

information concerning the customer parties' insurance holdings and the recommendations, if any, to the customer parties regarding insurance products.

LIST 2

Documents the Customer Parties Shall Produce in All Customer Cases

- 1) All customer party and customer party owned business (including partnership, corporate) federal income tax returns the customer parties filed, limited to pages 1 and 2 of Form 1040, Schedules A, B, D, and E, and the IRS worksheets related to these schedules, or the equivalent for any other type of return, redacted to delete the customer parties' [s]Social [s]Security numbers, for the three years prior to the first transactions at issue in the Statement of Claim through the date the Statement of Claim was filed. The income tax returns must be identical to those that were filed with the Internal Revenue Service. The customer parties may redact information relating to medical and dental expenses and the names of charities on Schedule A unless the information is related to the allegations in the Statement of Claim. [The income tax returns must be identical to those that were filed with the Internal Revenue Service.]

- 2) Financial statements, including statements within a loan application, or similar statements of the customer parties' assets, liabilities, and/or net worth for the period covering the three years prior to the first transactions at issue in the Statement of Claim through the date the Statement of Claim was filed. Customer parties are not required to create financial statements in order to comply with this item.

3) All documents the customer parties received from the firm/associated persons and from any entities in which the customer parties invested through the firm/associated persons, including account opening documents and/or forms, prospectuses, research reports, annual and periodic reports, and correspondence. Unless contending non receipt of periodic account statements and/or confirmations sent in the ordinary course of business, the customer parties may satisfy the production requirements for these items by stipulating to the receipt of all such periodic account statements and confirmations, but must produce those periodic account statements and confirmations that have handwritten notations or that are not identical to those the firm sent.

4) All account statements for each non-party securities firm where the customer parties have maintained an account for the three years prior to the first transactions at issue in the Statement of Claim through the date the Statement of Claim was filed. In the alternative, the customer parties shall provide a written authorization allowing the [respondent] firm/associated persons to obtain the account statements directly from each non-party securities firm. If the customer parties elect to provide written authorization to the firm/associated persons to obtain the account statements, the customer parties must also provide all account statements in the customer parties' possession, custody, or control containing handwritten notes or that are not identical to those the firm sent.

- 5) All documents, including agreements and forms, relating to accounts at the [respondent] firm or transactions with the [respondent] firm.
- 6) All account analyses and reconciliations prepared by or for the customer parties relating to the customer parties' accounts at the [respondent] firm or transactions with the [respondent] firm during the time period at issue.
- 7) All notes, including entries in diaries or calendars, relating to accounts at the [respondent] firm or transactions at issue with the [respondent] firm.
- 8) (a) All recordings and notes or logs of telephone calls or conversations about the customer parties' accounts or transactions at issue that occurred between the associated persons and the customer parties (and any person purporting to act on behalf of the customer parties).
- (b) All telephone records evidencing telephone contact between the customer parties and the firm/associated persons.
- 9) All correspondence the customer parties (or any person acting on behalf of the customer parties) sent or received relating to the accounts or transactions at issue.
- 10) Previously prepared written statements by persons with knowledge of the facts and circumstances related to the accounts or transactions at issue, including those by

accountants, tax advisors, financial planners, associated persons, and any other third party.

11) (a) All complaints/Statements of Claim and answers filed in all civil actions involving securities matters and securities arbitration proceedings in which the customer parties have been a party, and all final decisions or awards or non-confidential settlements entered in these matters through the date the Statement of Claim was filed.

(b) If a person is a party to a confidential settlement agreement that by its terms does not preclude identification of the existence of the settlement agreement, the party shall identify the documents comprising the confidential settlement agreement. Although not presumptively discoverable, a confidential settlement agreement may be obtained with an order from the panel.

12) Documents showing the customer parties' ownership in or control over any business entity, including general and limited partnerships and closely held corporations. If the customer parties are Trustees, provide documents showing the accounts over which the customer parties have trading authority.

13) All documents the customer parties received, including documents found through the customer parties' own efforts, relating to the investments at issue in the Statement of Claim.

14) For claims alleging unauthorized trading, all documents the customer parties relied upon to show that the customer parties did not know about or consent to the transactions at issue.

15) All materials the customer parties received or obtained from any source relating to the claims, transactions or products at issue, and all materials the customer parties received from any source relating to other investment opportunities, including research reports, sales literature, performance or risk data, prospectuses, and other offering documents, including documents intended or identified as being “for internal use only,” and worksheets or notes.

16) The customer parties’ resumes.

17) [Documents showing the customers complete educational and employment background or, in the alternative, a] Any existing description of the customer parties’ educational and employment background if not set forth in resumes produced under item 16.

18) All documents related to the case at issue that the customer parties received by subpoena under Rule 12512 or by document request directed to third parties at any time during the case.

19) To the extent that an insurance product that provides a death benefit is included in the Statement of Claim, the customer parties shall provide all [insurance] information received from an insurance sales agent or securities broker relating to such insurance.

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12506. Document Production Lists

(a) Applicability of Document Production Lists

When the Director serves the statement of claim, the Director will notify parties of the location of the FINRA Discovery Guide and Document Production Lists on FINRA's Web site, but will provide a copy to the parties upon request. Document Production Lists 1 and 2 describe the documents that are presumed to be discoverable in all arbitrations between a customer and a member or associated person.

(b) Time for Responding to Document Production Lists

(1) Unless the parties agree otherwise, within 60 days of the date that the answer to the statement of claim is due, or, for parties added by amendment or third party claim, within 60 days of the date that their answer is due, parties must either:

- Produce to all other parties all documents in their possession or control that are described in Document Production Lists 1 and 2;

- Identify and explain the reason that specific documents described in Document Production Lists 1 and 2 cannot be produced within the required time, and state when the documents will be produced; or
- Object as provided in Rule 12508.

(2) No change.

(c) No change.

* * *

12508. Objecting to Discovery; Waiver of Objection

(a) If a party objects to producing any document described in Document Production Lists 1 or 2 or any document or information requested under Rule 12507, it must specifically identify which document or requested information it is objecting to and why. Objections must be in writing, and must be served on all other parties at the same time and in the same manner. Objections should not be filed with the Director. Parties must produce all applicable listed documents, or other requested documents or information not specified in the objection.

(b)-(c) No change.

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