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July 11, 2013

VIA ELECTRONIC SUBMISSION

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

Re: File No. SR-FINRA-2013-024 – Proposed Rule Change Relating to Amendments to the Discovery Guide Used in Customer Arbitration Proceedings

Dear Ms. Murphy:

The Investor Rights Clinic at Pace Law School, operating through John Jay Legal Services, Inc. ("PIRC"),[1] welcomes the opportunity to comment on FINRA's proposed amendments to the Discovery Guide used in customer arbitration proceedings ("Guide").

E-Discovery

Generally, PIRC supports FINRA's proposal because it provides parties with additional guidance with respect to electronic discovery, given that other forums such as state and federal courts provide more detailed guidelines and even rules governing e-discovery among parties. In light of the vast differences between arbitration and litigation, however, the e-discovery rules applicable in court should not be adopted wholesale by FINRA arbitrators. Rather, guidelines that take into account the need for a more efficient, lower cost process are more appropriate in FINRA arbitration.

Specifically, PIRC supports the proposed language directing that parties produce electronic files in a reasonably usable format, as it will lead to more meaningful and useful e-discovery. However, while large institutions may find electronic production of documents efficient and economical, PIRC urges FINRA to train its arbitrators that customers of limited means may have difficulty producing documents in any format other than hard copy.

[1] PIRC opened in 1997 as the nation's first law school clinic in which J.D. students, for academic credit and under close faculty supervision, provide pro bono representation to individual investors of modest means in arbitrable securities disputes. *See* Barbara Black, Establishing A Securities Arbitration Clinic: The Experience at Pace, 50 J. LEGAL EDUC. 35 (2000); *see also* Press Release, Securities Exchange Commission, SEC Announces Pilot Securities Arbitration Clinic To Help Small Investors - Levitt Responds To Concerns Voiced At Town Meetings (Nov. 12, 1997), available at http://www.sec.gov/news/press/pressarchive/1997/97-101.txt.

Cost or Burden of Production

PIRC agrees with FINRA that additional guidance for arbitrators suggesting they can order a different form of production to lessen the cost or burden of producing electronic documents will be helpful in many cases. If the "Cost or Burden of Production" section of the Guide is amended as proposed, however, FINRA should clarify how a party can demonstrate that a "cost or burden is disproportionate."[2] The proposed guidance does not sufficiently recognize the disparities in financial resources between many customers and FINRA member firms. A production cost that may be infinitesimal to a large financial institution may be so burdensome to customers of limited means that it prevents them from pursuing meritorious claims. Furthermore, there is a very real knowledge divide among generations when it comes to technology and computers. Many customers are retirement-aged individuals who lack computer skills and would not be able to comply with an order to produce documents in electronic form, especially if they are proceeding *pro se*. FINRA's proposed guidance should be amended to instruct arbitrators to take these factors into account when fashioning e-discovery orders.

Product Cases

PIRC commends FINRA for recognizing that product cases (as defined in the proposal) require additional and unique treatment in the Guide. However, PIRC believes the solution is not general guidance in the narrative section of the Guide; rather, FINRA should create a separate list of presumptively discoverable documents for product cases. FINRA explains that it rejected the concept of creating a separate list for product cases because of its concern about the economic impact on firms and because it believes that general guidelines will foster conversation among the parties about their discovery needs and will provide arbitrators with flexibility when deciding discovery disputes in product cases.

By creating lists of presumptively discoverable documents, however, the Guide suggests to arbitrators that any document *not* on a list is presumptively *not* discoverable. Without a list of presumptively discoverable documents in product cases, arbitrators could perceive these documents as less discoverable. As a result, customers in product cases -- who are most in need of discovery due to the information asymmetry inherent in their claims, are more likely to have legitimate and necessary discovery requests denied. The fact that product cases are more likely to require production of a large volume and scope of documents only compounds the problem. Presented with a discovery request of this magnitude, an arbitrator, particularly one lacking experience with product cases, may be more inclined to deny it.

While PIRC understands FINRA's desire to guard against burdensome discovery requests, a well-drafted, separate list for product cases could contain only those types of documents that are most commonly requested in product cases. The Guide's existing general language stating that additional documents not listed may be relevant and discoverable in a particular dispute would allow customer claimants to request additional documents particular to that case.

[2] FINRA Discovery Guide (2011), p. 1.

In addition, as FINRA points out, product-related documents are more likely to be requested by multiple investor claimants in multiple cases which produces some efficiencies, thus mitigating to some extent the concerns that production is burdensome. Finally, a new list would only designate a type of document as *presumptively* discoverable; it wouldn't mandate production of that document in every case. The Guide has rules in place to allow an opposing party to rebut the presumption and prove to an arbitrator that a particular category of requested documents is too burdensome to produce or not relevant.

In sum, PIRC believes the guidance included in the Guide is a sound starting point, but the Guide should provide a separate list, or a sub-list, that enumerates presumptively discoverable documents in product cases.

Affirmation

Finally, PIRC supports FINRA's proposed language in the Affirmation section of the Guide to the extent it closes a loophole and permits a party to request an affirmation in the event of an opposing party's non-production or partial production.

However, the proposed new language seems to inadvertently narrow the affirmation requirement in other ways. By specifying that the affirmation accompanies a production in response to the Document Production Lists, the new language suggests that no affirmation is required at all when a party responds to a supplemental request for documents from an opposing party. It treats items not produced in response to the Document Production Lists in the Guide differently from items not produced in response to documents requested not on these lists. Because the Guide, under the section "Flexibility in Discovery," allows for the discovery of additional documents relevant in a particular case, treating them as a separate category for purposes of the affirmation requirement could lead to confusion. There is no reason why the affirmation requirement should be different with respect to validly discoverable documents, whether they are being produced in response to a formal list or not.

Respectfully yours,

JOHN JAY LEGAL SERVICES, INC.

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