Public Investors Arbitration Bar Association

March 27, 2009

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

RE: Amendments to Discovery Guide in FINRA Arbitrations
SR-FINRA-2008-024

Dear Ms. Murphy:

Thank you for the opportunity to comment upon the above-referenced proposal regarding changes to the Discovery Guide which applies to FINRA arbitration matters. I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"). PIABA is a national bar association whose members are devoted to the representation of public investors in arbitration proceedings. As such, we are keenly interested in the discovery procedures pertaining to FINRA arbitrations.

PIABA applauds the effort of FINRA to resolve the litany of issues that have presented problems with discovery in FINRA arbitration proceedings. However, the rule proposal in its current form is unacceptable. While some of the proposed changes do represent an improvement in the amount of material which investors will be able to obtain from member firms, we believe the additional burdens placed on investors in discovery outweigh the burdens placed on the industry. Moreover, some of the shortcomings of the present version of the FINRA Discovery Guide are not addressed by the rule proposal. While we will address both the positive and negative aspects of the new code provisions fully below, our overall feeling is that the negative aspects significantly outweigh the positive.

This comment letter will set forth PIABA's general observations concerning the new rule proposal. PIABA's comments as to the specific provisions of the rule proposal are contained in the attached Appendix, which should be considered an integral part of this comment letter.

FINRA arbitration proceedings have been criticized as biased in favor of the securities industry for many years. The criticism is supported by empirical evidence. In 2007, customer claimants received an award of any kind in only 37% of arbitration hearings.[1] Those receiving an award could not expect to receive more than 30% of their damages.[2] According to a GAO Study in June 2000, there is also only a 39% chance of collecting the entire award.[3]

In addition to the low recovery rates, another significant criticism has been the widespread discovery abuses committed by FINRA member firms in connection with customer disputes. Such abuses became so prevalent as to warrant the issuance of FINRA Notice to Members 03-70, admonishing member firms of their duty to cooperate with discovery in arbitration proceedings and advising firms that FINRA would refer perceived abuses for disciplinary review.

All of this points up the need for reform in FINRA's discovery procedures. In the current Discovery Guide, which was promulgated a decade ago by FINRA Notice to Members 99-90, FINRA provided that certain documents would be presumptively discoverable in all cases, and others would be presumptively discoverable in certain types of cases. While the current Discovery Guide resolved some of the issues which had repeatedly resulted in discovery motion practice, discovery abuses continued to be widespread. Clearly, more reform is needed.

The proposed revisions to the Discovery Guide move in the wrong direction in light of today's financial crisis. Rather than imposing a higher standard of accountability on the financial services industry, the new revisions increase the burden on the public customer. Investors have lost the right to bring their claims before a jury of their peers and instead are forced to seek relief in an industry-sponsored forum. Instead of recognizing the fact that the industry has a presence on most arbitration panels, the revisions to the Discovery Guide further erode the rights of the public investor.

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[1] See FINRA Dispute Resolution Statistics, available at: http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/index.htm

[2] Edward S. O'Neal and Daniel R. Solin, *Mandatory Arbitration of Securities Disputes: A Statistical Analysis of How Claimants Fare*, available at: http://www.smartestinvestmentbook.com/pdf/061307%20Securities%20Arbitration%20Outcome%20Report%20FINAL.pdf.

[3] United States General Accounting Office, *Securities Arbitration: Actions Needed to Address Problem of Unpaid Awards*, available at: http://www.gao.gov/archive/2000/gg00115.pdf.

THE INDUSTRY IS GIVEN A FISHING EXPEDITION INTO PRIVATE FINANCIAL INFORMATION WHICH IS PREDOMINANTLY IRRELEVANT

Under the current Discovery Guide, member firms and their associated persons are presumptively entitled, in every case, to a broad range of personal financial information relating to the customer claimant. The customer is required to provide financial statements, personal tax returns, business tax returns, and information about other securities accounts. Under the current Guide, these documents must be produced for a period commencing three years before the first transaction at issue until the filing of the Statement of Claim.

The current Discovery Guide has perpetuated an improper and false understanding of the law in securities fraud cases, and many other cases which find their way into FINRA arbitration. In essence, the Discovery Guide propagates the myth that FINRA arbitrations are all about placing the customer on trial. The industry often defends cases which are not defensible by proving that the customer was wealthy enough to have taken the risks involved, even if the wealthy customer was, in fact, extremely risk-averse. The SEC has repeatedly rejected this concept.[4] If a customer is lied to, it is irrelevant that the customer had some risky stocks at another firm eight years earlier.[5] If a customer gives an order which is not timely executed, it should not matter whether the customer was a pauper or a king. Yet by providing the industry with the customer's private financial information in every case, FINRA has led arbitrators to believe that the customer's wealth, or lack thereof, is the critical issue in every case.[6]

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[4] It is well-established that wealth of the customer (however accumulated) and sophistication are not bases for recommending risky investments, nor are they defenses to claims of unsuitability. See *Arthur Joseph Lewis*, 50 S.E.C. 747, 749 (1991) ("the fact that a customer ... may be wealthy does not provide a basis for recommending risky investments."); *David Joseph Dambro*, 51 S.E.C. 513, 517 (1993) ("Suitability is determined by the appropriateness of the investment for the investor, not simply by whether the salesman believes that the investor can afford to lose the money."); see also *Krull v. SEC*, 248 F.3d 907 (9th Cir. 2001) (giving deference to the SEC's interpretation of "unsuitability" under the NASD's Rules of Fair Practice) (citing *Alderman v. SEC*, 104 F.3d 285, 288 (9th Cir. 1997)).

[5] Hellie could not ignore his instructions on the basis of [the customer's] prior transactions. . . . If, as Hellie claims, he was uncertain as to what [the customer] meant by "medium risk," he was not free to guess at its meaning by following [the customer's] prior course of trading. *In re Hellie*, 50 S.E.C. 611, 613-14 (1991) (footnotes and citations omitted); see also *DBCC v. Wayne Vaughn*, 1998 NASD Discip. LEXIS 47 (October 22, 1998) ("A customer's prior transactions, however, are not relevant in a suitability determination...")

[6] This is reinforced by FINRA's own rule petition, where FINRA repeatedly states that the rule will "provide parties with a broader understanding of the customer's financial status."

The rule which governs the industry is the "Know Your Customer" Rule. FINRA is instituting a "Know Your Arbitration Opponent" rule in its stead. The question is not what the broker can find out about the customer now that he has been named as a respondent in a customer-initiated proceeding; rather, the question is what the broker did or did not learn about the customer before making a recommendation. With so much attention directed to enabling the industry, through discovery, to learn everything about a customer, the focus on learning what actually happened is relegated to secondary importance.

In some cases, industry respondents have taken the fishing expedition to an extreme. They have routinely sought information regarding bank accounts, loan documents, insurance information and the like, both through document requests and third-party subpoenas. These demands have been extremely intrusive of the customer's private information, and if anything, have had a chilling effect on customers' willingness to pursue valid claims. Moreover, these kinds of demands have added to the burden of customers in FINRA arbitrations, as they have necessitated extensive motion practice and hearings with the arbitrators. A number of states recognize the importance of protecting individuals' privacy by making bank records confidential. The logic behind this is simple: what people choose to spend their money on should not be open for the consumption of others. The prejudice from permitting the dispersal of private, personal expenditures far outweighs any potential probative value.

Rather than putting an end to this continuing injustice, the proposed Discovery Guide would make the situation worse. Tax returns, financial statements and brokerage accounts would now be presumptively discoverable for *five* years prior to the first transaction at issue, rather than three years, and the duty would continue up until the completion of discovery. We are troubled by the first transaction at issue being the signifying event; a suitability case, for example, may span the entire life of the account. If a case is filed six years after the first transaction at issue, and discovery ends a year after the case is filed, customers will have to dig up ***twelve years*** worth of financial information and hand it to the firm, whether or not the firm thought it was important when the recommendations were made.

Even in a suitability case, it is difficult to justify requiring a customer to dig back so far into her private financial history. What the customer was buying at age 52 is irrelevant to the customer's needs and objectives at age 62. This information is completely irrelevant in many cases, such as in unauthorized trading, cases, fraud cases and cases involving Ponzi schemes and other due diligence failures. Yet, the

customer's financial history under the Discovery Guide is presumptively discoverable in *every* case.

Similarly, it is difficult to understand the relevance of documents generated at other securities firms after the statement of claim is filed. What the customer is doing with other financial advisors or firms one month prior to the hearing is completely irrelevant to the case, and is no business of the respondents.

Perhaps the most odious section of the proposed Discovery Guide is the provision relating to loan documents. List 2, Category 12 presumptively requires the customer to identify all loans applied for by the customer, or guaranteed by the customer, from 5 years prior to the first transaction complained of through the filing of the Statement of Claim. This includes car loans, mortgage loans, home equity loans, credit card applications, personal loans, and loans that the drafters of the rule never considered. Once these loans are identified by the customer, the customer must provide the opposing party with an authorization directed to the third party lender for all loan applications.

A private citizen's loan information is not the kind of information which should have to be divulged as a prerequisite to making a claim against one's financial advisor. The probative value of the information on loan applications is nearly nonexistent in most cases; in those cases where firms have attempted to get third party subpoenas for such information, arbitrators usually refuse to issue the subpoena. The relevance of this private financial information is vastly outweighed in nearly every case by the customer's privacy rights. If such information was not relevant to the member firm when the account was opened, there is no reason to require its production now. There is no reason to make such information presumptively discoverable in all cases. In those few cases where such information might actually have some relevance, the firm can ask the arbitrator to issue a subpoena.

The current Discovery Guide already sends the wrong message to aggrieved investors and to the arbitrators who hear and decide their cases. Investors learn quickly that they must forfeit any right to financial privacy, even if their financial situation is completely irrelevant to the case. This has the effect of discouraging customers from asserting valid claims, and increases the financial and emotional toll of taking one's trusted advisor to arbitration. Arbitrators are led to believe that it is acceptable for the industry to delve into the personal and private lives of those who deign to sue member firms, without regard to relevance.

The proposed Guide is even worse. If FINRA truly wants to level the playing field, it should start by addressing the onerous production requirements of the Discovery Guide for customers in FINRA arbitrations.

THE BURDENS PLACED ON CUSTOMERS ARE DISPROPORTIONATELY HIGHER THAN THOSE PLACED ON THE INDUSTRY

Several of the provisions in the proposed Discovery Guide are beneficial to customers, and PIABA supports the inclusion of those provisions in a new Discovery Guide. Nonetheless, many proposed provisions drastically increase the presumptive discovery burden on customers. The cumulative effect of the proposed changes is to increase the burden on customers disproportionately to the burden imposed on member firms and associated persons.

There are five glaring examples of heightened obligations on customers, with no reciprocal obligations on the part of the industry.

Production of information absent an information request. List 2, which sets forth the documents to be produced by customers in all cases, contains three new items which appear to require the customer to provide *information*, in addition to documents. List 2, Item 4 requires the customer to identify all securities firms where the customer has maintained an account, from 5 years prior to the account or transactions at issue until the completion of discovery. This is an unprecedented expansion of the burden on customers, as it makes the provision of *information*, rather than *documents*, presumptively discoverable.

Item 5 is even worse. That category requires the customer, in all cases, to turn over "all agreements, forms, information or documents" relating to the accounts or transactions at issue. How a customer is to turn over all "information" is completely unclear. Certainly we understand this to mean that the term "information" refers to documents in tangible form. We are concerned, however, that firms will argue that the customer must be presumptively required to respond to interrogatories propounded by the firm. This would be completely contrary to the strong presumption *against* interrogatories in FINRA arbitrations. The word "information" must be removed from this Item.

Finally, Item 12 requires the customer to identify every loan he has applied for or guaranteed, beginning 5 years before the first transaction at issue in the claim, through the filing of the Statement of Claim. Apart from the incredibly intrusive nature of this category, as set forth above, it is another occasion where the customer

is presumptively required, without any showing of relevance, to provide information to the opposing side.

Nowhere does the proposed Discovery Guide impose upon the industry a similar obligation to provide information without being asked. This is one example of the disproportionality of the burdens placed on customers.

The affirmation that tax returns are the same as those filed with the IRS. The proposed Discovery Guide contains a requirement that, in connection with the production of tax returns, the customer must "represent" that the tax returns being provided are identical to those filed with the Internal Revenue Service. No similar obligation is imposed on the industry. There is no reason for the Discovery Guide to impose such an obligation on the customer in the first place. The List could simply require that the tax returns produced by the customer must be identical to those filed with the IRS—this should be sufficient to satisfy any concerns.

The written authorization to third parties to require the production of documents. List 2, Item 4 provides an unprecedented duty on the part of customers to not only identify all securities firms with which they have dealt, but also to provide the industry parties with a "written authorization allowing the respondent . . . to obtain the account statements directly from each securities firm." Presumably, the customer or her lawyer will be required to prepare these written authorizations. This places a brand new burden on the customer; whereas the brokerage firm formerly was required to prepare a subpoena and ensure that it passed muster over the customer's potential objections, now the customer is expected to do the respondent firm's work. Again, there is no similar obligation on the part of the member firms or their associated persons.[7]

Even worse, Item 12 requires the customer to prepare and execute an authorization directing each lender or prospective lender to release the loan application. PIABA strongly opposes this requirement. These loan applications could have a lot of personal information, financial or otherwise, which should not be subject to discovery. This provision removes the arbitrators from the role of "gatekeeper" with regard to the issuance of subpoenas. Customers should be entitled to the benefit of such neutral review before third parties are required to turn over their personal financial information. Indeed, there is no certainty that the lender or prospective lender will send only the loan application; a bank lender may, for example, release checking account information.

[7] If such a provision is retained, however, we agree that it should remain limited to monthly statements from third party firms.

Only customers are required to prepare and sign these authorizations; the industry is not required to grant access to third party discovery without the protections and safeguards of the subpoena process. The disparity is unprecedented and unfair.

Production of tape recordings. List 2, Category 8 makes presumptively discoverable any recordings of conversations or telephone calls in the customer's possession. There is no such requirement on the part of the member firm or associated persons. Yet, production *is* required under the current Discovery Guide (List 1, Item 7).

This omission is baffling. In nearly every case, there is a sharp divergence in the factual testimony of the customer and the associated person. There is nothing as relevant as a tape recording of conversations between the broker and the customer. Yet, whereas the customer is required to turn such tapes over (which is entirely appropriate), the industry is permitted to suppress this important evidence. There is no possible justification for FINRA to have omitted this item from the industry's list. FINRA may say that recovery of these tapes is overly burdensome for the industry. However, there can be no question that, if the tapes support the firm's position, they will show up at the 20-day exchange (but not necessarily during discovery). If they support the customer's story, they will never see the light of day. The industry must be held to the same duty of disclosure as the customer in regard to recordings.

Production of prior complaints and settlements.

List 2, Item 11 requires customers to provide copies of all complaints and statements of claim previously filed by the customer with regard to securities matters. The customer is also required to provide the final awards, judgments or settlement agreements resulting from these prior cases.

The industry, by contrast, is required by List 1, Item 6 to provide complaints against the associated person involved, if they allege "conduct similar to that alleged in the Statement of Claim against the associated person."

Limiting the production in this manner is unnecessary. It is unlikely that an associated person would have so many customer complaints or regulatory

investigations involving him or her that production of *all* such complaints would be unduly burdensome. If so many complaints did exist against one individual that it would be burdensome to produce them, then they *should* be produced, as an excessive number of complaints would support a claim of failure to supervise or evidence a need for heightened supervision of that individual. It is possible that a number of complaints were expunged and therefore not known to the customer in the case, or to the public in general. Accordingly, *all* customer complaints regarding an individual representative should be produced. Certainly a customer is required to provide all complaints involving securities; there is no justification for the different rule for the industry.

Moreover, there is no reason to require a customer to provide the judgment, award or settlement agreement, without requiring the same of the industry. Again, the impact is disproportionate as to the customer.

THE NEW PROVISIONS RELATING TO PRODUCTION BY INDUSTRY RESPONDENTS SHOULD BE RETAINED IN THE FINAL RULE

Some of the proposed revisions to the Document Lists are designed to require greater cooperation by member firms and associated persons in the production of documents. These are helpful changes, as the new Guide will state that these documents are presumptively discoverable. This should result in fewer arguments and less motion practice concerning the discoverability of these documents.

Claimant-Specific Information

List 1 sets forth the documents which the industry respondent is presumptively required to turn over in every customer case. The new proposal expands some of the customer-specific information to be made available. For example, List 1, Item 3 now requires the firm to produce all information in the firm's possession relating to the customer's "employment status, financial status, annual income, net worth, investment objectives and risk tolerance." This information should clearly be turned over in every case. It is essential for the claimant to know what the firm thought was important enough to be found out about the customer when the transactions at issue occurred. Similarly, Item 4 provides that the firm is to turn over documents relating to the trading strategies used in the customer's accounts, together with any documents reflecting supervisory review of the strategies. This is the kind of information which a firm should be compiling for its customer accounts,

and clearly they should retain and turn over these documents in arbitration proceedings.

Manuals

Tremendous resources have been devoted to motion practice concerning the production of compliance and other supervisory manuals. Firms have proven resistant to turning these manuals over, despite their clear relevance to industry standards and practices. List 1, Item 7 now makes it clear that manuals of all kinds are to be produced, together with updates, tables of contents and compliance bulletins. This language should be helpful in getting customer claimants the documents they need to establish their case, and will cut down on expensive and wasteful motion practice.

Supervisory Documents

The new Guide would expand member firms' obligation to turn over supervisory documents. This is a welcome change. Firms have often sought to prevent disclosure of these documents, claiming non-existent or discredited privileges, such as the "self-evaluative" privilege. Yet, if these matters were venued in court, supervisory documents would be ordered to be produced in nearly every case.

The proposed rule would make exception and activity reports discoverable in every case, rather than just cases alleging failure to supervise (List 1, Item 9). This proposal also broadens the language to include "similar reports," so that firms can no longer avoid disclosure by naming their exception reports something else.

List 4 defines the presumptively discoverable documents to be turned over by the firm and its associated persons in cases alleging failure to supervise. While we support many of the changes to this list, we believe the documents identified on List 4 should be discoverable in every case. Documents reflecting supervisory review of the broker and of the customer's accounts are nearly always relevant. There is no reason to limit the discoverability of these documents to cases where "Failure to Supervise" is alleged.

List 4, Item 4 requires the firm to turn over documents and notes reflecting communications between the subject broker and the firm's compliance department. This category of documents has often been inappropriately claimed as privileged, and

we welcome the addition of these documents to the presumptively discoverable list. Moreover, we note that the communications are not limited to those concerning the claimant or the claimant's accounts, but include all such communications. In a case where failure to supervise is alleged, this makes sense. An arbitration panel should want to see what supervision is taking place, or not taking place, as the case may be.

List 4, Items 7 and 8 require the firm to turn over any notes or memoranda evidencing supervisory review of the customer's accounts, and to turn over copies of correspondence with the customer showing supervisory review of the correspondence. There should be documentation to establish that supervision of the customer's accounts is occurring. Clearly, that documentation should be produced to the customer in arbitration. These are welcome additions to the Guide.

Despite the expansion of some of the supervisory materials, there is a glaring omission in the new Guide. The proposed Guide does a good job of requiring the industry to prove that it was supervising the claimant's *accounts*. However, industry rules require diligent supervision of both the customer's accounts *and the broker*. The current Discovery Guide requires firms to turn over, in connection with exception reports, "all other documents reflecting supervision *of the Associated Person(s)* and the customer accounts at issue." (Current List 5, Item 4; emphasis added.) In the new rule, there is no longer a requirement to turn over "all other" supervisory documents related to the supervision of the *broker*. Whether or not the omission was inadvertent or purposeful, this language must be restored to the Discovery Guide.

Documents Relied Upon by the Broker

List 7 requires the firm and associated persons in a negligence/breach of fiduciary duty case to turn over certain documents prepared by or used by the broker, or given to the customer. We welcome the addition of the language requiring the production of "performance or risk data." (The same language is added to List 11, for suitability claims.) The inclusion of this language will require the production of documents which will establish whether or not the broker was doing his or her job.

Unauthorized Trading

List 9 corrects a couple of obvious problems with the existing Discovery Guide for cases where transactions are alleged to have been unauthorized. First, Item 1 in the new Guide does away with the term "order ticket," which has essentially become obsolete. Rather, the proposed rule requires the functional equivalent, using the "memorandum of each order" language which tracks the SEC's document

retention rules (see SEC Rules 17a-3 and 17a-4). This will cover the electronic media which firms may now be using. The new rule also makes it clear that the document should show the compensation, both gross and net, to the associated person. Clearly, a broker's compensation goes to the incentive he or she might have had to enter an unauthorized trade.

List 9, Item 4 requires the member firm to turn over all of the broker's trades from 10 days prior to 10 days after the alleged unauthorized trade. This is a welcome addition to the Guide. Such information is often the most compelling evidence as to whether a trade was authorized or not. Similarly, where there is a dispute as to whether a trade was "solicited" or "unsolicited," this information usually resolves the issue.

Unsuitability

List 11 expands some of the documents which the firm must turn over in cases alleging lack of suitability. Item 2 requires the member firm and associated person to produce agreements relating to the broker's compensation, including whether it is fee-based. This is appropriate in every case, and certainly should be produced in suitability cases.

List 11, Item 3 requires the production of all documents between the firm/associated person and the customer relating to "asset allocation, diversification, trading strategies and market conditions related to the customer's account(s)." Given the dictates of Modern Portfolio Theory, one would expect a broker who is making recommendations to the customer to have some documents within this category. If they exist, they are highly relevant to the suitability claim, and they should be turned over. If they do not exist, the claimant should be made aware of this so that he can make inquiry at the hearing as to why there are no such documents in existence.

Product Cases

List 12 is completely new and relates to documents which should be turned over by the industry in cases involving specific products. This is an important addition to the Discovery Guide, and PIABA strongly supports it.

Item 1 permits the customer claimant to identify up to 5 particular products at issue, and the firm is then required to provide the broker's trading activity, compensation, etc. for those particular securities. This is the closest thing in the new Discovery Guide to full commission runs, which we believe should be made available

in nearly every case. However, at least in cases where particular products are at issue, much of the information will now, finally, be presumptively discoverable.

Item 2 provides protection to non-party clients of the firm, but still requires the inclusion of information concerning the customer's account, the broker's accounts and related accounts, and whether the account is an IRA. The inclusion of the broker's account information on these product cases is a welcome change. Item 2 also makes it clear that, in some cases, it may be appropriate to identify more than 5 such securities, and such a request may be made; however, beyond the first five securities such information would not be *presumptively* discoverable. It is critical that the rule state that the number 5 is not sacrosanct, but may be expanded in appropriate cases.

Items 3 and 4 relate to insurance products which provide a death benefit. These kinds of cases have become more prevalent, and it is sensible to require the production of these documents.

Item 5 fleshes out the broker's incentives to sell the product at issue, including commissions, bonuses and the like. We support the inclusion of this item as well.

Commission Runs

While there are some improvements in the proposed Guide with regard to trade and commission runs, PIABA believes that full commission runs should be turned over in all cases. If arbitration, and the discovery procedures, are intended to get at the truth, full commission runs should be presumptively discoverable. They often contain the kind of information which can be relevant in many arbitration matters. For example, full trade runs often show that the broker was trading a particular security in a number of his accounts, while marking the orders "unsolicited." This helps to establish that the broker was, in fact, initiating the trades in the security; it also helps to establish that the supervisors failed to heed a clear red flag when there are numerous unsolicited transactions in a single security. FINRA has demonstrated its ability to protect the privacy of non-party clients by allowing redaction of some identifying information; therefore, there is no valid reason to limit the production of this information in FINRA arbitrations.

If a member firm is entitled to know the type of trading a client was doing years before the conduct at issue in the case, surely the customer should be able to see the trading and investment strategies the broker was engaged in with his other clients

contemporaneously with the handling of the claimant customer's account. Commission runs are the most efficient way to demonstrate whether the conduct complained of by the customer was the result of the client's particular desires or of the associated person's standard practice.

GENERAL OBSERVATIONS

Method of Producing Documents

Absent from both the current and proposed Discovery Guides is any attempt to address the method of production. Although arbitration is intended to be a more expeditious method for resolving disputes than court, there are some court rules that may provide insight into fair means of addressing certain problems that arise. One such example is the method of producing documents. Rule 34 of the Federal Rules of Civil Procedure allows the requesting party to designate the manner in which electronically stored information is to be produced. *See* Fed. R. Civ. P. 34(b)(10(C). Rule 34 also requires that a party produce documents "as they are kept in the usual course of business or … organize and label [the documents] to correspond to the categories in the request." *See* Rule 34 (b)(2)(E)(i). There is currently no such requirement that the documents be produced in any organized fashion, and they are often produced by industry respondents in a haphazard manner regardless of the volume of documents produced.

Language Conforming to the SEC's Document Retention Rules

A number of provisions regarding the production of documents by member firms or associated person(s) permit the respondent to make the unilateral determination as to what documents are related to the issues in the statement of claim, or what conduct is similar to the conduct alleged to be at issue. *See, e.g.*, List 1, ¶¶ 6,7, List 4 ¶¶ 3, 5, and 6. The vagueness of these provisions vests sole interpretation in the responding party to determine which documents are responsive. Granting such unfettered discretion is likely to perpetuate ongoing discovery abuse.

We recognize and appreciate the fact that some of the language used in the proposed Lists conforms to the language of the SEC's document retention rules. For example, the term "memorandum of each order" in List 9, Item 1 tracks the document retention rule of SEC Rule 17a-3 (a)(6). Firms will no longer be able to say they are unable to turn over "order tickets" because they no longer keep them. Similarly, the term "account record" in List 1, Item 1 tracks SEC Rule 17a-4.

By conforming the language of the Discovery Guide to the SEC Rules, FINRA takes away the firms' ability to claim they do not understand what the Discovery Guide means. Moreover, if they claim that no such documents exist, they will need to explain why they have failed to keep the documents which the SEC requires them to keep.

We welcome any changes to the Guide which would remove ambiguity.

Confidentiality

An increasing trend in FINRA arbitration proceedings has been for arbitrators to enter blanket confidentiality orders in proceedings. This trend reflects either a misunderstanding or disregard for general principles governing confidentiality.

In April 2004, FINRA published an article in "The Neutral Corner", an educational newsletter for arbitrators, entitled "Arbitrators and Orders of Confidentiality."[8] In the article, FINRA explains that while arbitrators must treat all aspects of arbitration as confidential, the concept of confidentiality applies to arbitrators' ethical duty to maintain the details of proceedings in confidence. Parties, unlike arbitrators, "are generally free to disclose details of their own proceedings as they see fit." The article advises arbitrators that "the party asserting confidentiality [in the context of discovery] has the burden of establishing that the documents in question legitimately require confidential treatment." The article further identifies the factors that arbitrators should consider in determining whether certain documents warrant the issuance of a confidentiality order.

None of these caveats appears in the Discovery Guide itself, which addresses the topic of confidentiality only so far as to advise that parties may enter a stipulation regarding confidentiality or arbitrators may enter a confidentiality order. As a result, arbitrators often grant confidentiality when requested, seemingly without engaging in the necessary analysis to determine whether a confidentiality order is warranted. By publishing The Neutral Corner article, FINRA implicitly recognized that the party requesting confidentiality bears the burden of demonstrating its necessity. By failing to include a discussion of the relevant factors in the Discovery Guide, or at a minimum reminding arbitrators of the existence of that burden, FINRA ignores the repercussions of the statements regarding confidentiality in the Discovery Guide in its current form.

[8] The Neutral Corner, *Arbitrators and Orders of Confidentiality*, April 2004, available at: http://www.finra.org/ArbitrationMediation/Neutrals/Education/NeutralCorner/P010040

Ills arising from this include member firms' routine attempts to require that the documents be used only in the pending arbitration. Where members firms succeed in this effort, they will essentially prevent similarly situated customers from obtaining those documents. If they fail to succeed, they will still have driven up the time and expense required for motion practice. Either way, the member firms are making arbitration less fair and more expensive to customers. At a minimum, then, the Neutral Corner Article should be reprinted with the Discovery Guide.

FINRA should take this opportunity to include some sort of standard that arbitrators are to use when ruling on demands for confidentiality. FINRA recently indicated that it would reference the Neutral Corner article, but not change the introductory language on confidentiality. As many arbitrators and parties will have easy access to the Discovery Guide, but not necessarily to the Neutral Corner article, we feel such provision is inadequate to address the deficiency in informing arbitrators of their obligations when evaluating a request for a confidentiality order.

No Requirement to Plead Causes of Action

The Discovery Guide provides lists of documents that are presumptively discoverable based upon certain causes of action in addition to those documents to be produced in all cases. Providing different lists based upon causes of action, however, wrongly implies that customers have a duty to plead specific causes of action. Under the Code of Arbitration Procedure, claimants are not required to plead causes of action, but only to specify "the relevant facts and remedies requested." *See* Code of Arbitration Procedure, Rule 12302(a)(1).

It may be appropriate to eliminate the lists, particularly because there are few categories of documents that are contained within these lists, and simply identify documents that are presumptively discoverable in all cases. While the Code of Arbitration Procedure controls the arbitration process, arbitrators may rely upon the provisions in the Discovery Guide as support for interpreting provisions of the Code. In this situation, an arbitrator may incorrectly infer that, because document lists exist for various causes of action, a claimant must actually plead causes of action. Eliminating the individual lists would not create an undue burden upon the parties, as parties may object even to presumptively discoverable documents listed in the Discovery Guide. Implying that only certain pled causes of action will prompt the production of certain categories of documents may be a disadvantage to pro se parties, as well as to counsel who wish, for strategic or stylistic reasons, to avoid setting forth specific causes of action in statements of claim.

Affirmation that No Responsive Documents Exist

The current Discovery Guide provides that a party requesting documents may also request from the producing party an affirmation that no responsive documents exist after the producing party has conducted a good faith search. Neither the current Discovery Guide, nor the proposed revisions, requires a party to identify the person who conducted the search or provide the title or position of the person who conducted the search. We would like to see such a provision added.

CONCLUSION

Attached to this letter is an Appendix setting forth additional comments with respect to the specific items on the lists, all of which are incorporated into this letter by reference.

The history of discovery abuse by member firms underscores the need for a firm, clear list of documents that are presumptively discoverable in all FINRA arbitration cases. Some of the proposed changes are a step in the right direction toward clarifying some language and creating new categories of documents that are to be presumptively discoverable. They do not, however, go far enough to level the playing field in arbitration matters. The proposed Discovery Guide unfortunately perpetuates much of the unfairness which has been observed in FINRA arbitration proceedings. The comments and concerns outlined herein will, we hope, go towards making FINRA discovery practice more fair for all parties involved.

Respectfully,
PUBLIC INVESTORS ARBITRATION
BAR ASSOCIATION

Scott R. Shewan
Executive Vice President/President-Elect

Appendix to Comment Letter

Amendments to Discovery Guide SR-FINRA 2008-024

COMMENTS TO DOCUMENT PRODUCTION LISTS

List 1 – Documents to be Produced in All Customer Cases by Firm/Associated Person(s)

1) **"The account record information for the customer as well as all agreements with the customer, including, but not limited to, account opening documents, cash, margin and option agreements, trading authorizations, powers of attorney, or discretionary authorization agreements, and new account forms."**

- We generally approve of this provision, as it expands the scope of account-related documents that are presumptively discoverable. We assume that the term "account record information" is based on the language of SEC Rule 17a-4, and we approve of the language on that basis. We also believe that additional documents regarding the accounts should be mentioned, including the definition of any codes applied to customer accounts that relate to investment objectives and/or risk tolerance, and any documents that identify risk tolerance and/or investment objectives, as well as any surveys or questionnaires completed by the customer or registered representative in connection with the customer's accounts.

- There is a footnote that emphasizes that only named parties are included in the lists. There are a number of reasons why a claimant may choose not to name the associated person in a case. There may be issues of collectability or it may appear that the member firm is truly the liable party due to its failure to supervise an associated person adequately or marketing a defective product. Notwithstanding the justification for not naming an associated person, the documents related to that associated person are likely relevant and, assuming the individual broker is still a registered representative, subject to the jurisdiction of FINRA. Accordingly, he or she should be compelled to produce the presumptively discoverable documents, lest he or she be free to destroy whatever documents (s)he may have. The lists should include every individual identified in a statement of claim who is still employed by respondent firm, whether the individual is named as a respondent or not.

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2) **"All correspondence between the customer and firm/associated person(s) relating to the transaction(s) at issue. (Unless separately requested, confirmation slips and monthly statements need not be produced.)"**

- This provision should be clarified. It should be made clear that any statement inserts or marketing materials that were included with monthly statements should be produced if requested. This provision also gives the respondent unfettered and sole discretion to determine which documents "relate to the transaction(s) at issue." This is a problem throughout the lists.

- Moreover, all correspondence between the parties should be presumptively discoverable – it should not be limited in any way or restricted to only transactions at issue.

3) **"All documents concerning the customer's employment status, financial status, annual income, net worth, investment objectives, and risk tolerance."**

- This is a good addition to the Discovery Guide. It is essential that firms be required to produce these documents to demonstrate what knowledge they had of a customer which their associated person(s) relied on to make recommendations to the customer, rather than creating a profile after the fact based upon the documents produced by the customer in arbitration proceedings.

4) **"All documents evidencing any investment or trading strategies utilized or recommended in the customer's account, including, but not limited to, options programs, and any supervisory review of said strategies."**

- This is a welcome addition to the Discovery Guide, although it should relate to all of the customer's account(s), not merely one account.

5) **"All notes by the firm/associated person, including entries in any diary or calendar, relating to the customer and/or the customer's accounts."**

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- This is a positive addition to the Discovery Guide, as it expands the scope to include all of the customer's accounts, rather than limit notes to the account(s) at issue. This provision should be expanded to include all notes relating to other customers concerning the securities at issue. What the associated person was telling other customers is highly relevant to what (s)he was telling the claimant.

6) **"All Forms RE-3, U4 and U5 and Disclosure Reporting pages including all amendments, for the associated person, all customer complaints identified in such forms, and all customer complaints alleging conduct of a similar nature to that alleged in the Statement of Claim against the associated person, redacted to prevent the disclosure of nonpublic personal information of that customer."**

- The negative aspect of this provision is that it allows the member firm or associated person, in their sole discretion, to determine what constitutes a complaint "alleging conduct of a similar nature to that alleged in the Statement of Claim . . . ." Because any broker misconduct entails a complaint for failure to supervise, all complaints against associated person(s) in the office should be produced for a period of one year prior to the first transaction at issue through discovery. These complaints should be attached to the quarterly report required by NASD Rule 3070(c) of all customer complaints or NYSE Rule 351(d). The existence of a large number of complaints of any type would tend to establish a failure of supervision, thus all complaints should be produced. (See body of Comment Letter.) Moreover, records of oral complaints made to the firm would not be disclosed on the associated person's U-4; it should be made clear that oral complaints are to be disclosed as well.

7) Old Paragraph 7 (Eliminated). **"All records and notes of telephone calls or conversations about the customer's account(s) at issue that occurred between the Associated Person(s) and the customer (and any person purporting to act on behalf of the customer), and/or between the firm and the Associated Person(s)."**

- It is unclear why old paragraph 7 was eliminated. There does not appear to be any other provision that covers recordings of telephone conversations. The elimination of this paragraph may imply that records and notes of telephone calls or conversations are not important or relevant. Recordings of telephone conversations are potentially extremely important in any case where they exist and should be presumptively discoverable in every case. Moreover, any recordings of telephone calls would be the best evidence of those conversations – notes would therefore be

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inferior. If there is absolutely no dispute about what was said, and if it is too burdensome to produce recordings of telephone conversations, then a member firm or associated person may raise an appropriate objection. Recordings should be presumptively discoverable, not merely a fall back. Not to make them presumptively discoverable creates an uphill battle for a customer seeking recordings of telephone conversations. Moreover, it is indefensible to require customers to produce tape recordings, while letting members firms and their associated persons suppress the same evidence.

New Paragraph 7. **"All sections of the Firm's manuals and any updates thereto during the relevant time related to the claims alleged in the Statement of Claim, including separate or supplemental manuals governing the duties and responsibilities of the associated person and supervisors, any bulletins (or similar notices) issued by the Firm, and the entire table of contents and index to each such Manual."**

- The current Discovery Guide requires only the production of Compliance Manuals. Requiring the production of sections of *all* of the firms' manuals is a very positive change, as there are many more manuals than merely compliance manuals. We endorse the elimination of language limiting production to compliance manuals. A common problem in the past was with FINRA member firms failing or refusing to produce appropriate manuals.[1]

- We are concerned that giving member firms the discretion to decide which sections to provide will provide more opportunity to frustrate claimants. Respondents should be required to provide *all* manuals that are intended to be compiled as part of the Written Supervisory Procedures as required by NASD Rule 3010 and NYSE Rule 342 requirements of supervision. This should include manuals for both managers and registered representatives, as well as product manuals. Member firms should also be required to produce the table of contents to those manuals to permit claimants to identify any additional sections that may be relevant to their claims.

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[1] See FINRA News Release re Morgan Stanley settlement, September 27, 2007. Available on FINRA's website: http://www.finra.org/Newsroom/NewsReleases/2007/P037071

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8) All analyses and reconciliations of the customer's accounts prepared during the time period at issue, including, without limitation, those relating to examinations of the customer's accounts.

- This provision is essentially unchanged and is acceptable.

9) All exception reports, supervisory activity reviews, activity concentration reports, active account runs and similar documents produced to review for activity in customer accounts in which customer's account is referenced or listed.

- We are pleased that exception reports have been moved from the list involving cases of failure to supervise, so that it would now be required to be produced in all cases. However, this requirement should be for all supervisory activity reviews, and other identified reports for the registered representative at issue without regard to the customer account being referenced. If the similar activity is highlighted for other accounts in the months preceding or following one in which the customer is mentioned, it should be produced. Furthermore, if the customer account is not the subject of supervisory reviews, but should have been under firm guidelines, this fact is relevant.

- We are disturbed by the omission from this paragraph of the language from the current Guide requiring production of "all other documents" reflecting supervision of the Associated Person(s) involved. This language MUST be added back into the Discovery Guide. If the new Guide is adopted in its current form, it will provide documentation regarding supervision of the customer's *accounts,* but will not provide documents reflecting supervision of the *associated person(s).* Both are required under industry rules and standards. This is a glaring omission, and it must be rectified.

10) "Records of disciplinary action taken against the Associated Person(s) by any regulator or employer for all sales practices or conduct similar to the conduct alleged to be at issue."

- The language of this paragraph does not change from the current Discovery Guide provision, only the paragraph number changes. This provision, however, should be broadened to cover any disciplinary action, not just such actions that the

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member firm or associated person(s) deem, in their sole discretion, to be similar to the conduct at issue.

11) "All documents received by Respondent by subpoena or document request directed to third parties at any time during the case.

- This is a good thing to include in the presumptively discoverable materials.

List 2 – Documents and Information to be Produced in All Customer Cases by Customer

Footnote 2 – "A respondent may separately request the individual income tax returns of the representative (e.g. partner, officer, trustee) of a customer if the customer is a closely held corporation, partnership, trust, LLC, or ERISA plan."

- This provision is far too broad. According to this footnote, member firms and associated person(s) could seek tax returns from individuals not even involved in the investment process. It is also a tremendous violation of privacy interests of those individuals absent any showing whatsoever that they are relevant in any way to the arbitration proceeding. They should not be presumptively discoverable. Rather, they should be the subject of additional requests.

1) "Complete copies of all customer and customer owned business (including partnership, corporate) federal income tax returns filed by the customer, for the five years prior to the first transaction at issue in the arbitration through year in which the arbitration claim is filed. The customer will represent that the income tax returns being provided are identical to those that were filed with the Internal Revenue Service."

- This provision is unreasonably onerous on the customer and we oppose it. First, it imposes an unprecedented obligation on customers to affirm that the tax returns they have provided are identical to those that were filed with the IRS. Second, it requires that customers go back *five years* prior to the first transaction at issue. This provision, read jointly with FINRA Code of Arbitration Procedure Rule 12206, which states "No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim," would potentially require customers to go back *eleven years* to retrieve tax returns. There is nothing within the presumptively discoverable list of documents for firms or associated persons to go back so far and the Internal

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Revenue Service itself recommends generally that returns be kept in most cases for a maximum of seven years.[2]

- The current Discovery Guide provision, which in and of itself is unreasonably onerous, requires that customers produce returns for only three years prior to the first transaction at issue. There is no reason to expand the time period to five years, particularly as in most cases there is no evidence that an associated person or firm had this information in hand or relied upon it in any way in making recommendations. Accordingly, this provision should be eliminated and customers should not be required to produce tax returns unless it is clearly relevant, or unless the associated person, too, is required to produce tax returns.

- The current Discovery Guide requires only that the customer provide Pages 1 and 2 of Form 1040 returns, together with Schedules B, D and E. The proposed rule requires the customer to produce the entire tax return. There is no justification for this increased intrusion into the customer's private financial affairs. For example, we cannot fathom how the personal deductions in Schedule A could have anything to do with most cases. Similarly, neither the firm nor the arbitrators have any right to know what church or other charitable organization the customer supports financially.

- Moreover, tax returns should not be presumptively discoverable in arbitration proceedings at all. It is recognized that "[t]he party seeking discovery of tax returns has the burden of establishing their relevance to the subject matter of the action." *Lemanik, S.A. v. McKinley Allsopp, Inc.*, 125 F.R.D. 602, 609-10 (S.D.N.Y. 1989) (refusing to order production of tax returns in investment dispute where there were no allegations concerning misrepresentations of the tax consequences of the transactions). Absent allegations concerning tax consequences, or other relevant allegations, tax returns should not be presumptively discoverable at all. In some states, like California, tax returns are conditionally privileged, and would not be discoverable in a court of law. In view

[2] *See* United States Department of the Treasury, Internal Revenue Service, "How Long Should I Keep Records? http://www.irs.gov/businesses/small/article/0,,id=98513,00.html.

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of this, there is no reason to make tax returns presumptively discoverable in all FINRA arbitration proceedings.

- Finally, it is inappropriate to require customers to affirm that the tax returns produced are identical to those filed with the IRS where many people rely upon accountants or third parties to file their tax returns, and therefore may only be able to affirm so to the best of their knowledge. Moreover, this requirement is unique to customers; there are no reciprocal obligations placed on the industry under the proposed Guide.

2) **"Financial statements or similar statements of the customer's assets, liabilities, and/or net worth for the period covering the five years prior to the first transaction at issue in the arbitration through the date the Statement of Claim was filed."**

- As with tax returns, requiring the production of financial statements and the like going back five years prior to the first transaction at issue is unduly burdensome on customers and not relevant in most cases absent a nexus between those documents or the information contained therein and the claims in the case. A customer's financial status, and even his investments objectives, many years prior to the conduct at issue, bear little relevance to the case.

- We understand this item to mean that at customer must turn over financial statements only if they are in existence. There is not, nor should there be, a requirement that the customer prepare a financial statement in order to comply with this Item. We suggest that this could be clarified by way of a footnote.

3) **"Copies of all documents the customer received from the firm/associated person(s) and from any entities in which the customer invested through the firm/associated person(s), including, opening account forms, prospectuses, research reports, annual and periodic reports, and correspondence. Unless the customer is contending that he/she did not receive periodic account statements and/or confirmations sent in the ordinary course of business, the customer may satisfy the production requirements for these items by stipulating to the receipt of all such periodic account statements and confirmations and may produce only**

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those periodic account statements and confirmations that have hand written notations or are in any way non-identical to those sent by the firm."

- This section is generally acceptable. However, it is impossible for a customer to know if she has received all account statements and whether such account statements are identical to those maintained by the brokerage firm. If a party may stipulate to the receipt of the statements, it should be possible for the party to rescind such stipulation if it is later discovered that there may exist a discrepancy between the statements the customer has and the statements the firm has.

4) **"Identify each securities firm where the customer has maintained an account for the five year period prior to the first transaction at issue in the arbitration through the completion of discovery; produce account statements for the five years prior to the first transaction at issue in the arbitration through the completion of discovery; and provide a written authorization allowing the respondent firm/ associated person to obtain the account statements directly from each securities firm."**

- This provision imposes a huge, unprecedented onus on customers that is entirely unreasonable in light of the discovery obligations of firms and associated persons. First, this provision, as with the others addressed above, goes back too far. Second, it requires that customers provide a written authorization for firms to obtain documents from third parties. There is no authority or comparable provision in court rules or procedures which requires a party to provide, presumptively, a document authorizing another party to obtain documents from a third party. The appropriate procedure would be for a party to seek the documents from the other party, then, if documents are not produced, seek a subpoena, allow the opposing party an opportunity to object, and then allow the arbitrators to decide whether to allow a subpoena to a third party. This provision also unfairly provides firms with an opportunity to save the cost of serving a subpoena on a third party with no such benefit provided to customers for any category of documents to be produced by the member firm or associated person. Moreover, by authorizing the release of documents, the other securities firms may erroneously conclude that the customers are authorizing the charges for such production to be levied against them. This provision should not stand and should be eliminated.

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- The customers should be required, subject to appropriate objections, only to produce account statements for a more limited period, such as during the time period at issue, and only for what they have in their possession. They should not be required to provide an affirmative authorization for firms to obtain same.

- Although parties may object even to documents that are presumptively discoverable, any objectionable documents or affirmative obligations that are contained on the list of presumptively discoverable documents are more likely to be ordered discoverable by arbitrators, just by virtue of being in the Discovery Guide.

- There is legal authority that a customer's prior transactions are not relevant to a suitability determination. *In the Matter of Wayne B. Vaughan*, The National Adjudicatory Council, NASD, Dated: October 22, 1998 citing *In re Larry Ira Klein*, Exchange Act Re. No. 37835 (Oct. 17, 1996) and *In re Douglas Jerome Hellie*, 40 S.E.C. 611,613 n.8 (1991). "Prior securities transactions are relevant only to the extent that there is an adequate nexus with the investments at issue" in a particular action. *Lemanik, S.A. v. McKinley Allsopp, Inc.*, 125 F.R.D. 602, 609-10 (S.D.N.Y. 1989) (citing *Davidson Pipe Co. v. Laventhol and Horwath*, 120 F.R.D. 455, 460 (S.D.N.Y. 1988) ("McKenley is not entitled to examine Lemanik's entire business in the hope of finding a transaction inconsistent with the allegations of the Amended Complaint."); see also footnote 5 to comment letter. Allowing the presumptive discovery of other accounts at all is contrary to this authority.

- We also oppose lengthening the applicable period to make the customer required to produce these documents through the completion of discovery. This creates a continuing obligation to produce monthly statements at a customer's new firm up until shortly before the hearing. What a customer is doing at another firm during the pendency of a case, and after the dispute has ripened, is of little or no probative value. The current Discovery Guide cuts off the time for production at the filing of the Statement of Claim. This should be sufficient for presumptively discoverable documents; if there is some reason to get more recent documents, the respondent may propound additional requests.

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5) **"All agreements, forms, information, or documents relating to accounts at the respondent firm or transactions with the respondent firm."**

- This provision is overly broad and vague. The term "relating to" could include any number of categories of documents and will result in many objections. This provision could also cover documents subject to the work product doctrine or attorney-client privilege. Perhaps including language that clarifies non-privileged documents would alleviate the concern. The term "information" is grossly overbroad and must be removed from this provision. Generally only documents should be produced; requiring the presumptive production of all "information" is akin to adding an interrogatory, which is not permissible under the Discovery Guide in general. If this language is left unchanged, the industry will be able argue in favor of interrogatories seeking "information . . . relating to accounts at the respondent firm" as presumptively discoverable.

6) **"All account analyses and reconciliations prepared by or for the customer relating to the accounts or transactions by the firm."**

- As with Item 5 above, the term "relating to" is vague and could apply to many types of documents, including documents protected by privilege.

7) **"All notes, including entries in diaries or calendars, relating to accounts or transactions at issue."**

- We agree that these documents should be presumptively discoverable.

8) **"All recordings and notes of telephone calls or conversations about the customer's accounts or transactions at issue that occurred between the associated person(s) and the customer (and any person purporting to act on behalf of the customer)."**

- Oddly, as noted the comment above to List 1, old Paragraph 7, customers remain obliged to produce recordings of telephone calls, and appropriately so. Yet the member firms (who would be more likely to have recordings of telephone calls) are under no obligation under the revised Discovery Guide to produce same. This is an unacceptable discrepancy, and it must be fixed.

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9) **"All correspondence sent or received by the customer (or any person acting on behalf of the customer) relating to the accounts or transactions."**

- The phrase "at issue" should be included in this provision, which is otherwise acceptable.

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."**

- This provision should be clarified to exclude documents protected by attorney-client privilege or the work product doctrine. This could be accomplished by inserting the word "non-privileged" before "written."

11) **"Identify and produce, through the completion of discovery, copies of Complaints/Statements of Claim and Answers filed in all civil actions involving securities matters and securities arbitration proceedings in which the customer has been a party, and all final decisions or Awards or non-confidential settlements entered in these matters. If a person is a party to a confidential settlement agreement, the underlying documents of the confidential settlement agreement shall be identified. Although not presumptively discoverable, a confidential settlement agreement may be obtained with an order from the panel."**

- While we do not oppose this provision in general, it is unfair that there is no reciprocal obligation on firms and associated persons to produce similar documents. Indeed, the firms are permitted to limit the production of relevant complaints. This should not be allowed.

- As set forth above, we do oppose the expansion of the applicable time period to include "through the completion of discovery."

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12) **"Identify loans the customer has applied for or has guaranteed for the five years prior to the first transaction at issue in the arbitration through the date the Statement of Claim was filed; produce copies of related loan applications, and provide a written authorization allowing the respondent firm/associated person to obtain loan applications directly from each lender."**

- ***We vehemently oppose this provision***. Requiring the production of loan applications or loans that the customer has guaranteed is far too intrusive into personal financial affairs. Providing a written authorization to obtain these documents also overreaches into personal financial information, and imposes an affirmative obligation on customers that is unheard of in other arbitration forums or even in court proceedings.

- In addition, as with tax returns and financial statements addressed above, expanding the timeframe to five years is unduly burdensome and overly broad.

- Finally, the Discovery Guide should not require customers to provide a written authorization for any third party discovery (see body of Comment Letter).

13) Old paragraph 13 (Eliminated). **"All documents showing action taken by the customer to limit losses in the transaction(s) at issue."**

- The elimination of Paragraph 13 is welcome. This request goes to the concept of mitigation, a concept that has no place in investor arbitration. There is no foundation in the law that supports such a concept related to investor losses, and the very fact that this document request was on the list of presumptively discoverable documents wrongly implied that customers do have a duty to mitigate losses. We applaud the elimination of this paragraph.

14) **"Documents sufficient to show the customer's ownership in or control over any business entity, including general and limited partnerships and closely held corporations. If the claimant is a Trustee, he or she shall identify accounts over which he or she has trading authority."**

- This item raises a concern over whether firms will try to get documents related to the personal accounts of a trustee who takes over her parents' trust, or anything

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along those lines. We are also concerned about the requirement that claimant "identify" information without being asked.

15) **"Written documents relied upon by the customer in making the investment decision(s) at issue."**

- This provision is appropriate.

16) **"Copy of the customer's resume."**

- This provision is unchanged from the current Discovery Guide, and is acceptable.

17) **"Documents sufficient to show the customer's complete educational and employment background or, in the alternative, a description of the customer's educational and employment background if not set forth in a resume produced under item 15."**

- This provision should be consolidated with item 15, allowing the customer to produce either a resume or a description of his or her educational and employment background.

- There should be a similar provision for associated person(s) who handled the customer's account. As it currently stands, there are no presumptively discoverable documents that provide information on the associated person's education, employment, or training history, all of which are typically relevant in a case. At present, a customer is required to spend time at an arbitration hearing to learn the broker's background. It makes no sense to require this information from customers, but not from their brokers. Yet, this discrepancy between the discoverability of the personal information of the customer (the victim) and the personal information of the broker (the alleged wrongdoer), permeates the entire Discovery Guide.

18) **"All documents received by the customer by subpoena or document request directed to third parties at any time during the case."**

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- This provision is acceptable, although it would be helpful to get some guidance as to who is to bear the costs of reproduction.

List 3 – Claims of Excessive Trading – Firms/Associated Person(s)

1) **"The record of all compensation, monetary and non-monetary, including, but not limited to, monthly commission runs for the associated person, listing the securities traded, dates traded, solicited or unsolicited nature, and the gross and net commission from each trade, for all years in which the conduct alleged in the Statement of Claim occurred. The firm may redact names of customers who are not parties to this claim, but may not otherwise redact or delete information. If the firm asserts that the client controlled the trading in the account at issue, sufficient information must be provided to determine which accounts are those of the associated person. In addition, the firm must identify whether the associated person had related accounts that traded at the firm during the period in question."**

- We support this item. However, these documents should not be limited to excessive trading claims, but should be presumptively discoverable in ***all*** cases, as compensation is nearly always tied to the motive of an associated person(s) for recommending an investment. Evidence that numerous other investors with the same associated person also purchased the same securities on the same day also tends to relate to issues in all cases.

- The associated person(s)' accounts should be disclosed or identified in all cases, as well.

- Since this is information that firms are required to maintain under SEC Rule 17a-3(a)(19), it cannot be considered "unduly burdensome" to produce it and it should be produced in each case.

- The types of commission runs should not be limited to "monthly." Many firms also do quarterly and annual runs by product type and commission amount which should also be produced.

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- Finally, the time period identified in the previous version of the paragraph relating to compensation should be retained. It specified that the time period covered included two months preceding through the two months following the transaction(s) at issue, or up to twelve (12) months, whichever is longer.

2) "For all transactions at issue in the Statement of Claim, the memorandum of each order or instruction given, as well as documentation showing the compensation, gross or net, to the associated person for each such transaction. In the event accounts at issue are the subject of a wrap fee or similar arrangement, a record showing the compensation earned by period on the accounts."

- This should be available in all cases. Further the term "wrap fee" should be defined, as it may otherwise be deemed vague and result in excessive objections. We suggest the use of the term "asset-based" fee instead of "wrap" fee.

- Excessive trading, by definition, includes all transactions. Furthermore, there is no reason to limit order tickets (including their modern iterations) to excessive trading cases. Memoranda of each order contain information available nowhere else on a wide variety of claims. While firms normally claim that producing order memoranda is burdensome, they are required to keep them by SEC Rules 17a-3 and 17a-4. Order memoranda should be mandatory for all orders executed on a principal basis in order to show the terms of the transaction and the mark-up or mark-down.

3) "A record of all agreements pertaining to the relationship between the associated person and the Firm, summarizing the associated person's compensation arrangement or plan with the Firm, including commission and concession schedules, bonus or incentive plans, schedules showing compensation received or to be received based upon volume, type of product, nature of trade (agency v. principal) etc. and, to the extent that compensation is based on factors other than remuneration per trade, the method by which the compensation was determined."

- We support this Item. However, this paragraph is vague. Rather than requiring production of "a record" of all agreements summarizing compensation terms, the

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agreements themselves should be produced, as well as any manuals, bulletins, memoranda, or other documents that contain terms of compensation or incentive plans, sales contests, or any other documents that affected the compensation to an associated person. These types of documents should be produced in *every* customer case. Furthermore, there appears to be no reason why this requirement should not be mandatory for all cases as the overwhelming majority of cases involve the issue of the broker's compensation in some form.

List 4 – Failure to Supervise – Firms/Associated Person(s)

1) **"All commission runs and other reports showing compensation of any kind relating to the customer's account(s) at issue or, in the alternative, a consolidated commission report relating to the customer's account(s) at issue."**

- These should be produced in all cases and should also be expanded to include compensation and transactions for other accounts handled by the individual associated person. In addition, it is not clear that providing firms the alternative to provide a consolidated commission report will result in the production of the same type of information contained in commission runs. The Discovery Guide should clarify the term "commission run" to include each and every trade made by an associated person. The alternative of a "consolidated commission report" is inadequate, as it may allow member firms to produce reports that do not disclose the trades made in other accounts.

2) **"All exception reports, supervisory activity reviews, activity concentration reports, active account runs and similar documents produced to review for activity in customer accounts relating to the associated person(s) and/or the customer's account(s) at issue that were generated not earlier than one year before or not later than one year after the transaction(s) at issue."**

- We support this provision; however, these reports should be produced in all customer cases.

- In addition, there may be situations where associated person(s) not known by the customer share in compensation generated by investments or activity in the customer's account(s). Reports, reviews, and other documents related to such other associated person(s) should be presumptively discoverable.

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3) **"Those portions of internal audit reports for the branch in which the customer maintained accounts that: (a) focused on the associated person(s) or the 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."**

- Generally we support this provision; however, it should not be limited only to conduct that a firm or associated person deems "similar to the conduct alleged in the Statement of Claim." This provides too much interpretational discretion to the member firm.

4) **"Any writings reflecting conversations between the associate [sic] person assigned to the customer's account at issue during the time period at issue and members of the firm's compliance department."**

- We are very pleased by the concept of this provision; however, it should be expanded to include conversations with supervisors or other departments responsible for supervising or reviewing the associated person. Specifying the compliance department will likely lead to firms calling compliance or other supervisory employees something other than compliance to avoid responding to this request for documents. In other words, a firm could choose to interpret this category as excluding memoranda between a broker and her branch office manager. We recommend that the following language be added to the end of the category: "and/or any other department orperson responsible for supervising the associated person."

5) **"Copies of any inquiries, charges or findings by any regulator (state, federal or self-regulatory organization) and the responses thereto by the [firm/Associated Person] firm/associated person for alleged improper behavior by the associated person similar to that alleged in the Statement of Claim."**

- This provision should require production of all inquiries, charges or findings regarding the associated person and the particular branch office involved.

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Limiting the request to "alleged improper behavior by the associated person similar to that alleged in the Statement of Claim" allows the firm and/or associated person to determine in their sole discretion what constitutes responsive documents. If there are a number of such inquiries against a particular branch office or associated person, that information is relevant to demonstrate a lack of supervision and should be produced in all cases. This provision should also include both formal and informal inquiries.

6) **"Those portions of examination reports or similar reports following an examination or an inspection conducted by a state or federal agency of a self-regulatory organization that focused on the associated person(s) or the transactions at issue or that discussed alleged improper behavior in the branch against other individuals similar to the conduct alleged in the Statement of Claim."**

- Again, allowing firms and associated persons the ability to determine, in their sole discretion, what constitutes conduct or behavior similar to that alleged in the Statement of Claim is fraught with potential for abuse. All such reports mentioning or referring to the associated person(s) and the particular branch should be produced in every case, not just those that "focused on" the associated person(s).

7) **"Any notes or memoranda evidencing supervisory or managerial review of the customer's account or trades therein for the period at issue**."

- This paragraph is a positive addition to the Discovery Guide. Firms should be required to identify specifically the documents that are produced pursuant to this provision, and they should further be required to produce these documents in all cases. It should, however, include documents evidencing general supervision of the associated person, and not be limited to supervision in connection with the customer's accounts or trades at issue.

8) **"All correspondence between the customer and firm/associated person relating to the transaction(s) at issue bearing indications of managerial or supervisory review of such correspondence."**

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- We favor the addition of this category.

List 5 – Misrepresentations/Omissions – Firm/Associated Person(s)

"Copies of all materials prepared or used by the firm and/or associated person(s) and/or provided to the customer relating to the transactions or products at issue, 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 indicating the associated person(s) reviewed or read such documents."

- We approve of this rule, and particularly the addition of "performance or risk data."

List 7 – Negligence/Breach of Fiduciary Duty – Firm/Associated Person(s)

"Copies of all materials prepared or used by the firm and/or associated person(s) and/or provided to the customer relating to the transactions or products at issue, 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 indicating that the associated person(s) reviewed or read such documents."

- We approve of this rule, and particularly the addition of "performance or risk data."

List 8 – Negligence/Breach of Fiduciary Duty – Customer

"Copies of all materials received or obtained by the customer from any source relating to the transactions or products at issue, and other prospective investments, 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."

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- This category seems appropriate.

List 9 – Unauthorized trading – Firm/Associated Person(s)

1) Old paragraph 1 stated: "Order tickets for the customer's transaction(s) at issue." New paragraph 1 states: **"For all allegedly unauthorized transactions at issue in the Statement of Claim, the memorandum of each order or instruction given as well as documentation showing the compensation, gross and net, to the associated person for each such transaction."**

   - These memoranda should be mandatory for all claims, as they contain information entered by the actual associated person that is not available elsewhere, especially when the transaction is on a principal basis where spreads and discretionary mark-ups and mark-downs are prevalent.

   - We understand this language to be intentionally conformed to SEC Rule 17a-3(a)(6) and (7) and we approve of the language based on that understanding.

   - This provision should also include "In the event accounts at issue are the subject of an asset-based fee or similar arrangement, a record showing compensation earned by period on the accounts."

4) "Commission runs or other documents sufficient to show all trading by the associated person(s) in the security at issue for a period extending from ten trading days before and after each transaction the customer alleges was unauthorized. The firm/associated person(s) may redact customer names but must disclose the security traded, dates traded, whether trades were solicited or unsolicited and gross and net commission from each trade."

   - We support this provision. See body of Comment Letter.

List 10 – Unauthorized Trading – Customer

1) "Copies of all telephone records, including telephone logs, evidencing telephone contact between the customer and the firm/associated person(s).

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- This provision is acceptable.

2) **"All documents relied upon by the customer to show that the transaction(s) at issue was made without his/her knowledge or consent.**

- This provision is acceptable.

List 11 – Unsuitability – Firm/Associated Person(s)

1) **"Copies of all materials prepared or used by the firm and/or associated person(s) and/or provided to the customer relating to the transactions or products at issue, 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 indicating the associated person(s) reviewed or read such documents."**

- We support the inclusion of "sales literature" and "performance or risk data" into this paragraph.

2) **"Documents reflecting agreements between the firm and associated person related to the associated person's compensation, including fees received from fee-based accounts, during the years in which the transaction(s) or occurrence(s) occurred."**

- The term "fee-based accounts" should be defined here to prevent unnecessary objections. Member firms are required by SEC Rule 17a-3(a)(19)(ii) to maintain such documents, although the language could be expanded to mirror more closely 17a-3(a)(19)(ii), including the following language "including commission and concession schedules and, to the extent that compensation is based on factors other than remuneration per trade, the method by which the compensation is determined."

- This provision should also include specific reference to "any bonus or incentive program," which has been removed from the original paragraph.

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3) **"All documents between firm/associated person(s) and the customer relating to asset allocation, diversification, trading strategies and market conditions related to the customer's account(s)."**

- We welcome this addition to the Discovery Guide. See body of Comment Letter.

List 12 – Claims Involving Particular Products or Securities

A general observation regarding this list is that it does not specify who is to produce the documents identified, but rather creates some confusion as it appears to require some documents from the firm/associated person and some (paragraph 4) from the customer. It should be clarified who is to produce what documents under this list.

1) **With regard of up to five securities/products listed below, which are at issue in the claim, produce a record concerning trading activities in the customer accounts of the associated person(s) listing:**
   - **Account number;**
   - **Trade activity (i.e., buy, sell);**
   - **Number of shares, unit price, and dollar value of transaction;**
   - **Date traded;**
   - **Solicited or unsolicited;**
   - **Gross and net commission.**

   _____
   _____
   _____
   _____
   _____

   We support this addition to the Guide. See body of Comment Letter. However, we believe these documents should be available in any case. The items on this list would be ascertainable on a full commission run, which we believe should be required to be produced in every case.

2) **"In providing item 1 above, the firm may redact names of persons other than the claimant, but should provide sufficient information to identify (a) the claimant's**

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account; (b) the associated person's own and related accounts, and (c) the type of account (IRA, 401(k), etc.). This information shall be provided for a period of time beginning six months before and ending six months after the trades at issue in the claimant's account. If the claimant seeks production of information related to more than five products or securities, a separate request should be made; however, the information shall not be deemed presumptively discoverable."

- We generally support this provision; however, we note that the member firms have not identified any specific legislation or rules that protect the identity of other customers who may have been similarly harmed by the same associated person. Absent compelling authority to the contrary, respondents should be required to reveal the identity of other customers who may be potential witnesses regarding the conduct at issue. In court proceedings, there would be no presumptive protection and member firms would be required, particularly in federal court proceedings, to identify all potential witnesses. In FINRA arbitration proceedings, member firms are seeking to protect themselves, without authority, to deny customers the right to a fair hearing by refusing to reveal the identity of potential witnesses.

3) **"To the extent that an insurance product that provides a death benefit is included in the Statement of Claim, provide all information concerning the customer's insurance holdings and the recommendations, if any, to the customer regarding insurance products."**

- We support this provision. Often, firms assert in defense of variable annuity cases that the client desired the death benefit. In such a case, this information must be considered presumptively discoverable.

4) **"To the extent that an insurance product that provides a death benefit is included in the Statement of Claim, the customer shall provide all insurance information received from an insurance salesman or broker."**

- Consistent with the general comment above, it should be made clear that the other provisions of this list apply to the firm/associated person's obligation to produce. Otherwise, this provision seems appropriate.

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5) **"A record of all agreements pertaining to the relationship between the associated person and the firm, summarizing the associated person's compensation arrangement or plan with the firm, including commission and concession schedules, bonus or incentive plans, schedules showing compensation received or to be received based upon volume, type of product, nature of trade (agency v. principal), etc. and, to the extent that compensation is based on factors other than remuneration per trade, the method by which the compensation was determined."**

- We support this provision. This information goes to the incentive the broker had to recommend the security at issue.

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