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Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090.

RE: SR-FINRA-2008-024 Proposal to Amend the Discovery Guide to Update the Document Production Lists.

Dear Secretary Murphy,

The Cornell Securities Law Clinic (the "Clinic") would like to thank you for the opportunity to comment on the Financial Industry Regulatory Authority's ("FINRA") Rule Proposal to amend the Discovery Guide, which will update the Document Production Lists (the "Proposal"). The Clinic is a Cornell Law School curricular offering in which law students provide representation to public investors and public education as to investment fraud in the largely rural "Southern Tier" region of upstate New York. For more information, see http://securities.lawschool.cornell.edu.

Summary

The Clinic opposes the Proposal as it is currently written. The changes made by the Proposal tip the discovery balance unfairly in favor of member firms. The Proposal creates a chilling effect on customers who wish to pursue claims by dramatically increasing the financial and personal information customers must produce in every case, regardless of the nature of the claims in the case. By contrast, the categories of documents member firms must produce in every case are narrowed, and the only substantial expansion of the firms' production requirements is limited to certain types of cases.

To the extent the Proposal creates new categories of documents that must be produced by member firms in cases involving the sale of certain types of products, we support such changes. However, we cannot support the Proposal as a whole as drafted because these positive changes are far outweighed by the changes (a) to List 1 narrowing the scope of documents to be produced by member firms in every case, and (b) to List 2, creating a wholesale expansion of customers' production requirements in every case. If the SEC were to reject the changes to Lists 1 and 2, we would have no objection to other proposed changes on the other Lists.

There are four themes throughout the Proposal which, taken as a whole, have a severely negative impact on the customer who decides to bring an action against a member firm. The four themes we have identified in the Proposal are:

1. *For firms, a change in List 1, which will require that less information be turned over by firms*

   There are many documents in List 1 which the current Discovery Guide requires firms to turn over which will no longer be required under the Proposal. The Proposal eliminates the required production of confirmations, account statements, recordings, and holding pages.

2. *For customers, in List 2, the extension of the "relevant" time-frame from three years to five years*

   The Proposal extends the "relevant" time-frame from three to five years, which places a higher burden of disclosure on the customer and increases the invasiveness of the discovery process.

3. *For customers, in List 2, intrusion on the customers' privacy rights by giving firms the right to obtain documentation directly from other institutions and by intruding on the privacy rights of third parties by requiring non-party representatives (such as trustees) to produce financial information*

   The Proposal adds several provisions that require a customer to give up privacy protections that the customer would otherwise have regarding financial information not relevant to the arbitration.

4. *For customers, in List 2, the extension of document production to include events that take place after the filing of the Statement of Claim.*

   Several proposed changes to List 2 have extended the end of the time frame of production from the filing of the Statement of Claim to "through the completion of discovery." Similar to the changes that extend the time frame from three to five years, this extension is completely unjustified and will increase the invasiveness of the discovery process for the customer.

We will discuss and analyze each Item from the Proposal separately, with a focus on why we do not support the Proposal as drafted.

List 1 (Documents to be Produced by Firms/Associated Persons In Every Case)

There are many documents which the current Discovery Guide requires firms to turn over which will no longer be required under the Proposal. There are no parallel allowances in the proposed changes in List 2. The documents and items which will no longer be required are often integral to the development of the customer's case and the Discovery Guide should continue to require their production. Requiring the customer to specially request that the arbitrators mandate production of these documents places a high burden on the customer, which is not justified.

List 1, Item 2
FINRA proposes to delete List 1, Items 2 and 3 in their entirety. In many instances, the customer has retained account statements and/or confirmations, and requiring production of these documents in every case adds unnecessary delay and cost to the discovery process. If necessary, the customer may request these documents separately under proposed List 1, Item 2.

List 1, Item 4
FINRA proposes to delete Item 4 in its entirety, because holding pages generally are no longer in use, and transaction information in an electronic form would be available to the customer on account statements and/or confirmations.

Current List 1, Items 2 and 3, require that firms turn over confirmations and account statements. The Proposal deletes Items 2 and 3 in their entirety because "the customer has retained account statements and/or confirmations, and requiring production of these documents in every case adds unnecessary delay and cost to the discovery process." But in many cases, the customers have not retained these documents, and going through the process of specially requesting them as the Proposal requires would be very burdensome for the customer and will, in fact, unnecessarily delay the discovery process. Moreover, the production of these documents is not very burdensome to the firm at all, because the documents are stored in digital format and can be quickly and easily printed out or downloaded for discovery purposes.

Confirmations are important to the development of a customer's claim, because confirmations contain necessary information, such as commission and fee charges, not contained on monthly statements. Additionally, holding pages group transactions by security and, like confirmation sheets and account statements, are stored in digital format and easily produced. To the extent holding pages are not used, there is no burden on the firm from simply indicating such documents do not exist; removing such documents from discovery is not the appropriate remedy.

List 1, Item 7
FINRA is proposing to delete Item 7 in its entirety. Notes of telephone calls or conversations would continue to be discoverable under new Item 5, discussed above. FINRA proposes to eliminate mandatory production of recordings in every case because producing recordings is labor intensive, expensive, and unnecessary in cases where there is no dispute relating to conversations between the parties. Recordings would continue to be subject to discovery on a case by case basis, as the arbitrators deem to be appropriate under current Rule 12507.

List 1, Item 7 will be deleted under the Proposal. The Proposal continues to make notes of telephone calls or conversations presumptively discoverable under List 1, Item 5, but would eliminate the recordings of telephone calls or conversations requirement from List 1.

The Clinic objects to the elimination of the requirement regarding the production of recordings by the member where the parallel customer requirement in List 2, Item 8 to produce recordings, is not eliminated.

Under the Proposal, the customer would be required in every case to produce recordings of telephone calls or conversations even where "there is no dispute relating to the conversations between the parties." FINRA's justification for eliminating the recordings requirement as to firms is "because producing recordings is a labor intensive, expensive, and unnecessary in cases where there is no dispute relating to conversations between the parties." If this burden is so great and the reason is so compelling, then there is no reason why the firm should not be required to turn over recordings while customers are still required to do so.

List 1, Item 8
With regard to customer complaints alleging conduct of a similar nature to that alleged in the Statement of Claim, the amendments would allow the firm/associated person(s) to redact portions of these documents to prevent disclosure of nonpublic personal information about customers.

List 1, Item 8, would allow the firm/associated person(s) to redact portions of these Disclosure Reporting documents to prevent disclosure of nonpublic personal information about customers. While we agree with the sentiment behind this rule – the protection of privacy – the Proposal needs to be clarified further to outline what, specifically, may be redacted. Social security numbers, for instance, should be redacted. But the Proposal, as it is currently written, could allow for the redaction of names of potential witnesses and other information which may be relevant to the case.

List 2 (Documents to be Produced by Customers in Every Case)

The proposed changes to List 2 contain several troubling themes. It is the changes to List 2, which apply in every single customer case, which are the foundation of our opposition to the Proposal.

First, we have serious objections to the Proposal's significant change to the time frame for which certain information must be produced. This change affects numerous Items in the Production Lists, including: List 2, Items 1, 2, and 4. The change is from a time frame of three years prior to the first transaction to five-years prior to the first transaction. Also, several Items extend the end of the time frame, as well, from the filing of the statement of claim to "the completion of discovery".

Second, the Proposal requires the disclosure of sensitive personal financial information of the customer (and possibly non-parties) in every case. Among other things, the Proposal adds provisions that require the customer to provide the member firm with an authorization to obtain account statements and loan applications directly from firms or lenders the customer has accounts with or from whom the customer has applied for loans. The Proposal also requires that the customer produce a full tax return, instead of the first two pages and the schedules that specifically address investments, which is required under the current Discovery Guide. These additions compromise customers' privacy and the security of their personal information.

List 2, Item 1
Requires the production of all customer and customer- owned business (including partnership or corporate) federal income tax returns, limited to pages 1 and 2 of Form 1040, Schedules B, D, and E, or the equivalent for any other type of return, for the three years prior to the first transaction at issue in the Statement of Claim through the date the Statement of Claim was filed. FINRA is proposing to require the production of complete copies of tax returns for the five years prior to the first transaction at issue in the arbitration, through the year in which the statement of claim is filed.

List 2, Item 2
Current List 2, Item 2 requires the production of financial statements or similar statements of the customer's assets, liabilities, and/or net worth for the period(s) covering the three years prior to the first transaction at issue in the Statement of Claim through the date the Statement of Claim was filed. To provide parties with a broader understanding of a customer's financial status during the relevant period, FINRA proposes to amend this Item to expand the covered period to five years.

These two Items, as well as List 2, Item 4, expand the time period for production from three years to five years. FINRA's justification for the change from a three year to a five year time period lacks any logical explanation or substantial

support. FINRA has not cited any evidence that the three-year time frame has been the cause of any significant problems with the discovery process in arbitration. This three-year standard has been in existence for nearly 10 years, certainly a sufficient time to acquire data indicating the failure of this provision.

FINRA's failure to provide a logical explanation of the reason for this change leads the Clinic to conclude that this was a negotiated change, which is an insufficient justification. The shift to a five-year requirement has significantly broadened the scope of discovery for the customer. This is especially significant because the shift to a five-year time frame will affect all customer claims.

One can easily imagine a situation where a customer is unwilling to endure the intrusive discovery process, such as a claim involving a single transaction. For example, under the Proposal, a customer who has a claim involving a single trade that took place two years ago would now have to produce entire tax returns and statements of his financial assets for the last seven years (five years prior to the transaction two years ago through the current statement of claim). This change will undoubtedly have a chilling effect on the customer's willingness to bring meritorious claims.

Proposed List 2, Item 1 also contains one more troubling change: The new requirement that the entire tax return be produced. Previously, only the first two pages of the form 1040 and the schedules that address investments directly were required. This new requirement now allows the member access to information about the customer that is not the subject of the arbitration and invades the customer's privacy. Customers are likely to have information on the portions of the tax return that are completely irrelevant to the arbitration at issue. A customer's entire tax return should not be presumptively discoverable in all cases. If the broker or member believes the entire tax return is necessary that broker or member may request the arbitrators order production of the entire tax return. In a minority of cases, that may be a necessary and viable avenue to pursue but it is not a fair amendment to Item 1 of production List 2.

List 2, Item 4
FINRA is proposing to amend Item 4 to require the customer to identify each securities firm where the customer has maintained an account and to produce account statements for the five year period prior to the first transaction at issue in the arbitration, through the completion of discovery. The proposal would permit the customer to provide written authorization allowing the respondent firm/associated person to obtain account statements directly from the securities firms in lieu of providing copies of the statements.

List 2, Item 4, contains the same troubling expansion of the "relevant" time period for production that List 2 Items 1 and 2 did, from three to five years.

List 2, Item 4, along with List 2, Item 12, also raise problems regarding the

privacy of customers and third parties. Generally, a financial institution cannot disclose a customer's non-public personal information to an unaffiliated third-party business unless the customer is given a warning about the disclosure and is give an adequate amount of time to stop the institution from disclosing that information.[1] The Proposal would allow for the disclosure of this customer information without the customer having a chance to review which information is being released, which implicates not only the customer's privacy, but the privacy of associated third parties, as well.

We object to any provision that allows or requires direct communications between the member firm involved in the arbitration and other firms where the customer has accounts or loans. The exclusion of a mechanism for ensuring that only the information that is actually discoverable be produced is extremely troubling. Additionally, the customer may not be the only person on an account or loan application and without a mechanism to monitor the information being transmitted a person who has no involvement in the arbitration may have their private financial information transmitted to an unaffiliated third-party.

An analogy is that of privileged information. If a document were required to be produced during discovery the counsel for the customer would have the opportunity to examine the document in order to ensure that no privileged information is produced. This type of protection should be used in customer arbitration as well with regard to the production of otherwise protected confidential financial information.

We also object to the changes made in this Item, as well as List 2, Item 11, that extend the end of the time frame of production from the filing of the Statement of Claim to "through the completion of discovery." Like the changes that extend the time frame from three to five years, this extension is completely unjustified. FINRA did not address this change in the Proposal thus there is no reasoning given for adding this provision to the following Items: List 2, Items 4 and 11. FINRA, by not explaining this change appears to again be amending a provision consistent as the result of negotiations rather than reasoned justification.

There are many proposed amendments that do not change the production period to include "through the completion of discovery." There is no logical reason to include this provision in these specific Items. The member firms that want access to information about accounts while the case is pending should request it through the arbitrators if there is a justification for such an extension. This is an inappropriate addition to the presumptively discoverable information in all cases. A new provision that will have a chilling effect on the customers' willingness to bring meritorious claims should be rejected where there is neither rationale nor justification for the change.

Additionally, we object to this provision because it will likely have an insidious effect on the discovery process. The member firms will now have the opportunity to extend the discovery period because it will be unclear exactly when the discovery

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[1] *See* Gramm-Leach-Bliley Act, 15 U.S.C. § 6801; Regulation S-P, 17 C.F.R. 248.10.

period ends and thus the member firms will expect the customer to continue to produce information regarding other accounts on a rolling basis.

List 2, Item 6
Requires the production of all account analyses and reconciliations prepared by or for the customer relating to the account(s) at issue. FINRA is proposing to provide clarity to this Item by changing "the account(s) at issue" to "the accounts at the respondent firm or transactions with the respondent firm during the time period at issue."

This List continues the trend of expanding required production on the customer side during discovery (without a parallel expectation on the firm side). Changing the language to "the accounts at the respondent firm or transactions with the respondent firm during the time period at issue" doesn't merely clarify the production requirement, instead it expands. Where the current rules require that customers only produce account analyses on disputed accounts, the change would require the production of account analyses on *all* accounts that the customer has at that firm.

List 2, Item 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.)

The text of the current List 2, Item 8 requires the customer to produce all recordings and notes of telephone calls regarding the customer's accounts. FINRA has proposed that List 2, Item 8 also contain the clause "or transactions" in order to clarify what recordings are to be produced.

We object to the inclusion of List 2, Item 8 where the parallel item in List 1 is removed in the Proposal. Under current List 1, Item 7, the firm must produce all recordings and notes of telephone calls. FINRA has proposed mandatory production by the member of recordings be removed from List 1 because it is "labor intensive, expensive, and unnecessary" in every case. We strongly object to a situation where a firm, which is likely in a better position to bear the costs of production of recordings and arbitration, does not have to produce such materials and the customer is required to produce those materials. Perhaps production of recordings may be necessary in some cases but they should not be included in List 2 unless also required of the firm.

List 2, Item 8 should either be excluded for the same reasons it is excluded on the industry side or List 1, Item 7 should not be removed.

List 2, Item 9
Requires the production of all correspondence between the customer (and any person acting on behalf of the customer) and the firm/associated person(s) relating to the account(s) at issue. FINRA is proposing to amend this Item to broaden the scope of the production by deleting the reference to firm/associated person(s). The customer may have corresponded with persons/entities unrelated to the firm concerning the transactions at issue.

The current List 2, Item 9 requires the customer to produce all correspondence with the firm or associated person that pertains to the customer's account at issue. The proposed change to List 2, Item 9 would make the scope of production by the customer broader by eliminating the reference to the associated person. FINRA's justification for this change is that the customer will sometimes correspond with individuals who are not the associated person or the firm regarding the transaction or account at issue.[2]

We object to proposed change in List 2, Item 9 for several reasons. First, it is broader than the similar item in List 1 for the member. The current List 1, Item 5 is the equivalent production requirement for the member and the FINRA's proposal would remove that item. This is the same unequal treatment of the customer and the member that was evidenced in proposed List 2, Item 8. We object to the inclusion of this item in List 2, because it affects every case, and the exclusion of it in List 1.

Second, the Proposal could vastly expand the scope of discovery and the burdens placed on the customer, as well as triggering privacy concerns. The production of these communications would be onerous and would invade not only the customer's privacy, but also the privacy of any third parties.

List 2, Item 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.[3]

The Proposal adds a completely new List 2, Item 12. The justification given by FINRA for requiring information regarding loans and guarantees of loans is to "provide evidence relating to the customer's financial status, including . . . information on net worth, assets, and liabilities."[4]

The Clinic objects to the addition of List 2, Item 12 for three reasons. First, the

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2 FINRA Proposal Change, File No. SR-2008-024,14 (June 11, 2008).
3 FINRA Proposed Change, File No. SR-2008-024, Exhibit 5, 7 (June 11, 2008).
4 FINRA Proposed Change, File No. SR-FINRA-2008-024, 16 (June 11, 2008).

time period covered by this Item is too long. FINRA has offered no substantive explanation of necessity of the five-year time requirement for information regarding loans a customer has applied for or guaranteed. We object to the addition of List 2, Item 12, but if it is added, we particularly object to the five-year time frame. The three-year time frame for discovery production is more reasonable.

Second, we object to the written authorization to the firm/associated person to directly obtain information regarding the customer from each lender. This is inappropriate because the customer's privacy may be violated if the firm is able to obtain information about the customer without the customer or customer's counsel first examining the information. The risk of violations of privacy is higher here even than in the case of disclosure of statements of accounts from other securities investment firms because of the nature of loans. Customers may have applied for loans that have no relevance to the transaction(s) at issue in the arbitration, or may contain protected information of non-parties.

Finally, we object to the justification offered by FINRA for the addition of this item. The customer must already provide financial and similar statements, under List 2, Item 2. FINRA claims this Item has probative value for determining the financial status of the customer but List 2, Item 2 makes this Item unnecessary. This Item should not be included in List 2, instead it should be discoverable only in cases where the arbitrators find such information relevant to the specific claims in the case.

List 2, Item 14
Written documents relied upon by the customer in making the investment decision(s) at issue.

The current Production Lists require the customer to produce written documents that the customer relied on when making the investment decisions only in unsuitability claims, which are covered by List 14. The Proposal would move current List 14, Item 2 to List 2. This item was formerly in the list of presumptively discoverable items under a claim of unsuitability. The change would make this presumptively discoverable in all cases.

The Clinic objects to the introduction of this item into List 2. First, it presumes that the customer in all cases relied upon written documents and made the investment decisions in every case. While the customer may have made investment decisions that are the subject of the arbitration in some cases it is inappropriate to make it presumptively discoverable in every case. Thus the justification of FINRA that this information would be valuable in every customer case is an exaggeration. This information should be left in the current List 14.

Conclusion

Although there are additions to some of the Production Lists that would be beneficial to the discovery process in arbitration, the changes which apply in every case (Lists 1 and 2) are so objectionable that we cannot support the Proposal in its current form.

Very truly yours,

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