RBC Wealth Management

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BY EMAIL TO: **rule-comments@sec.gov**

Ms. Nancy Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: File No. SR-FINRA-2008-024
Proposed amendments to the Discovery Guide to update the Document Production Lists

Dear Ms. Morris:

RBC Wealth Management, a division of RBC Capital Markets Corporation (RBCWM) appreciates the opportunity to comment on the proposed amendments to the Discovery Guide ("Guide").[1] RBCWM applauds efforts to improve upon the FINRA arbitration discovery process, but has grave concerns regarding the newly presented Guide as to: 1) direct risks to the industry's mandate to keep customer information confidential; 2) the onerous nature of producing volumes of documents and information that are likely duplicative of other produced materials and/or tangentially related or unrelated to the claims; 3) the overly broad descriptors and requirements; and 4) new and vague categories of documents. RBCWM recommends that the Guide not be adopted as presented, but that specific edits be made that will retain the Guide's intended goal of mutual production by the parties of relevant documents without creating a burdensome, mandatory, "scorched earth" search requirement that yields volumes of tangentially relevant and irrelevant information, some of which threatens the

[1] Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Amendments to the Discovery Guide To Update the Document Production Lists, Release No. 34-59534; File No. SR-FINRA-2008-024, available at: http://edocket.access.gpo.gov/2009/pdf/E9-5389.pdf.

confidentiality of highly personal financial information of persons and entities not even a party to the dispute.

1. **Direct risks to the industry's mandate to keep non-party customer information confidential.**

As an industry, we collect, process and retain volumes of private and confidential information about our customers and are required to protect the confidentiality of this information. Confidential information is not limited to the customer's identity and in many situations (the wealthy; customers in the public eye; customers in small towns, etc.), disclosure of confidential information, including details regarding trading activity, account numbers and the like, can be as revealing as providing a name and address. In several places, the Guide threatens this confidentiality.

A customer who initiates arbitration is entitled to the information relevant to the claims being asserted, but the arbitration is not an open door to information on every other customer serviced by the respondent financial institution or associated person. As proposed, however, the Guide appears to require that confidential customer information relating to non-parties be provided to a litigating customer *en masse,* including account numbers, trading history, account values and other such data, with only the non-party customers' names retaining protection. Broker-dealers are bound to maintain confidentiality of this data. For example, a son cannot obtain his mother's account information and trading history without her expressed written authorization. However, as the Guide is written, if that son (or anyone else) commences litigation using the right buzz words for specific causes of action, he can get his mother's data and trading history without her authorization. The Guide, as written, creates tremendous opportunity for abuse and/or inadvertent disclosure.

There are several places in the Guide that require production of very detailed and highly confidential information as it relates to persons and entities that are not related to

and are not even parties to the dispute.[2] These non-parties would have no notice of the disclosure request and, as such, would not have an opportunity to voice their objection to the Panel to prevent disclosure of their confidential information. Although some of the Guide's requests specifically permit the redaction of the customer name, that alone is not sufficient to protect against the disclosure of nonpublic personal information of non-party customers. The level of detail regarding trading activities required to be disclosed pursuant to the Guide may be sufficient to "expose" or identify a customer, even though the customer's name may be redacted from the disclosure. Furthermore, some of the requests do not even indicate redacting the non-party names as an appropriate practice (which it should always be). Each of these identified requests in

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[2] **List 1(9) and List 4(2)** appears to request all exception reports, supervisory reviews, etc. without an opportunity to redact nonpublic personal information of customers who are not parties to the dispute.
List 3(1) and List 9(4) appears to request disclosure of all trading activity for any non-party customer of the associated person identified in the claim, without an opportunity to redact nonpublic personal information of customers who are not parties to the dispute – only redacting of the customer's name.
List 3(3) appears to request disclosure of all compensation for any non-party customer of the associated person identified in the claim, without an opportunity to redact nonpublic personal information of customers who are not parties to the dispute.
List 4(3) and List 4(6) appears to request internal and regulatory audit/examination reports for the branch that relate to non-party customers without an opportunity to redact nonpublic personal information.
List 4(4), appears to request all communications, including those relating to non-party customers, between the associated person and his compliance department without an opportunity to redact nonpublic personal information.
List 4(5) and List 4(6) includes "inquiries," (4(5)) and "examinations" (4(6)) apparently including those relating to non-party customers without an opportunity to redact nonpublic personal information.
List 12 in its entirety appears to request trading activity and communications of non-party customers not only without an opportunity to redact nonpublic personal information, but with an express requirement to disclose highly confidential information, such as account numbers, type of account, insurance holdings, death benefits and dollar amounts and trading activity. We recommend this list be eliminated and discovery be managed by the Panels on a case-by-case basis.

footnote 2 threatens the mandated protection of non-party customers' confidential information.

Furthermore, Statements of Claim are often drafted without sufficient investigation or are based upon erroneous information or assumptions. The Guide does not take into consideration claims that 1) are not founded in fact; or 2) wrongly identify an associated person(s) not affiliated with the party customer or acting in a supervisory role. Clearly, *any* information, whether it be non-party customer, compensation or other branch or corporate-related data that is not directly associated with the claim, but which is otherwise responsive under the Guide due to careless drafting or false understandings of associated person's relationships within the financial institution, should not be produced.

We recommend that any references to non-party customer information be removed in their entirety from the Guide and that the Guide expressly state that the Lists are not intended to require a financial institution to disclose non-party information, except when compiled with other non-party customer information so that the level of detail produced cannot be traced back to the non-party.[3] In rare situations where the disclosure of non-party information to the degree identified in the Guide may be necessary, such disclosure can be controlled by the Panel.

2. Onerous requirements to produce duplicative or irrelevant information.

Arbitration claims always involve transactions and events that occurred in the past, sometimes many years ago. Nearly all of the proposed changes to Guide appear

[3] For example, in churning and unauthorized trading cases, it may prove probative to produce the associated person's gross trading figures by category, but the detail for non-party individual trades would not be necessary. In cases in which a single equity or mutual fund is at issue, the associated person's volume of trading in that equity or fund for a time period may also prove probative, but the trade detail would not be necessary.

to assume everything a firm did in connection with running its business in the past can be easily re-created through savvy computer production.[4] However, throughout the industry, much information retained as a part of books and records retention requirements is retained in its produced state, not its created state. While a sophisticated computer system may routinely create a vast array of reports, what is often retained is an electronic image of the report, not a readily searchable database of information. The reason for this is simple--with the ever-expanding array of products and services, and the inherent volatilities of the marketplace, change and adaptation is constant. Retaining the imaged reports is the only practical way to accurately retain the history. As such, firms retain documents and information differently, but each retains its books and records consistent with business, regulatory and compliance requirements. These requirements are not designed in anticipation of litigation and discovery.

A good specific example of data retained in image is customer account statements. Although most broker-dealers create account statements from a sophisticated computer system that sorts through the hundreds of thousands of transactions conducted each day, the document that is retained is the image of the electronic data that was compiled for the customer. The same is true for most other books and records.

In securities arbitration, parties are required to provide information that is in their possession and control. They are not required to create or recreate documents and information that they do not possess or control. The proposed changes to the Guide potentially require compilation of data from multiple image sources and a manual review for relevance, a burdensome job, especially as weighed with the limited relevance and probative value the resulting documents would present. This is not a "one size fits all" industry. As such, there are challenges presented in the laudable effort that FINRA has

[4] e.g. List 1(2); List 1(3); List 1(4); List 1(5); List 1(7); List 1(8); List 1(9); Lists 3, 4, 5, 79, 11 and 12.

endeavored to create a "one size fits all" discovery guide. Nevertheless, the value of producing some of the requested documentation is far outweighed by the time required to identify, gather, review and produce such documents and information, especially where some of the retained material is imaged and not "searchable."

Further, the requirement to retain information does not also include a requirement to retain the systems necessary to calculate product pricing, commissions charged, associated person payouts, etc. As a result, many companies retain the requisite records, but may not retain the underlying data calculations or systems to recreate the information. Herein lies the concern with the broad sweeping nature of the Discovery Guide as it has been presented for change.

We recommend that language be added to the preamble of the Guide to allow for flexibility and good faith production of information, rather than designing it as a "scorched earth" exercise of imaged document review and redaction projects involving tens of thousands of documents for each and every case.

3. Overly broad descriptors and requirements.

Many of the requests in the Guide call for "all documents concerning" or "relating to the transaction(s) at issue" or some other broad reaching terminology.[5] Compliance

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[5] **List 1(2);**
List 1(3) We recommend: "Documents and information gathered from the party customer sufficient to show compliance with the know your customer rule.";
List 1(4);
List 1(7);
List 1(8);
List 1(9) We recommend: "Documents sufficient to show exception reports, supervisory activity reviews, active account runs and similar documents directly relating to the conduct alleged in the Statement of Claim in which the party customer's account is referenced or listed. However, the productions should be redacted to prevent the disclosure of any nonpublic personal information of any non-party customer.";

with these terms would lead to the production of duplicative or tangentially relevant or irrelevant information and require an onerous search for "all" documents. Read literally, some of the requests may require, for example, a review for content of every mass mailing included as statement stuffers, or provided by various departments including, but not limited to, retirements, compliance, marketing, specific product areas, the branch, etc. Although some of these general mailings may "relate" to the transaction(s) at issue, they would not "directly" relate to the transactions at issue.

To avoid this undue burden, we recommend replacing "all documents concerning" with "documents sufficient to show", and replace "relating to" with "directly relating to", as well as the other related recommendations as outlined in footnote 5.

List 1(11) We recommend: "All documents received by Respondent in response to any subpoena or document request Respondent served/serves on any third party as a direct result of the party customer's complaint and received at any time before or during the pendency of the case.";
List 3(1) and List 9(4) We recommend: "Documents sufficient to show total compensation (monetary and non-monetary) paid to the associated person for all customers (parties and non-parties), including an itemized identification of the associated person's compensation as to each of the party customer's transactions during the ten day period on either side of the time frame for all conduct alleged in the Statement of Claim. In addition, documents sufficient to show the party customer's detailed trading activity, dates of trades, whether the trades were solicited or unsolicited and the commissions charged to the party customer for each trade for all conduct alleged in the Statement of Claim.";
List 4(1) and List 9(1) We recommend: "Documents sufficient to show an itemized identification of the associated person's compensation as to each of the party customer's transactions during the time frame for all conduct alleged in the Statement of Claim.";
List 4(2);
List 4(4);
List 5 and List 11(1) We recommend: Documents sufficient to show materials prepared specifically for the party customer and/or used by the associated person or firm in communicating to the party customer about the transactions or products at issue in the dispute, including, research reports …";
List 7 We recommend: "Identification of materials prepared by the firm and/or associated person and expressly used in communicating to the party customer and/or provided to the party customer relating directly to the transactions…";
List 11(3)

4. New and vague categories of documents.

In addition to the comments above, there are two additional requests in the Guide that require attention. Those requests introduce new terms, which are vague and/or overly broad on their face. Specifically, **List 1(1)** includes a newly introduced and overbroad term: "the account record information for the customer." We recommend: "All documents signed by the party customer and all agreements with the party customer, including…".

In addition, **List 1(7)** includes a newly introduced and vague term: "all sections of the Firm's manuals and any updates thereto" We recommend: "Documents sufficient to show the Firm's policies and/or procedures in place directly relating to the claims alleged in the Statement of Claim during the relevant time periods, including…"

Thank you for giving RBCWM the opportunity to comment on the proposed amendments to the Discovery Guide. If you have any questions regarding this comment letter, please contact me at michael.pysno@rbc.com or 612-371-6121.

Sincerely,

Michael Pysno