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April 3, 2009

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

Re: *Proposed Amendments to the Discovery Guide in FINRA Arbitrations*
SR-FINRA-2008-024

Dear Ms. Murphy,

I am writing to comment on the above proposal regarding changes to the Discovery Guide which applies to FINRA arbitration matters. I am an attorney practicing in Milwaukee, Wisconsin and I have represented investors around Wisconsin in arbitrations for over twenty years. The forum has become increasingly slanted in favor of the industry and against the individual investor. The proposed changes will make the process even more one-sided. They should, for the most part, be rejected.

I have read the comments submitted by the Public Investors Arbitration Bar Association, of which I am a member, and join in those comments. I have some concerns that I wished to address separately as well.

The proposed changes to the Guide significantly increase the amount of discovery from the customer and significantly decreases the discovery required from the firm. The Guide implies to arbitrators what is presumed relevant in the arbitration. Thus, the implication created by the proposed changes is that all of the information required by the amended List 2 must be relevant. It is not. Many cases involve negligence or misrepresentation as to a certain stock. The vast bulk of the documents and information required of the customer is irrelevant in such cases.

Most of the requested information ostensibly relates to a suitability case. However, in fact what is relevant in such a case is what the broker understood to be the suitability criteria at the time of the transaction. The law requires that a broker "know your customer." The Discovery Guide is focused on the firm "knowing your arbitration opponent." By allowing the firm an unfettered fishing expedition, the Guide supports the firm's efforts to shift the issue in a fraud case from what was said, why a particular stock was purchased and whether a fraud occurred, to irrelevant red herrings, such as whether "the customer is rich, so he can afford the

loss," or whether "the customer traded in risky stocks many years ago somewhere else," or whether "the customer was willing to take out risky loans to buy a house he could not afford." The proposed amendments to the Guide support the firm's typical attempts to put the client on trial.

The inequity of the proposed amendments is obvious from the start, with a comparison of heading for List 1 – "*Documents* to Be Produced in All Customer Cases by Firm/Associated Person(s)" - with List 2 – "Documents *and Information* to Be Produced in All Customer Cases by Customer." Interrogatories are not allowed in arbitration, so any attempt by the customer to get information from the firm is cut off right away. Now the Discovery Guide mandates a wealth of interrogatories to be answered by the customer. This one-sided discovery must be rejected.

The proposed Amendment requires the customer to produce items that the firm is not. For example, many cases turns on what is said. The customer is required to turn over recordings of conversations (List 2, Item 8) – the firm is not (List 1 Item 5). This brazen disparity is astounding.

Customers must provide all complaints, decisions and settlements from any securities matter in which the customer has ever been a party (List 2, Item 11), but the "associated person" need only produce "complaints alleging conduct of a similar nature" (List 1, Item 6) – and even then not decisions or settlements. Further, aside from the inherent unfairness that the customer be required to produce many documents that the associated person does not have to produce, the associated person is able to limit his or her production of customer complaints to those of a *similar nature.* This limitation the firm is able to assert shows up as well in Item 7. It is absurd to allow the party required to produce relevant documents to determine what is or is not "similar." *All* customer complaints should be turned over, along with all decisions and settlements – just as they are required of the customer.

The Amendment proposes unnecessary and onerous extensions on the time frames for which the customers must produce documents. What is striking is that those onerous limits are not imposed on the firms. The customer must now produce a ridiculous amount of documents *and information* going back *five* years before the first transaction at issue (which means the customer must now find documents going back five to ten years on average) and now continuing to the end of discovery – rather than the date the Statement of Claims was filed. There is no reasonable reason to increase the timeframe from three to now five years. This burden is only placed on one party – the customer. The proposed cut-off for discovery imposed just on the customer is equally unfair. The old cut-off was the commencement of the action. What happens after the arbitration commences is not relevant to why the broker made the recommendations he did or why the transactions at issue occurred. The new cutoff *does* impose further burden on the customer. It is to be expected that the firm will demand that the customer continue to produce documents (such as tax returns, credit applications, mortgage refinancing applications, and monthly statements from any new accounts) *as and when received throughout the ongoing arbitration.* No such burden (surprise, surprise) is put on the firm in its required production.

Indeed, the failure to have similar time frames in List 1 stands out. The Firm can limit its production to "the relevant time related to the claims alleged" (Item 7) or to documents "prepared during the time period at issue" (Item 8). Indeed, the inequity of the requirements is underscored by Item 8 of List 1. The firm need only produce analyses and reconciliations of the customer's account "prepared during the time period at issue." There is no limitation on the time during which the analyses are prepared by or on behalf of the customer.

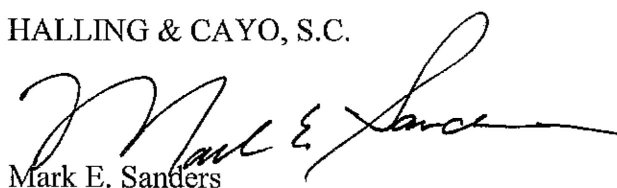
The scope of production is also unequal. The Customers must turn over all "information or documents relating to accounts at the respondent firm" (List 2, item 5) while the firm only need turn over "correspondence … relating to *the transactions at issue*" (List 1, Item 2). Thus, the customer is required to produce *every document* relating to the account whereas no such obligation is placed on the firm. The firm is more likely to have all such documents – whereas the customer often does not. Yet the party with the documents does not have to produce them under the proposed amendment.

The proposed Amendments require that the customer provide authorizations. This requirement should be rejected. The relevance of the third party information in most cases is remote, at best. The invasion of the customer's privacy is extreme. Firms already have the ability to obtain such documents pursuant to a subpoena issued by the arbitrator. That approach allows customer to object and be heard; allowing the arbitrator to function as a gatekeeper provides at least some protection for the customer. Again, it is telling that this authorization requirement is only forced on the customer, not the firm. This amendment should be soundly rejected.

I urge the SEC to reject the bulk of the proposed amendments, and adopt the suggestions set forth in PIABA's comment letter. Thank you for considering my comments.

Very truly yours,

HALLING & CAYO, S.C.



Mark E. Sanders

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