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April 13, 2009

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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:

I am an attorney in Seattle, and have represented both investors and stockbrokers/broker-dealers in FINRA arbitrations for more than 18 years. I'm also an arbitrator with the FINRA.

The context. Currently investors are forced to arbitrate virtually all claims against stockbrokers/broker-dealers in the arbitration system run by the securities industry. In my experience the results of that process are on average worse (and certainly less predictable) for the customers—many of whom in my case have been retired individuals, or individuals with little investment experience. Win rates for customers in FINRA arbitrations are inexplicably low, and when customers do win arbitration panels commonly award less than all of the actual damages suffered; the customer usually is required to pay his or her own attorneys' fees; and, incredibly, arbitration panels often split 50/50 the FINRA's cost of the proceeding, which can easily run $10,000-$25,000, between the "winning" customer and the securities industry Respondents. All in all, the system appears to be structurally biased against investor claims.

General: increased burdens on customers. Many of the proposed changes to the Discovery Guide increase the burden on Customer's to produce documents and information. The proposed changes again and again expand the ability of Respondents to dig into customer's personal financial history—which is seldom actually *relevant* to the issue of whether, for example, a securities salesperson omitted material facts when selling a stock.

The proposed revisions to the Discovery Guide move in the wrong direction. I am unaware of any broad complaints by industry counsel about Customers failing to produce relevant documents. What prompted the increased requirements in the proposed changes to the Guide?

Failure to address Respondents' discovery abuse. On the other hand, the feeling is universal among Claimants' counsel that Respondents abuse the discovery process more often than they comply with the spirit of the Discovery Guide. Based on my own 18 years of experience (which began with me representing *industry* parties), I have found that to be the case.

Knowing that Claimants cannot conduct depositions to learn what kinds of documents *should* exist, what happened to documents that appear to be missing, who was responsible for what, Respondents counsel feel empowered take a much more narrow view of what is "relevant" enough to be produced than they would dare in federal court. Arbitrators tend to accept at face value the assertions by large brokerage firms that they have produced "all there is", and Claimants do not have to discovery tools to prove otherwise. Since the securities industry has taken away from customers the ability to dig beneath the superficial materials Respondents often produce, the Discovery Guide must provide investors the protection their attorneys cannot.

On the flip side, Respondents routinely seek information about the customer's bank accounts, loan documents, insurance information and the like, both through document requests and third-party subpoenas. These demands are extremely intrusive into the customer's private information and make the victim feel like he or she is the one who is on trial.

Turning to some of the specific proposed changes to the Guide:

Customer obligations.

- Tax returns, financial statements and brokerage accounts are made presumptively discoverable for **five years** prior to the first transaction at issue, rather than three years. The first transaction at issue often occurred long before, imposing on customers the burden of digging up volumes of old records with less and less probative value, as they go back farther and farther.

- Loan documents. List 2, Category 12 presumptively requires the customer to identify all **loans** applied for by the customer, or guaranteed by the customer, for the past 5, 8, 10 years through the filing of the Statement of Claim—home equity loans, credit card applications, car loans, personal loans. Then, once the customer identifies all these loans, he or she is required to *provide the opposing party with an authorization directed to the third party lender for all loan applications.*

  This is highly personal information and it imposes a substantial burden on the customer to dig up such records. It sweeps in vast amounts of sensitive information that will be of no relevance—but which could be used simply to create prejudice, upon finding some irrelevant but juicy tidbit about some prior events in the customer's life.

This is not the sort of information that customers should automatically be required to be disclosed in all cases.

- Increasing the customer's obligation to provide Interrogatory-like "information", compared to the industry's obligation to produce only *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.
  Presumably the customer or the customer's lawyer will have to prepare these written authorizations. This imposes on the customer an additional expense. Before, the Respondents had to prepare a subpoena and ensure that it passed muster over the customer's potential objections. Under the proposed changes, the customer is expected to do the respondent firm's work.

- List 2, Item 5 requires the customer to turn over "all agreements, forms, *information* or documents" relating to the accounts or transactions at issue. How is a customer to turn over "information", beyond documents. It is a safe bet that Respondents will eventually use this terminology to argue that the customer must respond to interrogatories propounded by the firm seeking "information".

- List 2, 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. Then, once these loans are identified by the customer, he or she must provide the opposing party with an authorization directed to the third party lender for all loan applications. This forces the customer to prepare and sign authorizations directing each lender or prospective lender to release the loan applications, often full of personal information which should not be subject to discovery. This takes the arbitrators out of the process of issuing subpoenas for such materials. Customers should have the right for a neutral party to review whether materials of this broad and personal a nature are relevant and probative enough to justify the intrusion of producing them.

- List 2, Item 11 requires customers to provide copies of all complaints and statements of claim the customer has previously filed regarding securities matters, along with the final awards, judgments or settlement agreements resulting from these prior cases.

  At the same time, List 1, Item 6 requires Respondents to provide only complaints against the associated person involved, if they allege "conduct similar to that alleged in the Statement of Claim against the associated person." This limitation is an invitation for abuse. My experience has been that very few prior claims against a broker involved conduct "similar" to that involved in my client's case. Why this limitation? Respondents generally do not have so many written complaints that it is burdensome to produce *all* complaints involving securities. Why have a different rule for the industry than for the customer?

Respondents' obligations

- Current List 5, Item 4 requires firms to turn over, "all other documents reflecting supervision of the Associated Person(s) and the customer accounts at issue." The proposed changes still requires the production of materials about supervision of the customer's account, but *removes* the requirement that firms disclose materials related to the supervision of the *broker*. What is the possible basis for this change?

- In my experience some of the most revealing evidence of a Respondent's conduct, and financial motivations, comes from commission runs. The proposed Guide does improve the requirements regarding to trade and commission runs, but to avoid ambiguity and the occasion for gamesmanship, the Guide should simply provide that **full commission runs** be turned over in all cases. Those commission runs are loaded with information relevant to supervision (what other trades was the broker doing, were there patterns showing a lack of individualized recommendations to customers, did the broker inordinately sell products with enhanced commissions (e.g., IPOs of closed-end funds). Any concerns about disclosing other individuals' transactions can be eliminated by simply redacting identifying information.

Thank you for the opportunity to submit these comments. I am profoundly disturbed at the trend reflected in the proposed changes to the Discovery Guide. The current FINRA arbitration system does not deliver fair results as it is. The proposed changes to the Guide, instead of focusing on reducing that unfairness, just make the process more burdensome and intimidating to people who have often already been victimized.

Very truly yours,

Carl J. Carlson