Public Investors Arbitration Bar Association

August 24, 2010

Rule-comments@sec.gov

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

RE: SR-FINRA-2010-035 (Rule Proposal Regarding Discovery Guide in FINRA Arbitrations)

Dear Ms. Murphy:

Thank you for the opportunity to comment upon the above-referenced proposal to amend FINRA's Discovery Guide ("Guide"). The Discovery Guide has significant impact on the conduct of parties and arbitrators in FINRA arbitration proceedings.

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"). PIABA is a national bar association of approximately 450 attorneys devoted to the representation of public investors in arbitration proceedings. As such, we are keenly interested in the discovery procedures and their impact on the fairness of FINRA arbitrations.

INTRODUCTORY COMMENTS

PIABA commends FINRA's exhaustive efforts to refine the Guide. We believe that on balance, the proposed revisions to the Guide represent a meaningful improvement to the existing Guide. Accordingly, PIABA urges the Commission to adopt the proposed rule change. The proposed revisions to the Guide would tend toward a leveling of the playing field for public investors during the discovery process. The proposed Guide also clarifies some outstanding ambiguities commonly faced during discovery proceedings. PIABA believes the proposed Guide will better protect investors' rights during the arbitration process, potentially discourage abusive tactics, and instill greater public confidence in the FINRA arbitration system.

That said, we continue to find certain aspects of the proposed Guide to be troubling. For example, disparate and unnecessary burdens are still imposed upon customers with regard to documents that are presumptively discoverable in all cases. However, we note that such concerns pertain primarily to provisions carried forward from the existing Discovery Guide, and not to the new provisions of the proposed Guide. PIABA concludes the improvements in the proposed Guide outweigh the negatives. Public investors will be best served if the proposed revisions to the existing Guide take effect promptly.

We further note that the Guide has essentially remained unchanged since its adoption in 1999. During the intervening years, there have been significant changes in the securities industry, and we have seen several industry-wide scandals relating to various products and practices. We think, and we believe FINRA also feels, that too much time has gone by since the original Guide was adopted without regular scrutiny and amendment. As a result, the rewriting of the Guide has turned out to be a herculean task. In future, we hope that FINRA will regularly review the Guide with a view to its constant improvement, especially as new product cases arise and present different discovery challenges. With that in mind, this letter will provide suggestions for FINRA's consideration in the future, as well as our comments on the current proposed rule change.

FINRA'S INTRODUCTORY COMMENTS TO THE GUIDE

PIABA is pleased with the proposed Guide's introductory comments. The introduction clarifies existing principles as taught to arbitrators in FINRA training. PIABA also suggests that FINRA include provisions that direct and remind arbitrators to uphold their duty to enforce the discovery obligations of the parties.

1. Confidentiality

PIABA approves of the Guide's introductory discussion of Confidentiality Agreements. The proposed discussion will assist the arbitrators in particular by: 1) clarifying that the party seeking confidential treatment of documents has the burden of establishing legitimate reasons for such exceptional treatment; and 2) illustrating some factors for arbitrators to consider when deciding whether that burden has been met. While these non-exhaustive factors have been set forth and discussed in FINRA's Neutral Corner publication[1], inclusion of these points within the Guide's introduction will clarify for arbitrators and parties that a confidential designation is not automatic. Rather, it is appropriate only under limited circumstances.

2. Affirmations

PIABA supports FINRA's proposed clarification to a portion of the existing provisions, so as to provide, among other things, that the party who claims it does not have documents requested by the other party must produce affirmations that no responsive documents are within

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

the party's "possession, custody or control". Currently, such affirmations call for the party to represent that no such documents "exist." By essentially narrowing the breadth of what the party need affirm, the affirmations provide a more practicable tool for discovery. Parties who may not be able to affirm that documents do not exist may be able to more accurately affirm that the documents are not within its possession, custody or control.

3. Arbitrator Enforcement of Discovery Obligations

PIABA encourages FINRA to add language concerning arbitrators' duty to enforce discovery obligations. We also propose that in its arbitrator training, and in its written materials provided to arbitrators, FINRA emphasize the arbitrators' ability to sanction parties who ignore or subvert the discovery process. Too often, our members experience situations where brokerage firms, particularly the major firms, submit wholesale objections to the current Discovery Guide, followed by production of monthly statements, confirmations, and little else.

Arbitrators need to be reminded that they have the authority to enforce orders, strike pleadings and preclude admission of evidence at hearing when a party has stonewalled production during the process.[2] In other words, the arbitrators need to be instructed, indeed encouraged, to give "teeth" to discovery enforcement provisions. If parties and arbitrators better understand that discovery obligations cannot be manipulated under the guise that arbitrations are "informal proceedings," or in favor of those associated with a powerful brokerage firm that necessarily appears in numerous arbitrations, the discovery process will be better served.

4. Electronically Stored Information.

The introductory comments to the proposed Guide make it clear that information which is stored electronically falls within the definition of a "document." This is a welcome addition, and should foreclose any argument to the contrary.

5. No Obligation to Create Documents

The proposed introductory language clarifies that no party has an obligation to create documents to satisfy a discovery request. In the past, firms have sought to have the arbitrators require customer claimants to prepare a financial statement when one was not already in existence. PIABA welcomes this clarification.

[2] Rules 12511(b), 12514(c), Code of Arbitration Procedure

SPECIFIC COMMENTS ON DOCUMENT LISTS

PIABA offers the following comments to the lists set forth in the proposed Guide.

LIST 1-Documents the Firm/Associated Persons Shall Produce in All Customer Cases

1) (a) The account record information for the customers, including the customers' name, tax identification number, address, telephone number, date of birth, employment status, annual income, net worth, and the account's investment objectives.

(b) All documents concerning the customers' risk tolerance.

(c) All agreements with the customers, including, but not limited to, account opening documents and/or forms; cash, margin, option, and discretionary authorization agreements; trading authorizations; and powers of attorney.

PIABA strongly supports all parts of this Item. These documents are essential. They should reflect basic information that member firms must obtain from their customers both when opening an account, and thereafter when updating account profiles. The firms must retain these documents in good order pursuant to industry regulation. Production of the documents should therefore not impose any undue burden.

We note with approval FINRA's use of language that tracks SEC Rule 17a-4, to clearly include 'account record' information as part of the presumptive production in all cases. This clarifies the records to be produced and should enable customers to obtain the official records duly kept by the firm pursuant to applicable regulations. In addition, specification of 'account record' information will require firms to provide those documents reflecting whether a principal of the firm approved the record. PIABA suggests that this item should include codes used by the firm so the customer can identify relevant information such as 1) objectives and 2) risk tolerance, and similar information which might be presented by use of codes.

2) All correspondence sent to the customers or received by the firm/associated persons specifically relating to the accounts or transactions at issue including, but not limited to, documents relating to asset allocation, diversification, trading strategies, and market conditions; and all advertising materials sent to customers of the firm that refer to the securities and/or account types that are at issue. (Unless separately requested, the firm/associated persons need not produce confirmation slips and monthly statements.)

PIABA supports this Item which clarifies some ambiguities within the current List 1, Item 2, to expressly require production of documents relating to asset allocation, trading strategies and other historical facts relative to a customer's account or the transactions at issue. Under existing practice, customers too often find

that they must waste time battling firms for highly relevant information. The proposed item 2 should help alleviate those wasteful exercises and allow parties to proceed with discovery and resolution of the dispute.

PIABA also supports this Item's expansion to include various advertising materials relating to the accounts or transactions at issue, and which the firm sent to the customer.

PIABA does not oppose elimination of confirmation slips and monthly statements from scope of the proposed item. While this means that firms do not have to automatically produce these records, it is clear in cases where the documents are needed, an arbitration panel should order their production should a firm/associated person fail to honor the customer's supplemental request.

3) All documents evidencing any investment or trading strategies utilized or recommended in the customers' accounts, including, but not limited to, options programs, and any supervisory review of such strategies.

This Item is new, and a welcome addition to the [proposed] Discovery Guide. Trading strategies used or recommended, for example, must be produced for the customer's accounts, as well the records of any supervisory review of these records. Early production of these records, if they exist, will promote arbitration's goal of expedient yet full and fair resolution of claims.

4) For claims alleging unauthorized trading, all documents the firm/associated persons relied upon to establish that the customers authorized the transactions at issue and all documents relating to customer authorization of the transactions at issue.

PIABA supports this Item and is pleased that it slightly expands upon the existing provision in List 11, Item 3. The proposed Item would properly require firms/associated persons to produce those documents relating to the authorization of a disputed trade.

5) (a) All materials the firm and/or associated persons prepared or used and/or provided to the customers relating to the transactions or products at issue, including research reports, sales materials, performance or risk data, prospectuses, and other offering documents, including documents intended or identified as being "for internal use only."

(b) All worksheets or notes indicating that the associated persons reviewed or read such documents.

PIABA supports this proposed Item. Materials the firm/associated persons used, prepared or showed to customers relating to the very transactions/accounts at issue are highly relevant. We are pleased to see that FINRA also proposes to retain the language calling for 'internal use only' documents. As most representatives, and the regulators, are aware, this latter category of documents is often what the broker uses in whole or in part to promote an investment.

The Guide should also specifically make presumptively discoverable all information and all materials that the brokerage firm and/or associated person obtained from the customer prior to placing the first trade or transaction, and every subsequent trade or transaction, in the customer's account. And more specifically, the Guide should make presumptively discoverable every document and all information obtained by the firm and/or associated person which provided the basis upon which the firm and/or associated person made a recommendation, sold an investment product, or provided any other financial planning or financial advice. While the firms/associated persons may not in fact have documents showing a basis for recommendations throughout the account life, to the extent they do, such documents should be presumptively discoverable.

6) All notes the firm/associated persons made, including, but not limited to, entries in any diary or calendar, relating to the customers and/or the customers' accounts or transactions at issue.

PIABA supports this Item, which appears on current List 1, Item 6. The slight expansion to include notes and other documents relating more broadly to the customer, [and not just his accounts or transactions at issue], may provide important evidence in the case, with minimal additional burden. Certainly the firms/associated persons will or should review all their records regarding the customer. The customer in turn ought to be afforded the same opportunity to review these materials.

7) (a) All notes or memoranda evidencing supervisory, compliance, or managerial review of the customers' accounts or trades therein for the period at issue.

(b) All correspondence between the customers and firm/associated persons relating to the customers' accounts or transactions at issue bearing indications of managerial, compliance, or supervisory review of such correspondence

This Item properly identifies relevant documentation without imposing undue burden. However, the Guide might clarify, or refer to the introductory comments, specifying that electronic and/or digital forms of these writings are to be produced. This Item should clarify that it encompasses summaries of such communications and reviews.

8) All recordings, telephone logs, and notes of telephone calls or conversations about the transactions at issue that occurred between the associated persons and the customers (and any person purporting to act on behalf of the customers), and/or between the firm and the associated persons.

This Item calls for essential documents presumptively relevant to all cases. PIABA believes this does not impose any undue burden and supports the proposal.

Indeed, this Item is similar to proposed List 2, Item 8, which requires the same, and a bit more, from customers in all cases. In the customer counterpart, for example, customers must also produce these records as they relate to 'accounts' at issue, not just to 'transactions' as is here proposed for firms and associated persons. FINRA explains that this item is limited for firms to those records relative to 'transactions' because otherwise a broad search for telephone records /notes relative to 'an account' could impose undue expense/effort upon firms that would not be able to set temporal parameters around the search relative to 'accounts' and telephone notes, for example.

PIABA does not oppose the narrowing of this Item for purposes of determining what is presumptively discoverable. However, PIABA submits that qualifying language ought be included to explain to parties and the arbitrators that such documents would be subject to production if 1) the customer provides details sufficient to narrow the search, or 2) facts of the case suggest that these logs/notes are likely relevant to a claim.

Discussed below at List 2, Item 8, are the customer's production obligations concerning telephone records/logs/notes of conversations. There appears to be some ambiguity in that proposed Item as discussed below.

9) All writings reflecting communications between the associated persons assigned to the customers' accounts at issue during the time period at issue and members of the firm's compliance department relating to the securities/products at issue and/or the customers' accounts.

PIABA supports inclusion of this new Item. Documents reflecting communications between the associated person and the firm's compliance department concerning the customer's account at issue, or products at issue, are certainly relevant if they exist. Any such records bear on supervision issues, at a minimum. We submit the language should also encompass other supervisory departments for the same reasons. In many instances, the associated person may communicate not initially with compliance, but with others in a supervisory chain, such as a regional director, or with a registration department official. The Item is appropriate, and the purpose can be better fulfilled by expansion to include all supervisory departments or personnel.

10) All Forms RE-3, U-4, and U-5 and Disclosure Reporting Pages, including all amendments, for the associated persons assigned to the customers' accounts at issue during the time period at issue, redacted to delete associated persons' social security numbers, all customer complaints identified in such forms, and all customer complaints filed against the associated persons that were generated not earlier than three years prior

to the first transactions at issue through filing of the Statement of Claim, redacted to prevent the disclosure of non-public personal information of the complaining customer.

PIABA supports this Item. It should be clarified to state that oral complaints are included, as they are encompassed within certain DRP reports.

11) All sections for all of the firm's manuals and all updates thereto relating to the claims alleged in the Statement of Claim for all years in which the Statement of Claim alleges that the conduct occurred, including separate or supplemental manuals governing the duties and responsibilities of the associated persons and supervisors, all bulletins (or similar notices) the firm issued for all years in which the Statement of Claim alleges that the conduct occurred, and the entire table of contents and index to each such manual or bulletin. In responding to this request, the firm must provide a list of all of its manuals and bulletins which may contain directives related to the conduct or product at issue in the claim.

PIABA supports this Item as essential to preparing a customer's case. PIABA applauds FINRA for dealing with this consistently difficult discovery issue. Historically, obtaining a firm's manual(s) has been a herculean task not for the faint of heart. In addition, many arbitrators have given great credence to the firms' insistence that the manuals contain trade secrets, for example. In other instances, we have witnessed gamesmanship by firms who fail to produce a manual unless requested by the exact name of that manual. While ultimately manuals that are produced often do not contain trade secrets or other highly confidential material, the manuals are crucial to establishing what the firm did or did not have in place for proper execution of its compliance obligations.

FINRA's current proposal will significantly reduce such wasteful discovery battles, and will promote the investor's ability to concentrate on the task at hand --- developing his case for final hearing. PIABA also notes with approval the proposal's requirement that firms produce in all cases a list of all the firms' manuals and bulletins.

12) All analyses and reconciliations of the customers' accounts prepared during the time period at issue, including, without limitation, those relating to reviews of the customers' accounts or transactions at issue.

This provision is substantially identical to List 1, Item 10 of the current Discovery Guide. PIABA supports the expansion of the provision, which now includes both accounts *and* transactions at issue. PIABA also approves the inclusion of analyses 'prepared' during the time at issue, including those relating to reviews of customers' accounts/transactions at issue.

13) (a) All exception reports, supervisory activity reviews, concentration reports, active account runs and similar documents produced to review for activity in the customers' accounts related to the allegations in the Statement of Claim or in which the transactions at issue are referenced or listed.

(b) For claims alleging failure to supervise, all exception reports, supervisory activity reviews, concentration reports, active account runs, and similar documents produced to review for activity in customer accounts handled by associated persons and related to the allegations in the Statement of Claim that were generated not earlier than one year before or not later than one year after the transactions at issue.

PIABA supports both sections of this Item. Generally, inclusion of these critical documents will streamline the case process and enable customers, and respondents, to assess important facts customers are entitled to discover. We offer suggestions for future improvement as well.

Paragraph (a) is similar to List 1, Item 11 of the current Discovery Guide. It now includes the language "related to the allegations in the Statement of Claim" or "in which the transactions at issue are referenced or listed". This section is reasonable, though there should be a mechanism for a customer to learn exactly how the firm defined 'related to' when conducting its search. The proposed language is highly subjective and prone to abuse. This item might best include a provision for a customer to verify the nature and parameters of the firm's search, and to ask that the panel review, perhaps *in camera*, a record evidencing the firm's search. Alternatively, or in addition, this Item could mention that customers can require the firm to produce the affidavit that these documents do not exist, somewhat in a similar vein to the provision for affidavits available when a party asserts the documents are not within its possession, custody or control.

Paragraph (b) apparently only applies to claims for failure to supervise, and therefore reasonably requires the production of those reports 'related to' the allegations in the Statement of Claim, among other parameters. We believe these documents should be presumptively discoverable in all cases regardless of whether or not failure to supervise is explicitly alleged. Some customers file arbitrations *pro se* and do not know to allege failure of supervision even when it exists. Other customers might unfortunately be represented by inexperienced counsel. Public customers should not be penalized for failure to denominate a claim properly. Finally, we believe the time frame should extend to three years prior to the transactions at issue.

14) Those portions of internal audit reports for the branch in which the customers maintained accounts that: (a) focused on associated persons or the accounts or 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.

We are pleased that this Item has been moved from List 5, Item 3 of the current Discovery Guide and made presumptively discoverable in all cases, and not just those alleging failure to supervise. In addition, we are pleased that it has been expanded to include the customers' accounts, and not solely the transactions at issue.

15) Records of disciplinary action taken against associated persons by any regulator or employer for all sales practice violations or conduct similar to the conduct alleged in the Statement of Claim.

PIABA is pleased that this Item, already included in List 1, Item 12 of the current Discovery Guide, remains in the proposed Guide. We note with approval that the language has been expanded to include the word 'violations'. This helps to make the provision more inclusive and less ambiguous than if it called for documents merely that 'relate to' conduct alleged in the Statement of Claim. As we have mentioned in connection with other Items, we are concerned about the use of the phrase 'conduct similar to,' as it leaves some room for interpretation as to what constitutes similar conduct, and may be subject to abuse.

16) All investigations, charges, or findings by any regulator (state, federal or self regulatory organization) and the firm/associated persons' responses to such investigations, charges, or findings for the associated persons' alleged improper behavior similar to that alleged in the Statement of Claim.

PIABA supports this new Item. Again, however, the provision should not limit production to investigations, charges or findings that relate to behavior 'similar' to that alleged in the Statement of Claim, allowing the firm and/or associated person to interpret what constitutes similar behavior. If there are a number of investigations, charges or finding against an associated person, this is relevant. Alternatively, the firms/associated persons should be required to maintain a log of all such investigatory documents, for possible review if the 'similarity' assessment is called into question.

17) Those portions of examination reports or similar reports following an examination or an inspection conducted by any regulator (state, federal or a self-regulatory organization) that focused on the associated persons' or the customers' accounts or 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, for the period one year before the transactions at issue through the filing of the Statement of Claim.

PIABA is pleased that this Item has been retained. Presently, it appears in List 5, Item 3 of the current Discovery Guide, but is now made presumptively discoverable in all cases, and not just those alleging failure to supervise. In addition, we are pleased that the provision has been expanded to include customers' accounts in addition to the transactions at issue. As with the prior Item, we believe this provision should not be limited to behavior 'similar' to the conduct alleged in the Statement of Claim, as this provision is fraught with potential for abuse. Moreover, all reports should be produced that reference the associated person or the customers' accounts or the transactions at issue, and not simply those that "focused on" these items. We submit the time frame should be expanded to three years consistent with time frames proposed for other items. Examinations are not conducted annually in many instances, and by limiting the time frame to one year, important documentation could be missed when, for instance, the last

examination was 2 years prior to the transaction at issue and yet contained otherwise relevant information.

18*)* All documents related to the case at issue that respondent received by subpoena under Rule 12512 or by document request directed to third parties at any time during the case.

We support the inclusion of this new Item. This should remain a continuing obligation throughout the discovery process.

19) For all transactions at issue in the Statement of Claim, documentation showing the compensation, gross and net, to the associated persons for such transactions. In the event accounts at issue are the subject of fee arrangements that are not based on remuneration per trade, a record showing compensation earned by period on the accounts.

PIABA supports this new Item. We are pleased with the addition of this new Item as presumptively discoverable in all cases. It appears that this Item replaces commission runs which are in the current Discovery Guide as Item 1 on both Lists 3 and 5. The new Item should present the commission information in a more accessible, simple way for the customer's understanding. It would be beneficial if the firms and associated persons were also required to produce documents showing the associated person's overall gross compensation. Compensation relating only to the transactions at issue tells only part of the story. The percentage of such compensation to the associated person's gross compensation can be strong evidence in a case.

20) (a) For claims related to solicited trading activity, a record of all compensation, monetary and non-monetary, including, but not limited to, monthly commission runs for the associated persons, listing the securities traded, dates traded, whether the trades were solicited or unsolicited, and the gross and net commission from each trade. The firm shall provide this information for a period of time beginning three months before and ending three months after the trades at issue in the customer's accounts.

(b) The firm may redact names and other non-public personal information concerning customers who are not parties to this claim, but should provide sufficient information to identify: (1) the non-party customers' accounts, including the last four digits of the nonparty customers' account numbers; (2) the associated persons' own and related accounts, including the last four digits of the associated persons' account numbers; and (3) the type of account (IRA, 401(k), etc.).

PIABA supports both sections of this Item. This Item is the missing part of the picture which is not included in item 19 above. We also submit it should be presumptively discoverable in all cases, and not only those relating to solicited trading activity. It is not uncommon in FINRA arbitrations for there to be a dispute as to whether an order ticket is properly marked "unsolicited." This Item is similar to Item 2 on both Lists 3 and 5 of the current Discovery Guide. The time frame has been changed from two months preceding through two months following the transaction at issue or twelve months, whichever is longer, to three months before to three months after the trades at issue. We support the

lengthening of the time frame from two months to three months; however, for claims relating to shorter periods of time, we suggest that the item include the minimum time period of twelve months which has been removed.

21) (a) A record of all agreements pertaining to the relationship between the associated persons and the firm, summarizing the associated persons' compensation arrangement or plan with the firm, including:
• Commission and concession schedules;
• Bonus or incentive plans including those relating to deferred compensation; and
• Schedules showing compensation received or to be received based upon volume, type of product, nature of trade *(agency v. principal),* etc.

(b) To the extent that compensation is based on factors other than remuneration per trade, the method by which the compensation was determined.

We are pleased with the inclusion of this Item as presumptively discoverable in all cases. The Item is similar to List 13, Item 2 of the current Discovery Guide; however, it has been changed to now require production of records of agreements rather than the documents themselves. A fair reading of Item 22 may be that the industry parties must supply the records described therein, with the agreements themselves constituting part of those records. However, to avoid future disputes, we suggest that this Item plainly state that 'records' shall include the actual agreements as well.

22) If the Statement of Claim includes allegations regarding an insurance product that includes a death benefit, the firm and/or associated persons must provide all information concerning the customers' insurance holdings and the recommendations, if any, to the customers regarding insurance products.

We support the inclusion of this new Item.

LIST 2 -Documents the Customers Shall Produce in All Customer Cases

1) All customer and customer owned business (including partnership, corporate) federal income tax returns the customers filed, limited to pages 1 and 2 of Form 1040, Schedules A, B, D, and E, and the IRS worksheets related to these schedules, or the equivalent for any other type of return, redacted to delete the customers' social security numbers, for the three years prior to the first transactions at issue in the Statement of Claim through the date the Statement of Claim was filed. The customers may redact information relating to medical and dental expenses and the names of charities on Schedule A unless the information is related to the allegations in the Statement of Claim. The income tax returns must be identical to those that were filed with the Internal Revenue Service.

PIABA continues to be deeply troubled by this provision, which is a holdover from the prior Guide, and similar provisions requiring the customer to provide private financial information in all cases. To begin with, the customer's financial status has no relevance

to many kinds of cases filed in FINRA arbitrations, such as claims asserting churning, unauthorized trading, breach of contract, fraud or violation of state Blue Sky acts. Indeed, theses documents are not always relevant to suitability cases. The danger is that it will lead arbitration panels to believe, incorrectly, that a customer's wealth will permit a post hoc determination of suitability, rather than focusing on what the firm knew or should have known at the time the investment recommendation is made. There is no basis in law for permitting such an after-the-fact analysis.

Personal tax information is highly sensitive and private. In some states, such as California, tax returns are privileged from disclosure in litigation proceedings except where tax issues are specifically involved. Under this Item, the firm/associated person is permitted to conduct a fishing expedition into a customer's financial condition, whether or not such financial condition has any bearing on the issues presented by a case. PIABA encourages FINRA and the Commission to reconsider permitting firms to engage in this intrusive discovery, which has been likened to a "financial colonoscopy." Customers should not be required to waive their financial privacy rights as a condition to filing a claim in arbitration, except in those cases where the customer's financial condition is at issue.

2) Financial statements, including statements within a loan application, or similar statements of the customers' assets, liabilities, and/or net worth for the period covering the three years prior to the first transactions at issue in the Statement of Claim through the date the Statement of Claim was filed. Customers are not required to create financial statements in order to comply with this item.

PIABA believes this Item, like tax returns, should not be part of a presumptively discoverable checklist. PIABA does note with approval that this Item properly states that a customer has no obligation to create such documents, in keeping with the overarching instructions to this Guide. However, we nevertheless are concerned that the presumptive discoverability of this item will have a chilling effect on pro se customers, and confuse members of the panel with the erroneous notion that a customer's financial statements are relevant in all cases. They are not.

Perhaps the drafters of this proposed item intended that it serve to "provide a better understanding of the claimant's financial status …", as FINRA described in its discussion of Item 1 immediately above. However, FINRA does not state any reason why item 2 should be presumptively discoverable in all cases. PIABA submits that financial statements should not and need not be required in all cases. PIABA suggests that this item be removed from the proposed Guide. Alternatively, qualifying language as used in the Guide's Introduction when discussing firms with different business models, could be adopted with respect to Items 1 and 2 of the proposed List 2.

PIABA does not suggest that former 'claim specific' lists are appropriate. Rather, for Items 1 and 2 of List 2 , language can be tailored for certain claims as has already been done for certain categories of documents within List 1.

3) All documents the customers received from the firm/associated persons and from any entities in which the customers invested through the firm/associated persons, including account opening documents and/or forms, prospectuses, research reports, annual and periodic reports, and correspondence. Unless contending non receipt of periodic account statements and/or confirmations sent in the ordinary course of business, the customers may satisfy the production requirements for these items by stipulating to the receipt of all such periodic account statements and confirmations, but must produce those periodic account statements and confirmations that have handwritten notations or that are not identical to those the firm sent.

PIABA has no objections to this Item.

4) All account statements for each securities firm where the customers have maintained an account for the three years prior to the first transactions at issue in the Statement of Claim through the date the Statement of Claim was filed. In the alternative, the customers shall provide a written authorization allowing the respondent firm/associated persons to obtain the account statements directly from each securities firm. If the customers elect to provide written authorization to the firm/associated persons to obtain the account statements, the customers must also provide all account statements in the customers' possession, custody, or control containing handwritten notes or that are not identical to those the firm sent.

PIABA does not object to production of these documents or the alternative production of authorization for the firm to seek the documents directly. However, the time frame is excessive. Contrast the time frames in List 1 applicable to production of an associated person's commission reports. The information is limited both as to the nature of claims (solicited trading only) but also to a shorter time running from three months before, to three months after the trades at issue. There is less reason – in all cases – to require that a customer produce account statements at another firm beginning three years prior to the trading in question. The disparate treatment should be resolved in any event, with the shorter time frames being less burdensome for both firms and customers.

5) All documents, including agreements and forms, relating to accounts at the respondent firm or transactions with the respondent firm.

PIABA does not oppose this Item.

6) All account analyses and reconciliations prepared by or for the customers relating to the accounts at the respondent firm or transactions with the respondent firm during the time period at issue.

PIABA does not oppose this Item.

7) All notes, including entries in diaries or calendars, relating to accounts at the respondent firm or transactions at issue with the respondent firm.

PIABA does not oppose this Item.

8) (a) All recordings and notes or logs of telephone calls or conversations about the customers' accounts or transactions at issue that occurred between the associated persons and the customers (and any person purporting to act on behalf of the customers).

PIABA does not oppose this Item. We note, however, that recording of telephone calls can be unlawful in many states. If privileges attach to production of such documents (under the Fifth Amendment, for example), we trust that a customer should be allowed to assert such privilege.

(b) All telephone records evidencing telephone contact between the customers and the firm/associated persons.

PIABA does not oppose this Item with one important clarification. In its Notice of Filing, and discussion therein concerning this item, FINRA states that for "claims alleging unauthorized trading, claimants are required to produce telephone records" evidencing phone contact with the associated person. However, the actual text of the rule does not reflect that language limiting presumptive production to unauthorized trading cases. PIABA believes this is an oversight, or error, in the final printing of List 2, Item 8 (b). We believe subsection (a) correctly states the proposal and is in accordance with FINRA's discussion. However, a careful reading of 8(b) indicates an error. Assuming that the FINRA discussion on page 54-55 of its filing is correct, and the text of the final Item 8(b) mistakenly omits the 'unauthorized trading' limitations, PIABA would have no objection to this subsection. The language of List 2, Item 8(b) needs to be reviewed, compared to the discussion in Notice, and clarified.

PIABA would oppose a presumptive requirement to pay for and produce all telephone records in all cases. We note there is no such requirement of the associated person/firm and, again, believe there is an error in the text of Item 8(b).

9) All correspondence the customers (or any person acting on behalf of the customers) sent or received relating to the accounts or transactions at issue.

PIABA does not object to this request insofar as it calls for presumptive production of such correspondence between claimants and firms/associated persons. Nor does PIABA object to production of such non-privileged correspondence with third parties and that relates to financial matters. However, the item as proposed is overly broad and could impose undue burden in some situations.

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.

PIABA does not object to this Item, noting that in accordance with the Rule Proposal and applicable state law, it does not call for privileged material.

11) (a) All Complaints/Statements of Claim and answers filed in all civil actions involving securities matters and securities arbitration proceedings in which the customers have been a party, and all final decisions or awards or non-confidential settlements entered in these matters through the date the Statement of Claim was filed.

This sub-part appears in the current Discovery Guide, and is reasonable for at least discovery purposes. PIABA does not object to this Item.

(b) If a person is a party to a confidential settlement agreement that by its terms does not preclude identification of the existence of the settlement agreement, the party shall identify the documents comprising the confidential settlement agreement. Although not presumptively discoverable, a confidential settlement agreement may be obtained with an order from the panel.

Settlement agreements in securities matters typically have confidentiality clauses, usually at the insistence of brokerage firms. And, as this item appears to contemplate, some such agreements preclude the client from even acknowledging the existence of the settlement agreement. Many of these agreements have strict consequences for a client who breaches the confidentiality clauses, and any requirement to produce these agreements would trigger those consequences. This can create a dilemma where a customer is supposed to keep a prior settlement agreement confidential, but then is ordered to produce the agreement by a panel. In any event, this item does not appear to require a claimant to disclose an agreement whose very existence is subject to confidentiality. Assuming this reading of the item is correct, PIABA does not object to the Item standing alone.

However, we note a seeming lack of corresponding obligations requiring firms/associated persons to produce settlement agreements. If the obligation is imposed on the claimant, the firm/associated person should likewise be obligated to produce these agreements, at least as pertains to the associated person or the transactions, or to the branch that might be implicated in such a settlement agreement. If the matter is a "product" case, then the firm should have to produce settlement agreements related to the investment at issue. This could easily be made part of proposed List 1, Item 10.

12) Documents showing the customers' ownership in or control over any business entity, including general and limited partnerships and closely held corporations. If the customers are Trustees, provide documents showing the accounts over which the customers have trading authority.

We observe that this Item does not reference a time frame. A plain reading of the Item suggests the documents sought pertain to the customer's present holdings. This needs to be clarified. PIABA does not object to producing general information described in this Item, assuming the time frame is limited reasonably. In addition, to be relevant for presumptive discovery, the business related documents should be limited to a listing of the business ownership/control, at least for purposes of initial presumptive production in all cases.

PIABA does not object to the section of this Item concerning Trustees, to the extent that a listing of accounts over which a customer has trading authority is sufficient, with personal information of non-parties redacted. However, provision should be made for professional trustees who may have dozens of trusts under their control. In such a case, this information should not be discoverable.

13) All documents the customers received, including documents found through the customers' own efforts, relating to the investments at issue in the Statement of Claim.

This Item is reasonable and PIABA does not object to the concept.

14) For claims alleging unauthorized trading, all documents the customers relied upon to show that the customers did not know about or consent to the transactions at issue.

This Item is reasonable. PIABA does not object.

15)All materials the customers received or obtained from any source relating to the transactions or products at issue, and all materials the customer received from any source relating to other investment opportunities, 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.

This Item has two main parts. PIABA notes that the first phrase seems duplicative of Item No. 13, and is unnecessary. As to the remainder of the Item, PIABA respectfully submits that this request is confusing, overbroad both in time and scope of all materials, apparently without regard as to whether the customer bought the security, or even considered the security or investment opportunity. The ambiguities and overbreadth render this Item unduly burdensome. If this Item would require a customer to produce documents concerning an investment the customer considered (which is not entirely clear from the language) and which the customer decided not to invest in, the document would not be relevant for all cases. Such materials about investments, which the customer may not have even considered, would instead be relevant in few cases at most.

16) The customers' resumes.

PIABA does not object, and notes that the proposal does not require creation of a resume to satisfy this Item.

17) Documents showing the customers' complete educational and employment background or, in the alternative, a description of the customers' educational and employment background if not set forth in resumes produced under item 16.

PIABA does not object to this Item.

18) All documents related to the case at issue that the customers received by subpoena under Rule 12512 or by document request directed to third parties at any time during the case.

PIABA has no objection. This Item calls for production of material relevant at least for discovery purposes. As with other third party documents, PIABA notes that the Guide and applicable laws protect against production of privileged documents. PIABA also notes as a practical matter that parties might not receive subpoenaed documents until after the Discovery Guide deadline. The Guide should reference that production of these documents be within thirty days of the customer's receipt of the same.

19) To the extent that an insurance product that provides a death benefit is included in the Statement of Claim, the customers shall provide all insurance information received from an insurance sales agent or securities broker relating to such insurance.

PIABA does not object to this Item.

ESSENTIAL IMPROVEMENTS NEEDED TO PROTECT PUBLIC INVESTORS

The current Discovery Guide has perpetuated an improper and false understanding of the law in securities cases, whether they sound in negligence, fraud, equity or contract, and which find their way into FINRA arbitration. In essence, the current Discovery Guide propagates the myth that FINRA arbitrations are all about placing the customer on trial. To the extent that the proposed Guide lists extensive financial disclosure *presumptively* discoverable by all customers *in all cases*, that myth is perpetuated. Not only does such production unduly burden many investors, the Guide's pronouncement on this point almost certainly conveys to some arbitrators hearing an attendant discovery objection the belief that such documents are essential for all cases.

The industry often defends cases which are not otherwise defensible by attempting to prove that the customer was wealthy enough to have taken the risks involved, even if the wealthy customer was, in fact, extremely risk-averse, or had been deceived as to salient facts. The SEC has repeatedly rejected this concept. No one deserves to be lied to, especially when paying for investment services in an industry that touts professionalism and integrity. If a customer nearing retirement is lied to about liquidity of an investment, for example, it is irrelevant that the

customer had some risky stocks at another firm eight years earlier.[3] 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 instructing arbitrators – in every customer case – that a broad reach into the customer's private financial information is presumptively justified - in every case - FINRA gives arbitrators the strong, yet erroneous, message that the customer's wealth, or lack thereof, is the critical issue in every case.[4]

Even in a suitability case, wholesale mining for financial records, in every such case, is both intrusive and unwarranted. If a 55 year old man bought a municipal bond fund 5 years ago upon his advisor's recommendation, the information he put on a car an application 8 years ago is of little consequence. Even if the customer no longer has the loan application, firms, using their tremendous credit check and other investigatory resources, will relentlessly seek subpoenas for even remote, trivial nuggets, and sometimes unfortunately will do so to harass and wear down the customer who dared to bring a claim.

In addition, the firms should have sufficient information in their possession about the suitability of recommendations to the customer. The test after all has not been what should the broker have learned, but rather has centered on what the customer disclosed, and what the broker knew about the security and the customer before making recommendations. By allowing broad, tangentially relevant discovery, the brokers are empowered to conduct essentially an improper *ex post facto* suitability profile for the customer who has had the temerity to file an arbitration claim. This is hardly consistent with investor protection goals.

For other cases such as unauthorized trading, bad executions, forgery, material omission and more, as noted above, there is virtually no credible reason to burden every such customer with expansive tax and financial disclosures in order to bring those claims.

The more principled approach at this time would be for FINRA to simply remove hugely broad financial fishing expeditions from the presumptively discoverable lists that are now proposed. At a minimum, FINRA can include limiting language, as FINRA has done for the industry in the Guide's introductory comments. The proposed Guide states:"not all firms have

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[3] 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)).

[4] 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...")

the same business operations model and certain items on the Lists may not be relevant in a particular case when the firm's business model …is taken into consideration". There is no compelling reason why some limiting instruction cannot also be provided to protect customers from intrusive, burdensome disclosure of potentially irrelevant private information in every single case, when at a minimum preliminary limiting language can be included in the Discovery Guide.

CONCLUSION

The Discovery Guide is, and even with the proposed improvements will continue to be, deeply flawed. We understand that this is a natural outgrowth of the collaborative process which takes place as a precursor to the Guide's adoption and revision. Despite this historical approach to the Guide, we urge FINRA and the SEC to take a more proactive approach to ensure the primacy of investor protection, consistent with the stated mission of the Commission and the SROs.

Despite its continued shortcomings, PIABA views the proposed revisions to the Guide as a long overdue step in the direction of leveling the playing field in arbitrations. We support the rule's passage, and we urge FINRA and the Commission to continue to improve the Guide.

I thank the Commission for its consideration and attention to PIABA's comments. If you wish to discuss any aspect of this letter further, please do not hesitate to contact me.

Respectfully,

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