Public Investors Arbitration Bar Association

July 11, 2013

Via Email Only
Ms. Elizabeth M. Murphy
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090
rule-comments@sec.gov

Re: SR-FINRA-2013-024 – Proposed Rule Change to Amend the Discovery Guide Used in Customer Arbitration Proceedings

Dear Ms. Murphy,

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"). PIABA is an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration, while also advocating for public education regarding investor rights. Our members and their clients have a profound interest in FINRA rules relating to the dispute resolution process.

When FINRA updated the Discovery Guide in 2011, it created a Discovery Task Force committed to reviewing e-discovery issues and discovery in product cases. PIABA supports FINRA's efforts to update the coverage of the Discovery Guide to include guidance on electronic discovery and discovery in product cases. The proposed amendments should be approved by the staff of the Commission.

Because the proposed changes to the Discovery Guide are in the form of guidance to arbitrators, FINRA should have its Discovery Task Force monitor the implementation of its guidance, including the polling of arbitrators and claimants' counsel. Specifically, FINRA should attempt to determine whether the guidance with respect to e-discovery results in electronic documents being produced in reasonably usable formats within the meaning as the terminology that FINRA proposes to include in its training materials and whether electronic documents are being produced in "native" format when requested by claimants' counsel. With respect to both e-discovery and product cases, FINRA should seek to determine whether its guidance results in the voluntary production of documents described in the guidance without the need to file motions to compel. If the guidance does not result in electronic documents being produced in reasonably usable format and product discovery occurring without a fight, then FINRA should implement the following proposals.

With respect to e-discovery, FINRA may need to require arbitrators to ask a question during the initial pre-hearing conference relating to the extent of cooperation that has occurred between the parties with respect to production of electronic documents. Requiring such an inquiry would encourage cooperation and may in some instances encourage discussion concerning taking appropriate steps to preserve electronic documents.

FINRA may need to implement more specific guidance and state that documents such as emails which, in the ordinary course of business, are stored in a searchable format and/or in a format that includes metadata, must be produced in a format that is searchable and that contains metadata, if a party so requests. FINRA's guidance may need to specify that a .pdf file which does not comply with the definitions of appearance, searchability, metadata, and maneuverability as proposed by FINRA is an unacceptable format in which to produce electronic documents. This additional guidance may be necessary, in part, because many FINRA arbitrators are retirees who do not appear to have familiarity with e-discovery issues, yet they are called upon to make the same kinds of discovery rulings that are made in federal court by highly trained and experienced magistrates.

FINRA may need to require that brokerage firms search their e-mail servers and reasonably accessible backups and produce any and all e-mails referencing the customers and/or their accounts. Brokerage firms frequently attempt to avoid undertaking such a search based on claimed cost and burden, and sometimes even attempt to limit production to copies of e-mails that have been printed out and placed in a paper file at the branch. Finally, such guidance should provide that e-mail searches are not limited to searches for e-mails between the brokerage firm and the customer. Experience shows that brokerage firms frequently attempt to limit their searches for e-mail to e-mails to and from the customer's e-mail address, even though internal e-mails at the brokerage firms referencing the customers and/or their accounts may be highly relevant to issues such as supervision or the firm's knowledge of a registered representative's activities.

With respect to discovery in product cases, FINRA may need to change its guidance into a list of documents and categories of documents which are presumptively discoverable. The inclusion of documents on a list would provide specific guidance to arbitrators as to the presumptively discoverable documents in product cases, lessening the potential for inconsistent discovery rulings in similar cases which claimants' counsel have experienced in many product cases.

Regardless of the results of FINRA's monitoring of the implementation of its guidance, PIABA remains concerned that brokerage firms will continue to object to any production of e-documents on the grounds that the production is overly burdensome and too costly. Most documents kept by brokerage firms are maintained in an electronic format. Firms must not be allowed to raise objections as to documents kept in the ordinary course of business simply because the firms maintain those documents in

electronic format. Guidance should be implemented now to make it clear that objections made by brokerage firms as to cost or burden must be highly specific[1] and be supported by an affidavit of a representative of the brokerage firm. Further, such objections should be scrutinized with great care, particularly if the records are the varieties that the SEC or FINRA requires be maintained. Brokerage firms should not be able to get away with making claims of burden with regard to documents that the SEC requires to be readily accessible.

In summary, PIABA commends FINRA's work toward making the Discovery Guide more comprehensive and specifically designed to address electronic discovery issues. PIABA also commends FINRA's recognition of the additional categories of documents that arbitrators should be aware are appropriate subjects of document requests in product cases. PIABA believes FINRA needs to monitor the implementation of its guidance to determine whether the more specific guidance and the product case document list as described above should be incorporated into the Discovery Guide. PIABA thanks the Securities and Exchange Commission for the opportunity to comment on this proposal.

Very truly yours,

Scott C. Ilgenfritz
President

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Contact information for Mr. Ilgenfritz:

Scott Ilgenfritz
Board Certified Business Litigation Lawyer
Johnson, Pope, Bokor, Ruppel & Burns, LLP
403 East Madison Street, Suite 400
Tampa, FL 33602
Phone: (813) 225-2500
Fax: (813) 223-7118

[1] Courts do not consider discovery objections of cost or burden unless specific factual evidence is presented. Arbitrators often sustain such objections by firms based on the unsubstantiated arguments of counsel.