

Dear Gentlepersons:

I have reviewed FINRA's requested changes to its Arbitration Procedures Discovery Guide referenced in the above proposal, and have some comments regarding several.

### **List 1**

Category/Item 1: Given that virtually every document sent by a broker-dealer to a customer includes information regarding "market conditions" or the customer's account, this Category really calls for every document that was sent to the customer. Most customer cases tend to be suitability complaints that concern a handful of the securities bought; to force a firm as a matter of course to produce every document regarding the customer's account – specifically, non-complained of transactions – is unwarranted. This is even more so because in the typical suitability case the customer will generally not identify the transactions at issue and will claim (even though this is clearly not true) that **all** transactions are "at issue," and use that vague pleading to justify member firm's costly production of documents many of which cannot possibly be relevant to the customer's legitimate claims.

Category/Item 7(a): All firms require daily review of trades. The requirement that all "managerial review" documents be produced would seemingly require production of every daily review in which a customer transaction appeared, even if that transaction was not "at issue." In larger accounts, or situations where the customer has multiple accounts, the production could run into the hundreds of pages per year involving transactions that are not truly in dispute.

Category/Item 13(b): Virtually every customer claim contains an allegation of failure to supervise even though under the law a member firm is generally liable under *respondeat superior* for the associated person's alleged defalcations, making the claim moot. This Category would thus require the production of virtually every supervisory record for every account to which the associated person was assigned because, as noted *supra*, most customer complaints are bereft of specific allegations regarding which specific securities are at issue. In cases in which other claims are also alleged in vague, conclusory terms (e.g., "the account was excessively traded"), it will be very difficult for an arbitrator to say that supervisory reviews of other accounts are not related to the specific customer's suitability, churning, negligence, etc. claims and so order production of thousands of pages of records on other customers many of which would have to be redacted to eliminate privacy right infringements. To the extent that supervisory records on other clients are sought, they should not be considered part of a mandatory production but available only through a specific request for which the requesting customer can demonstrate significant relevance to his/her/its claims.

Category/Item 20: The term "solicited trading activity" appears not to be limited to claims of excessive trading but to any type of transaction that the associated person initiated – which is 80-90% of most transactions in the vast majority of accounts. In such cases, the claim is almost always not that the associated person simply recommended the transactions but that the transaction was substantively "unsuitable" for the customer. A list of all trades in which the associated person was involved sheds no relevant evidence whatsoever on suitability claims because such claims are, by definition, determined on a customer-by-customer basis. Even less so is the compensation (e.g., commission) derived by the broker from every trade he/she participated in – it yields no evidence regarding the claimant's allegations. Lastly, the redaction

described in subpart (b) is incredibly time-consuming and expensive for information that is not warranted being incurred given the lack of relevance to the complaining customer's claim.

## **List 2**

Category/Item 1: The list should be expanded to include Schedule C (self-employment income). A customer's business background is always germane to the case. Oftentimes, individuals filing under Schedule C expend business revenue for arguably personal expenses, which in turn distorts a realistic suitability analysis based on the customer's true finances, and diminish the real value of the business by hiding the business's gross revenue, which is often most reflective the fair market value of the business. The redaction of Social Security Numbers is unnecessary as: (1) that information often will lead to discovery of admissible evidence on the customer's other assets and income, and (2) is generally contained in the member firm's customer account information so it is not unknown.

Category 4: This Category should also include account documentation on file with the other member firms. Discrepancies in financial information (e.g., Rule 405), investment objectives and risk tolerances disclosed to other member firms are often highly relevant to what statements the customer made the member firm/associated person in question as well as the customer's true investment experience, objectives, financial resources and risk tolerance . As such, they often constitute impeaching or contradictory statements to those the customer may offer at the arbitration hearing or mediation.

**Category 12:** The reference to "limited liability company" should be added, given its popularity as a means of conducting business.

**Deleted Categories:** (1) *Current List 2, Item 11* – the respondent firm would only have copies of what complaints were lodged against it, not against other member firms. E.g., Merrill Lynch would not know what complaints were made against Wells Fargo Advisors. This Item/Category should be retained. (2) *Current List 2, Item 13:* The duty to mitigate damages arises when the customer has reason to believe he/she/it has been wronged. At that point, it is unlikely that the customer will be sharing any information or documents with the member firm/associated person; moreover, the absence of any documents would tend to prove that the customer did **not** mitigate damages. This Category/Item should be retained.

Very truly yours,  
/s/

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