Discovery Demands In FINRA Arbitration – One Size Does Not Fit All

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I. Introduction

Practitioners on both sides of a securities arbitration should carefully consider the relatively simple discovery rules of the FINRA Code of Arbitration Procedure. Unlike the more entangling provisions of state and federal laws, discovery under the FINRA Rules of Arbitration Procedure are straightforward, without the torturous provisions of discovery rules mandated by the courts.

Some argue that the FINRA Rules of Arbitration Procedure do not provide sufficient guidance, but most seasoned securities arbitration practitioner representing investors believe that this is all more the reason for them to make the case for relevant documents and information from the outset of the case, right in the Statement of Claim.[1]

The reason for this is because if there is a dispute about the breath of your discovery requests, you can refer the arbitrators to assertions made in the Statement of Claim. Your requests are relevant if you teed-up related issues in your clients' pleading. All the more reason to write detailed Statements of Claim, for one size does not fit all.

In this article, I examine the discovery rules and recommend the best way to use them to your clients' advantage.

II. FINRA Discovery Rules[2]

a) Presumptive Discovery Pursuant To FINRA Rule 12506

[1] See FINRA Regulatory Notices 11-17, 13-40, 14-40 and 18-22.

[2] All of the Customer code discovery rules and the Discovery Guide appear at the end of the article as Appendix A.

Rule 12506 of the FINRA Rules of Arbitration Procedure and the Discovery Guide set forth the documents and information which the respective sides to customer claims are required to provide to opposing counsel without the necessity of a formal discovery demand seeking these items.

The two lists have undergone several changes over the years and there are ongoing initiatives to add yet further and other items to it. One of the most common complaints heard about the lists are that its use of certain generic terminology fails in certain circumstances to fully particularize included documents and information. Given the variety of investment products and customer victimization schemes which forms the basis of the customer complaints, it is incumbent upon a customer's counsel to clearly make the case that specific documents and information are as a matter of course subsumed by one or several items contained on Lists 1 and 2 of the Discovery Guide.[3] Alternatively, customized demands can be a more effective approach when dealing with cases calling for investment vehicle specific demands.[4]

b) Customized Demands For Documents And Information Pursuant To FINRA Rule 12507

While the presumptive discovery categories set forth in List 1 of the Discovery Guide encompass the lion's share of relevant documents and information in customer cases, cases involving esoteric investments and even apparent bread and butter investments require the production of specific categories of documents and information not while specifically particularized in the Discovery Guide, but nonetheless are encompassed by one or various enumerated items in the Discovery Guide.

For example:

1. Cases involving junk bonds - distressed debt offerings - require attorneys to drill down on TRACE records for each transaction.

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[3] See FINRA Regulatory Notices 11-17, 13-40, 14-40 and 18-22.

[4] See Rule 12507 of the FINRA Rules of Arbitration Procedure.

2. Cases involving the dumping of failing securities issues into the accounts of unsuspecting customers will require the production of broker dealers principal holding pages and documents and information evidencing possible cross-sales.

3. Private placement cases require the production of due diligence files, selling agreements, accredited investor questionnaires.

4. Best execution cases require the production of internal market sourcing records, as well as payment for money flow arrangements which broker dealers may have with certain market makers.

And these are just a few examples.

How Do I know What Specific Documents And Information Are Needed In My Case?

The answer to the question is this: Seek a consultation with an expert witness or an attorney experienced with claims in the produce area of your case.

Whether or not the documents and information you are seeking are presumptively discoverable under Rule 12506 or additional items sought under Rule 12507, it is essential that your discovery demand includes discovery of documents and information related to your specific claim.

From my experience, brokerage firms will not go out of their way to produce specific documents, information and/or witnesses unless claimant's counsel doggedly pursues them with focused requests and demands. Indeed, the discovery demand process is "where the rubber meets the road" and Respondents counsel have meaningful opportunities to size up their adversaries (Claimants counsel) by assessing scope and focus of discovery demands, including their specificity.

Many customer cases have seen subpar recoveries or have even gone down in flames due to the fact that the "smoking gun" was never asked for; opposing counsel won't shoot themselves in the foot if that can be forestalled.

While Respondent's counsel are duty bound under the FINRA Rules to provide presumptive discovery and any additional items requested and ordered for production by an arbitration panel, they surely will not go out of their way to produce damning documents, information and witnesses unless specifically asked for and even then, the production of such damaging items may easily require discovery motion practice. Claimants' counsel need to ask for those needles in the haystacks but, before that, reference their existence in the Statement of Claim.

Attorneys who are newcomers to representing customers in FINRA arbitrations are best served taking the time to fully research the documentary and factual underpinnings of their claims or better yet, contacting a competent expert witness or attorney seasoned in this area of securities brokerage customer claims.

The Public Investors Advocate Bar Association (PIABA), a nationwide organization of approximately 400 attorneys, has formed a network of expert witnesses with experience in various of the separate product and wrongful conduct-type claims typically pursued by victimized investors. Another source is the Securities Expert Roundtable[5] which consists of highly experienced experts in distinct subjects.

A number of law schools in the State of New York maintain securities arbitration clinics to represent the interests of income/net worth qualified investors. They include Fordham Law School, New York Law School, St. John's, Pace University Law School, Cardozo Law School and Cornell Law School.

In the respondent's arena, the Securities Industry Financial and Markets Association (SIFMA) has its own counterpart network of members who continually circulate, updates, bulletins and notices which include topics of interest of broker dealers and their associated persons desirous of avoiding being the target of adversarial claims.[6]

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[5] http://securitiesexpert.org/

[6] SIFMA'S headquarters are located at 120 Broadway, 35th Floor, New York, New York 10271 (212) 313-1200 and 1099 New York Avenue, NW, 6th Floor, Washington DC 20001 (202) 962-7300.

While there are certain customer cases that are so black and white that one might argue that an expert witness is unnecessary, more likely than not whether the decision is made to merely retain an expert to assist in framing a Statement of Claim and drafting Rule 12507 discovery demand and/or actually retaining such an expert to testify at hearings, expert witnesses are an essential resource in this arena.

In the same vein, expert witnesses oftentimes have crossed paths with other expert witnesses. A seasoned expert is one who might assist you in sizing up any disclosed experts retained by Respondents counsel. Further yet, as in other areas of the law, opposing expert witnesses can be effectively cross-examined or even neutralized on the basis of available transcripts of their prior testimony, adverse employment history, bogus credentials or lack of meaningful experience or knowledge.

Seasoned experts and attorneys practicing in the area of securities brokerage customer claims can also be a valuable resource when ranking and striking proposed arbitrators pursuant to the FINRA arbitrator selection rules. They can be a useful resource for vetting the decisional history of arbitrators when considering the ranking and striking of proposed arbitrators. FINRA Office of Dispute Resolution maintains an online database of Award going back to 1995; see https://www.finra.org/arbitration-mediation/arbitration-awards.

III. Relevancy of Discovery Demands and the Need for Arbitration Panels to Assure the Provision of all Relevant and Necessary Documents and Information

Many cases involve tens of thousands of pages of documents produced in electronic format. Some will suggest that Respondents counsel can intentionally produce thousands of pages of peripheral or non-essential documents and information so as to bog down the discovery process or otherwise hide that proverbial needle in the haystack. Several rounds of discovery follow-up letters appropriately tailored with headers focusing upon the most relevant documents and information can serve, later on, as the best exhibits in a discovery motion seeking to compel the production of documents that are clearly in their possession.

It is my belief that defense counsel will be loathe to want to face an arbitration panel in the discovery motion context when faced with several pointed letters from claimant's counsel

fully particularizing the categories of documents and information which have not been produced with specific reference to the pagination in question or the redactions which have been made on apparently relevant documents.

While it may sound like an unnecessary expenditure of time, Claimants counsel would be wise to spoon feed their adversaries, in plain language, about the clear relevancy and requirements for the production of documents and information when Respondents counsel might be stonewalling on discovery. Tying specific demands to the Discovery Guide's presumptive discovery list is ideal. Further, many additional demands which might at first glance be deemed constitute additional documents and information pursuant to FINRA Rule 12507 which can nonetheless fall in List 1 categories of the Discovery Guide.

One of the grounds for a court to vacate an arbitration Award is the failure of an arbitration panel to consider or hear relevant evidence. That is why they often err on the side of allowing everything into evidence and, in discovery, allowing all the utensils found in a kitchen sink.

IV. Discovery Motion Practice

The FINRA Rules of Arbitration Procedure require that before filing discovery motions counsel must articulate their good faith, best efforts towards procuring the cooperation of opposing counsel prior to filing a discovery motion. This is somewhat analogous to the general spirit of the state and federal discovery rules.[7] A finely tailored discovery demand, which has been comprehensively ignored, coupled with proof of several documented phone calls and follow-up letters, will generally suffice this pre-requisite of a good faith effort to gain your opponent's cooperation.

The Initial Pre-Hearing Conference Scheduling Order should also fully particularize and anticipate possible discovery disputes with scheduled deadlines for compliance and motions. Some FINRA panels have become more proactive and have successfully moderated discovery disputes with separate discovery sessions moderated by the panel chair with the resultant rulings

[7] See Rule 12505 of the FINRA Manual of Arbitration Procedure/Customer Disputes.

directing or declining the production of documents and information sought. See Rule 12500 of the FINRA Manual of Arbitration Procedure/Customer Disputes.

Counsel for any party to an arbitration proceeding are best serving their clients' interests by clearly making known to an arbitration panel the significance of sought-after but contested discovery demands. Most arbitration panels can be expected to provide a reasoned ruling on a discovery dispute when properly and comprehensively provided with the authority and relevance of contested documents, information and witnesses.

Discovery disputes in securities brokerage customer claims filed with the American Arbitration Association or JAMS an expert a more *ad hoc* procedures and rulings when faced with discovery disputes depending upon the makeup of the arbitrators sitting on the case, the agreed upon rules of procedures and the venue of the claims.

V. The Importance of Providing Sufficient Factual Allegations in the Underlying Statement of Claim to Support the Production of Documents and Information

The FINRA Code of Arbitration Procedure affords Claimants counsel wide discretion as to how particularized the Statements of Claim might be.

12302. Filing and Serving an Initial Statement of Claim

(a) Filing Claim with the Director

To initiate an arbitration, a claimant must file the following with the Director:

(1) Signed and dated Submission Agreement; and

(2) A statement of claim specifying the relevant facts and remedies requested

The claimant may include any additional documents supporting the statement of claim.

These provisions notwithstanding, there is a growing trend of Respondents counsel to treat the overly broad Statement of Claim as being ripe for a motion for more particularized Statement of Claim analogous to the rule under the CPLR in the Federal Rules of Civil Procedure. Many argue that such motion to practice is inimical to the spirit of the arbitration process as a whole and can serve to see arbitration claims degenerate into bogged down and

endless documentary exchanges designed to obfuscate, as well as delay an ultimate hearing on the merits.

While some cases are well suited for a brief summary of the nature of a claim and prayer for relief, other types of cases beg for a full particularization of the alleged wrongdoing. Claimants counsel could surely almost hear Respondents counsel at the hearing objecting to documents and witnesses with the battle cry that "It's not in the Statement of Claim and this is the first time we are hearing of this; therefore, it is not relevant."

VI. Stipulations to Facts in Lieu of the Production of Contested Documents and Information

Some arbitration proceedings have been known to drag on with multiple hearing sessions lasting over a period of years when hearing sessions become protracted evidentiary disputes over the admissibility and relevance of documents, information and witnesses. Arbitration panels have been known to fall into this trap adjourning to "executive session" with each successive admissibility objection, with such sessions lasting up to an hour each before resolution can be had. Some argue that Respondents counsel intentionally delay and stretch out cases over multiple sessions - over months and even years - so that any damning evidence and testimony ultimately becomes lost on the arbitrators at the time of their final deliberations.

Anticipating such delays Claimants counsel should consider having the arbitration panel chair include a stipulated exhibits filing deadline in the Initial Pre-Hearing Conference Scheduling Order. Such stipulations regarding documents, information and witnesses can go a long way towards assuring that the panel is focused on the merits of the case and not getting lost in the relevant delay tactics and irrelevant arguments. In addition to the stipulation to documents, information and witnesses, stipulations on contested facts can also serve to assure the expedited and efficient use of hearing time without differing the panel from an essential task of giving full and fair consideration to the essence of the arguments on both sides of the fence.

VII. Orders of Appearance

An Order of Appearance pursuant to Rule 12513 of the FINRA Code of Arbitration Procedure should be a fairly straightforward matter involving the procuring of the arbitration

panel chair's signature on an appropriately worded single sheet of paper. Stipulations to the production of witnesses without the involvement of the arbitration panel might be your better route and avoid the cost and time associated with having to make a motion. Prior to filing an proposed Order of Production, counsel for the requesting party is required to make known his or her desire for the production of a particular witness accompanied with a reason for the relevance and necessity of the witness.

Orders of Appearance and Production require all associated persons of a member firm to fully cooperate and appear or otherwise risk regulatory and disciplinary sanctions. Even with a stipulation, an Order of Appearance and Production might be necessary to assure the production of a witness who may have departed from the firm in question but otherwise remains in the industry after having been hired away by another firm.

VIII. Subpoenas

Unlike Orders of Appearance and Production for associated persons of a FINRA member firm, many cases require the testimony of employees of broker dealers who are not FINRA registered associated persons. Rule 12512 is the subpoena rule. Examples include receptionists, sales assistants, investment advisor representatives of registered investment advisory firms, cashiers and trading surveillance. In addition to these categories of non-registered employees of brokerage firms, subpoenas may also be necessary for unaffiliated third parties such as family members, accountants, other customers, retired former FINRA registered associated persons.

Somewhat akin to an eviction proceeding, the process of a subpoena for a witness can require congenial efforts, notifications and correspondence similar to that pursued for Orders of Appearance and Production making known to the anticipated witness their apparent involvement, the necessity of their testimony and the anticipated time and place of their anticipated testimony.

Unlike Orders of Appearance, FINRA panels cannot impose any regulatory or disciplinary sanction upon non-associated persons who are not registered and licensed with FINRA. In this context, the process of compelling by subpoena an uncooperative witness who fails to appear to testify can require a separate foray into federal court to compel their attendance.

IX. Preserving On The Record The Failure To Produce Relevant Documents and Information

As the case proceeds through the discovery process and progresses along the various discovery deadlines set in the Initial Pre-Hearing Conference Order, preserve on the record any failure to produce relevant, necessary and/or required documents and information. The substantive hearing sessions on the merits of a case with a fully empaneled FINRA arbitration panel is not the best time or place to make known the failure of opposing counsel to cooperate with the discovery process. In this context, one can clearly hear opposing counsel whining that any such concerns regarding missing documents, information and witnesses should have been pursued many months prior to hearings.

X. In Closing

As an experienced securities arbitration attorney, I also suggest that diligent Claimants counsel should start the framing of demands for documents and information not, in the first instance, with the issuance of a formal written discovery demand after the receipt of an Answer from Respondents counsel, but rather, within the four corners of the Statement of Claim.

Statistics show that over 85 % of FINRA venued arbitration claims are settled without proceeding through the issuance of a full award by an arbitration panel. I strongly suggest that in many instances, cases are settled due to the fact that the Respondent firms are not desirous of producing relevant documents and information which might tend to more clearly support the claims set forth in a Claimant's Statement of Claim.

Additionally, it is suggested that claims are also settled by respondent firms due to the simple fact that the production of certain documents and information might serve to expose the firm to regulatory, as well as criminal liability. Respondent firms are also vigilant of the fact that the production of certain documents and information might serve to bring to light the victimization of other customers of the firm, usually serviced by the same broker, who were victimized in similar fashion.

The Discovery Rules of the Customer Code

12506. Document Production Lists

(a) Applicability of Document Production Lists

The Director will notify parties of the location of the FINRA Discovery Guide and Document Production Lists on FINRA's Web site, but will provide a copy to the parties upon request. Document Production Lists 1 and 2 describe the documents that are presumed to be discoverable in all arbitrations between a customer and a member or associated person.

(b) Time for Responding to Document Production Lists

(1) Unless the parties agree otherwise, within 60 days of the date that the answer to the statement of claim is due, or, for parties added by amendment or third party claim, within 60 days of the date that their answer is due, parties must either:

(A) Produce to all other parties all documents in their possession or control that are described in Document Production Lists 1 and 2 serving the requested documents or information by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile as provided in Rule 12300(a)(3);

(B) Identify and explain the reason that specific documents described in Document Production Lists 1 and 2 cannot be produced within the required time, and state when the documents will be produced, and serve this response on all parties and file this response with the Director; or

(C) Object as provided in Rule 12508and serve this response on all parties and file this response with the Director.

(2) A party must act in good faith when complying with subparagraph (1) of this rule. "Good faith" means that a party must use its best efforts to produce all documents required or agreed to be produced. If a document cannot be produced in the required time, a party must establish a reasonable timeframe to produce the document.

(c) Redacted Information

For purposes of this rule and Rule 12507, if a party redacts any portion of a document prior to production, the redacted pages (or range of pages) shall be labeled "redacted."

12507. Other Discovery Requests

(a) Making Other Discovery Requests

(1) Parties may also request additional documents or information from any party by serving a written request on the party. Requests for information are generally limited to identification of individuals, entities, and time periods related to the dispute; such requests should be reasonable in number and not require narrative answers or fact finding. Standard interrogatories are generally not permitted in arbitration.

(2) Other discovery requests may be served:

(A) On the claimant, or any respondent named in the initial statement of claim, 45 days or more after the Director serves the statement of claim; and

(B) On any party subsequently added to the arbitration, 45 days or more after the statement of claim is served on that party.

The party must serve copies of the request on all other parties. Any request for documents or information not described in applicable Document Production Lists should be specific, and relate to the matter in controversy.

(b) Responding to Other Discovery Requests

(1) Unless the parties agree otherwise, within 60 days from the date a discovery request other than the Document Production Lists is received, the party receiving the request must either:

(A) Produce the requested documents or information to all other parties by serving the requested documents or information by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile;

(B) Identify and explain the reason that specific requested documents or information cannot be produced within the required time, state when the documents will be produced, and serve this response on all parties and file this response with the Director; or

(C) Object as provided in Rule 12508and serve this response on all parties and file this response with the Director.

(2) A party must act in good faith when complying with subparagraph (1) of this rule. "Good faith" means that a party must use its best efforts to produce all documents or information required or agreed to be produced. If a document or information cannot be produced in the required time, a party must establish a reasonable timeframe to produce the document or information.

12508. Objecting to Discovery; Waiver of Objection

(a) If a party objects to producing any document described in Document Production Lists 1 or 2 or any document or information requested under Rule 12507, it must specifically identify which document or requested information it is objecting to and why. Objections must be in writing, and must be served on all other parties. Parties must produce all applicable listed documents, or other requested documents or information not specified in the objection by serving the requested documents or information under Rule 12300.

(b) Any objection not made within the required time is waived unless the panel determines that the party had substantial justification for failing to make the objection within the required time.

(c) In making any rulings on objections, arbitrators may consider the relevance of documents or discovery requests and the relevant costs and burdens to parties to produce this information.

12509. Motions to Compel Discovery

(a) A party may make a motion asking the panel to order another party to produce documents or information if the other party has:

- Failed to comply with Rule 12506 or 12507; or

- Objected to the production of documents or information under Rule 12508.

(b) Motions to compel discovery must be made, and will be decided, in accordance with Rule 12503. Such motions must include the disputed document request or list, a copy of any objection thereto, and a description of the efforts of the moving party to resolve the issue before making the motion.

12510. Depositions

Depositions are strongly discouraged in arbitration. Upon motion of a party, the panel may permit depositions, but only under very limited circumstances, including:

- To preserve the testimony of ill or dying witnesses;

- To accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing;

- To expedite large or complex cases; and

- If the panel determines that extraordinary circumstances exist.

12511. Discovery Sanctions

(a) Failure to cooperate in the exchange of documents and information as required under the Code may result in sanctions. The panel may issue sanctions against any party in accordance with Rule 12212(a) for:

- Failing to comply with the discovery provisions of the Code, unless the panel determines that there is substantial justification for the failure to comply; or

- Frivolously objecting to the production of requested documents or information.

(b) The panel may dismiss a claim, defense or proceeding with prejudice in accordance with Rule 12212(c) for intentional and material failure to comply with a discovery order of the panel if prior warnings or sanctions have proven ineffective.

12512. Subpoenas

(a) To the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas.

(1) Arbitrators shall have the authority to issue subpoenas for the production of documents or the appearance of witnesses.

(2) Unless circumstances dictate the need for a subpoena, arbitrators shall not issue subpoenas to non-party FINRA members and/or employees or associated persons of non-party FINRA members at the request of FINRA members and/or employees or associated persons of FINRA members. If the arbitrators determine that the request for the appearance of witnesses or the production of documents should be granted, the arbitrators should order the appearance of such persons or the production of documents from such persons or non-party FINRA members under Rule 12513.

(b) A party may make a written motion requesting that an arbitrator issue a subpoena to a party or a non-party. The motion must include a draft subpoena and must be filed with the Director. The requesting party must serve the motion and draft subpoena on each other party. The requesting party may not serve the motion or draft subpoena on a non-party.

(c) If a party receiving a motion and draft subpoena objects to the scope or propriety of the subpoena, that party shall, within 10 calendar days of service of the motion, file written objections with the Director, and shall serve copies on all other parties. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena.

(d) If the arbitrator issues a subpoena, the party that requested the subpoena must serve the subpoena on all parties and, if applicable, on any non-party receiving the subpoena. The party

must serve the subpoena on the non-party by overnight mail service, overnight delivery service, hand delivery, email or facsimile.

(e) If a non-party receiving a subpoena objects to the scope or propriety of the subpoena, the non-party may, within 15 calendar days of receipt of the subpoena, file written objections with the Director and the requesting party. The non-party may file the objection by overnight mail service, overnight delivery service, hand delivery, email or facsimile. The Director shall forward a copy of the written objections to all other parties. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. The party must serve the response on the non-party and all other parties and file proof of service with the Director pursuant to Rule 12300(c)(5). The Director will send, at the same time, objections and responses to the panel after the reply date has elapsed, unless otherwise directed by the panel. After considering all objections, the arbitrator responsible for issuing the subpoena shall rule promptly on the objections.

(f) Any party that receives documents in response to a subpoena served on a non-party shall serve notice on all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request by serving them by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile. Parties must not file the documents with the Director.

(g) If the arbitrators issue a subpoena to a non-party FINRA member and/or any employee or associated person of a non-party FINRA member at the request of a FINRA member and/or employee or associated person of a FINRA member, the party requesting the subpoena shall pay the reasonable costs of the non-party's appearance and/or production, unless the panel directs otherwise.

12513. Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas

(a) Upon motion of a party, the panel may order the following without the use of subpoenas:

(1) The appearance of any employee or associated person of a member of FINRA; or

(2) The production of any documents in the possession or control of such persons or members.

(b) The motion must include a draft order and must be filed with the Director. The requesting party must serve the motion and draft order on each other party. The requesting party may not serve the motion or draft order on a non-party.

(c) If a party receiving a motion and draft order objects to the scope or propriety of the order, that party shall, within 10 calendar days of service of the motion, file written objections with the Director and shall serve copies on all other parties. The party that requested the order may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the order.

(d) If the arbitrator issues an order, the party that requested the order must serve the order on all parties and, if applicable, on any non-party receiving the order. The party must serve the order on the non-party by overnight mail service, overnight delivery service, hand delivery, email or facsimile.

(e) If a non-party receiving an order objects to the scope or propriety of the order, the non-party may, within 15 calendar days of receipt of the order, file written objections with the Director and the requesting party. The non-party may file the objection by overnight mail service, overnight delivery service, hand delivery, email or facsimile. The Director shall forward a copy of the written objections to all other parties. The party that requested the order may respond to the objections within 10 calendar days of receipt of the objections. The party must serve the response on the non-party and all other parties and file proof of service with the Director pursuant to Rule 12300(c)(5). The Director will send, at the same time, objections and responses to the panel after the reply date has elapsed, unless otherwise directed by the panel. After considering all objections, the arbitrator responsible for issuing the order shall rule promptly on the objections.

(f) Any party that receives documents in response to an order served on a non-party shall serve notice on all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request by serving them by first-

class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile. Parties must not file the documents with the Director.

(g) Unless the panel directs otherwise, the party requesting the appearance of witnesses by, or the production of documents from, non-parties under this rule shall pay the reasonable costs of the appearance and/or production.

DISCOVERY GUIDE

This Discovery Guide and Document Production Lists supplement the discovery rules contained in the FINRA Code of Arbitration Procedure for Customer Disputes ("Customer Code") (See Rules 12505-12511).

No requirement under the Discovery Guide supersedes any record retention requirement of any federal or state law or regulation or any rule of a self-regulatory organization.

Flexibility in Discovery

The Discovery Guide, including the Document Production Lists (Lists), serves as a guide for the parties and the arbitrators. While the parties and arbitrators should consider the documents described in the Lists presumptively discoverable, the parties and arbitrators retain their flexibility in the discovery process. Arbitrators can: order the production of documents not provided for by the Lists; order that parties do not have to produce certain documents on the Lists in a particular case; and alter the production schedule described in the 12500 series of rules.

Cost or Burden of Production

A party may object to producing a document on a List because of the cost or burden of production. If the party demonstrates that the cost or burden is disproportionate to the need for the document, the arbitrators should determine if the document is relevant or likely to lead to relevant evidence. If the arbitrators determine that the document is relevant or likely to lead to relevant evidence, they should consider whether there are alternatives that can lessen the impact, such as narrowing the time frame or scope of an item on the Lists, determining whether another document can provide the same information, or ordering a different form of production.

Requests for Additional Documents

Where additional documents may be relevant in a particular case, parties can seek them in accordance with the time frames provided in the 12500 series of rules. Arbitrators must use their judgment in considering requests for additional documents and may not deny document requests solely on the ground that the documents are not expressly listed in the Discovery Guide.

Nothing in the Discovery Guide precludes the parties from voluntarily agreeing to an exchange of documents in a manner different from that set forth in the Discovery Guide. FINRA encourages the parties to agree to the voluntary exchange of documents and to stipulate to various matters. The fact that an item appears on the Lists does not shift the burden of establishing or defending any aspect of a claim.

Only named parties must produce documents pursuant to the guidelines set forth herein. However, non-parties may be required to produce documents pursuant to a subpoena or an arbitration panel order to direct the production of documents (see Rule 12513). In addition, the arbitrators may use the Lists as guidance for discovery issues involving non-parties.

Parties and arbitrators should recognize that not all firms have the same business operations model and certain items on the Lists may not apply to a particular case when the firm's business model (e.g. full service firm, discount broker, clearing firm, or online broker) is taken into consideration. In addition, certain items on the Customer List may not apply to a particular case depending on the claims asserted. Absent a written objection or party agreement, the parties shall exchange documents on the Lists within the time frames set forth in the Customer Code. Parties should raise any objections to the production of documents, based on an established privilege, in accordance with the time frames for objections set forth in the Customer Code.

Form of Production

The parties are encouraged to discuss the form(s) in which they intend to produce documents (hard copy production or electronic production in its original format or some other format) and, whenever possible, agree to the form(s) of production. Both hard copy documents and electronic files are "documents" within the meaning of the Discovery Guide. Parties must produce electronic files in a reasonably usable format. The term reasonably usable format refers, generally, to the format in which a party ordinarily maintains a document, or to a converted format that does not make it more difficult or burdensome for the requesting party to use in connection with the arbitration.

The arbitrators shall decide any dispute that arises concerning the form in which a document will be produced. When resolving contested motions relating to the form of production, arbitrators should consider the totality of the circumstances including, among other matters, the following in determining whether the electronic files are in a reasonably usable format:

1. For documents in a party's possession or custody, whether the chosen form of production is different from the form in which a document is ordinarily maintained;
2. For documents that must be obtained from a third party (because they are not in a party's possession or custody), whether the chosen form of production is different from the form in which the third party provided it; and
3. For documents converted from their original format, a party's reason(s) for choosing a particular form of production; how the documents may be affected by the conversion to a new format; and whether the requesting party's ability to use the documents is diminished by a change in the documents' appearance, searchability, metadata, or maneuverability.

Confidentiality

If a party objects to document production on grounds of privacy or confidentiality, the arbitrators or one of the parties may suggest a stipulation between the parties that the documents in question will not be disclosed or used in any manner outside of the arbitration of the particular case, or the arbitrators may issue a confidentiality order. When deciding contested requests for confidentiality orders, arbitrators should consider the competing interests of the parties. The party asserting confidentiality has the burden of establishing that the documents in question require confidential treatment. In deciding questions about confidentiality, arbitrators should, taking into account the facts of a particular case, consider factors such as the following:

1. Whether the disclosure would constitute an unwarranted invasion of personal privacy (e.g., an individual's Social Security number, or medical information).
2. Whether there is a threat of harm attendant to disclosure of the information.
3. Whether the information contains proprietary confidential business plans and procedures or trade secrets.
4. Whether the information has previously been published or produced without confidentiality or is already in the public domain.
5. Whether an excessively broad confidentiality order could be against the public interest or could otherwise impede the interests of justice.
6. Whether there are legal or ethical issues which might be raised by excessive restrictions on the parties.

Privileged Documents

Parties are not required to produce documents that are otherwise subject to an established privilege, including the attorney-client privilege and the attorney work product doctrine. The

arbitrators shall not issue an order or use a confidentiality agreement to require parties to produce documents otherwise subject to an established privilege, including attorney work product.

Affirmation in the Event that a Party Does Not Produce Documents Specified in the Document Production Lists

If a party does not produce a document specified in a List item on the applicable Document Production List, upon the request of the party seeking the document that was not produced, the customer or the appropriate person in the brokerage firm who has knowledge, must: 1) affirm in writing that the party conducted a good faith search for the requested document; 2) describe the extent of the search including, but not limited to, stating the sources searched; and 3) state that, based on the search, the party does not have the requested document in the party's possession, custody, or control. The arbitrators may also order *a party to provide* such affirmations regarding discovery requests for documents beyond those contained in the Discovery Guide.

No Obligation to Create Documents

Parties are not required to create documents in response to items on the Lists that are not already in the parties' possession, custody, or control.

Admissibility

Production of documents in discovery does not create a presumption that the documents are admissible at the hearing. A party may object to the introduction of any document as evidence at the hearing to the same extent that a party can raise any other objection at an arbitration hearing.

Product Cases

Product cases are cases in which one or more of the asserted claims center around allegations regarding the widespread mismarketing or defective development of a specific security or specific group of securities. Product cases are different from other customer cases in several ways:

1. The volume of documents tends to be much greater
2. Multiple investor claimants may seek the same documents
3. The documents are not client specific
4. The product at issue is more likely to be the subject of a regulatory investigation
5. The cases are more likely to involve a class action with documents subject to a mandatory hold
6. The same documents may have been produced to multiple parties in other cases involving the same security or to regulators
7. Documents are more likely to relate to due diligence analyses performed by persons who did not handle the claimant's account.

In a product case, parties typically request documents relating to, among other things, a firm's: creation of a product; due diligence reviews of a product; training on or marketing of a product; or post-approval review of a product. The Document Production Lists may not provide all of the documents parties usually request in a product case. Pursuant to this Discovery Guide, parties are not limited to the documents enumerated in the Document Production Lists. As stated earlier in this Discovery Guide, where additional documents may be relevant in a particular case, parties can seek them in accordance with the time frames provided in the 12500 series of rules.

Parties do not always agree on whether a claim centers around a product as defined above and may ask the arbitrators to make that determination. The arbitrators may ask the parties to explain their rationale for asserting that a claim is, or is not, a product case. Parties may also ask the arbitrators to resolve disputes concerning which additional documents they must produce, and the scope of the additional documents.

Document Production Lists

Throughout the Lists, FINRA refers to customers that are parties to an arbitration case as "customer parties" and other firm/associated persons' customers as "customers." The Guide provides separate Lists for firms/associated persons and for customer parties. For ease of reference, throughout the Lists, the terms "customer parties," "customers," "documents," "associated persons," "accounts," "claims" and "transactions" include the singular terms "customer party," "customer," "document," "associated person," "account," "claim" and "transaction," respectively. In addition, unless otherwise specifically stated, the term "firm" refers to a firm that is a party to the arbitration case.

* * *

DOCUMENT PRODUCTION LISTS

LIST 1

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

1) (a) The account record information for the customer parties, including the customer parties' 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 customer parties' risk tolerance.

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

2) All correspondence sent to the customer parties or received by the firm/associated persons relating to the claims, accounts, transactions, or products or types of products 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 products and/or account types that are at issue or that were used by the firm/associated persons to solicit or provide services to the customer parties. (In addition, if requested, the firm/associated persons shall produce confirmation slips and monthly statements. Even if not requested, the firm/associated persons must produce confirmation slips and monthly statements that have handwritten notations or that are not identical to those the firm sent to the customer parties.)

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

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

5) (a) All materials the firm and/or associated persons prepared or used and/or provided to the customer parties relating to the transactions or products at issue, including research reports, sales materials, performance or risk data, prospectuses, other offering documents, and copies of news

articles or outside research, 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.

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

7) (a) All notes or memoranda evidencing supervisory, compliance, or managerial review of the customer parties' accounts or transactions therein or of the associated persons assigned to the customer parties' accounts for the period at issue.

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

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 customer parties (and any person purporting to act on behalf of the customer parties), and/or between the firm and the associated persons.

9) All writings reflecting communications between the associated persons assigned to the customer parties' 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 customer parties' claims, accounts or transactions.

10) All Forms RE-3, U-4, and U-5 and Disclosure Reporting Pages, including all amendments, for the associated persons assigned to the customer parties' 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 the filing of the Statement of Claim, redacted to prevent the disclosure of non-public personal information of the complaining customers.

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, claims, or product or types of products at issue in the claim.

12) All analyses and reconciliations of the customer parties' accounts prepared during the time period at issue, including, without limitation, those relating to reviews of the customer parties' claims, accounts, transactions, or the product or types of products 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 customer parties' accounts related to the allegations in the Statement of Claim or in which the claims, transactions, products or types of products 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.

14) Those portions of internal audit reports for the branch in which the customer parties maintained accounts that: (a) concern 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.

15) Records of disciplinary action taken against associated persons by any regulator (state, federal or self-regulatory organization) or employer for all sales practice violations or conduct similar to the conduct alleged in the Statement of Claim.

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.

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 customer parties' claims, accounts or transactions, or the product or types of products 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.

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

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.

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 parties' accounts.

(b) The firm may redact names and other non-public personal information concerning customers who are not parties to the claim, but should provide sufficient information to identify: (1) the non-party customers' accounts, including the last four digits of the non-party 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.).

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.

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 customer parties' insurance holdings and the recommendations, if any, to the customer parties regarding insurance products.

LIST 2

Documents the Customer Parties Shall Produce in All Customer Cases

1) All customer party and customer party owned business (including partnership, corporate) federal income tax returns the customer parties 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 customer parties' 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 income tax returns must be identical to those that were filed with the Internal Revenue Service. The customer parties 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.

2) Financial statements, including statements within a loan application, or similar statements of the customer parties' 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. Customer parties are not required to create financial statements in order to comply with this item.

3) All documents the customer parties received from the firm/associated persons and from any entities in which the customer parties 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 customer parties 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.

4) All account statements for each non-party securities firm where the customer parties 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 customer parties shall provide a written authorization allowing the firm/associated persons to obtain the account statements directly from each non-party securities firm. If the customer parties elect to provide written authorization to the firm/associated persons to obtain the account statements, the

customer parties must also provide all account statements in the customer parties' possession, custody, or control containing handwritten notes or that are not identical to those the firm sent.

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

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

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

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

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

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

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.

11) (a) All complaints/Statements of Claim and answers filed in all civil actions involving securities matters and securities arbitration proceedings in which the customer parties 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.

(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.

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

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

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

15) All materials the customer parties received or obtained from any source relating to the claims, transactions or products at issue, and all materials the customer parties 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.

16) The customer parties' resumes.

17) Any existing description of the customer parties' educational and employment background if not set forth in resumes produced under item 16.

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

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