DKR

DIMOND KAPLAN & ROTHSTEIN, P.A.
ATTORNEYS AT LAW

Offices at Grand Bay Plaza
2665 South Bayshore Drive
Penthouse 2B
Miami, FL 33133
Tel. 305.374.1920

www.dkrpa.com

Offices in Miami, West Palm Beach, New York, Los Angeles, and Detroit

September 6, 2018

Via E-Mail [pubcom@finra.org]
Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street
Washington, DC 20006-1506

RE: Regulatory Notice 18-22 Proposed Amendment to Discovery Guide To Require Production of Insurance Information

Dear Ms. Mitchell:

I am a shareholder in the law firm Dimond Kaplan & Rothstein, P.A. and I write in support of FINRA's proposed Discovery Guide amendment that would require respondents to disclose complete entire insurance policies, coverage limits, and exclusions and exceptions to any insurance coverage. I have represented hundreds, if not thousands, of customers/claimants in NASD and then FINRA arbitrations for nearly 25 years. Many of those representations have involved under-capitalized broker-dealers and registered representatives.

Information regarding the existence, limits, and scope of insurance coverage for customer claims is vitally important to fully analyze claims and defenses, as well as the economic sense of expending resources to prosecute claims. Contrary to some broker-dealer complaints that insurance disclosures would harm them or provide no benefit to them, such disclosures likely would benefit not only customers, but also broker-dealers and FINRA.

Insurance Disclosures Could Avert Wasteful Resource Expenditures

FINRA's capital requirements are minimal and many broker-dealers are, therefore, insufficiently capitalized to cover liabilities. Insurance disclosures would allow investors and their counsel to determine whether any recourse (read: financial recovery) even is possible. If a registered representative or broker-dealer has no money, is out of business or bankrupt, and does not have an insurance policy that would cover a claim, then a decision could be made not to continue prosecuting a claim. While that is a bitter pill to swallow for an aggrieved investor, it would avoid the unnecessary expenditure of additional resources. (Broker-dealers and FINRA similarly would avoid the unnecessary expenditure of resources on the case.)

On a similar note, if insurance disclosures reflect coverage limits below the amount of money at issue (and the broker-dealer is undercapitalized), then a decision could be made to resolve a case within the insurance limits rather than spend additional resources prosecuting a case without any

possibility of a recovery in an amount greater than the insurance limits. This would allow claimants, respondents, and FINRA to avoid expending unnecessary resources.

Finally, insurance disclosures would reveal whether a policy is a "wasting" policy, whereby defense fees and costs are paid out of available coverage limits (and depleting insurance proceeds available to pay a claim). Knowledge of whether a "wasting" policy is in effect could help claimants and counsel determine whether to (a) proceed with a final hearing (during which defense fees and costs would further deplete insurance limits available to pay a claim) or (b) resolve a case through a settlement. This decision also could benefit a broker-dealer. If the "wasting" aspect of a policy were unknown, a broker-dealer's entire insurance coverage could be depleted by defense fees and costs, leaving the broker-dealer without any coverage for a claim subject to an arbitration award that could put the broker-dealer out of business. As such, broker-dealers also would stand to benefit by the disclosure of insurance information.

Insurance Disclosure Would Protect Customers *and* Broker-Dealers

Insurance disclosures would permit claimants to amend pleadings to avoid alleging facts, products, or claims that could obviate insurance coverage. This would benefit customers and broker-dealers. It would provide a greater likelihood of financial recovery for customers, consistent with FINRA's "investor protection" edict. And pleading within insurance coverage would make it more likely broker-dealers would receive the insurance coverage for which they had paid premiums, and allow broker-dealers to protect their capital and remain in business.

Moreover, it is no secret that insurance companies often seek to avoid coverage, fail to tender policy limits, or otherwise fail to protect insureds' financial interests. Insurance disclosures would allow claimants to make and preserve coverage arguments that could (a) secure claimants' ability to recover damages and (b) protect the insured broker-dealers or registered representatives rights to the insurance coverage for which they paid. Indeed, when coverage disputes arise, the insured and the claimant often cooperate to secure insurance coverage. Absent insurance disclosures, customers may not be able to obtain insurance payments to which they are entitled and broker-dealers and registered representatives may not be able to use the protection of insurance for which they have paid.

Insurance Disclosures Would Not Encourage Customer Claims

Some broker-dealers have disingenuously argued that insurance disclosures would encourage the filing of customer claims. This argument is a red herring. Customers currently file FINRA arbitration claims *without* knowing whether any insurance coverage exists. Moreover, FINRA's proposal only would require insurance disclosures to be made *after* a claim is filed. As such, the decision to file a claim could not be predicated on knowledge about insurance coverage.

Courts Require Insurance Disclosures

Finally, both federal rules of procedure and many state laws require insurance disclosures. Some states even require such disclosures *before* litigation commences. As such, lawmakers have recognized the benefits that parties enjoy by virtue of insurance disclosures.

Based on the foregoing, we firmly support FINRA's proposal. Insurance disclosures would allow for informed decisions to be made by all parties to a case, would permit action to be taken to protect the interests of all parties, and would not present any harm to the interests of the parties to a FINRA arbitration proceeding.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Jeffrey B. Kaplan