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September 5, 2018

Jennifer Piorko Mitchell
Office of the Corporate Secretary
Financial Industry Regulatory Authority
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:

Please accept this letter in support of the proposed amendments to the Discovery Guide to include the production of insurance information.

Our practice for almost thirty years has been substantially related to the representation of investors.

FINRA has received many informed comments regarding the inclusion of insurance related information into the Discovery Guide.

The disclosure of insurance related information, including “any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment” is required under the Federal Rules of Civil Procedure. (Fed. R. Civ. P. 26(a)(1)(A)(iv).

As a preliminary matter, insurance coverage is inadmissible to prove liability.

However, as stated in the Comments to the Federal Rules:

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect.

The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.

Notes of Advisory Committee on Rules—1970 Amendment.¹

The inclusion of insurance information in FINRA securities arbitration is *particularly* important as part of FINRA's "investor-protection mandate," and its express purpose "[t]o investigate and adjust *grievances* between *the public* and members and between members." Restated Certificate of Incorporation of Financial Industry Regulatory Authority, Inc. § 3 (July 2, 2010)(emphasis added); *See also*, David E. Robbins, *Securities Arbitration Procedure Manual* § 5-6(i) (5th ed. 2009); Norman S. Poser & James A. Fanto, *Broker-Dealer Law and Regulation* § 28.07(A) (4th ed. 2009).

In many cases, thinly capitalized broker-dealers lack any cognizable Errors and Omissions Liability Insurance, and quite often, investor victims of the most egregious misconduct, even when successful in arbitration, are often left without any recovery. In other cases, where there is an Errors and Omissions Liability Insurance Policy, those persons charged with defending the investors' claims are the same persons seeking to defend or exclude policy coverage.

Information regarding coverage or exclusions is always important.

¹ Even prior to the 1970 Amendments, the cases favoring disclosure rely heavily on the practical significance of insurance in the decisions lawyers make about settlement and trial preparation. In *Clauss v. Danker*, 264 F.Supp. 246 (S.D.N.Y. 1967), the court held that the rules forbid disclosure but called for an amendment to permit it.

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For example, in one case, an insurer sought to deny coverage because the insolvent/defunct broker-dealer could not pay the retention or policy deductible. In another case, an insurer sought to avoid or limit coverage by taking the position that multiple investor claims were part of one unitary event. In that case, the investors were not paid until counsel, as a group filed and obtained a declaratory judgment in federal court against the insurer for the aggregate policy limits.

But for the disclosure of insurance information, and the underlying conflict between the broker-dealer and the insurer, those investors would have been left without a remedy.

Again, the need for this information is particularly important.

Another case in point: John Thomas Financial. John Thomas Financial was one of the most notorious brokerage firms in recent American history, defrauding thousands of unsuspecting investors of at least \$100 million.

John Thomas Financial, together with its owner and principals, have been found by the United States Securities & Exchange Commission and the Financial Industry Regulatory Authority to have engaged in the most egregious fraud, intimidation, the falsification of records, trading ahead of customer orders, and the operation of what best can be described, as a boiler-room Ponzi-like scheme. *In the Matter of John Thomas Financial, Inc., et al.* SEC Administrative Proceeding File No. 3-15255 (Oct. 17, 2014); *Department of Enforcement v. John Thomas Financial, Inc.*, Disciplinary Proceeding No. 20120334673-01 (Jan. 9, 2015).

John Thomas Financial and its principals have been barred from the securities industry, many or all of its principals have declared bankruptcy, and at last count, of the many customer arbitrations filed and awards rendered against John Thomas Financial and its principals, to the best of our knowledge, no one has collected a dime.

However, John Thomas Financial had Liability Insurance.

Unbeknownst to our clients and many others, its insurer, New York Marine and General Insurance Company filed a declaratory judgment action in the New York Supreme Court, seeking to deny all coverage under the policy based upon the notion that John Thomas Financial failed to timely disclose that he was the subject of any SEC Investigation.

The defunct broker-dealer never contested the declaratory judgment action, and our efforts to intervene in that action, were, among other things, dismissed as untimely. *Boonie v. New York Marine and General Insurance Co.*, Supreme Court of New York (Manhattan), Index No. 651953 (Aug. 2, 2013).

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Certainly, if this information was required to be produced in discovery, these investors may have had some form of recovery.

Information regarding insurance ought to be discoverable, and as provided for under the federal rules, “Disclosure [ought to be] required when the insurer “may be liable” on part or all of the judgment. Thus, an insurance company must disclose even when it contests liability under the policy, and such disclosure does not constitute a waiver of its claim.”

If FINRA securities arbitration is going to have the appearance of fundamental fairness to investors and the investing public, it is about time that FINRA join the modern era and allow such information to be discoverable and made part of the Discovery Guide.

Respectfully submitted,
Nicholas J. Guiliano
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