



Securities Arbitration Clinic
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Via email to pubcom@finra.org
Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 2006-1506

Re: **FINRA Regulatory Notice 18-22**
Discovery of Insurance Information in Arbitration

Dear Ms. Mitchell:

Thank you for the opportunity to comment on the discovery of insurance information in arbitration. We are writing this comment on behalf of the Securities Arbitration Clinic at St. John's University School of Law (the "Clinic"). The Clinic is part of the St. Vincent De Paul Legal Program, Inc., a not-for-profit legal services organization. The Clinic represents small aggrieved investors and is committed to investor education and protection. Accordingly, the Clinic has a strong interest in the rules governing the arbitration process and the discoverability of relevant information during that process.

Generally, the Clinic is supportive of the proposed changes to the rule to include an additional item in the Discovery Guide on the firm/associated person list to require the production of information relating to insurance policies obtained through third-party carriers.

Understanding a firm's ability to pay a potential arbitration award is an important consideration for a customer in pursuing a claim. In 2016, 389 customer

disputes concluded with an arbitration award.¹ Of the 389 awards, customers were awarded damages in 158 of the cases.² Of those 158 awards, 43 (27%) remain unpaid.³ The unpaid awards were as low as \$10,000 and as high as over \$3 million.⁴ FINRA recognized that awards remain unpaid not only because of firms' inability to pay, but also because of firms' unwillingness to pay.⁵

FINRA recognizes that information about a firm's insurance coverage may be important for a customer when considering litigation strategy, including whether to settle. FINRA further recognizes that "when the insurance coverage of a firm or an associated person is not known and their ability to pay an award is less certain, then a customer may have difficulty determining whether to settle a claim and for what amount."⁶ Given that over a quarter of the arbitration awards had gone unpaid in 2016, this is a particularly important consideration for customers.

We agree with FINRA that adding insurance policy information to the Document Production List is helpful to investors in ascertaining a firm's ability to pay an arbitration award or the soundness of a settlement offer. However, the proposal contemplates that this one item will not be presumptively discoverable, as every other item on the list is. The customer will have to affirmatively make a discovery request for this one item. This should not be the case.

Such information should be presumptively discoverable as are the other items on the lists. Requiring investors to request insurance information puts them at a disadvantage. First, the proposed rule already makes it easy for firms to object to the production of the information if a firm does not believe insurance coverage is at issue in the case. FINRA Rule 12508 provides firms with the ability to object to any item on the production lists. While information about insurance coverage may be less relevant if the firm is larger, the firm is in a much better position to object to the production and explain the reason for the objection, rather than requiring the customer to affirmatively seek the information. Accordingly, this item should be included in the Discovery Guide as a presumptively discoverable item.

In addition, the proposal treats customers more harshly than firms. Under Discovery Production List 2, investors are required to turn over their financial

¹ FINRA, *Statistics on Unpaid Customer Awards in FINRA Arbitration* (2016) ("Unpaid Awards Statistics"), available at <https://www.finra.org/arbitration-and-mediation/statistics-unpaid-customer-awards-finra-arbitration>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ FINRA, *Discussion Paper – FINRA Perspectives on Customer Recovery*, at *19 (Feb. 8, 2018) ("Perspectives on Customer Recovery"), available at https://www.finra.org/sites/default/files/finra_perspectives_on_customer_recovery.pdf.

⁶ FINRA Reg. Notice 18-22, *Discovery of Insurance Information in Arbitration* at *5 (July 26, 2018).

information in "all customer cases."⁷ An investor's financial information includes any businesses owned, tax returns, loan applications, and statements indicating the investor's assets, liabilities, or net worth.⁸ Firms, on the other hand, are only required to produce documents related to the customer-broker relationship.⁹ If firms are afforded the opportunity to ascertain an investor's financial situation, investors looking to earn back what was lost by firms, should be afforded the same opportunity. Firms should be required to produce insurance information unless there is a valid objection.

Moreover, investors are not always represented in the arbitration process. The discovery process should be easy for a *pro se* customer to follow. The proposed change to the discovery guide leave these customers at a disadvantage as they lack the experience and understanding of the discovery process. The customer will have to understand that one of the items on the production list is different from the others, and must be affirmatively requested, even though no other item is treated that way. Customers who should be able to consider the firm's insurance coverage may not have requested it. It would be much fairer to put the burden on the firm to object rather than on the customer to figure out to request the item.

Securities regulations are meant to protect investors. In order to ensure investor protection, investors should be awarded a fair ability to recover what was lost by their broker's misconduct. To adequately protect investors and allow them to make informed decisions regarding a firm's willingness and ability to pay arbitration awards or settlements, a firm's insurance information should be presumptively discoverable. Thank you for the opportunity to comment on this important proposal.

Very truly yours,

/s/
Kayla Martin
Research Assistant

/s/
Christine Lazaro
Director of the Securities Arbitration Clinic
and Professor of Clinical Legal Education

⁷ Discovery Guide at *13–14 (2013), available at <https://www.finra.org/sites/default/files/ArbMed/p394527.pdf>.

⁸ *Id.*

⁹ *Id.* at 7–13. Documents a firm must produce include, but are not limited to,: (1) account record information of the customers, such as the customer's name, tax identification number, address, and other personal information; (2) documents recording the customer's risk tolerance; (3) customer account agreements; (4) correspondence sent to a customer or received by the firm from a customer "relating to the claims, accounts, transactions . . ." etc.; (4) claims alleging unauthorized trading; (5) materials the firm prepared or used regarding transactions or products issues. *Id.* at 7–8. Other information includes documentation of policy procedures in place and communications between the firm and customer. *Id.* at 9.