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September 24, 2018

Ms. Jennifer Piorko Mitchell
Vice President, Corporate Governance
Office of the Corporate Secretary
The Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1606

RE: Regulatory Notice 18-22: FINRA Requests Comment on Proposed Amendments to its Discovery Guide to Require Production of Insurance Information in Arbitration

Dear Ms. Mitchell:

The University of Miami School of Law Investor Rights Clinic (IRC) appreciates the opportunity to comment on the Financial Industry Regulatory Authority's (FINRA) proposed amendment to its Discovery Guide to require production of insurance information in customer arbitration proceedings (the Amendment). The proposed Amendment would require the firm or associated person to provide insurance information concerning the coverage and policy limits of any insurance policy that any third-party carrier may be liable to pay to the claimant to satisfy an arbitration award. Although the Amendment would render insurance coverage information presumptively discoverable, the claimant would have to specifically request this information, in contrast to other Discovery Guide items. The IRC strongly supports requiring respondent firms or associated persons to produce insurance information.

I. Overview

As the only *pro bono* organization in Florida dedicated to assisting investors of modest means, the IRC has had the opportunity to assist numerous small claim investors in the recovery of their investment losses due to broker misconduct. The IRC fully supports the presumptive production of insurance information given its importance in assessing potential arbitration cases, including critical issues of strategy and settlement.

The average IRC client is a retiree that suffered investment losses due to opportunistic broker misconduct yet cannot find legal representation due to the size of their claim. For many of our clients, these losses represent a lifetime of savings. Many of our clients are elderly, some have physical infirmities, and most have never been through any litigation process. The FINRA arbitration process (especially discovery) can feel invasive and challenging, and the prospect of attending and testifying at an arbitration hearing is intimidating. When the respondent is a small firm or individual broker, information about the collectability of a potential award is critical. That information can help customer claimants assess whether to proceed with an arbitration in

the first place, and if so, help our clients evaluate settlement offers based upon the collectability of a final award. These issues are no less important for IRC clients, who obtain free legal representation. Many would not proceed with arbitation if it is unlikely that they will collect an award even if they prevail.[1]

II. The Proposed Amendment to the Discovery Guide, List 1

The proposed Amendment adds new item 23 to List 1 of the FINRA Discovery Guide, titled, "*Documents the Firm/Associated Persons Shall Produce in All Customer Cases*." Subsection (a) of new Item 23 provides that:

> If requested, the firm/associated persons shall produce documents sufficient to provide details concerning the coverage and limits of any insurance policy under which any third party insurance carrier might be liable to satisfy in whole or in part an award issued by an arbitrator in the subject arbitration proceeding or to indemnify or reimburse a party for payments made to satisfy an award.[2]

The Amendment would thus make insurance information presumptively discoverable, if requested by the claimant. As FINRA observes in Notice 18-22, the inclusion of Item 23 would "alert arbitrators that insurance information is a typical type of information the parties use to prepare" in arbitration. This presumption would also reduce the number of motions to compel production of this information, thereby reducing expenses and the use of resources.

However, the IRC has concerns that the requirement that customer claimants *request* insurance information will disadvantage *pro se* claimants. For most claimants, a FINRA arbitration represents their first experience with the litigation process, and they have little training and knowledge about the discovery process. As such, a *pro se* claimant could easily overlook the requirement that he or she must request insurance information. A better approach would be to require automatic production – as with all other items in both lists of the Discovery Guide – and perhaps include a capital threshold for production, above which large and well-capitalized firms would not be subject to the presumption that insurance information is discoverable.

FINRA should resist calls to leave this information off of the Discovery Guide List 1. The insurance information can provide investors with insight on whether to proceed or drop a case against a firm or broker before incurring even more costs. It is the unfortunate reality that many

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[1] According to FINRA, 27% of awards issued to customers in 2017 went unpaid. *Statistics on unpaid Costumer Awards in FINRA Arbitration,* https://www.finra.org/arbitration-and-mediation/statistics-unpaid-customer-awards-finra-arbitration (Last visited September 18, 2018). Setting aside the real concerns raised by investors' inability to recover for losses caused by undercapitalized firms, requiring production of insurance information from member firms and associated persons can help reduce the trend of unpaid awards generally.

[2] FINRA Regulatory Notice 18-22: *FINRA Requests Comment on Proposed Amendments to its FINRA Discovery Guide to Require Production of Insurance Information in Arbitration* (September 2018). Subsection (b) of the new Item 23 limits the submission of insurance information at the arbitration hearing unless the proposing party can show that "(1) there are extraordinary circumstances warranting admission of the insurance information; or (2) the existence of an insurance policy is directly related to the dispute outlined in the statement of claim." *Id.*

small firms and individuals are undercapitalized and simply are not able to pay an award. Claimants should not be forced to bear the monetary, physical and emotional costs of arbitration if there is a strong likelihood that they will not be able to recover their losses, even if they win.

The argument raised by member firms and associated persons that production of insurance information would give claimants an unfair advantage during settlement negotiations lacks merit. As FINRA recognized in the Notice, most states and federal discovery rules already require production of insurance information. Member firms and associated persons have given no reason why they should be treated differently in a forum that they insist their customers use. Moreover, insurance policy information is already discoverable in an arbitration, usually requested under Rule 12507. The Amendment recognizes that the information is important in many cases, and provides for production while reducing discovery disputes and motion practice. Undoubtedly, the Amendment could lead to fairer and more robust settlement negotiations, more efficient resolutions, and save time and money for all parties.

III. Conclusion

The IRC is committed to protecting retail investors and providing small claim investors with an opportunity to recover their losses. Even though our clients do not pay legal fees, they should not be burdened with the emotional and physical toll that arbitration takes unless there is a real prospect of recovery. The proposed Amendment aligns discovery of insurance information with practices in state and federal courts. The IRC would urge FINRA to adopt the Amendment, with the requirement that the production be aligned with the other items of the Discovery Guide.

Respectfully Submitted,

Paul Vargo
Legal Intern, Investor Rights Clinic