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September 24, 2018

Via email to 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 Amendments to Discovery Guide to Require Production of Insurance Information

Dear Ms. Mitchell,

The Securities Arbitration Clinic of the University of Pittsburgh School of Law (the "Clinic") appreciates the opportunity to comment on the Financial Industry Regulatory Authority's ("FINRA") proposed new amendments to the Discovery Guide to require production of insurance information. The Clinic, a University of Pittsburgh curricular offering, provides legal representation to investors who have limited resources, often advocating for people whose claims represent much of their life savings. The Clinic supports the proposed amendments as they further FINRA's goal and dedication to investor protection through efficient regulation of broker-dealers.

For the reasons set forth below the Clinic strongly supports the proposed amendments to the Discovery Guide to require production of insurance information.

The proposed amendments provide for the production of documents sufficient to provide details concerning 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. The party should, at least and without much difficulty, provide a copy of the insurance policy to the claiming counsel, and at most, provide an annotated copy highlighting and explaining the exact terms of the policy that relate to the case in arbitration. The firm or associated person should be allowed to redact any personal information regarding the policyholder, employees, clients, etc., but should not be allowed to redact the information relating to policy liability and coverage.

The existence and scope of liability insurance policies is vital information for an attorney if he/she is to appropriately advise his/her investor clients in cases where the firm is not highly

capitalized or self-insured. The ability to pay is an essential consideration when advising clients on whether to take the case to hearing or settle, and whether a settlement proposal from either side is reasonable. Additionally, the proposed amendments would address an existing gap in the Discovery Guide that has led to inconsistent arbitrator rulings as to the production of insurance information by firms and associated persons. The proposed rule succinctly addresses this issue by making insurance information presumptively discoverable if requested by a claimant.

The proposed amendments provide that a party must seek express authorization from the arbitration panel to submit evidence to the panel relating to insurance information. Under FINRA Rule 12212 (Sanctions), the arbitrators would be permitted to sanction a party for providing evidence of insurance information to the panel without seeking express authorization to do so. FINRA's proposal for sanctions for unauthorized disclosures of any/all of this information to the panel should be sufficient to protect the information and resolve any concerns of prejudicial impact to the arbitrators.

If the insurance disclosures were released to the arbitration panel without express authorization, an unlikely event, FINRA believes that arbitrators would continue to determine monetary awards based on actual damages. However unlikely this occurrence might be, insurance information, if leaked, could indeed usurp an arbitration proceeding's fairness. Putting in place penalties for any party that leaks such information to the panel would help address this. Other measures could include: (1) dismissing the claims in question against a firm when the insurance information is shared intentionally or negligently with the arbitration panel by the claimant; (2) if a claiming party is representing himself/herself in arbitration, without counsel, it should be left to the panel's discretion to determine the maliciousness of the offense. A claiming party representing himself/herself should not be penalized unless it can be determined the insurance information was provided for malicious purposes; and (3) if an attorney has a history of repeat offenses of providing insurance information without express authorization, he/she could be banned from representing claiming parties in FINRA arbitration proceedings.

The proposed amendments will affect smaller firms more than larger institutions. Claimants will likely not request submission of a larger firm's insurance policy because it is assumed that the firm has the ability to pay. The larger the scale of the financial services business, the better they will be able to withstand losses caused by payment in damages. However, since smaller firms are more likely than larger firms to default into bankruptcy in the case of damages, they should assume the burden of higher insurance costs rather than the consumer. Various firms have raised the concern that disclosure will lead to prejudice. However, prejudice would only occur if the customer party leaked the information to the arbitrators. This is an unlikely scenario as Regulatory Notice 18-22 describes that the arbitrators would be permitted to sanction a party for submitting evidence of insurance information to the panel without express authority to do so, pursuant to FINRA Rule 12212. Furthermore, insurance information will not be requested in every instance. It would only be requested when it is necessary, like when the respondent is a small firm.

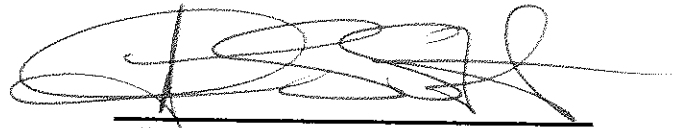
The benefits for customers outweigh the costs associated with the proposed amendments. The costs of adhering to the proposed amendments are minimal. Firms will have the costs of producing the documents (printing, delivering, etc.). Additionally, premiums may rise as a result

of the proposed rule being passed. Any material economic impacts, including costs and benefits, to customers, firms or associated persons that are associated specifically with the proposed amendments would be very minimal. The burden to firms or associated persons would be a nominal one. Although the rule might, in some cases, lead to increased insurance premiums for FINRA members, it would also create an incentive for fair dealing, checks and balances, and oversight by members in order to avoid potential liability to clients. And, these proposed amendments stand to reduce the forum fees and honorariums that are incurred when parties seek an arbitrator's ruling on a proposed order for production. Finally, the alternative to the proposed amendment considered by FINRA is automatic production of insurance information by a firm or associated person in every case. This alternative is even more burdensome to the firm.

Conclusion

The Clinic strongly supports the Proposed Amendments to the Discovery Guide as it fosters market transparency and efficiency.

Respectfully Submitted,



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and Professor of Law



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Adjunct Professor of Law

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