July 26, 2018

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 write in support of the proposed amendments to the Discovery Guide to require the production of insurance information when requested by claimants.

I have been a Finra arbitrator for nearly 30 years, and I have represented customers in the securities arbitration forum throughout that time. I am a long-time member of the National Arbitration and Mediation Committee, and studied and supported the proposal to amend the Discovery Guide when it came before the NAMC.

The existence and scope of liability insurance policies is essential information for attorneys to consider if they are to properly advise their investor clients in cases where the respondent is not highly capitalized or self-insured. The unfortunate reality is that many member firms and associated persons are financially unable to satisfy arbitration awards.[1] In too many cases, the ability to pay is an essential consideration when advising clients on whether to go to hearing or settle, and whether a settlement proposal from either side is fair and reasonable under the circumstances. Without that critical insurance information, we are operating in the dark. We are put in a position where we have to advise clients on what may be the most important financial decision in their lives without knowing one of the most critical facts. That untenable position is inconsistent with Finra's "Investor Protection" mandate.

The proposal would do nothing more than put parties in customer disputes on the same playing field that exists in many states. For example, in my home state of Oregon, insurance policies have been routinely produced in discovery for many years. Oregon Rule of Civil Procedure 36B(2) provides:

> B(2) Insurance agreements or policies.

[1] Finra recognizes the unpaid arbitration award issue and has published a paper on it this year, stating that "FINRA has been focused on this important issue for many years in the context of the arbitration forum that FINRA operates for the resolution of disputes between customers and FINRA members or their employees." *See*: Finra Perspectives on Customer Recovery (February 8, 2018) at http://www.finra.org/sites/default/files/finra_perspectives_on_customer_recovery.pdf.

> B(2)(a) Requirement to disclose. A party, on the request of an adverse party, shall disclose:
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> > B(2)(a)(i) the existence and contents of any insurance agreement or policy under which a person transacting insurance may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and
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> B(2)(a)(ii) the existence of any coverage denial or reservation of rights, and identify the provisions in any insurance agreement or policy on which such coverage denial or reservation of rights is based.
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> B(2)(b) Procedure for disclosure. The obligation to disclose under this subsection shall be performed as soon as practicable following the filing of the complaint and the request to disclose. The court may supervise the exercise of disclosure to the extent necessary to ensure that it proceeds properly and expeditiously. However, the court may limit the extent of disclosure under this subsection as provided in section C of this rule.
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> B(2)(c) Admissibility; applications for insurance. Information concerning the insurance agreement or policy is not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application for insurance shall not be treated as part of an insurance agreement or policy.

Finra asked for comment on what documents would satisfy the proposed rule, and the answer is simple: a complete copy of the policy itself, including any amendments and riders.

I agree that in the vast majority of cases, the existence of insurance should not be admissible as evidence in the hearing, and the proposed rule adequately addresses that issue. Any concerns that unscrupulous lawyers will make arbitrators aware of policies that are produced are misplaced. Lawyers usually exchange settlement offers before a hearing, and I have never been in a case in which either side has sought to inform the arbitrators about settlement offer amounts prior to the issuance of a decision on liability.[2] Inadmissible insurance

[2] The only time I have seen settlement information disclosed to arbitrators has been in the context of a petition for attorney fees after the panel had decided the liability issues.

information is no different from inadmissible settlement discussions. It won't come before the arbitrators.

The required disclosure of insurance information from non-highly capitalized and self-insured firms is long overdue. The proposed rule should be adopted. Thank you for your consideration.

Very truly yours,

Robert S. Banks, Jr.

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