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September 10, 2018

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street N.W.
Washington, DC 20006-1506

Re: Regulatory Notice 18-22 – Proposed Amendment to Discovery Guide to
Require Production of Insurance Information

Dear Ms. Mitchell:

The purpose of this letter is to provide the Financial Industry Regulatory Authority (“FINRA”) with comments on the above referenced Regulatory Notice which was issued by FINRA on July 26, 2018.

I am an attorney whose practice is exclusively devoted to the representation of individual and institutional investors in their disputes with the securities industry. Moreover, I am the current Chairman of FINRA’s National Arbitration and Mediation Committee (“NAMC”) and a public member of the NAMC; the former Chairman of FINRA’s Discovery Task Force Committee (“DTFC”); a former member of the Securities Investor Protection Corporation (“SIPC”) Modernization Task Force; and a former President and current Director Emeritus of the Public Investors Arbitration Bar Association (“PIABA”).

It is my understanding that FINRA is requesting comment on proposed amendments to the FINRA Discovery Guide’s (“FINRA-DG”) Firm/Associated Persons Document Production List so as to require firms and associated persons, upon request, to produce documents concerning third-party insurance coverage in customer arbitration proceedings.

It is my opinion that the proposed amendments would be a fair, equitable and reasonable approach which would provide essential information to investors in customer-initiated arbitration proceedings.

As noted in the Regulatory Notice, FINRA’s Dispute Resolution Task Force (“DR Task Force”) initially considered this issue and, in its final report, dated December 16, 2015, concluded that insurance information would be beneficial to customers in arbitration proceedings. The conclusion of the DR Task Force not only recognized

that most state statutes require the production of insurance information, but that insurance information is also discoverable under Federal discovery procedures.

Based on all of the preceding, the DR Task Force recommended that FINRA amend the Firm/Associated Persons List to provide for the production of insurance policies that may be applicable to an investor's claims.

Thereafter, the DR Task Force recommendation was considered by the NAMC and, in October of 2016, the NAMC *unanimously* approved the proposed amendment of the FINRA-DG's Firm/Associated Persons Document Production List so as to require firms and associated persons, upon request, to produce documents concerning third-party insurance coverage in customer arbitration proceedings.

While it is disappointing that it has taken almost two (2) years for this issue to be presented for consideration – and it is equally as disappointing for this proposal to have been published for comment in a Regulatory Notice which, by its own nature, will mostly generate comments from the industry – I will address the specific questions that have been set forth as follows:

Question Presented No. 1: 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. What type of documents should a party produce in order to comply with this requirement? What information contained in the documents, if any, should a party be allowed to redact before production to the other parties in the arbitration proceeding?

It is my opinion that the documents that a party should be required to produce in connection with this issue are fairly simple and straightforward – it would consist of documents that would indicate the third-party coverage dates and limits (*i.e.*, the declaration pages for the applicable policies), any potential exclusions from the stated coverage limits, and any amount(s) that may have already been applied against (reduced) the stated policy limits for each and every third-party insurance policy that might be available to satisfy, in whole or in part, an arbitration award. The only potential information that should be redacted from the documents to be produced would be the partial redaction of the last four (4) digits of the policy number and the premium cost for each third-party policy.

Question Presented No. 2: 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. Should FINRA take any additional steps relating to sanctions if a party provides

insurance information to the arbitration panel without express authorization? What steps should FINRA consider taking?

FINRA Rule 12212 already provides arbitrators with a multitude of potential sanctions that can be imposed against a party for the violation of the FINRA Code of Arbitration Procedure. These existing sanctions include assessing monetary penalties against a party; precluding a party from presenting evidence; making an adverse inference against a party; assessing postponement and/or forum fees; assessing attorneys' fees, costs and expenses; and, in the most extreme cases where prior warnings or sanctions have proven ineffective, the dismissal of a claim, defense or arbitration with prejudice.

It is my opinion that these sanctions are more than sufficient so as to insure that evidence of insurance information is not presented to a panel without first seeking express authorization to do so.

Question Presented No. 3: What other rule requirements, if any, should FINRA consider to address a party's submission of insurance information to the arbitration panel without express authorization?

It is my opinion that no other rule requirements are necessary in view of the potential sanctions, discussed above, that are available to arbitrators if a party violates the proposed rule.

Question Presented No. 4: Are there any material economic impacts, including costs and benefits, to customers, firms or associated persons that are associated specifically with the proposed amendments? If so: a) What are these economic impacts and what are their primary sources? b) To what extent would these economic impacts differ by business attributes, such as size of the firm or differences in business models? c) What would be the magnitude of these impacts, including costs and benefits?

As noted in the Regulatory Notice, "[i]nsurance information can provide valuable information to a claimant when determining a litigation strategy" and "can be particularly important during settlement discussions when the ability of a firm or an associated person to pay an award is otherwise less certain." Moreover, as acknowledged in the Regulatory Notice, "[t]he discovery of insurance information . . . could increase the ability of customers to determine a litigation strategy to maximize the monetary compensation they could expect to receive." This is a potentially significant economic benefit for customers.

At the same time, it should be recognized that the disclosure of insurance information would also have a potential economic benefit in terms of the "unpaid

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arbitration award” issue that has continued to plague FINRA over the years. [See, e.g., *Discussion Paper – FINRA Perspectives on Customer Recovery* (Feb. 8, 2018), available at http://www.finra.org/sites/default/files/finra_perspectives_on_customer_recovery.pdf (visited Sept. 1, 2018) and *Statistics on Unpaid Customer Awards in FINRA Arbitration*, available at <http://www.finra.org/arbitration-and-mediation/statistics-unpaid-customer-awards-finra-arbitration> (visited Sept. 1, 2018)].

It is important to note that most unpaid customer arbitration awards are against firms or individuals whose FINRA registration has been terminated, suspended, canceled, or revoked, or who have been expelled from FINRA.

Question Presented No. 5: Are there any expected economic impacts associated with the proposed amendments not discussed in this *Notice*? What are they and what are the estimates of those impacts?

It is my opinion that, aside from my comments in response to Question Presented No. 4 above, the Regulatory Notice discusses all of the relevant economic impacts that will be associated with the approval of the proposed amendments to the FINRA DG.

Based on all of the preceding, the proposed amendments to the FINRA-DG Firm/Associated Persons Document Production List, so as to require firms and associated persons, upon request, to produce documents concerning third-party insurance coverage in customer arbitration proceedings, should be immediately approved for formal filing with the U.S. Securities & Exchange Commission.

Thank you for providing me with the opportunity to submit my comments on this Regulatory Notice.

Very truly yours,

Maddox Hargett & Caruso, P.C.

s/ Steven B. Caruso

Steven B. Caruso