

April 18, 2011

## SEC Grants Accelerated Approval to FINRA's Proposed Overhaul of its Discovery Guide

The Securities and Exchange Commission (SEC) has granted accelerated approval to the Financial Industry Regulatory Authority's (FINRA) [proposed rule](#) overhauling its Discovery Guide (the Guide). Initially introduced in 1999, the Guide provides guidance to arbitrators and parties regarding discovery obligations during the course of a FINRA arbitration and sets forth lists of documents that are presumptively discoverable by the parties. FINRA originally submitted its proposed revisions to the Guide to the SEC last July and amended its proposed revisions to the Guide in February of this year. The revised Guide as amended can be found [here](#).

The SEC has determined that "good cause exists to approve the proposal, as modified by Amendment No. 1, on an accelerated basis." SEC Release No. 34-64166 at 21. FINRA has stated that it will convene a Discovery Task Force six months after implementing the revised Discovery Guide "to review substantive issues relating to the Discovery Guide on an ongoing basis, for the purpose of keeping the Discovery Guide current as products change and new discovery issues arise." *Id.* at 4 - 5. The new Discovery Guide likely will become effective in May 2011.

### Consolidation of Multiple Lists

The most noticeable revision to the Guide is the elimination of multiple claim-specific document lists. The current 14 lists will be consolidated into two lists of documents, one list for the firm and one for the customer, that are, for the most part, discoverable in all cases. To address concerns that parties will be forced to produce documents that have no relevance to the issues raised in their particular case, FINRA emphasizes that arbitrators and parties retain flexibility with respect to the discovery process, and arbitrators have the authority to exclude from production certain documents on the lists. Moreover, as with the current Guide, parties may object to producing documents on the list.

### Electronic Files Are "Documents"

Another significant revision to the Guide is the addition of language expressly providing that electronic files are "documents" within the meaning of the Guide. Thus, it is likely that e-mails will be subject to discovery from firms and customers.

### Documents to be Produced by Member Firms

The revised Guide will no longer require firms to produce account statements or confirmations. Statements and confirmations that contain handwritten notes or are otherwise not identical to those sent to the customer remain discoverable. See Proposed List 1, Item 2. Moreover, a customer may request the production of account statements and confirmations. *Id.* Other notable changes include:

- The revised Guide provides that "all correspondence sent to the customer parties or received by the firm/associated person relating to the claims, accounts, transactions or products or types of products at issue, including but not limited to, documents relating to asset allocation, diversification, trading strategies, and market conditions; and all advertising materials sent to

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customers of the firm that refer to the products and/or account types that are at issue or that were used by the firm/associated persons to solicit or provide services to the customer parties” are discoverable from the firm. See Proposed List 1, Item 2. This appears to broaden the current List Item, which provides that “[a]ll correspondence between the customer and the firm/Associated Person(s) relating to the transaction(s) at issue” are discoverable. See Discovery Guide List 1, Item 5.

- The revised Guide provides for the production of all (non-privileged) writings “reflecting communications between the associated persons assigned to the customer parties’ accounts at issue during the time period at issue and members of the firm’s compliance department relating to the securities/products at issue and/or the customer parties’ claims, accounts or transactions.” See Proposed List 1, Item 9.
- The revised Guide expands the types of manuals that are discoverable from Compliance Manuals relating to the claims alleged in the Statement of Claim (as is currently required under List 1, Item 9) to all firm manuals relating to such claims. Likewise, the revised Guide expands the types of bulletins or similar notices that are discoverable from those issued by the firm’s compliance department to all bulletins or similar notices issued by any part of the firm. The new List Item includes the production of a list of all firm manuals and bulletins which may contain directives related to the conduct, claims, or product or types of products at issue in the claim. See Proposed List 1, Item 11.
- The revised Guide expands the type of regulatory documents that are discoverable from the firm. See Proposed List 1, Item 16.
- For claims related to solicited trading activity, the revised Guide provides for the production of a detailed record of all compensation, monetary and non-monetary, for the relevant associated persons for the period of three months before to three months after the trades at issue in the customer parties’ accounts. See Proposed List 1, Item 20.
- The revised Guide also provides for the production of a detailed record of “all agreements pertaining to the relationship between the associated persons and the firm, summarizing the associated persons’ compensation arrangement or plan with the firm.” See Proposed List 1, Item 21.

## Documents to be Produced by Customer Parties

Unless the receipt of periodic account statements or confirmations is at issue, customer parties may stipulate to the receipt of periodic account statements and confirmations in lieu of producing these. See Proposed List 2, Item 3. Account statements and confirmations containing handwritten notes or that are otherwise not identical to those sent by the firm remain presumptively discoverable. *Id.* Other revisions to the Guide expand the types of documents that are presumptively discoverable from customer parties. For example:

- The revised Guide significantly expands the types of documents presumptively discoverable from customer parties to include “[a]ll materials . . . received or obtained from any source relating to the claims, transactions or products at issue, and all materials the customer parties received from any source relating to other investment opportunities, including research reports, sales literature, performance or risk data, prospectuses, and other offering documents, including documents intended or identified as being ‘for internal use only,’ and worksheets or notes.” See List 2, Item 15.
- Customer tax returns remain presumptively discoverable. Moreover, in addition to pages 1 and 2 of IRS Form 1040 and Schedules A, B, D and E for customer parties and customer party owned businesses, the revised Guide provides that IRS worksheets related to these schedules, or the equivalent for any other type of return, are presumptively discoverable. See Proposed List 2,

Item 1. The new List Item likewise provides that income tax returns must be identical to those filed with the Internal Revenue Service, but permits the redaction of Social Security numbers and certain personal information. *Id.*

- The revised Guide makes telephone records evidencing telephone contact between the customer parties and the firm/associated persons presumptively discoverable from customer parties for all cases, not just those including allegations of unauthorized trading. See Proposed List 2, Item 8 (b).
- The revised Guide expands the scope of correspondence considered presumptively discoverable from the customer party to include all correspondence sent or received relating to the accounts or transactions at issue. See Proposed List 2, Item 9. The Guide currently provides for the production of “[a]ll correspondence exchanged between the customer ... and the firm\Associated Person(s) relating to the account(s) at issue.” See List 2 Item 9.



*If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.*

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