NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
750 First Street N.E., Suite 1140
Washington, D.C. 20002
202/737-0900
Fax: 202/783-3571
www.nasaa.org

NASAA

August 25, 2010

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

RE: Release No. 34-62584; File No. SR-FINRA-2010-035

Dear Ms. Murphy,

The North American Securities Administrators Association, Inc. ("NASAA") hereby submits the following comments in response the proposal of the Financial Industry Regulatory Authority, Inc. ("FINRA") to amend the Discovery Guide used in FINRA arbitrations.

NASAA believes the proposal to amend the Discovery Guide exacerbates certain shortcomings of the FINRA arbitration forum relating to the fair resolution of customer disputes with its members. As a number of commentators have already noted, FINRA does not train its arbitrators in how to utilize their discretion and apply the law to discovery issues. A direct consequence of this failure to train is that arbitrators, more often than not, defer to the Discovery Guide to determine what is or is not relevant. This "determination by reference" only serves to exacerbate an already imbalanced system. This is because investors are, more often than not, unable to procure the most relevant documents because of their maintenance by the firms and their consequent inaccessibility. To limit the universe of relevant documents to a pre-determined list would likely restrict the proof available to the investor in records which are not listed, but are specifically relevant (and certainly discoverable) to the claims of their particular case. In practice, it is not unusual for an investor to complain about a certain type of misconduct related to his or her account, only to learn through discovery that the misconduct was actually much more serious, or that a variety of misconduct took place.

As pointed out by Professor Lipner, cases involving firm-wide or industry-wide practices are particularly ill suited for discovery "lists." The presence of an industry arbitrator on the panel further exacerbates the potential for bias against the investor.[1] Professor Lipner also recognizes the partiality to FINRA members in the extremely over-broad and highly objectionable list of documents to be produced by the investor versus the "under inclusiveness" of the documents investors need to bring their cases.[2]

1 See comment letter from Professor Seth E. Lipner, available at http://www.sec.gov/comments/sr-finra-2010-035/finra2010035.shtml.

2 Prof. Lipner refers to the breadth of items on the investor list as a "financial colonoscopy". *Id.*

This list includes broad categories of personal, sensitive, and otherwise confidential information regarding an investor not likely to be discoverable if the investor had the opportunity to bring their claims in court. While such documents may be relevant in some instances, more often they are irrelevant and production should be ordered only upon a showing of necessity. Given the limitations on what the firms are required to produce under this "list" system, there is no apparent valid rationale to subjecting investors to such intrusive and often irrelevant discovery. Under the Federal Rules of Civil Procedure, the court will balance the intrusiveness of the request against its likelihood of leading to admissible evidence. In FINRA arbitration, experience has shown that the arbitrators are unlikely to exercise discretion, but rather simply rely on the list by default.

Finally, most of the financial information to be gleaned from the documents included on the investor production list is irrelevant because even in a suitability case, it is the duty of the firm to know the financial condition of the investor before making any recommendations to the investor.[3] Whether an investor actually had more or less net worth than the firm was able to reasonably verify is irrelevant to whether the recommendation was suitable based on what the firm knew at the time.

NASAA believes that the proposed changes to the discovery guide we discuss in this letter should not be implemented unless they are altered in a fashion that would result in a more impartial system of arbitration.

Should you have any questions regarding these comments please contact John Cronin at john.cronin@state.vt.gov or Rex Staples, NASAA's General Counsel at rs@nasaa.org.

Sincerely,

/S/

John R. Cronin
Vermont Securities Director and
Chair, NASAA Arbitration Project Group

3 See comment letter from Steven B. Caruso, available at http://www.sec.gov/comments/sr-finra-2010-035/finra2010035.shtml.