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[BY EMAIL (PUBCOM@FINRA.ORG)]

September 23, 2018

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

RE: Regulatory Notice 18-22: Discovery of Insurance Information in Arbitration

Dear Ms. Piorko Mitchell,

Regulatory Notice 18-22 requests comments on a proposed amendment to the Discovery Guide's Firm/Associated Persons Document Production List to require firms and associated persons to produce documents concerning third-party insurance coverage in a customer arbitration proceeding.

Responding as a small firm member of FINRA, I oppose this proposed amendment.

The argument for adoption of this proposed amendment rests squarely, as expressed in a few dozen plaintiff attorney comment letters, on the proposition that because the Federal Rules of Civil Procedure permit the disclosure of liability insurance coverage in civil litigation, FINRA should enact a rule making such information presumptively discoverable in customer arbitrations. I believe that proposition is fundamentally flawed, for the following reasons.

It is an indisputable fact that FINRA members and associated persons do not enjoy the same Constitutional protections that other Americans do under the federal rules of civil procedure and federal rules of evidence found in the federal court system. For instance, the protections for defendants of litigation to have a case decided by a jury of their peers or to have the ability to exclude evidence traditionally believed to be unreliable, such as hearsay, are not afforded to FINRA member firms or their associated persons. Also, the right to move cases from the FINRA arbitration system to federal courts is impermissible for FINRA member firms and/or their associated persons.

Further, unlike the federal court system, FINRA does not have an appeal process through which a party may challenge an award. This means that all awards rendered under the FINRA Codes are final and are not subject to review or appeal, except under very limited circumstances; the bottom line is FINRA does not hear appeals on arbitration awards. In small firms' collective experience, it takes a virtual act of Congress to have an arbitration award appeal granted. Keeping in mind, too, that even clear mistakes of law or fact will not necessarily justify an arbitration award being overturned. This is the significance of the term "binding" in binding arbitration and provides my concern for small firm rights, specifically when small firms are dealing with potentially less than reputable plaintiff attorneys who initiate meritless actions and file vexatious litigation that is so costly and harmful to small businesses.

I think it is vital that we seek to strike the right balance to ensure that defendants' rights to due process remain intact while preserving protections for customers. Providing plaintiff attorneys a home-field advantage by which the architecting of the most financially damaging claim is certainly a reasonable possibility, when counsel KNOWS these small businesses cannot afford to avail themselves of a robust

defense against these at times frivolous claims, *does not advance fair and equitable due process* for FINRA defendants.

I also think that claimants are adequately protected under the current Code. Specifically, pursuant to FINRA Rule 12507, any party may request documents and information beyond that identified as presumptively discoverable under the Guide. Accordingly, a claimant is entitled to request the insurance information that is the subject of the Proposed Amendment and arbitrators may rule on any objections thereto. I believe subjecting such requests to the oversight of the arbitrator is appropriate and that arbitrators are very capable of distinguishing well founded requests from frivolous requests.

Finally, there will be a negative commercial consequence to member firms of all sizes, but especially small firms because we cannot afford to self-insure ourselves, when insurance companies drastically raise their premiums in response to the passing of a rule amendment like this one. This unfairly penalizes small firms, most of which try every day to conduct their business ethically and honestly.

Small businesses are an important component of economic growth and our continued competitiveness in the industry is critical to investor choice. Due process of a small firm defendant does not appear to be protected by this proposed amendment and I therefore respectfully submit this comment letter in opposition to 18-22 and request that FINRA and its board also reject this proposal.

Sincerely,

Tina B. Maloney

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Chairman
Winslow, Evans & Crocker, Inc.

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