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Securities and Exchange Commission
http://www.sec.gov/cgi-bin/ruling-comments

Re: No. SR-FINRA-2010-039:
Rules 2090 (Know Your Customer) and 2111 (Suitability)

I am a California attorney who has spent the last 16 years representing customers in NASD, NYSE, PSE and FINRA arbitrations. I have had the privilege to represent hundreds of investors in disputes with their financial advisers. I submit this letter in response to the proposed changes to the *Know Your Customer* and *Suitability* rules.

As a practical matter all securities arbitration cases are "suitability" cases. In my opinion, FINRA Arbitrators tend to ignore state securities law concerning misrepresentations and omissions of material fact in favor of a "suitability" standard. This is so even in California where the law clearly mandates a fiduciary standard.

Based on an allegiance to the suitability standard, FINRA arbitrators require virtually all customers to provide documents to reveal their financial resources, education, and business experience in a quest to determine if the "recommendation" by the broker was suitable. Specifically, FINRA arbitrators order the customers to produce years of extensive and intrusive financial records in almost every case. However, the broker is not held to the same standard or obligation to produce an extensive list of documents.

The stated reason is that broad and detailed records of the customer's financial history are important to arbitrators, or more recently to ". . . provide parties with a broader understanding of the claimants' financial status and investment activity during the relevant period." However, the "parties" were supposed to understand that prior to a recommendation. The only "parties" to benefit are member firms and brokers.

In each new case arbitrators are reminded that a thorough examination of the customer's financial records and those of her family and business associates are required by the Discovery Guide. Because this broad and mostly irrelevant financial documentation is required in every instance, every case is a suitability case. What constitutes "suitability" is therefore a major issue in arbitration, regardless of the actual claims made.

Yet the term "recommendation" has no definition and the rule ignores the term "solicited" altogether. In arbitration, the term "solicited" is variously used as synonymous, similar, or completely different than "recommended." This places customers at a distinct disadvantage when filing a FINRA arbitration claim. Even if the claim is for misrepresentation, fraud, breach of fiduciary duty, or other statutory or common law causes of action, FINRA insists it be treated as a "suitability" case which only applies to a "recommendation." The following are several of the rule's more glaring shortcomings.

DEFINITIONS

What is a "recommendation?" The New York Stock Exchange already has a workable definition that this proposed rule seeks to delete.

Recommendations [See Rule 472.40(1)]

> For purposes of these standards, the term "recommendation" includes any advice, suggestion or other statement, written or oral, that is intended, or can reasonably be expected, to influence a customer to purchase, sell or hold a security.

The only apparent reason to dump this definition is that FINRA firms want to maintain a moving target when it comes to suitability. With little to fear from FINRA Enforcement (think Bernie Madoff, R. Allen Stanford, et al.) the objective of obfuscation and confusion concerning the meaning of basic terms works to the member's benefit in arbitration. The confusion increases when "recommendation" is mixed with the term "solicited." FINRA acknowledged the issue but ignored it when raised by Charles Schwab and others in prior comments concerning the "Know Your Customer" Rule and "unsolicited" orders.

> "FINRA agrees with those commenters who stated that the "know your customer" obligation should remain flexible and that the extent of the obligation generally should depend on a particular firm's business model, its
> customers, and applicable regulations."

That begs the question. Are "recommended" and "solicited" the same thing? A generation of brokers testifying under oath in NASD/FINRA arbitration swears that they are two completely different things. Usually it goes something like this:

> Solicited is a technical term like if I ever sent them a research report or something they called and asked me for out of the blue and a couple months later they called and placed an order. Technically, since I sent them something, its "solicited" but I never recommended it so I have no responsibility for it even if it was solicited.

This occurs most often when Claimant is denied commission runs in arbitration. There is no evidence of the other eight customers who did the same thing the same day. Left with only the confirmation which indicates only that the order is not "unsolicited", the broker is free to make up whatever story fits.

Alternately, there are brokers who have been in the business for 20 years who have never entered a ticket that isn't marked unsolicited. They may "suggest" or "mention" or provide alternatives or choices, but they never, ever, recommend anything to a client and are therefore never, ever responsible for any purchase or sale ever made. They argue that customers are adults after all and have to take responsibility for their own actions. They explain that someone who has lived to be 85 years old and was married for over 60 years to a very successful businessman who played the market for many years before his death cannot try to blame her own bad decisions on her broker. Her name was on those joint account statements at that other brokerage firm seven years ago and by golly she'd better produce them in arbitration to demonstrate her investment sophistication which is the only thing at issue for arbitrators.

In either case it's time for FINRA to stop playing word games and provide working definitions of "recommended" as the NYSE did and "solicited" and "unsolicited" as the NYSE never got around to. The reference to a wide range of Notice to Members and case law is disingenuous. NTM 96-60 states that:

> . . . a broad range of circumstances may cause a transaction to be considered recommended, and this determination does not depend on the classification of the transaction by a particular member as 'solicited' or 'unsolicited.'

If "recommended" has nothing to do with "solicited" and "unsolicited" what do those two terms mean when they appear on a confirmation customers are presumed to understand. The confirmation is normally the only document received by a customer that indicates if the broker is attempting to blame really bad investments on the customer. The presence or absence of unsolicited is a huge deal in arbitration and no one knows what it means.

That means the terms "recommended", "solicited" and "unsolicited" need definition. Those definitions should be clearly and prominently communicated to customers. Arbitrators deal harshly with the naive customers who do not understand that "unsolicited" means they are on their own and the broker did not in any way recommend the transaction to them. If it was incorrect, why didn't they complain to the office manager? Why did they wait so long to complain? The industry has a vested interest in keeping the investing public ignorant of these esoteric terms in order to shift blame for their conduct to the customer. It should not be allowed to continue.

Recommendation to Hold

Possibly the most cynical aspect of FINRA's response to prior comments is the statement that:

> . . .the proposed rule would capture explicit recommendations to hold securities as a result of FINRA's elimination of the 'purchase, sale or exchange' language and the addition of the term 'strategy.' Accordingly, there is no reason to define 'recommendation' to include recommendations to hold securities.

This is completely disinguiness. Without even getting to the fact that since they haven't defined "recommendation" it can't include anything else.

The removal of a few words in an old rule which arguably did not previously include recommendations to hold will not, in the opinion of any rational person, result in the inclusion of that entirely new issue. It will require a specific inclusion. The plain meaning of the word "transaction" itself precludes the lack of a transaction. The addition of "strategy" does nothing to change that. While doing nothing could conceivably be a strategy, it is more normally onsidered the lack of a strategy.

Due Diligence

Rule 2090 requires a firm to, ". . . use due diligence in regard to the opening and maintenance of every account, to know (and retain) the essential facts concerning every customer . . ." but it doesn't require them to do anything with that knowledge until making a recommendation (whatever that is). That is not in the best interest of the investing public. If, in opening a new account transferred from another brokerage firm, the securities are obviously unsuitable based on the customer's financial profile, the firm should have an affirmative duty to inform the customer of that fact.

The issue is common in arbitration. A bad broker moves from firm to firm as complaints mount. Bad brokers who generate big commission have no problem finding brokerage firms with which to register. When he transfers securities they are often entirely unsuitable for the customers. Sometime later the customers file claims for the ensuing losses. Who's responsible? The transferring firm says that everything was fine when they transferred out. The receiving firm says it didn't recommend it because they didn't buy it here. We may have known that the securities were garbage based on the investor profiles, but we had no obligation to tell them that. This can't be allowed.

There should be a requirement that the firm notify customers that their holdings do not meet their financial profile. A member should not be allowed to "know" a portfolio is unsuitable and remain silent. If the member accepts an account with unsuitable securities and doesn't tell the customer, they should be jointly and severally liable with the prior firm (often out of business). Acceptance of an account should equal approval and a tacit recommendation that the portfolio is suitable based on the customer's financial profile.

"Due Diligence" After the Claim

Brokers are not required to document "any other information" upon which they relied in making a suitability determination. Instead, they are allowed to wait until someone files an arbitration claim against them and then do a post claim suitability determination also called a financial colonoscopy. FINRA believes it necessary for parties and arbitrators to have broad and detailed records of the customer's financial history at the end of the customer/firm relationship. Should member firms not be required to obtain the same information at the beginning of the relationship? With that in mind, I propose that all the same documents be required to be obtained and maintained by member firms prior to making a recommendation. The following are directly from the proposed Discovery Guide, List 2:

1) All customer and customer owned business (including partnership, Corporate) federal income tax returns the customers filed, limited to pages 1 and 2 of Form 1040, Schedules A, B, D, and E, and the IRS worksheets related to these schedules, or the equivalent for any other type of return, redacted to delete the customers' social security numbers, for the three years prior to the first transactions at issue in the Statement of Claim through the date the Statement of Claim was filed. The customers may redact information relating to medical and dental expenses and the names of charities on Schedule A unless the information is related to the allegations in the Statement of Claim. The income tax returns must be identical to those that were filed with the Internal Revenue Service.

2) Financial statements, including statements within a loan application, or similar statements of the customers' assets, liabilities, and/or net worth for the period covering the three years prior to the first transactions at issue in the Statement of Claim through the date the Statement of Claim was filed. Customers are not required to create financial statements in order to comply with this item.

12) Documents showing the customers' ownership in or control over any business entity, including general and limited partnerships and closely held corporations. If the customers are Trustees, provide documents showing the accounts over which the customers have trading authority.

16) The customers' resumes.

17) Documents showing the customers' complete educational and employment background or, in the alternative, a description of the customers' educational and employment background if not set forth in resumes produced under item 16.

Why should a firm formulating suitable investment recommendations have less documentation than an arbitration panel passing judgment on that recommendation in the future? It isn't fair to the member firms and FINRA should put them on a level playing field with arbitration panels by requiring the same information up front.

Sincerely,

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(a Subsidiary of Brewer Law Firm, A.P.C.)