



vernon•healy
ATTORNEYS AT LAW

3080 Tamiami Trail East
Naples, Florida 34112
Phone: (239) 649-5390
Fax: (239) 649-7369
www.vernonhealy.com

March 27, 2009

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: SR-FINRA-2008-024

Dear Ms. Murphy:

We appreciate the opportunity to comment on the changes to the FINRA Discovery Guide proposed by FINRA's National Arbitration and Mediation Committee. We are sure that you will receive numerous comments from attorneys who, like us, regularly represent customers in claims filed in the arbitration forum. We will therefore confine our comments to the following two major concerns about the proposed changes:

- They are unconstitutional, at least in the State of Florida, and
- They violate FINRA's statutory purpose of protecting investors, as mandated in Section 15A(b)(6) of the Securities Exchange Act of 1934, 15 U.S.C. 78o-3(b)(6).

The proposed rules greatly expand the amount of personal financial (and nonfinancial) information that is deemed to be "presumptively relevant." In addition to being subjected to specific requests for documents served by a member firm, a customer must *automatically* produce the documents identified in the discovery guide in virtually every case. First, the types of documents customers are required to disclose is greatly expanded under the proposed change, including *inter alia*:

- Entire tax returns (as opposed to form 1040 plus the selected schedules relating to investments that are now required);
- Credit card and loan applications;
- Settlement agreements; and
- Correspondence with anyone about the subject matter of the claim.

Additionally, the proposal expands the “discovery period” for which these (and other documents must be produced) from three years prior to the beginning of the “relevant period” – the date of the earliest transaction that is the subject of the complaint - to five years.

Article I, Section 23 of the Florida Constitution established a constitutional right to privacy in Florida that extends to personal financial information:

[P]ersonal finances are among those private matters kept secret by most people. Disclosure of income and personal investments is often not made even to siblings and others within the immediate family, much less to strangers. Private financial worth information is thus usually withheld from the world at large unless the courts compel such disclosure. Even then, disclosure is made only so far as necessary.

Woodward v. Berkery, 714 So.2d 1027, 1035 (Fla. 4th DCA 1998) (citation omitted). Florida’s constitutional privilege requires either that the holder of the privilege authorize the disclosure or that the requesting party demonstrate a compelling need for the information before it can be produced. *Id.*

In Florida, private financial information is protected from discovery in the course of litigation absent a “relevant or compelling reason to compel disclosure.” *Mogul v. Mogul*, 730 So.2d 1287, 1290 (Fla. 5th DCA 1999). An individual does not subject his or her personal finances to wholesale disclosure simply by becoming a party to litigation.¹ Where there is a very narrow range of issues involved in the proceeding, there is a correspondingly narrow scope of discovery, circumscribed by “the range of permissible issues to be litigated.” *Woodward*, 714 So.2d at 1037.

¹ By requiring the disclosure of customers’ entire tax return, the proposal indiscriminately subjects other personal information to mandatory disclosure, including information about medical treatment and religious contributions. In those cases where a member firm can articulate a reason for additional discovery beyond what is required to be produced in all cases under the current version of the discovery guide, it has the ability to make a specific request under Rule 13506.

It is questionable whether the additional customer information that the proposal requires in *every* case would be relevant in *any* case.² According to FINRA, “The expanded production would provide parties with a broader understanding of a customer’s financial status during the relevant period.” In many cases, including claims involving toxic products or misrepresentations, the customer’s financial status is only tangentially relevant, if it is relevant at all. Even in suitability cases, the relevant inquiry is whether the product or investment strategy was suitable is determined by the facts disclosed by the customer to that broker, not information that the broker never requested or considered:

In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis *of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.*

FINRA Manual Rule 2310(a)(emphasis added). If, as FINRA maintains, the new information set forth in the proposal is necessary for “a broader understanding of a customer’s financial status,” the broker should have requested it from the customer *before* offering investment advice, as required by Rule 2310(b). The only apparent purpose for such massive, indiscriminate disclosure of a customer’s private financial information after a claim has been filed is to provide member firms the unfair advantage of being able to try to cobble together an after-the-fact excuse for investment advice that cannot be justified on the basis of the information available to the broker when the advice was given. That reasoning is hardly consistent with FINRA’s statutory mandate to protect investors, as acknowledged on page 25 of its proposal.

The effect of the proposed changes is to render FINRA arbitration even more fundamentally unfair to the customer than it is already.³ It is well accepted in Florida that the compelled disclosure of constitutionally protected personal financial information may cause irreparable harm when the information is not relevant to the issues of the case. *Borck v. Borck*, 906 So.2d 1209 (Fla. 4th DCA 2005); *Mogul*, 730 So.2d at 1290. If FINRA’s proposal is adopted, it will provide customers with an additional legal basis, at least in Florida, to argue that their only way they can get a fair hearing is to be allowed to file their claims in court.

² The proposal requires automatic disclosure of customers’ credit applications. One can imagine a member firm using the mortgage application of a customer who has been victimized by a predatory lender as evidence in a securities fraud case to argue that the customer was at fault for having a too trusting nature. The customer would be victimized three times – first by the lender, then by the broker, and finally by the FINRA rule that misdirected the inquiry to irrelevant and prejudicial personal matters.

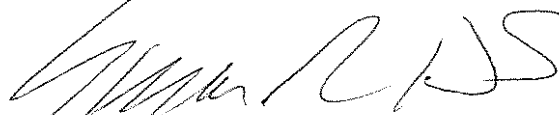
³ This is not the time to air concerns about other aspects of the arbitration process.

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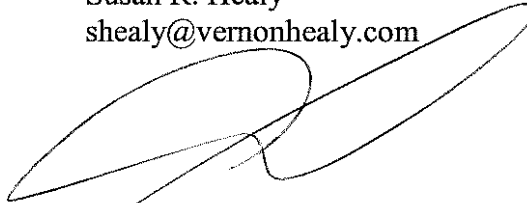
If the SEC's purpose is for arbitration to provide a fair, efficient and cost effective alternative to the courtroom, including the cumbersome and heavily litigated discovery procedures associated with judicial proceedings, a good first step would be to reject FINRA's proposed changes in their entirety.

Sincerely,

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Susan R. Healy
shealy@vernonhealy.com



Christopher T. Vernon
e-mail: cvernon@vernonhealy.com

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