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The following comment is submitted in response to the NTM 07-30: Supervision of Electronic Communications. NASD and NYSE Request Comment on Proposed Joint Guidance Regarding the Review and Supervision of Electronic Communications. Please note that this comment is submitted by me in my personal capacity and should not be taken to reflect the views or opinions of any law firm or organization with which I may be affiliated.

Although I take issue with the scope of the proposed guidance and what I consider an unwarranted expansion of regulation that restricts the First Amendment rights of hundreds of thousands of individuals registered on Wall Street, I also concede that under the established parameters of "commercial speech," that reasonably proscribed restrictions on otherwise permissible communications are both justified and proper. Nonetheless, I have seen no credible studies demonstrating that the growing use of electronic communications by registered persons on Wall Street has resulted in an explosion of fraudulent conduct warranting additional restrictions and policies. Similarly, I have not seen any studies that considered whether more effective policing of the Internet and emails by national/international regulatory organizations and criminal enforcement agencies would better combat the perceived problem – particularly since the more egregious spam campaigns and touting originate offshore or with elements of organized crime. Are we truly addressing a growing regulatory issue, or is this simply regulatory make-work in search of a non-existent problem? Enough with the anecdotes. Let's see the hard, statistical facts.

I would like to recommend that a study be undertaken to determine the cost-effectiveness of the proposed additional burdens. Pointedly, what will the financial burden be on independent and regional firms to implement these proposals? Similarly, what is the typical present-day volume of communications generated by those who will be subject to these policies, and how many hours per day will be necessary to implement and monitor the proposals? Finally, will such increased financial/staffing burdens unduly impact smaller firms and place them at a worsening disadvantages to their larger competitors? Has any regulator determined whether the perceived problems are more prevalent at larger firms and, as such, these proposals might better be implemented through a phase-in that would start as a pilot project for members with at least X registered persons (for example, 200 or more), and could include recidivist smaller firms with a history of non-compliance with communications oversight or with a background of troubling numbers of consumer-initiated securities practices complaints? Why is the proposal so set upon "one size fits all"?

Assuming, arguendo, that the proposed guidance is even necessary, it strikes me as grotesquely unfair for the NYSE and NASD to solely seek comments from their member firms --- particularly since neither self-regulator provides enfranchisement to the individual, associated persons who will be directly impacted by the matters under consideration. In seeking comment on policies involving personal communication devices, it would seem only fair for the SROs to seek input from beyond their parochial member/employer base and to make a serious effort to notify the associated person community of this regulatory agenda – and to solicit and consider (in abundant good faith) comments from those men and women, as well. In light of the inability of any associated person to directly vote on any rule proposal or for any individual seeking elective office at a self-regulator, it is only fair that the SROs reach out to those who will be most impacted by these proposals (and who have virtually no say in their scope or implementation, and absolutely no vote).

The proposed new regulatory guidance should also include a clear statement as to the limits of what are deemed “business” communications, and should expand upon the explanation of what would be viewed as non-covered “personal” communications. Moreover, firms should be encouraged to create a system whereby qualified communications may be stored in electronic folders marked “non-business.”

I would encourage firms to appoint an independent monitor to consider all protests from their employees concerning the “business” nature of any communication, and for that monitor to segregate such communications from unwarranted dissemination throughout the firm and from automatic submission to a regulator. Similarly, the SROs’ proposed guidance should address how to segregate and protect confidential communications (such as attorney-client) and ensure that they are not deemed “business” communications within the ambit of the new guidance. Any such commentary should note that the non-production of personal/confidential documents will not initially be treated as a failure to cooperate in an SRO investigation, provided that such withheld production is subject to 1. a schedule showing the date of draft of such communications, 2. the generic nature of the communication; and 3. the confidential nature or privilege cited to withhold production. Additionally, the member firm should be able to demonstrate that its internal monitor had independently reviewed the communications and agreed to their segregation from “business” communications. If the SROs wish to press for the production of such withheld communications, then there should be a proceeding instituted whereby an independent trier of fact will confidentially review the withheld communications and confirm or deny the basis for their being deemed “non-business” communications. If the trier of fact confirms such status, there should be no disclosure to the SRO staff of the contents or nature of the communications.

Finally, why aren’t telephone communications also deemed electronic communications? I continue to fail to understand why the regulatory community is not worried about ongoing fraudulent communications conducted over the telephone. Assuming the rationale for monitoring of all electronic communications is sound (and I continue to question that premise), why doesn’t it logically follow that all telephone communications should be similarly monitored and archived? While this question is somewhat rhetorical in nature (and certainly a tad sarcastic), I often raise it when confronted with regulatory efforts to monitor email, instant messaging, chat room postings, etc. It would seem to me that whatever logic compels such comprehensive oversight of electronic communications must fall with even greater weight upon telephone communications. Why do the SROs persist in treating those two forms of communication so differently? The ultimate point is that telephone calls are only monitored when a member firm has demonstrated recidivist tendencies or when it has too many associated persons from firms with serious regulatory histories. Why not apply the very same policies to electronic communications?

Sincerely,

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