

Discovery

SEC Approves Amendments to FINRA Rule 9251 to Explicitly Protect From Discovery Those Documents That Federal Law Prohibits FINRA From Disclosing

Effective Date: December 2, 2011

Executive Summary

The SEC recently approved an amendment to FINRA Rule 9251 (Inspection and Copying of Documents in Possession of Staff) that explicitly protects from discovery during FINRA proceedings those documents that federal law prohibits FINRA from disclosing.¹ The amended rule text is set forth in Attachment A and is effective December 2, 2011.

Questions concerning this *Notice* should be directed to:

- ▶ James S. Wrona, Vice President and Associate General Counsel, Office of General Counsel (OGC), at (202) 728-8270; or
- ▶ Matthew E. Vitek, Counsel, OGC, at (202) 728-8156.

Background & Discussion

FINRA Rule 9251 describes the types of documents that FINRA's Enforcement and Market Regulation Departments must produce to respondents during the discovery phase of a FINRA proceeding. The rule also explicitly protects certain types of documents from production. Enforcement and Market Regulation, for example, may withhold documents that are protected by attorney-client privilege or work-product immunity.² The rule, however, previously did not explicitly protect from discovery documents that federal law prohibits FINRA from disclosing. Enforcement and Market Regulation had to seek a hearing officer "good cause" determination allowing them to withhold such documents.³ The SEC recently approved an amendment to Rule 9251 that increases efficiency by avoiding the need for the parties to brief and hearing officers to resolve "good cause" motions regarding documents that FINRA cannot legally produce.

November 2011

Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Senior Management

Key Topics

- ▶ Code of Procedure
- ▶ Discovery

Referenced Rules & Notices

- ▶ FINRA Rule 9251

Amended Rule 9251 now explicitly allows Enforcement and Market Regulation automatically to withhold from discovery documents that federal law prohibits them from disclosing.⁴ The amended rule also prohibits a hearing officer from ordering Enforcement or Market Regulation to either produce or reveal information about the existence of a document to a respondent if federal law prohibits such disclosure.⁵ The amendment, however, contains a procedural safeguard allowing a hearing officer to review a document to determine whether federal law prohibits Enforcement or Market Regulation from disclosing it.⁶

Endnotes

1. See Exchange Act Release No. 65281 (September 7, 2011), 76 FR 56848 (September 14, 2011) (Order Approving Proposed Rule Change; File No. SR-FINRA-2011-031).
2. FINRA Rule 9251(b)(1)(A).
3. FINRA Rule 9251(b)(1)(D).
4. See FINRA Rule 9251(b)(2); see also Exchange Act Release No. 65281 (September 7, 2011), 76 FR 56848 (September 14, 2011) (Order Approving Proposed Rule Change; File No. SR-FINRA-2011-031).
5. FINRA Rule 9251(c).
6. *Id.*

ATTACHMENT A

Text of Amended Rule

New language is underlined; deletions are in brackets.

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9200. DISCIPLINARY PROCEEDINGS

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9250. Discovery

9251. Inspection and Copying of Documents in Possession of Staff

(a) No Change.

(b) Withheld Documents [That May Be Withheld]

(1) No Change.

(2) The Department of Enforcement or the Department of Market Regulation shall withhold a Document if the Document is prohibited from disclosure by federal law.

(3) Nothing in paragraph (b)(1) authorizes the Department of Enforcement or the Department of Market Regulation to withhold a Document, or a part thereof, that contains material exculpatory evidence.

(c) **Withheld Document List**

The Hearing Officer may require the Department of Enforcement or the Department of Market Regulation to submit to the Hearing Officer a list of Documents withheld pursuant to paragraph[s] (b)[(1)(A) through (D)] or to submit to the Hearing Officer any Document withheld. Upon review, the Hearing Officer may order the Department of Enforcement or the Department of Market Regulation to make the list or any Document withheld available to the other Parties for inspection and copying unless federal law prohibits disclosure of the Document or its existence. A motion to require the Department of Enforcement or the Department of Market Regulation to produce a list of Documents withheld pursuant to paragraph (b) shall be based upon some reason to believe that a Document is being withheld in violation of the Code.

(d) through (g) No Change.

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