

Public Investors Arbitration Bar Association

VIA E-MAIL To: pubcom@finra.org

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December 30, 2010

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1506

Re: Regulatory Notice 10-54
Disclosure of Services, Conflicts and Duties

Dear Ms. Asquith:

On behalf of the Public Investors Arbitration Bar Association ("PIABA")¹, I thank FINRA for the opportunity to comment on the concept proposal advanced in Regulatory Notice 10-54. The concept proposal would require member firms, at or prior to commencing a business relationship with a retail customer, to provide a written statement to the customer describing the types of accounts and services it provides, as well as conflicts associated with such services and any limitations on the duties the firm otherwise owes to retail customers.

We support the concept of the proposal in that it would require firms to set forth in plain English a firm's accounts and services as well as associated conflicts of interest. However, in this electronic age where we are all bombarded with a deluge of information, FINRA must remain ever vigilant to assure that written disclosures are not used to avoid liability for misrepresentations and omissions by member firms. FINRA has long taken the firm stance that oral misrepresentations which contradict written disclosures may nullify the effect of the written disclosures and make the member liable for rule violation and civil damages.² This position is consistent with the long established SEC policy that broker dealers owe a special duty of fair dealing with their customers and the making of misrepresentations is directly contrary to those duties.³ This initiative must not be used to erode existing policy.

We oppose the proposal to the extent it invites limitations on a firm's duties to an investor, as those duties are often determined by laws and regulations which are subject to anti-waiver provisions as well as the circumstances of the ongoing interactions between the firm and investor.

¹ PIABA is a national, not-for-profit bar association comprised of attorneys, including law school professors and regulators, both former and current, who devote a significant portion of their practice to the representation of public investors in securities arbitrations.

² See NASD Notices to Members 94-16, 04-30 and 05-59.

³ See *In Re Robert Foster*, 51 SEC 1211, Release No. 7077 (July 20, 1994), and *SEC v. Hasho*, 784 Fed. Supp. 1059, 1107 S.D.N.Y. 1992.

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We do not believe such a disclosure should contain a section regarding the duties of the firm and broker. Such a section would appear to be nothing more than an attempt at a disclaimer of liability should a broker not live up to the expectations set through his or her actions and words. Rather than attempt to set forth the potential limitations on a broker's duties that may exist and the various circumstances that may give rise to those limitations, a uniform fiduciary duty should be established.

In general, PIABA supports disclosure of the types of accounts and services a firm offers, as well as conflicts associated with such services. PIABA opposes the inclusion of a disclaimer of duties owed by a broker and firm to an investor as well as any effort to undermine long standing FINRA policy regarding verbal misrepresentations and omissions. Pursuant to section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the SEC is currently studying the effectiveness of the standards of care applicable to firms and brokers. Enacting disclosures should in no way alleviate the need to harmonize the duties owed by firms and brokers to investors. We urge FINRA to support the current initiative to adopt uniform fiduciary standards for broker dealers and their registered representatives.

Respectfully submitted,
PUBLIC INVESTORS ARBITRATION
BAR ASSOCIATION



Peter J. Mougey
President

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