SUITABILITY IN THE WAKE OF FINRA REGULATORY NOTICE 12-55

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I. Introduction

In December 2012, the Financial Industry Regulatory Authority ("FINRA") issued Regulatory Notice 12-55, setting a new interpretation of what constituted a "customer" for purposes of FINRA Rule 2111 (Suitability), and superseding related answers in Frequently Asked Questions format issued in Regulatory Notice ("RN") 12-25 earlier that year. In a seven month period, FINRA materially changed the definition of a customer for purposes of suitability from "an individual or entity with whom a broker-dealer has even an informal business relationship related to brokerage services, as long as that individual or entity is not a broker or dealer,"[2] to "a person who is not a broker or dealer who opens a brokerage account at a broker-dealer or purchases a security for which the broker-dealer receives or will receive, directly or indirectly, compensation even though the security is held at an issuer, the issuer's affiliate or a custodial agent."[3] Essentially, FINRA "skipped" the step of rulemaking at the SEC level and in a back-door fashion added two qualifications for an investor to become classified as a "customer" for suitability purposes: either that the person opened a brokerage

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2. RN 12-25.

3. RN 12-55.

account at the broker-dealer, or purchased a security for which the member will receive compensation.

Falling between the cracks of the new definition of suitability are several types of cases that claimants' attorneys come across frequently in their practice, including individuals who have not opened accounts with a broker's member firm, but have invested in Ponzi schemes run by the broker, invested in private placements based on recommendations from the interested broker, or acted on recommendations of the broker where the broker could gain remuneration through uncommon means.

This article will review the history of the suitability rule (Part II). This article then argues that Regulatory Notice 12-55 was a one-sided overreaction in response to member concerns (Part III). This article next addresses the potential concerns raised by FINRA's action, including among other things, the deterioration of the suitability requirements of securities laws and FINRA rules (Part IV). Finally, the article reflects on the possible impacts the definition change has on claimants' cases in the future (Part V).

II. History

The requirement that members ensure the suitability of recommendations has consistently been an important aspect of securities regulation, helping to ensure that investors are recommended investments that match their goals and are appropriate for them. FINRA's currently suitability rule, Rule 2111, provides that:

> A member or an associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile.[4]

This language was largely adapted from NASD Rule 2310(a),[5] which provided that:

> In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable

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4. Rule 2111(a).

5. Rule 2111(a) was also based on implicit applications of NYSE Rule 405, as interpreted.

> 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.[6]

Both Rule 2111(a) and its precursor 2310(a) rely on the term "customer" to limit the obligations of suitability of recommendations. A "customer" has been consistently defined as "not includ[ing] a broker or dealer."[7] In the interpretive Notices to Members ("NTMs") and Regulatory Notices ("RNs") that have followed, the word "customer" has not been further defined.[8]

FINRA has often used the term "customer" to refer to activities commonly directed to the investing public. For example, in NTM 01-23, the NASD listed various activities that may or may not constitute recommendations as a result of members' online activity, using the word "customer" throughout to refer both to activities that would generally be targeted to customers with brokerage accounts as well as prospective customers. According to NTM 01-23, a customer may be an individual who uses online search engines or online research databases maintained by the member, or who sign up for email alerts (all activities which would not generally constitute a recommendation).[9] On the other hand, a customer may also be someone the member emails regarding suggested investments, or an individual who is identified by the member through its own "data-mining" efforts to "analyze a customer's financial or online activity whether or not known by the customer and then, based on those observations, sends specific investment suggestions that the customer purchase or sell a security" (which may constitute making a recommendation).[10] NTM 01-23 did not delineate what constituted a "customer" for purposes of suitability.

Courts have ruled on the definition of "customer" but generally only on the basis of arbitrability, typically reading in a requirement of some sort of business arrangement between the investor and the FINRA member or its registered representative.[11] Where such a business arrangement exists, these

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6. NASD Rule 2310(a).

7. FINRA Rule 0160(b)(4) (Definitions); *see also* NASD Rule 0120(g) (Definitions).

8. *See, e.g.*, IM-2310-02, NASD NTM 96-32, NTM 01-23, RN 09-25, FINRA NTM 11-02.

9. NTM 01-23, pg. 3.

10. *Id*.

11. *See, e.g., UBS Secs., LLC v. Allina Health Sys*., 12-CV-2090, 2013 U.S. Dist. LEXIS 17799 (D. Minn. Feb. 11, 2013) (finding broker who underwrote deal

courts will find a customer relationship, regardless of whether the investor had a brokerage account.[12]

FINRA finally provided some guidance of the definition of customer for purposes of suitability when it issued RN 12-25 in May 2012 in a Frequently Asked Questions format. In Answer 6, related to the definition of "customer" for purposes of Rule 2111, FINRA provided that:

> The suitability rule only applies to a broker's recommendation to a "customer." FINRA defines "customer" broadly as including anyone who is not a "broker or dealer." Although in certain circumstances the term may include some additional parameters, a "customer" clearly would include an individual or entity with whom a broker-dealer has even an informal business relationship related to brokerage services, as long as that individual or entity is not a broker or dealer. *A broker-customer relationship would arise and the suitability rule would apply, for example, when a broker recommends a security to a potential investor, even if that potential investor does not have an account at the firm.*[13]

This FINRA interpretation included individuals with informal business relationships, specifically those without accounts at the firm, as customers subject to the suitability requirements of 2111, aligning FINRA regulations with substantial case law finding that investors of Ponzi schemes, investments often sold away from employing broker-dealers, are generally defined as customers for arbitrability purposes.

Within the year, FINRA then issued RN 12-55 to supersede, *inter alia*, Answer 6 in RN 12-25:

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provided more than underwriting services and therefore was obligated to arbitrate claim brought by investor); *World Group Secs., Inc. v. Suggs*, 10-CV-2282, 2013 U.S. Dist. LEXIS 14134 (S.D. Cal. Feb. 1, 2013) (holding that firm that was alleged to have provided loan modification services was not obligated to arbitrate claim in FINRA because the defendant was not a customer); *Peyser v. Kirshbaum*, 12 Civ. 2857, 2012 U.S. Dist. LEXIS 176873 (S.D.N.Y. Dec. 11, 2012) (holding that firm that employed broker who sold away Tax Advantaged Stock Loans, a Ponzi scheme, was obligated to participate in the FINRA arbitration because the investor was a customer).

12. *Id*.

13. RN 12-25, pg. 6 (internal footnotes omitted, emphasis added).

> The suitability rule applies to a broker-dealer's or registered representative's recommendation of a security or investment strategy involving a security to a "customer." FINRA's definition of a customer in FINRA Rule 0160 excludes a "broker or dealer." *In general, for purposes of the suitability rule, the term customer includes a person who is not a broker or dealer who opens a brokerage account at a broker-dealer or purchases a security for which the broker-dealer receives or will receive, directly or indirectly, compensation* even though the security is held at an issuer, the issuer's affiliate or a custodial agent (e.g., "direct application" business, "investment program" securities, or private placements), or using another similar arrangement.[14]

Through its superseding Answer 6(a), FINRA essentially added requirements to the definition of "customer" for suitability purposes, including that the investor either open a brokerage account, or purchase a security for which the member receives compensation.

III. An Unnecessary Overreaction

Following the issuance of RN 12-25, industry members apparently became concerned with the scope of the rule, and appear to have voiced such concerns to FINRA.[15] Among these concerns was the fear of a perceived expansion of the suitability rule to cover "informal comments made at pitches or in social situations"[16] including "informal recommendations made at a social gathering, such as a holiday party."[17]

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14. RN 12-55, Answer 6(a) (emphasis added).

15. Bingham.com, *FINRA Issues Additional Guidance on its Soon to be Implemented New Suitability Rule*, May 31, 2012, http://www.bingham.com/Alerts/2012/05/finra-issues-additional-guidance-suitability-rule. It is worth noting that such comments appear to have been unprompted as no public request for comment on RN 12-25 was issued.

16. Bingham.com, *FINRA Issues Guidance Narrowing the Scope of its New Suitability Rule*, Dec. 17, 2012, http://www.bingham.com/Alerts/2012/12/FINRA-Issues-Guidance-Narrowing-the-Scope-of-its-New-Suitability-Rule.

17. Sutherland.com, *FINRA Reverses Course and Issues Guidance Changings Its Interpretation Regarding the Key Issues of 'Potential Investors' and Non-Security Recommendations*, Dec. 19, 2012, http://www.sutherland.com/files/upload/FINRAReversesCourseandIssues Guidance.pdf.

In response to these *member concerns* (as FINRA apparently did not solicit investor comment), FINRA "reversed course,"[18] recanting its previous guidance, which was consistent with the SEC's official release, and issuing a less consistent, but more member-friendly version, RN 12-55, in its stead. It took a mere seven months for FINRA to complete this "180" about to whom the new suitability rule applied and narrow its scope from "potential investors"[19] to only account holders. This highly unusual decision to recant on its previously issued guidance is curious for two reasons: (A) no official comment period was ever held, and (B) although not changing the text of the rule, FINRA materially changed its substance.

A. No Official Comment Period

While RN 12-55 represents a substantive change to and departure from the existing meaning of Rule 2111 of the FINRA Code, it has been couched as a change to rule guidance. RN 12-55 contradicts the previously issued guidance on the rule, and it materially alters Rule 2111 to read in additional requirements to the definition of "customer" not present in Rule 0160.

Changes to the FINRA Code require the approval of the Securities and Exchange Commission, to ensure compliance with the Securities Exchange Act of 1934.[20] Among FINRA's current obligations in the rulemaking process are the solicitation of comments from the public, filing with the SEC, responding to comments, amending the proposed rule based on comments, and finally obtaining SEC approval of the rule for inclusion in the Code.[21]

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18. *Id.* *See also*, Dan Jamieson, *FINRA Dials it Back on Suitability Rule*, InvestmentNews, December 16, 2012, http://www.investmentnews.com/article/20121216/REG/312169978 ("[t]he new guidance was welcomed by industry lawyers, who have complained that the earlier guidance, issued in May, caught the industry by surprise. 'Finra should be praised for listening to its member firms and reps,' said Brian Rubin, a partner at Sutherland Asbill & Brennan LLP"); *Newly Released Regulatory Notice 12-55 Provides Additional Clarity on Suitability Obligations*, December 17, 2012, http://www.financialservices.org/page.aspx?id=3984 ("[a]lthough we would have preferred FINRA providing clarity on these points at the time the final rule was adopted, we appreciate FINRA's effort to respond to our concerns by offering this guidance").

19. RN 12-25.

20. 15 U.S.C. § 78s (2013).

21. *Id*.

However, for the purposes of issuing guidance on the rules, FINRA's obligations are substantially less.[22]

FINRA's stated mission ("Investor Protection. Market Integrity") includes the protection of the investing public, but does not include the protection of its members. Formally modifying the language of Rule 2111 to be consistent with the meaning given to it by RN 12-55, which protects member firms at the expense of public investors, contradicts this stated mission and would certainly have been met by staunch opposition from the public, including investors' rights advocates, during any comment period – had one been provided.

B. FINRA Changed the Substance of the Rule Away From the Correct Interpretation

FINRA's initial interpretation in 12-25 is clearly what the rule was intended to mean. The official SEC release announcing the approval of the rule along with subsequent FINRA guidance support the interpretation in 12-25.

The official SEC Release approving the amendments to Rules 2090 and Rule 2111 supports this original interpretation by FINRA. *After* the official SEC comment period and *after* twenty-two comments from representatives of the industry, investors' rights advocates, and neutrals, the SEC published Release No. 34-63325 on November 17, 2010, officially approving the proposed rule changes to Rules 2090 and 2111. It was the stated goal of the SEC and FINRA to "retain the core features" of each rule, "while modifying both rules to *strengthen* and clarify them."[23] The SEC emphasized that these rules "are critical to ensuring investor protection" as well as "fair dealing with customers,"[24] two intertwined, yet independent objectives. The use of the term "investor" where the term "customer" could have been easily substituted is indicative of the intent of this suitability rule, even in the *post-comment period.* In response to comments concerning potential overlap between the amended rules and pending Dodd-Frank provisions, the SEC noted FINRA's affirmative indications that, among other things, "the proposed changes to those rules would provide greater protection to

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22. *Id.*

23. *Id.* (emphasis added).

24. Granting Accelerated Approval of Rule Changes, Exchange Act Release No. 63325, 75 FR 71479 (Nov. 17, 2010), *available at* http://www.sec.gov/rules/sro/finra/2010/34-63325.pdf.

investors."[25] Again, the option to substitute the word "customer" for "investor" was available, but not taken. Tellingly, nowhere in the official release does the SEC limit the applicability of the suitability rule only to an "account-holder" or the like.

Following the passage of these two rule amendments, FINRA offered three consistent instances of guidance, before taking the meaning of the rule in a different direction.[26] First, FINRA issued Regulatory Notice 11-02, announcing to members that the SEC had approved the rules as amended and their effective date of October 7, 2011. Next came Regulatory Notice 11-25, which provided additional guidance on the rule amendments to members. Finally came RN 12-25, issued in May of 2012, which provided further guidance, specifically on Rule 2111.

In issuing RN 12-55, FINRA overreacted in a knee-jerk fashion ostensibly without consulting investor advocates in response to member concerns. This is not how rulemaking was intended to occur. In RN 11-02, FINRA returned to the use of the word "customer," but in the same context as was previously understood.[27] Nowhere in 11-02 does it indicate that a customer must be an "account-holder" or the like.[28] Rather, FINRA focused on the act of making a recommendation: "The new rule continues to use a broker's "recommendation as the triggering event for application of the [suitability] rule…"[29]

Altering the application of the rule to alleviate any issue presented by social gathering discussions was unnecessary. This issue did not need to be addressed in the definition of a customer. Rather, this concern should have been addressed as a definition of what constitutes a recommendation. As seasoned attorneys in this field are aware, the determination of whether or not a recommendation has been made is flexible, while still being an

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25. *Id*.

26. *See Burr Alert: FINRA Updates Guidance on its Suitability Rule*, Dec. 19, 2012, http://www.burr.com/News-,-a-,-Resources/Resources/Burr-Alert-FINRA-Updates-Guidance-on-its-Suitability-Rule.aspx#.UUnyjBymiPs ("This is FINRA's fourth regulatory notice concerning the rule – it previously published Regulatory Notice 12-25, Regulatory Notice 11-25, and Regulatory Notice 11-02 – but this notice takes the rule in a slightly different direction, at least appearing to soften the enforcement of the rule").

27. *See* NTM 11-02; *see also* Sec. II, *supra.*.

28. *See* NTM 11-02.

29. RN 11-02, p. 2.

"objective test."[30] The question of whether or not a recommendation has been made is answered by making an informed determination based upon the facts and circumstances present in light of FINRA's guiding principles and the precedent set by previously litigated decisions.[31] This makes the recommendation analysis a much more appropriate place to address these member concerns over the perceived breadth of Rule 2111.

Brokers present themselves to the public as professionals, whom the public should trust for financial advice. The flip side of that coin is that in dealing with public investors, brokers must understand the influence they wield as professionals, and refrain from making recommendations to public investors without a complete understanding of the specific facts and circumstances. This is not an unbearable burden. Such an issue did not require a modification of the rule, but simply an undertaking of basic responsibility in dealing with the investing public, account-holder or not.

IV. Potential Concerns

Since the publication of RN 12-55, several specific and serious concerns have arisen over the potential ramifications resulting from FINRA's about-face in the application of the suitability rule.

Since the interpretation propounded by RN 12-55 removes a broker's recommendations to investors from the purview of the suitability obligations so long as the purchases are not made at the firm and an account is not held with the firm, the issuance of 12-55 resulted in the loss of some related causes of action, including negligence *per se* based upon the violation of a standard-setting statute.[32] Not only will this complicate future civil complaints on behalf of defrauded public customers, but also likely future disciplinary proceedings brought by FINRA's Enforcement Division.

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30. *Id*.

31. RN 11-02 p. 3; *see also*, RN 12-25.

32. *See, e.g., Martin v. Herzog*, 228 N.Y. 164 (NY 1920) (the violation of a duty imposed by statute for the benefit of a particular class is negligence itself) (internal quotations omitted); *but see*, *Chen v. U.S.*, 854 F.2d 622 (2d Cir. 1988) ("it is long and firmly established in New York, that the violation of a rule of an administrative agency is merely some evidence of negligence but does not establish negligence as a matter of law because a regulation lacks the force and effect of a statute") (internal quotations omitted).

Take, for example, a situation where a broker is a stock holder in a thinly traded company and pushes public investors (none of whom have an account at the registering member firm) to buy stock elsewhere to boost the value of the broker's own account holdings. Under this set of circumstances, the suitability obligations appear not to attach. This presents a seemingly high, but clearly unwarranted, hurdle for both claimants and regulators to overcome.

RN 12-55 also injects an element of ambiguity in the definition of the term "customer" as used in the FINRA Code. While Rule 0160 clearly states that a customer "shall not include a broker or a dealer" without qualification, and caselaw interprets this definition broadly, RN 12-55 creates a carve out, imposing a qualification that essentially limits "customer" to "account-holder." This begs the questions: How much further will FINRA go in limiting to whom various rules do and do not apply? How slippery is this slope, and to where will it lead?

Oftentimes, ambiguities in the law and in regulation invite substantial abusive misinterpretations and misrepresentations to follow. The risk of the interpretation of "customer" in RN 12-55 being misapplied by litigants and arbitrators, alike, is so great as to appear to be an almost certainty. Since unsuitability forms the foundation of a majority of customer claims in FINRA arbitrations, it typically appears before arbitration panels as one of several alleged rule violations in any given case. In such a circumstance where unsuitability is one of multiple rules violations alleged, the prospect of distinguishing between a "customer" for the purposes of applying the suitability rule and a "customer" for purposes of applying other rules before an arbitration panel is not a bright one. To envision advocates for member firms arguing a misapplication of these distinctions in favor of their clients in an arbitration does not require a departure from the reasonably expected. How FINRA educates arbitrators on these nuances may ultimately prove to be critical.

V. Why The Impact of RN 12-55 is Limited

Simply speaking, the actual impact of RN 12-55 should be limited because claimants' attorneys possess sufficient alternate causes of action to obtain full recoveries for their clients who may also be subject to the rule interpretation. Considering the two hypotheticals of the investor in unsuitable securities recommended by a broker and the Ponzi scheme victim;

these and similar activities may still involve selling away and/or failure to supervise causes of action.[33]

Selling away and failure to supervise claims may be brought by investors against employing member firms, even if they did not have brokerage accounts with those firms. Generally, member firms must arbitrate claims when they are requested by a customer.[34] "Customers," for purposes of arbitrability, include those individuals that had a business relationship with the broker. It is well-settled under both New York and Federal Law that "the NASD's definition of "customer" is broad …, plainly including customers of an associated person as well as of the member itself."[35] The court in *Financial Network Inv. Corp.* went further by saying "[w]hen the investor deals with an agent or representative [of a member], the investor deals with the member …"[36] In *John Hancock*, the Second Circuit Court of Appeals held that "even assuming that the [i]nvestors' claims do not relate to [the member's] business," the investors can still be customers of the firm.[37] Even where the firm argues that "the promissory notes [that the associated person] sold to [i]nvestors were in no way related to [the member firm's] business … supervision arises in connection with the member's business."[38] Furthermore, "[c]ustomer status is not negated by an investment firm's lack of knowledge as to its representatives' customers."[39]

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33. Although not specifically addressed in this article, it should be noted that investors may also have other viable claims against member firms for the actions of their employees/registered representatives, including claims stemming from negligence, common law fraud, and SEC Rule 10-b5.

34. *See* FINRA Rule 12200.

35. *Financial Network Inv. Corp. v. Becker*, 305 A.D.2d 187, 762 N.Y.S.2d 25 (N.Y. App. Div. 1st Dept. 2003) (citing *John Hancock Life Insurance v. Wilson*, 254 F.3d 48 (2d Cir. 2001)).

36. *Financial Network Inv. Corp.*, 305 A.D.2d at 188 (quoting *Vestax Sec. Corp. v. McWood*, 280 F.3d 1078, 1082 (6th Cir. 2002)).

37. *John Hancock Life Insurance*, 254 F.3d at 58-59 (citing *First Montauk Sec. Corp. v. Four Mile Ranch Dev.*, 65 F. Supp. 2d 1371, 1379 (S.D. Fl. 1999)).

38. *MONY Securities Corp. v. Bornstein*, 390 F.3d 1340 (11th Cir. 2004) (citing *John Hancock, 254 F.3d* at 59, and *Multi-Financial Sec. Corp. v. King,* 386 F.3d 1364, 1366 (11th Cir. 2004)).

39. *Financial Network Inv. Corp*, 305 A.D.2d at 188 (citing *Oppenheimer & Co., Inc. v. Neidhart*, 56 F.3d 352, 357 (2d Cir. 1995)).

In a situation where an investor does not have an account with the member firm, but purchases an investment through the member's registered representative, a selling away claim may be pursued. Additionally, even where a purchase was not made at the member firm or through the member's registered representative, but rather was made at the registered representative's recommendation, investors may pursue claims against member firms for failure to supervise.

Such claims are based on the broker's activities that should have been appropriately and adequately supervised by the member, but were not. NASD Rule 3010 requires that members provide a baseline level of supervision and compliance of branch offices, and imposes upon members the obligation to review the activities of each office, which includes the period examination of customer accounts to detect and prevent irregularities and abuse.[40] NTM 99-45 highlights that:

> [i]t is important that members not only review their supervisory systems and procedures to ensure that they are current and adequate, but also conduct inspections to determine whether the systems and procedures are being followed.

The rules serve to protect investors and the public interest by involving member firms in the prior review of all business activities of their associated persons. "Ultimately, the duty to supervise is a firm's obligation . . . Thus, the burden falls to a firm to implement effective procedures, staffing, and to provide sufficient resources and a system of follow-up and review to determine that any responsibility to supervise is being diligently exercised."[41]

Additionally, in a situation where a broker steered a public investor into an investment in a company in which the broker has an interest, the investor may pursue a claim based on failure to supervise the broker's outside business activities. Member firms also are required to properly supervise and achieve compliance in activities conducted by the broker, which are considered to be outside business activities. FINRA Rule 3270 states in part that "[n]o registered person may be … compensated, or have the reasonable expectation of compensation, from any other person as a result of any

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40. *See* Rule 3010 ("Final responsibility for proper supervision shall rest with the member"); NASD NTM 99-45; *see also* NASD NTM 98-38 (providing guidance on supervision of unregistered and branch offices, especially in the presence of "red flags"); *In re Royal Alliance Associates, Inc.*, Exchange Release No. 34-38174 (January 15, 1997), *available at* http://www.sec.gov/litigation/admin/3438174.txt.

41. *Dept. of Enforcement v. Magellan Securities, Inc.,* NASD Disciplinary Proceeding No. C3B010016 (December 30, 2002).

business activity outside the scope of the relationship his or her member firm" unless notice of such arrangement has been provided to the member.[42] NASD NTM 01-79 reminded members of their responsibilities to ensure that their supervisory procedures are "reasonably designed to achieve compliance" regarding outside business activities.[43] "[A]llowing a registered representative to engage in outside business activities involves the risk that the representative will use his outside business to carry out or conceal violations of the securities laws."[44]

The SEC has repeatedly instructed firms to "be alert to and investigate possible 'red flags' indicating possible undisclosed outside business activities and assess all outside business activities by a representative, whether or not related to the securities business."[45] In the 1999 written decision by the NASD imposing sanctions on an individual for failure to supervise, the NASD noted that "the [Securities and Exchange] Commission has held, when faced with indicators of irregularities or misconduct (many times referred to as 'red flags'), a 'supervisor cannot discharge his or her supervisory obligations simply by relying on the unverified representations of employees.'"[46]

VI. Conclusion

There is no question that FINRA has substantially altered the applicability of suitability of recommendations by re-defining who is a "customer" as pertains to suitability. The ambiguity between the historic definition of "customer" and that now applicable to suitability will require

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42. *See* FINRA Rule 3270.

43. NASD NTM 01-79, pg. 697.

44. Signal Secs., Exchange Release No. 43350, 2000 SEC LEXIS 2030 (Sept. 26, 2000), *available at* http://www.sec.gov/litigation/admin/34-43350.htm.

45. SEC Staff Legal Bulletin No. 17: Remote Office Supervision, 2004 SEC No-Act. LEXIS 933 (March 19, 2004), *available at* http://www.sec.gov/interps/legal/mrslb17.htm; *cf.* Press Release, SEC Release 2000-143 (September 27, 2000) ("Heightened supervision is needed … where there are indications of potential misconduct").

46. *Dist. Bus. Conduct Comm. Dist. 8 v. Freedom Investors Corp.,* 1997 NASD Discip. LEXIS 21, 44 (January 27, 1999) (citing In re Michael H. Hume, Exchange Act Release No. 35608, 1995 SEC LEXIS 983, 52 S.E.C. 243 (April 17, 1995)).

careful lawyering by claimants' attorneys to avoid confusion and pitfalls before arbitration panels.

While the claimants' bar has arguably lost claims for unsuitability and other negligence-related causes of action, other claims, including selling away and failure to supervise will still (as they always have) provide a route to full recourse for investors who have fallen for fraudulent or unsupervised investments recommended by unscrupulous brokers.