

Customer Complaints

By Deborah G. Heilizer

Introduction

Customer complaints are often the bane of compliance and legal departments. Because they are frequently time intensive, often factually involved and sometimes fraught with emotion, responding to customer complaints can consume significant resources.¹

The process of analyzing and reporting customer complaints will likely become even more complicated. Last year, FINRA revised Forms U4 and U5 in at least two significant respects. First, arbitration matters and litigation complaints alleging sales practice violations may need to be reported even if the representative is not identified in the caption of the complaint. The framework FINRA has created surrounding this requirement presents both operational and analytical challenges. Second, the forms now require the reporting of “willful” violations.

Although responding to and tracking customer complaints are usually thankless tasks, devoting attention to the process can be time well spent for a firm. Aside from the obvious benefits of running a compliant program, careful attention to customer complaints can help a firm manage risk. Consistent review of complaints can flag account holders who may not be a good fit for the firm, emphasize issues before they become problems, and highlight areas in which additional compliance efforts may be prudent.

Implementing or managing a customer complaint process in light of recent regulatory changes and market turmoil presents significant challenges. Some of the questions that the current regulations and prior practice create are discussed below, including what is a complaint, what is the difference between oral and written complaints, how to evaluate whether a complaint raises allegations of sales practice violations, questions that arise when reviewing arbitration or civil litigation claims, and threshold reporting issues. This article is not intended to be a comprehensive analysis of the customer complaint reporting process, but is intended to highlight issues that may arise in the current regulatory and economic climate.²



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Is It a Complaint?

Determining whether a customer communication is a complaint is often an art, rather than a science. It may not always be obvious whether a particular statement is a complaint, or non-reportable “regular customer correspondence (*i.e.*, customer inquiries or observations).”³ For example, a customer might submit routine transfer instructions in writing, and append a note stating that he or she is disappointed in the price movement of a particular security in the portfolio. Whether this piece of correspondence is categorized as a complaint requires the exercise of judgment and the application of several factors.

NASD Rule 3110(e) defines a complaint as “any written statement of a customer or any person acting on behalf of a customer alleging a grievance involving the activities of those persons under the control of the member in connection with the solicitation or execution of any transaction or the disposition of securities or funds of that customer.”⁴ While at first blush, this definition might appear limited, other rules and historical or developing practice have expanded its scope. For example, New York Stock Exchange Rules define a customer complaint as “any written statement of a customer, or any person acting on behalf of a customer, other than a broker or dealer, alleging a grievance involving the activities of those persons under the control of a member organization.”⁵ Because the NYSE definition extends to all “activities,” it arguably is broader than the NASD definition. In addition, Form U4 now requires reporting certain oral complaints. Finally, several of the sales practice problem codes (*e.g.*, documentation, failure to follow instructions) might be interpreted to extend the literal definition of the term.

One way to attempt to find the line between complaints and “inquiries or observations” is to consult the list of problem codes that FINRA publishes on its Web site. The most recent version, dated October 1, 2008, is available at <http://www.finra.org/web/groups/industry/@ip/@comp/@rf/documents/appsupportdocs/p117562.pdf>. This Disclosure Events and Complaints list summarizes 27 sales practice related and 19 non-sales practice related codes. Each code description provides a brief summary of the type of customer

allegations FINRA believes should be reported in connection with that code, and hence, provides indirect guidance on issues that FINRA believes constitute reportable complaints.

Although firms have well-documented procedures to handle and record customer communications that are deemed to be complaints, it may also be useful to document the thought process behind a determination that a particular matter does not rise to the level of a reportable complaint. A decision may seem obvious at the time it is made, but as time passes, memories dim, and employees leave, it may become difficult to reconstruct thought processes and judgments, if called upon to do so during a regulatory examination or investigation. Firms may wish to keep a file of those communications determined NOT to constitute complaints, as well as note the reasons for those determinations.

Does It Need To Be Reported, and If So, To Whom and How?

If a customer communication constitutes a complaint, it may need to be reported on the firm’s Rule 3070 or NYSE Rule 351(d) reports, the firm’s Form BD, and/or perhaps on the representative’s Form U4 or U5.⁶ Reporting a complaint on a representative’s CRD record can be a matter of concern to a firm’s representatives, particularly since the trend has been to continue to make more complaint information available publicly on BrokerCheck for longer periods.⁷ Therefore, it is important that firm personnel who report complaints have a thorough understanding of the reporting requirements, and apply consistent and thoughtful judgment in their review of complaints.

Is a Sales Practice Violation Alleged?

Only complaints that allege a “sales practice violation” understood to involve an amount not less than \$5,000 in damages are reportable on a representative’s Form U4 or U5. Non-sales practice customer complaints are reportable quarterly pursuant to FINRA Rule 3070 or NYSE Rule 351(d).

The concept of an alleged sales practice violation is extremely broad. The Form U4 Explanation of Terms states that “sales practice violations”:

*Shall include any conduct directed at or involving a customer which would constitute a violation of: any rules for which a person could be disciplined by any self-regulatory organization; any provision of the Securities Exchange Act of 1934; any state statute prohibiting fraudulent conduct in connection with the offer, sale or purchase of a security or in connection with the rendering of investment advice.*⁸

The potential span of this definition is exemplified by FINRA Rule 2010's "high standards of commercial honor and just and equitable principles of trade," which can be (and have been) stretched to cover myriad forms of conduct. A sales practice violation can also result from the violation of the rules of any other self-regulatory organization, including a national securities or commodities exchange, or any registered clearing agency.⁹ State statutes can be broad as well, as are the prohibitions of the Securities Exchange Act of 1934.

The Disclosure Events and Complaints Codes available on FINRA's Web site show how broadly FINRA interprets the concept of sales practice violations. Not only are there codes for mainstream sales practice violations such as misrepresentation, unauthorized trading, and suitability, but there are also codes for failure to follow instructions, and identity theft. Conversely, there are fewer non-sales practice problem codes and definitions (19 as of October 2008). These codes tend to describe the operations issues that may occur in account administration, such as delays or deficiencies in the provision or receipt of certain paperwork or trade execution.

In certain circumstances, the concept of sales practice violations may be limited by product type. That is, FINRA has stated that "[a] sales practice violation does not include violations of banking, insurance, or real estate laws or rules."¹⁰ However, allegations involving forgery, theft, misappropriation or conversion of funds or securities relating to securities, commodities, banking, insurance or real estate are reportable in response to Question 14I(3)(b) and/or 14I(5)(b).¹¹ Question 14I(5)(b) asks for the same information as Question 14I(3)(b) in the context of litigation and arbitrations which are not limited by reference to the notion of sales practice allegations.

What is Misappropriation?

FINRA's Interpretive Answers also suggest it may interpret the term "misappropriation" to cover circumstances in which the alleged conduct did not enrich the representative. In response to a question of what is included in the terms "misappropriation" or "conversion" of funds or securities, the guidance states:

*Misappropriation refers to any intentional or reckless use of customer funds or securities. This includes, but is not limited to, placing money from a customer into an account under a representative's control, diverting funds or securities from one customer's account to another customer's account, and stealing customer funds or securities. The term does not include complaints about delays in transfers of funds or accounts.*¹²

As compliance personnel and representatives well know, divorce or dissolution situations, business disputes and inheritance situations are often fraught with tension. Disputes about which client is the superior or rightful holder of account assets are common. Eventually, assets may be transferred or distributed in a manner that leaves certain customers or consumers dissatisfied. Because written tirades from customers are not infrequent in these situations, allegations may be made concerning account transfers between and

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among competing stakeholders. These allegations typically do not assert that the representative took possession of any assets, but they may raise issues that appear to call for reporting under the guidance described above.

A "yes" answer to a theft or misappropriation question can be expected to cause a representative anxiety, stimulate questions by the regulators, and may even provoke an inquiry. A firm may be able to assist its representatives in avoiding unnecessary filings by helping them understand that the

early involvement of the legal and/or compliance department can be helpful in matters involving familial or business disputes or uncertainty over account assets. In some situations, once counsel for the firm is involved, lawyers for some of the affected parties appear, which may ease resolution of the dispute at issue. In any event, it may make it less likely that allegations are lodged against the representative.

Written or Oral?

Initially, only written complaints were reportable for NASD purposes.¹³ Over time, however, NASD (now FINRA) changed its position to require the reporting of oral complaints that alleged a sales practice violation involving representatives that were settled for more than a threshold amount under Question 14I(2) of Form U4.¹⁴

Last year, Form U4 was amended in a number of respects. Question 14I(2) now asks whether a representative was the subject of a “written or oral” complaint alleging sales practice violations settled for \$15,000 or more (after May 2009, and for a lesser amount prior to that date). According to FINRA, this change was made in accordance with the above interpretation, but did “not alter or expand this interpretation.”¹⁵ Also, FINRA has noted that other references to “written complaint” were not changed.¹⁶ Thus, at present, FINRA is not extending the types of oral complaints that must be reported on Form U4 beyond those that allege sales practice violations and result in a settlement of \$15,000 or more (on or after May 18, 2009).

When a complaint is first made, it is impossible to determine whether compensation will be paid at all, and if so, how much. As a result, it is extremely difficult to determine which oral complaints (if any) may eventually be reported. By their nature oral complaints can be brief, and any notes made of them even briefer. Thus, they can present particular challenges later when trying to determine the actual substance of the complaint and whether the complaint asserted that a representative was involved in the alleged conduct. As a result, member firms may wish to consider developing an internal protocol to assist with answering these questions later. The protocols may be as simple as creating note pads with

suggested questions, or on lists of problem and product codes so that contemporaneous impressions regarding the complaint can be captured.

Does the Complaint Involve the Representative or Is He or She the Subject of an Arbitration or Civil Litigation?

Historically, determining whether an arbitration or civil litigation matter was to be reported on a representative’s Form U4 was easy—if the representative’s name appeared in the caption of the complaint or arbitration, a filing was likely. After the amendments to Form U4 in May 2009, however, firms are to perform a good faith investigation relating to “persons identified in the body of a civil litigation complaint or an arbitration claim.”¹⁷ According to the guidance, firms are required to report a “yes” answer to Questions 14I(4) or 14I(5) on Form U4 (or the relevant questions on Form U5) if, the firm makes a good-faith determination after a reasonable investigation that an alleged sales practice violation involved a registered person who was named or could reasonably be identified in the arbitration statement of claim or complaint.¹⁸

The term “involved” is defined in the Form U4 Explanation of Terms¹⁹ to mean “doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.” The updated Form U4 and U5 Interpretive Questions and Answers²⁰ suggest that FINRA expects the term “involved” to be interpreted broadly, including failure to supervise the alleged conduct. The Answer to Question 4 (to Question 14I(1)) notes:

It is not necessary that a statement of claim use precise legal terminology. The fact that a claim does not use the legal term “failing reasonably to supervise” does not alleviate the branch manager’s obligation to report. The allegation that the manager should have been overseeing a broker’s activities is sufficient to trigger reporting.

Thus, determining whether a statement of claim alleges involvement by a representative or a supervisor may require the exercise of considerable judgment. It may be useful for firms to document

the reason it decided not to report a particular claim on a Form U4 (*e.g.*, because of lack of, or insufficient, allegations).

The concepts of “good faith determination” and “a reasonable investigation” are not defined in the Form U4 Explanation of Terms. Nor has FINRA to date provided supplemental guidance regarding these terms. The inclusion of these concepts in the proposed releases provoked a barrage of comment from numerous interested parties. It is not yet clear how firms are implementing these concepts or whether industry standards have developed with which FINRA and industry participants are comfortable.

One issue that the new disclosure questions create is how firms can separate compliance, record keeping or reporting functions from legal functions related to the litigation. Both the SEC and the SROs have document retention requirements relating to customer complaints.²¹ The new reporting requirements require post-litigation investigation for reporting purposes, which regulators have historically considered to be a compliance, non-privileged function. FINRA examination staff may demand to see the records of the “reasonable investigation” and the factors that went into the “good faith determination” with respect to reported and non-reported complaints.

However, because any investigation will be conducted after the filing of an arbitration claim or civil litigation, it is possible that an investigation to determine whether disclosure should be made could become intertwined with an investigation in connection with defense of the litigation, which might normally be thought of as privileged or subject to work product protection. It is therefore possible that these disclosure rules will increase the tension between non-privileged compliance activity and legal or privileged or protected activity.

Firms may wish to address these tensions by developing procedures or guidance for compliance personnel that separate the reporting investigation from that performed in connection with the litigation. This may be particularly important if the same personnel operate in both legal and non-legal capacities. For example, there may be some instances in which compliance personnel create non-privileged materials, and other instances when,

at the direction of counsel, they are assisting with the litigation.

If the same personnel will be conducting a review for registration purposes and assisting with the litigation, a firm may wish to consider developing eye-catching, easy-to-locate colored tablets that can be used for different purposes and be easily distinguished. For example, if registration-related questions are printed on a pink or green tablet, it may be easier for personnel to later segregate privileged from non-privileged material. Files that can be consistently retained that separate non-privileged materials (*e.g.*, the complaint, any reporting forms that are filled out, and the response) from privileged or protected work product materials, can streamline preparation for examinations and discovery requests.

Firms may wish to consider developing a set of guidelines for assisting compliance personnel in conducting a reasonable investigation. The guidelines might consist of setting out the steps that should be performed in connection with making that determination. For example, is the compliance person to review materials outside of the complaint or statement of claim? Which ones? Are physical account statements to be reviewed? Recorded lines reviewed? Branch managers consulted?

Firms may also wish to consider providing guidance on the factors to be used in determining whether to report arbitrations or complaints on Form U4. Finally, because this is a new requirement, an appreciation of issues, problems and solutions will develop over time. Firms may wish to pay special attention to new developments in this area and review and revise their processes and procedures in light of new developments.

Does the Complaint Meet the Reporting Threshold?

Complaints which either claim less than \$5,000 in damages, or which are determined by the firm in good faith to involve damages that “would be” less than \$5,000, may not need to be reported. If that determination cannot be made, Form U4 states that the complaint must be reported.

Determining a potential damage amount can be complicated. Damages can include all amounts paid to an investor, even if the amounts represent

a sum in excess of losses. For example, in light of the ARS settlements of the past year or two, FINRA issued specific guidance on reporting customer dispute settlements involving ARS that requires firms to consider the entire dollar amount refunded to a customer to be “considered for the purpose of determining settlement reporting thresholds.”²²

While the ARS guidance is issued in the context of settlement thresholds, rather than initial claims, FINRA may take the position that the analysis applies to evaluation of initial claims. In particular instances, it may be appropriate to seek guidance from disclosure staff.

Do the Willful Violation Questions Impact Privilege?

In May 2009, Forms U4 and U5 were revised to add three new subparts to Questions 14C and 14E, which ask whether the representative was found to have committed a willful violation in regulatory actions by the SEC, CFTC and SROs. Until November 2009, firms were able to submit provisional “no” responses at their discretion in answer to these questions.

While the ostensible reason for this change was to make tracking of willful violations easier for the regulators, it may impose additional interpretive burdens on compliance staff. It may not always be easy for compliance staff to determine whether a particular violation was willful, or in

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a multi-party order, to sort out against whom certain types of findings were entered.²³ It may be that the level of interpretation required by this question would make legal input helpful. If so, firms may wish to consider whether the input of legal personnel is intended to be privileged, and if so, how to maintain the documents evidencing that advice.

Responding to Customer Complaints

Once the appropriate investigation and reporting of a complaint is completed, a response will need to be prepared. Because complaints are often “one off,” responses can be time consuming to prepare. Responding to a complaint, like determining whether a matter is a complaint, can be an art rather than a science.

Many responses will require some kind of background work by the responder. It may be necessary to collect and review account documentation and transaction information, and to develop some understanding of the history of the account(s) at issue. It may also be useful to speak with the representative or sales assistant who typically deals with the client.

Both tone and content can be important in responses. It is helpful if the content is factual and provides enough information so that a later reader can understand the context of the issue as well as the reasons for the resolution that the firm proposes or applies. Adjectives can be counterproductive. It is not uncommon for litigation matters to be preceded by a customer complaint, submitted for the very purpose of obtaining a response, which may be the first exhibit to a statement of claim.

There may be some procedural difficulties in responding to these matters, particularly when a response is to be completed within a particular period of time. For example, NYSE rules require members to acknowledge a complaint within 15 days, and provide a written response within a “reasonable period of time,”²⁴ which may be interpreted as a period of 30 days. In addition, complaints forwarded by the SEC or FINRA have a time period by which a response is required.

The statutes and rules related to privacy limit the persons with whom a firm may correspond regarding an account. A family member or other person acquainted with an account holder might either seek information about an account or submit correspondence to which a response might be required. However, unless the correspondent has permission to receive account information, it may not be possible to correspond directly with the author. Firms may seek to obtain written permission from an account holder, or other documentation, that permits correspondence with the complainant.

Complaints regarding particular subject areas may require particular enclosures or content. For example, when responding to complaints concerning municipal securities, firms are required, pursuant to MSRB Rule G-10,²⁵ to include a brochure specified by the rules. Checklists can help to ensure that timely responses containing required enclosures are made.

What If I Can't Decide?

Compliance risk is heightened in times of regulatory change, and recent market events and the FINRA consolidation process have aligned to accelerate the historic pace of rule and guidance changes relating to the reporting of customer complaints.

It is inevitable that from time to time questions will arise in connection with the interpretation and reporting of events described in customer communications that are not easily answered by reference to the problem codes. In those instances, reporting personnel may wish to consider contacting FINRA. FINRA's disclosure specialists can be helpful, particularly when dealing with questions of interpretation of the language in regulatory filings.

It may also be useful, in non-routine matters, to enlist the assistance of outside counsel in a dialog

with FINRA or other appropriate staff. Outside counsel can sometimes engage in more generalized discussions than a firm employee and confirm the advice in a letter to the staff. While such letters may not provide complete comfort, they may offer the firm some limited guidance and documentation pertinent to a decision regarding the reporting of a particular matter.

Conclusion

Customer complaint reporting obligations have become more complicated. As a consequence, the process of analyzing, reporting, and responding to complaints may call for input from the legal department to help navigate the regulatory maze created by recent regulatory changes and interpretive guidance. Thus, while clear and continually updated procedures in this area may assist compliance personnel in dealing with the majority of registration and reporting issues that arise from complaints, the involvement of the law department may become increasingly necessary in the customer complaint process. Although this involvement creates certain privilege issues, it also enables in-house counsel to partner with the business to help manage risks posed by the complaint response process.

ENDNOTES

- ¹ E. Beeson, *FINRA Demands More Upfront Info on Complaint*, Compliance Reporter at 1 (March 26, 2010), available at www.compliancereporter.com/Article.aspx?ArticleID=2453702.
- ² Nothing in this article is intended to constitute legal advice, nor create an attorney-client relationship with the reader.
- ³ 5/28/96 FINRA Interpretive Letter on NASD Rule 3070-Reporting Requirements Re: Interpretive Request Regarding Article III, Section 50 of the NASD Rules of Fair Practice, available at www.finra.org/Industry/Regulation/Guidance/InterpretiveLetters/P002718.
- ⁴ The text of FINRA Rule 3110. Books and Records, is available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3734&record_id=11853.
- ⁵ NYSE Rule 351.13 (adopted September 15, 2008). The NYSE Rules on Operations of Member Organizations are available at: http://nyserules.nyse.com/nysetools/PlatformViewer.asp?SelectedNode=chp_1_5&manual=nyse/rules/nyse-rules/
- ⁶ See <http://www.finra.org/Industry/Compliance/Registration/CRD/FilingGuidance/p005235>.
- ⁷ See, e.g., Regulatory Notice 09-66 (November 2009) (regarding permanent availability of certain information concerning final regulatory actions against brokers), available at www.finra.org/Industry/Regulation/Notices/2009/P120407; FINRA Rule 8312(b)(7), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3891.
- ⁸ Available at <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p116979.pdf> at p.3 (May Version 2009.2) (emphasis in original)
- ⁹ Form U4 and U5 Interpretive Questions and Answers, Questions 14i(3) and 14i(5), Answer to Question 4 available at <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p119944.pdf> (as of 09/22/2009).
- ¹⁰ See Form U4 and U5 Interpretive Questions and Answers, Questions 14i(3) and 14i(5), Answer to Question 4 (emphasis added).
- ¹¹ Question 14i(3)(b) asks whether a representative was the subject of an investment-related, consumer initiated written complaint not otherwise reportable, which alleges forgery, theft, misappropriations, or conversions.
- ¹² See Form U4 and U5 Interpretive Questions and Answers Questions 14i(3) and 14i(5), Answer to Question 5 (emphasis added).
- ¹³ See NASD Rule 3110, which defines a complaint in subsection (e) as "any written statement of a customer or any person acting on behalf of a customer alleging...." (emphasis added). See also Special NASD Notice to Members 98-27 (March 1998) at 165 ("Oral complaints are not required to be reported, even if they result in a settlement. However, if a customer lodges an oral complaint with a member, and the customer later submits the complaint in writing in the course of settlement negotiations, the oral complaint has become a written complaint, which must be reported"), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p004779.pdf>. Prior to May 2009, the Form U-4 on the FINRA Web

site required disclosure of certain written customer complaints. See Rev. Form U-4 (10/2005), disclosure question 14I(3).

¹⁴ See FINRA Form U4 and U5 Interpretive Questions, Answer to Question 14I(2), formerly available at <http://www.finra.org/Industry/Compliance/Registration/CRD/FilingGuidance/p005243>.

¹⁵ Letter from Richard E. Pullano to Elizabeth M. Murphy Regarding SR-FINRA-2009-008, at 10 (May 5, 2009), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p118650.pdf>

¹⁶ Self Regulatory Organizations: Financial Industry Regulatory Authority, Inc.: Notice of Filing of Proposed Rule Change Relating to Proposed Changes to Forms U4 and U5, 74

Fed. Reg. 13491, 13494 n.26 (2009), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p118319.pdf>.

¹⁷ Regulatory Notice 09-23 at 4 (May 18, 2009), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p118705.pdf>.

¹⁸ *Id.*

¹⁹ Available at <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p116979.pdf>, at 2 (May-Version 2009.2).

²⁰ Available at <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p119944.pdf> (as of 09/22/2009).

²¹ 17 C.F.R. §§ 240.17a-3(18)(i) and 240.17a-4(a)(1); FINRA Rule 3110.

²² See Regulatory Notice 09-12, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p117861.pdf>, at 2.

²³ See Sections 15(h)(4) and 15(b)(6) of the Securities Exchange Act of 1934 for a description of administrative actions against broker-dealers or associated persons, including those that require willfulness.

²⁴ NYSE Rule 401A(a)(2), available at <http://www.nyse.com/FrameSet.html?displayPage=http://rules.nyse.com/NYSE/Help/Map/rules-sys406.html>.

²⁵ See <http://www.msrb.org/msrb1/rules/ruleg10.htm>.

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