

September 9, 2010

VIA E-MAIL

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

**Re: File No. SR-FINRA-2010-039
Notice of Filing of Proposed Rule Change to Adopt FINRA Rules 2090
(Know Your Customer) and 2111 (Suitability) in the Consolidated
FINRA Rulebook**

Dear Ms. Murphy:

We are submitting this letter on behalf of our client, the Committee of Annuity Insurers (the "Committee"),¹ in response to *Notice of Filing Proposed Rule Change to Adopt FINRA Rules 2090 (Know Your Customer) and 2111 (Suitability) in the Consolidated FINRA Rulebook* (the "Proposal Notice"), issued by the U.S. Securities and Exchange Commission (the "SEC").² As described in the Proposal Notice, the Financial Industry Regulatory Authority ("FINRA") proposes to use NASD Conduct Rule 2310 as the model for proposed FINRA Rule 2111 ("Rule 2111"), addressing the suitability obligations of member firms. In addition, the Proposal Notice indicates that FINRA proposes FINRA Rule 2090 ("Rule 2090") based on a modified version of NYSE Rule 405(1) that addresses know-your-customer ("KYC") obligations. Each of the proposed FINRA rules (together, the "Proposal") makes modifications to the existing rules upon which they are based. The Committee appreciates the opportunity to provide comments on the proposed FINRA rules.

¹ The Committee of Annuity Insurers is a coalition of 31 life insurance companies that issue fixed and variable annuities. The Committee was formed in 1981 to participate in the development of federal securities law regulation and federal tax policy affecting annuities. The member companies of the Committee represent over 80 % of the annuity business in the United States. A list of the Committee's member companies is attached as Appendix A.

² The Proposal Notice was published in SEC Release No. 34-62718, 75 Fed. Reg.52562 (Aug. 26, 2010).
9577419.2

The Proposal has been revised and differs in some respects from the proposal (the “2009 Proposal”) published by FINRA in Regulatory Notice 09-25 (“RN 09-25”),³ in response to which the Committee submitted comment.⁴ The Committee wishes to comment on several aspects of the Proposal.

More specifically, we believe that:

- the significant changes called for by the FINRA rulemaking should not be imposed on FINRA members during the pendency of the SEC Study on Broker-Dealer and Investment Adviser Standard of Care and any resulting rulemaking;
- further guidance is necessary regarding the application of a suitability obligation to “investment strategies,” to ensure that this requirement does not serve to chill communications between registered representatives and their retail customers;
- the requirement regarding the exercise by a firm of “reasonable diligence” with respect to the obligation to collect customer information is vague and needs to be better defined;
- explicit guidance should be provided i) recognizing the interplay between Rule 2090 and other rules which also require a firm to collect and assess customer information, and ii) encouraging firms to leverage compliance with these other rules in satisfying the obligations created by Rule 2090; and
- clarification should be provided that certain transactions in the context of a variable annuity (for example, a reallocation) do not constitute “servicing an account,” in connection with Supplementary Material (“SM”) .01 of Rule 2090.

COMMITTEE COMMENTS: RULES 2090 AND 2111

The SEC Study on Broker-Dealer and Adviser Standard of Care

FINRA’s Suitability and Know-Your-Customer rule filing is being advanced at the same time that the SEC is conducting its study as directed by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) on the effectiveness of legal and regulatory standards of care for brokers, dealers and investment advisers, and their associated persons, who provide personalized investment advice about securities to retail customers.

³ FINRA Regulatory Notice 09-25: Proposed Consolidated FINRA Rules Governing Suitability and Know-Your-Customer Obligations (May 15, 2009), *available at* <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p118709.pdf>.

⁴ Letter from Committee of Annuity Insurers, dated June 29, 2009, *available at* <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/noticerecommendations/p119267.pdf>. 9577419.2

The changes called for by the Proposal are significant. Coupled with possible changes which may come about as a result of the SEC study, the rule filing could create two significant changes to broker-dealer standard of care obligations in a very short period of time. This would lead to significant time and expense spent by firms to comport with multiple changes to their suitability obligations in a short period of time.

While we appreciate that Dodd-Frank does not require the SEC to halt rulemaking, as a practical matter the SEC and FINRA should agree to delay implementation of any new suitability obligations until the SEC clearly resolves the standard of care applicable to broker-dealers and their associated persons who provide personalized investment advice about securities to retail customers. Since the SEC study is designed to identify gaps, overlaps and deficiencies, if any, in the standard of care applicable to a broker-dealer who provides investment advice about securities to retail customers, it seems that any changes to FINRA's rules governing a broker-dealer's suitability obligation or the imposition of any KYC obligation should be crafted in reliance on the findings from such a comprehensive study that will be available in a relatively short time period.

COMMITTEE COMMENTS: RULE 2111 -- SUITABILITY

New Suitability Rule's Expansion to Cover "Investment Strategies"

Proposal. Rule 2111 proposes to apply the suitability obligations to recommendations of "investment strategies" involving securities. In response to comments, the Proposal Notice adds SM.02 to Rule 2111. SM.02 seeks to provide guidance on the scope of the term "investment strategy involving a security or securities." The guidance indicates that the term "is to be interpreted broadly" and excludes certain routine communications on investment strategies that do not include express recommendations.⁵

Comment. The Committee's comment letter on the 2009 Proposal provided a number of comments concerning the extension of a suitability requirement to "investment strategies" including urging FINRA to provide more guidance on: i) what would be deemed to be an investment strategy in securities; ii) what type of suitability review process should be implemented for recommendations of investment strategies in securities; and iii) what type of monitoring and supervision might be appropriate to oversee recommendations of investment strategies in securities. In addition, the Committee expressed its belief that common features of a variable annuity contract such as dollar-cost-averaging and asset re-balancing should be excluded from the term "investment strategy."

⁵ Among other things, there is an exception provided for general financial and investment information, descriptive information about retirement or benefit plans, and asset allocation models.

We appreciate FINRA's efforts to respond to our previous comment by providing guidance in SM.02 that serves to except certain "general financial and investment information," "asset allocation models" and "interactive investment materials" from the definition of "investment strategy."

While we appreciate FINRA's intent that the term be interpreted broadly, we believe to help guard against chilling interactions between a registered representative and his or her retail customers, the term "investment strategy involving a security or securities" should be revised to cover an "investment strategy in connection with a recommendation involving a security or securities." We believe that this would properly focus the requirement on strategies involving recommendations of securities as opposed to general investment strategies.

Reasonable Diligence

Proposal. Under the 2009 Proposal, a firm was required to consider "facts known by the member" or "disclosed by the customer in response to . . . reasonable efforts to obtain" certain required suitability information. Under the revised Rule 2111, a firm is required to exercise "reasonable diligence . . . to ascertain the customer's investment profile," including the required information. There is some description of the expectations with respect to "reasonable diligence" in the Rule Filing, but not in revised Rule 2111 or any SM to such rule. There is no description of what "investment profile" means.

Comment. We appreciate the revisions made in response to comments received which eliminate the "facts known by the member" requirement.

We believe that the terms "reasonable diligence" and "investment profile" should be defined (or otherwise provided greater clarity through an SM) and that interested parties should have an opportunity to provide comment. These terms are central to the rule and leaving them open-ended without definition does not serve the investing public or FINRA members and is an invitation for members to be second-guessed by FINRA examiners.

We also believe that FINRA should acknowledge that in certain situations it would be appropriate for a firm to not collect certain information, even if specified in the rule, if it makes a reasonable determination that such information is irrelevant to the particular investment.

Finally, we believe that Rule 2111 should clarify that a firm is provided with flexibility with respect to the manner in which it collects the required information. For example, while firms may seek to gather such information through traditional question and answer formats, other firms may seek to gather the information through interactive materials or other means.

Suitability Rule's Applicability to Non-Securities Activities of Broker-Dealers

Proposal. In the 2009 Proposal, FINRA requested comment on whether Rule 2111 should be applied to non-securities product recommendations. In the Notice Filing, FINRA notes that a large number of commenters suggested that FINRA should not expand the reach of the suitability rule, and determined not to expand the applicability of Rule 2111 to non-securities recommendations.

Comment. For the reasons cited in our comment letter on the 2009 Proposal we support FINRA's determination not to expand the reach of the suitability rule to non-securities.

COMMITTEE COMMENTS: RULE 2090 – KNOW-YOUR-CUSTOMER

Overlap with Other Rules

In its comment letter on the 2009 Proposal, the Committee noted that, as a preliminary matter, the KYC obligations appear to be duplicative of a number of other requirements imposed under existing NASD and proposed FINRA rules. By way of example, the Committee explained that there are requirements to verify the identity of the client (under NASD Rule 3011) and to keep certain client account information (under NASD Rule 3110); and Rule 2111 would create an obligation to obtain certain customer-specific information. In addition, the Committee pointed out that the SEC's rules related to broker-dealers impose requirements on firms with respect to maintaining and updating client information under Rule 17a-3(a)(17) under the Securities Exchange Act of 1934. The Committee expressed its belief that, at a minimum, FINRA should attempt to clarify how the information required to be reviewed and maintained for purposes of Rule 2090 differs from the requirements identified above. Moreover, the Committee suggested that FINRA reconsider whether Rule 2090, practically speaking, would provide any additional benefit to customers, or supervisory tools to members, beyond what currently is, or would be, provided under other rules.

In its filing, FINRA indicates that a number of other commenters expressed concerns similar to those expressed by the Committee in its comment letter on the 2009 Proposal. However, FINRA does not expressly address the duplicative nature of Rule 2090 or the possible confusion related to the interplay of such rule and other FINRA rules. We would urge FINRA to provide explicit guidance that: i) recognizes the interplay between Rule 2090 and other rules which also require a firm to collect and assess customer information; and ii) encourages firms to leverage compliance with these other rules in satisfying the obligations created by Rule 2090.

KYC During the “Maintenance” of an Account/ The Concept of Servicing an Account

Proposal. In its Notice Filing, FINRA states that it is “self-evident” that a broker-dealer must know its customers throughout the life of the account. In addition, FINRA refused to provide any guidance on the timing requirements for such ongoing maintenance by stating that a firm’s relationship with a customer is “dynamic.”

Related, the concept of an “account” is included in SM.01 which in response to commenters has been revised to include a more general recitation of what would constitute essential customer information. SM.01 provides that essential facts are those required to: *effectively service the account*; act in accordance with special handling instructions; understand the authority of each person acting on behalf of the customer; and comply with applicable laws, rules and regulations (emphasis added).

Comment. The Committee wishes to note that variable annuities are often externally held (i.e., held not at the broker-dealer but rather at an insurance company issuer). As such, a broker-dealer or its registered representatives would not “service the account” along the lines contemplated by SM.01. For example, the rule would not seem to reach a contractowner’s investment reallocation, subsequent purchases, withdrawals or any other transaction where the contractowner’s interaction is directly with the insurance company (e.g., no registered person associated with a firm is servicing the contractowner’s account). It would be helpful for the rule to include an SM which sets forth this guidance.

We would also note that the Committee views SM.01(d)’s requirement compelling firms to know and retain essential facts necessary to “comply with applicable laws, regulations, and rules,” to be unnecessary given that such requirement would be required directly by the terms of such rules. If FINRA determines to keep this requirement, it should provide clearer guidance about what is anticipated by this provision.

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The Committee appreciates the opportunity to comment on the Suitability and KYC obligations proposed under FINRA's consolidated rulebook project. Please do not hesitate to contact Eric Arnold (202.383.0741) or Cliff Kirsch (212.389.5055) if you have any questions.

Respectfully submitted,

SUTHERLAND ASBILL & BRENNAN LLP

BY: *Eric G. Arnold*

BY: *Clifford E. Kirsch EAA*

FOR THE COMMITTEE OF ANNUITY INSURERS

Appendix A

THE COMMITTEE OF ANNUITY INSURERS

AEGON Group of Companies
Allstate Financial
American General Life Insurance Companies
AVIVA USA Corporation
AXA Equitable Life Insurance Company
Commonwealth Annuity and Life Insurance Company
CNO Financial Group, Inc.
Fidelity Investments Life Insurance Company
Genworth Financial
Great American Life Insurance Co.
Guardian Insurance & Annuity Co., Inc.
Hartford Life Insurance Company
ING North America Insurance Corporation
Jackson National Life Insurance Company
John Hancock Life Insurance Company (USA)
Life Insurance Company of the Southwest
Lincoln Financial Group
Massachusetts Mutual Life Insurance Company
Metropolitan Life Insurance Company
Nationwide Life Insurance Companies
New York Life Insurance Company
Northwestern Mutual Life Insurance Company
Ohio National Financial Services
Pacific Life Insurance Company
Protective Life Insurance Company
Prudential Insurance Company of America
RiverSource Life Insurance Company
(an Ameriprise Financial company)
SunAmerica Annuity and Life Insurance Company
Sun Life Financial
Symetra Financial
TIAA-CREF
USAA Life Insurance Company