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VIA ELECTRONIC DELIVERY

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

Re: Proposed Rule Change to Adopt FINRA Rules 2090 (Know Your Customer) and 2111 (Suitability); File No. SR-2010-039

Dear Ms. Murphy:

TIAA-CREF Individual & Institutional Services, LLC (“TC Services”) appreciates the opportunity to comment on the proposed rule change to adopt Financial Industry Regulatory Authority (“FINRA”) Rules 2090 (Know Your Customer) and 2111 (Suitability) in the Consolidated FINRA Rule Book (“Proposal”).

TC Services is registered with the Securities and Exchange Commission (“Commission”) as a broker-dealer under the Securities Exchange Act of 1934, as amended (“Exchange Act”) and is a member of FINRA. TC Services is wholly owned by Teachers Insurance and Annuity Association of America (“TIAA”). TC Services and TIAA are members of the TIAA-CREF group of companies which comprise one of the world’s largest retirement plan systems. For over 90 years, TIAA-CREF has helped people in the academic, research, medical and cultural fields plan for and live through retirement.¹

TC Services supports FINRA’s efforts to create a Consolidated Rule Book,

¹ TIAA-CREF presently serves over 3.7 million individuals at over 15,000 institutions. The overwhelming majority of TC Services’ clients are participants within employer sponsored retirement plans that TIAA administers —e.g., 401(k) or 403(b) plans.



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including consolidating National Association of Securities Dealers and New York Stock Exchange rules concerning suitability and know your customer requirements. We are concerned, however, that the Proposal implicitly assumes all members formulate recommendations using one uniform advice methodology – *i.e.*, a methodology that uses each of the proposed new fields of suitability information (“Proposed New Information”).²

This is not the case — member firms rely upon numerous different, yet equally appropriate, advice methodologies when serving differing customer needs. Not all of the Proposed New Information fields are relevant to all advice methodologies. Moreover, certain fields, even if relevant to a particular methodology, are often inherent and inferred from the advice session. This is particularly true for retirement plan asset allocation recommendations.

By way of example, one widely used and highly regarded investment methodology does not consider investment experience relevant when providing advice over assets held within an employer sponsored retirement plan.³ These plans generally consist of a limited menu of mutual funds and annuities selected by a plan sponsor in its role as fiduciary as appropriate for its employee base. The advice provided in this context is viewed as suitable for investors of all experience levels.

Additionally, the retirement plan participant’s liquidity needs are known. The recommendations are limited to the assets held in the retirement account. By definition, these are assets that are intended for retirement. Liquidity needs prior to retirement are not relevant.

Rather than imposing rigid new information gathering requirements, FINRA should modify the proposal to provide flexibility that reflects both today’s varied advice methodologies and also accommodates the continued evolution and refinement of advice methodologies. To do otherwise seems to place FINRA in the position of favoring certain methodologies over others— *i.e.*, picking winners and losers— and also freezing the development of new advice methodologies.

Realistic alternatives exist that preserve investor protections while reducing burdens on members. We urge FINRA to adopt a methodology neutral approach that either: (1) incorporates the Proposed New Information fields as illustrative of potentially relevant customer profile information and not as a requirement; or (2) creates a rebuttable presumption that the Proposed New Information fields are a relevant component of the customer’s investment profile that members must attempt to gather from the customer. In the latter case, FINRA should permit a member to

² FINRA proposes to expand the explicit list of fields of information that broker-dealers must attempt to gather and analyze to include a customer’s age, investment experience, investment time horizon, liquidity needs and risk tolerance.

³ TIAA has retained Ibbotson Associates, Inc. (“Ibbotson”) to provide objective advice over employer sponsored retirement plans administered by TIAA. Ibbotson applies a proprietary methodology called “human capital.” The participant’s age, investment time horizon and human capital (*i.e.*, the value of the participant’s remaining working years) are driving components of the methodology.

overcome this presumption where the member makes a determination that the information is not relevant to the suitability determination.

Members should be allowed to gather from customers only those categories of Proposed New Information that are germane to their recommendation. Information that is not germane to the recommendation provides no additional investor protection benefits. Moreover, the associated process and systems enhancements that firms would need to undertake to facilitate the collection of such information come at a cost – including revising forms, procedures and training materials and making systems enhancements.

Given the availability of effective alternatives that provide effective investor protections while lessening burdens on members, we believe the Proposed New Information gathering requirements of the Proposal are inconsistent with the requirements of Section 15A(b)(9) of the Exchange Act which prescribe that association rules may not impose any burden on competition not necessary or appropriate in furtherance of the purposes of Title 15 of the United States Code.⁴ Furthermore, as emphasized through case law, the Commission must analyze carefully the potential effects of approving the Proposal to satisfy its statutory obligations and only should approve the Proposal if the Commission affirmatively determines the Proposal, including the Proposed New Information gathering requirement contained therein, is consistent with the Exchange Act.⁵

If FINRA and the Commission nevertheless believe that there are benefits to investors that outweigh the burdens to members, we urge FINRA to consider a lengthy implementation period (at least 18 months) so that firms can make necessary process and systems changes to accommodate the Proposed New Information gathering fields.

Additionally, FINRA and the Commission should consider deferring action on the Proposal until the parameters of any rulemaking resulting from the Commission's Study on Broker-Dealer and Adviser Standard of Care are clear. FINRA and Commission efforts on this front should be harmonized to avoid requiring members to implement related process, procedure and control changes on a piecemeal or even inconsistent basis.

* * *

⁴ Section 15A(b) provides that "An association of brokers or dealers shall not be registered as a national securities association unless the Commission determines . . . (9) the rules of the association do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title. . ."

⁵ See *Chamber of Commerce of the USA vs. SEC*, 412 F.3d 133 (D.C. Cir. 2005), 443 F.3d 890 (D.C. Cir. 2006), *Timpanaro v. SEC*, 2 F.3d 453 (D.C. Cir. 1993), *Clement v. SEC*, 674 F.2d 641 (7th Cir. 1982).

If you have any questions, please do not hesitate to contact me at
303.626.4535.

Very truly yours,

A handwritten signature in black ink that reads "Pamela Lewis Marlborough/ke". The signature is written in a cursive style with a large initial "P" and a trailing "ke" at the end.

Pamela Lewis Marlborough
Associate General Counsel

cc: Robert Cook, Director, Division of Trading and Markets
John Ramsay, Deputy Director, Division of Trading and Markets
Katherine England, Assistant Director, Division of Trading and Markets