



May 4, 2011

Via Electronic Filing

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

**Re: Release No. 34-64260; File No. SR-FINRA-2011-016 (Proposed Rule Change to Delay the Implementation Date of FINRA Rule 2090 and FINRA Rule 2111)**

Dear Ms. Murphy:

The Cornell Securities Law Clinic (the “Clinic”) opposes the Securities and Exchange Commission’s (the “SEC”) grant of the Financial Industry Regulatory Authority’s (“FINRA”) request to delay the implementation date of the modified suitability and “know your customer” rules. As set forth below, FINRA does not give any evidence of a substantial need for the delay. Additionally FINRA’s request for a delay, using Rule 19b-4(f)(6) or a “non-controversial” rule change, is also inconsistent with and significantly affects investor protection.

**I. Procedural History of the Non-Controversial Rule Change Proposal**

- In May 2009, FINRA requested comment in *Regulatory Notice 09-25* on proposed consolidated FINRA rules governing suitability and “know your customer” obligations.<sup>1</sup>
- On July 30, 2010, after an evaluation of the comments in response to *Regulatory Notice 09-25*, FINRA filed its Rule Change proposal to the SEC (the “Original Rule Change Proposal”).<sup>2</sup>
- On August 19, 2010, the SEC in the *Federal Register* sought public comment on FINRA’s Original Rule Change proposal.<sup>3</sup>

<sup>1</sup> Financial Industry Regulatory Authority, Inc., *Regulatory Notice 09-25* (May 2009), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p118709.pdf>.

<sup>2</sup> Financial Industry Regulatory Authority, Inc., SR-FINRA-2010-039, Text of Proposed Rule Change (hereinafter “Text of Proposal”), available at <http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p121835.pdf>.

<sup>3</sup> See Securities Exchange Act Release No. 62718 (August 13, 2010), 75 FR 51310

- On August 26, 2010, the SEC corrected its notice in the *Federal Register* and again sought public comment.<sup>4</sup>
- On October 21, 2010, after an evaluation of the comments in response to the *Federal Register*, FINRA filed its amended Rule Change proposal to the SEC (the “Amended Rule Change Proposal”).<sup>5</sup>
- On November 17, 2010 the SEC approved FINRA’s Amended Rule Change Proposal.<sup>6</sup>
- On January 12, 2011 FINRA issued *Regulatory Notice* 11-02 regarding the new rules and implementation date of October 7, 2011.<sup>7</sup>
- On April 7, 2011, after an evaluation of the comments in response to the *Federal Register* and *Regulatory Notice* 11-02, FINRA filed a “non-controversial” rule change proposal (the “Non-Controversial Rule Change Proposal”).<sup>8</sup>

## II. The Reasons Underlying the Non-Controversial Rule Change Proposal are Insubstantial

According to FINRA, one of the reasons for the delay in the effective date of the new suitability and “know your customer” rules was in response to comments received from firms requesting more time to adjust to the new rules before they become effective. (See Securities Exchange Act Release No. 34-64260 at 3). The SEC should reject a delay of the implementation date because the firms’ comments are insubstantial. The firms should have known about FINRA’s proposed changes to the suitability and “know your customer” rules since the beginning of the rule change proposal process in May 2009, detailed above.

The firms had the time and should have been prepared in the likelihood that the SEC would approve the proposal. In addition, as previously scheduled, the SEC will have given the firms, from the time the SEC approved the Amended Rule Change Proposal until its original effective date, eleven months to prepare for the change. Finally, the firms’ comments are also insubstantial because they give no reason why they need more time than what the SEC would have already given them to adjust to the changes.

---

(August 19, 2010) (Notice of Filing of Proposed Rule Change; SR-FINRA-2010-039), *available at* <http://edocket.access.gpo.gov/2010/pdf/2010-20537.pdf>.

<sup>4</sup> See Securities Exchange Act Release No. 62718A (August 20, 2010), 75 FR52562 (August 26, 2010) (Corrected Notice of Filing of Proposed Rule Change;SR-FINRA-2010-039), *available at* <http://69.175.53.6/register/2010/Aug/26/2010-21228.pdf>.

<sup>5</sup> Amendment No. to FINRA–2010–039, dated October 21, 2010 (“Amendment No. 1”), *available at* <http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p122318.pdf>.

<sup>6</sup> See Securities Exchange Act Release No. 63325 (November 17, 2010), 75 FR 71479 (November 23, 2010) (Order Approving File No. SR-FINRA-2010-039), *available at* <http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p122480.pdf>.

<sup>7</sup> Financial Industry Regulatory Authority, Inc., *Regulatory Notice* 09-25 (May 2009), *available at* <http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p122778.pdf>

<sup>8</sup> Financial Industry Regulatory Authority, Inc., SR-FINRA-2011-016, Text of Non-Controversial Rule Change (hereinafter “Non-Controversial Rule Change Proposal”), *available at* <http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p123452.pdf>.

### III. The Non-Controversial Rule Change Proposal is Procedurally Unsound

A “non-controversial” rule change may take effect upon filing pursuant to Section 19(b)(3) of the Act<sup>9</sup> and paragraph (f)(6) of Rule 19b-4. Normally, a “non-controversial” rule change filed under Rule 19b-4(f)(6) has a 30 day operative delay after the filing date.<sup>10</sup> However, under Rule 19b-4(f)(6)(iii), the SEC may waive the 30 day operative delay if such action is consistent with the protection of investors or the public interest.<sup>11</sup>

As requested by FINRA, the SEC granted the Non-Controversial Rule Change Proposal, which delays the implementation date of the new suitability and “know your customer” rules by nine months, as a “non-controversial” rule change. FINRA and the SEC state such a delay is consistent with the protection of investors because FINRA members remain subject to existing NYSE and NASD suitability and “know your customer” obligations. (See Securities Exchange Act Release No. 34-64260 at 5).

The Non-Controversial Rule Change Proposal, however, is inconsistent with the protection of investors or the public interest. Delaying the effective date of the new suitability and “know your customer” rules will deprive investors for an additional nine months of the benefits the modified rules will bring, thus being inconsistent with investor protection.

Indeed, FINRA stated, in its Original Rule Change Proposal, when it proposed the modification to the suitability and “know your customer” rules, that such changes would “strengthen and clarify” the already existing rules.<sup>12</sup> FINRA also made modifications in the new suitability and “know your customer” rules, such as adding consistent terminology and providing detailed explanations of terms. These modifications further the goals of investor protection, according to FINRA, because they “[require] firms and associated persons to know, deal fairly with, and make only suitable recommendations to customers.”<sup>13</sup> FINRA has also stated in its Original Rule Change Proposal that “the suitability and ‘know your customer’ obligations are *critical* to ensuring investor protection and fair dealing.”<sup>14</sup>

Pursuant to Rule 19b-4(f)(6), a “non-controversial” rule change must not effect a change that significantly affects the protection of investors.<sup>15</sup> The SEC should not have granted the Non-Controversial Rule Change Proposal because such a delay significantly affects an investor by impeding on the goals of investor protection for the reasons already stated above.

---

<sup>9</sup> 15 U.S.C. 78s(b)(3).

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

<sup>11</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>12</sup> Text of Proposal at 5.

<sup>13</sup> Amendment No. 1 at 10.

<sup>14</sup> Text of Proposal at 5 (alteration in original).

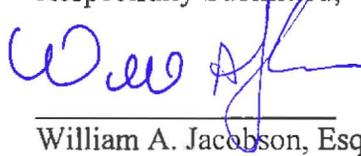
<sup>15</sup> See 17 CFR 240.19b-4(f)(6)(i). “Effecting a change that: (i) does not significantly affect the protection of investors or the public interest”

Although the SEC indicates the delay will further investor protection by giving firms more time to implement procedural changes and educate their employees of these new rules, such a benefit does not outweigh the loss investors will experience in the absence of these extra protections. (See Security Exchange Act Release No. 34-64260 at 3).

IV. **Conclusion**

In conclusion, the Clinic opposes FINRA's Non-Controversial Rule Change Proposal, which requested a "non-controversial" rule change to extend the implementation date of the new suitability and "know your customer" rules.

Respectfully Submitted,



William A. Jacobson, Esq.  
Associate Clinical Professor of Law  
Director, Cornell Securities Law Clinic



Nelsy De La Nuez  
Cornell Law School '11