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June 29, 2009

Via E-mail: pubcom@finra.org

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K. Street, NW
Washington, DC 20006-1506

**Re: Regulatory Notice 09-24
FINRA Rule Governing Know Your Customer and Suitability Rules**

Dear Ms. Asquith:

Wells Fargo Advisors, LLC (“WFA”) is pleased to comment on FINRA’s proposed Rule 2090 (“know your customer”) and proposed Rule 2111, on suitability. WFA supports generally the principles underlying proposed Rule 2090 and Rule 2111. We file this brief letter to highlight some concerns raised by the proposed rules in their current form.

WFA consists of brokerage operations that administer over \$900 billion in client assets. It accomplishes this task through 15,600 full-service financial advisors in 1,100 branch offices in all 50 states and 5,900 licensed financial specialists in 6,610 retail bank branches in 39 states.

Proposed Rule 2090 – Know Your Customer

“Know your customer” and suitability rules are the basic building blocks of the relationship between financial advisors, clients and brokerage firms. A threshold question concerns whether FINRA should place the underlying tenets of both rules into one comprehensive rule. Though FINRA states that “the obligation arises at the beginning of the customer/broker relationship and does not depend on whether a recommendation has been made,” placing the information in the same section as suitability will give the rules a logical flow and give the clarity to the appropriate information to gather at the relevant stage of the investment relationship.

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Regardless of where it situates “know your customer” in the rule book, FINRA’s Supplementary material raises some concerns.¹ “Financial profile” as used there is an undefined term. Securities professionals likely will have differing and often confusing standards on the elements of a “financial profile” such that there will be no consistency regarding what information needs to be gathered in order to satisfy the “know your customer” requirements. It appears that the supplementary material is itself making a connection to the suitability rule’s (proposed Rule 2111(a)) requirements for “customer information.”² FINRA must provide a clear definition of “financial profile” that the brokerage industry can use uniformly in establishing and managing their relationships with investors.

A second definitional issue in the “know your customer” supplementary material is the inclusion of “investment objectives.” Many firms in the industry provide customers the opportunity to participate in on-line, self-directed accounts. Brokerage firms using this model ask that customers provide essential information in order to participate in these types of accounts which satisfies the “know your customer” rules. Traditionally, these accounts have not needed to list investment objectives since the broker is not making recommendations and clients determine their own investment objectives and manage their account accordingly. The proposed supplementary language specifically mandates that brokers gather “investment objectives” as a part of uncovering “essential facts.” The adoption of the supplementary language would unduly expand the requirements set forth in the “know your customer” rule causing an unnecessary and burdensome requirement for self-directed customer accounts with no demonstration of a benefit. Therefore, we recommend that FINRA remove the “investment objectives” requirement under proposed Rule 2090 or create an exemption for self-directed customer accounts.

Proposed Rule 2111 – Suitability

WFA generally supports the proposed language set forth in Rule 2111 – Suitability as the basic suitability obligations³ have long stood for not only customer protection but protection for firms. Accordingly, gathering and retaining customer information when opening and servicing accounts is simply good business as well as complying with the regulatory requirements of suitability. There are, however, some areas of concern. The rule as drafted enumerates a number of factors that some might interpret as a mandatory “checklist” for every customer in every situation.⁴ The facts relevant to a suitability analysis will vary by customer and investment situation, and it may be that an overly formulaic application of certain listed factors prevents a firm from making the correct suitability call for that customer. It may be that some will conclude with a checklist, that a firm must give each listed factor equal weight in each suitability analysis, and a conclusion that would also lead to flawed assessments as to whether a firm reached a reasonable result on suitability. The goal is that firms gather enough relevant information to be comfortable that there

¹ FINRA states in the Supplementary Material that facts “essential” to knowing the customer include the customer’s financial profile and investment objectives or policy.

² The rule would require the following expanded list of required information from the customer, “age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance and any other information the member or associated person considers being reasonable in making recommendations.”

³ FINRA has defined three suitability obligations as: “1) reasonable basis (firms must have a reasonable basis to believe, based on adequate due diligence, that a recommendation is suitable at least for *some* investors); 2) customer specific (firms must have reasonable grounds to believe a recommendation is suitable for the specific investor); and 3) quantitative (firms must have a reasonable basis to believe the number of recommended transactions within a certain period is not excessive.”

⁴ See footnote 2, above.

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is a reasonable and supportable basis for concluding that its recommendation is suitable. We join the call of others that FINRA modify the rule to allow the industry to apply the factors flexibly and assign them varying importance depending upon the facts and circumstances of a given recommendation.

The proposal needs to clarify some of the terms it uses for the enumerated required information. Specifically, FINRA should further define the phrases “investment time horizon” and “liquidity needs.” Although FINRA has attempted to quantify investment time horizon and liquidity needs⁵, the definitions of and expectations for these terms are still ambiguous. FINRA should make clear whether it is expecting an overview of the investment time horizon and liquidity needs for each account at opening or as a subset of information gathered at each transaction in a given product within the account.

It is important to keep in mind that many products now solicit information regarding the length of expected investment as well as liquid assets on hand and/or liquid net worth prior to purchase. WFA strongly recommends that FINRA further define these terms and provide clear guidance on when and how the information should be gathered and maintained.

FINRA has also added language in the proposed rule that would ask brokers to gather “any other information” considered to be reasonable in making “recommendations.”⁶ This factor is ambiguous and overly broad. It would be nearly impossible for a broker or firm to adequately cover “any other information” that a customer may have. The industry relies on customers to provide this information openly and honestly in order to give them the best service and products for their individual needs. FINRA’s ambiguity in this provision will leave the door open to costly and time consuming litigation to interpret the limits of “any other information.” In addition, it is impractical for FINRA to expect firms to adequately supervise and maintain the technology needed for such an ambiguous requirement. Unless FINRA makes it clear that industry professionals should consider flexibly the current list of enumerated information in making a suitability determination, it should eliminate this language in the proposed rule.

FINRA sought comments on whether they should expand the suitability obligations to include “all recommendations of investment products, services and strategies made in connection with a firm’s business, regardless of whether the recommendations involve securities.” WFA provides a wide range of products, financial services and strategies to their customers through brokerage and bank accounts. We are able to satisfy supervisory and regulatory obligations set forth by each governing agency for all recommendations made regardless of the attachment to a security product. Expanding the suitability obligations would duplicate or overlap current supervisory and regulatory obligations. Additionally, it is unclear how FINRA would monitor and review the application of the expanded suitability language. FINRA has not explained how it will develop the expertise to review and enforce the standards for countless non-securities products. FINRA should refrain from expanding the suitability rule to include non-security recommendations.

⁵ Refer to FINRA Notice to Members, 07-43 Obligations Relating to Senior Investors and Highlights Industry Practices to Serve these Customers.

⁶ Proposed Rule 2111(a).

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Institutional Customer Exemption

FINRA has provided an exemption for an institutional account under proposed Rule 2111(b)⁷. WFA fully supports FINRA's effort to provide a constant definition of institutional accounts versus institutional customer. The additional requirement of receiving notification from the institutional customer that they will "affirmatively forego" their customer-specific obligation of suitability is an untenable and unnecessary rule provision. Institutional customers are usually sophisticated, and they have independent obligations to make suitable decisions in the management of the institutional account. For example, some have obligations under ERISA or state municipal, trust or corporate law. Few brokers will have the full financial picture of many institutional accounts, and they are unlikely to be familiar with the full legal standards that apply. Forcing brokers to make a suitability determination for such large and varying institutions likely will be at best random guesses and illusory. Brokerage firms are already under an obligation to determine the customer's capacity to exercise independent judgment and to evaluate the customer's ability to review recommendations by the firm. These factors supersede the need for an affirmative indication from the firm as to whether they need the protections of suitability afforded individual customers. Therefore, WFA strongly recommends that FINRA remove this requirement in the proposed exemption language.

Thank you for providing WFA the opportunity to comment on the "know your customer" and suitability rule proposals. If you have any questions regarding this comment letter, please do not hesitate to contact me.

Sincerely,

Ronald C. Long
Director, Regulatory Affairs

⁷ The proposed language is as follows: "(1) the institutional customer affirmatively indicates that it is willing to forego the protection of the customer-specific obligation of the suitability rule and (2) the member or associated person has a reasonable basis to believe that the institutional customer is (A) capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies involving a security or securities and (B) exercising independent judgment in evaluating the member's or associated person's recommendations. Where an institutional customer has delegated decision-making authority to an agent, such as an investment advisor or a bank trust department, these factors shall be applied to the agent."