

June 29, 2009

VIA ELECTRONIC MAIL

Ms. Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1500

Re: *FINRA Regulatory Notice 09-25 – Proposed Amendments to the Suitability and Know Your Customers Rules*

Dear Ms. Asquith:

TD AMERITRADE, Inc.¹ (“TD Ameritrade” or “the Firm”) appreciate the opportunity to comment on the above referenced Regulatory Notice in which FINRA proposes to adopt new modified rules and related Supplementary Material governing suitability and know-your-customer obligations in the Consolidated FINRA rulebook. Although TD Ameritrade applauds FINRA’s efforts to streamline and consolidate the NASD and NYSE rulebooks, TD Ameritrade strongly opposes the proposed rule change regarding the collection of suitability-like information at account opening because it creates a significant potential for unintended consequences that could adversely impact member firms’ ability to offer brokerage services to self-directed clients. TD Ameritrade also shares its perspective on other aspects of the proposal below.

Know Your Customer Information at Account Opening

Proposed Rule 2090 and Supplemental Material .02 would impose an obligation on firms to obtain “essential facts” about all customers upon account opening “including the customer’s financial profile and investment objectives or policy.” FINRA notes that “[t]his obligation arises at the beginning of the customer/broker relationship and does not depend on whether a recommendation has been made.”

Existing rules require firms to collect essential facts about a client when opening an account. Firms are required to confirm the identity of the customers, their address, the legal authorization of persons on the account, the source of funding, to name a few. Many firms also collect additional information from customers for many reasons. For example, information may be collected to determine what type of products customers may be interested in, or to allow the firm to approve more easily the opening of options or margin accounts.

¹ TD Ameritrade is a wholly owned broker-dealer subsidiary of TD AMERITRADE Holding Corporation (“TD Ameritrade Holding”). TD Ameritrade Holding has a 34-year history of providing financial services to self-directed investors. TD Ameritrade Holding’s wholly owned broker-dealer subsidiary, TD Ameritrade serves an investor base comprised of over 5.1 million funded client accounts with approximately \$258 billion in assets. In addition, on June 12, 2009, TD Ameritrade Holding completed the acquisition of thinkorwim Group, Inc., including its broker-dealer subsidiary, thinkorswim, Inc.

The key point is that a firm's decision on what information to collect beyond the minimum requirements is driven by the firm's obligations to its customers based upon its business model and applicable regulations. For firms offering self-directed brokerage accounts, it is not necessary for the firm to know the customer's financial profile or investment objectives, beyond those requirements that may be specifically tied to an options account. In fact, if a customer opens a self-directed brokerage account, provides such information at account opening and decides to trade in a fashion inconsistent with such information, there is significant concern that regulators, arbitration panels and courts may later seek to hold the firm liable for allowing the customer to trade inconsistent with their stated objectives.

TD Ameritrade doubts that FINRA intended to create such an obligation for brokers currently offering investors self-directed brokerage services to investors. Moreover, customers already find that providing unnecessary personal information is intrusive and it unnecessarily adds superfluous information to the firm's records required to be maintained in a secure fashion. As a result, the Firm requests that FINRA amend its proposal and not expand the know your customer requirement at account opening and continue to allow member firms to decide what information to collect beyond the essential facts as required today.

Suitability Obligations to Non-Securities Investment Products

FINRA requests comment on whether it should expand the suitability requirement to all recommendations of investment products, services, and strategies, regardless of whether the recommendation involves securities.

TD Ameritrade believes it is appropriate for suitability obligations to be limited to securities. In particular, it would appear that the collection of suitability information before recommending cash management products, like bank sweep and bank savings products, would be a poor and ineffectual use of time and resources given that such products are acknowledged to be suitable for all clients. This position is consistent with current NASD Rule 2310, which exempts money market fund recommendations from a suitability analysis. In addition, some products, like commodities, are subject to regulatory requirements administered by other regulatory authorities, and imposing an additional suitability obligation in such a situation could create conflicting standards for member firms selling such products.

Information Required to be Gathered When Determining Suitability

FINRA proposes that a suitability analysis must include not only what the customer discloses, but also, "information that is known by the member or associated person." TD Ameritrade submits that it will be impracticable for member firms to create policies and procedures reasonably designed to ensure compliance with this proposal, and would not be necessarily in the best interest of customers.

By way of example, suppose a customer maintains several accounts at a member firm and its affiliates, each with its own purpose: (1) a self-directed 401(k) account; (2) an advised account seeking to allocate among various ETFs to save for a child's college expenses; (3) a brokerage account used by the customer to seek aggressive growth, with a high risk tolerance; and (4) an account to carry out a 10b5-1 trading plan. For each account, the customer may speak to different registered representatives. In addition, the affiliate companies may not be permitted to share the customer's information. Moreover, the discussions may be very specific to the account in question expressing the customer's varied intent with regard to each specific account. The Firm submits that not only would it be extremely difficult to design

procedures reasonably designed to ensure that each representative has knowledge of every conversation a customer has with a firm, but that it may have the unintended consequence of delaying services to a customer while the different divisions or companies sort out the varied information obtained under differing circumstances by a customer. As a result, comments, questions and discussions had regarding one situation or account should not be imputed to a firm and its representatives each time a different recommendation is made. Given this, the Firm submits that such a standard is impractical, not in the customer's best interest and should be withdrawn.

FINRA also proposes Rule 2111(a) to require member firms to collect additional information when making a suitability determination: (1) age; (2) investment experience; (3) investment time horizon; (4) liquidity needs; and (5) risk tolerance. Current NASD Rule 2310 requires member firms to collect the following information before executing a recommended transaction:

- (1) the customer's financial status;
- (2) the customer's tax status;
- (3) the customer's investment objectives; and
- (4) such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

TD Ameritrade believes that firms should have the ability to determine the information they need to collect when recommending products and services. For instance, information that is important to collect in recommending one product may be unnecessary in recommending another. Also, from a practical standpoint, customers will sometimes balk at giving the necessary information as they perceive the questions to be too probing and private. As a result, TD Ameritrade believes member firms should have the discretion to determine what information beyond the current NASD Rule 2310 requirements is necessary in making a suitability determination. In many cases, member firms go beyond what is required by Rule 2310. Ultimately, the member firm must be comfortable that it can demonstrate that it had a reasonable basis to make the recommendation.

Alternatively, TD Ameritrade suggests that proposed Rule 2111(a) list the additional information to collect as recommended but not required. Whether to collect such additional information should be left to the discretion of the member firm.

Finally, TD Ameritrade requests that FINRA clarify the continuing applicability of NASD Notice to Members 01-23, which was issued as a Policy Statement interpreting NASD Rule 2310. Specifically, the Firm requests whether NASD Notice to Members 01-23, which provides guidance on what constitutes a recommendation for purposes of the suitability rule, will remain in effect after NASD Rule 2310 is eliminated.

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TD Ameritrade appreciates the opportunity to comment on FINRA's latest proposals regarding suitability and know your customer requirements. In sum, TD Ameritrade comments are as follows:

- FINRA should not create regulations that have detrimental effects on businesses that serve the self-directed investor and, as a result, FINRA should not expand know your customer requirements concerning the collection of information at account opening to include a customer's financial profile and investment objectives.
- Suitability need not and should not be extended to non-securities investments.
- FINRA should not require member firms to collect additional information when making suitability determinations. In the alternative, the Firm recommends the additional information collection be left to the discretion of member firms.

Please contact me at 443-539-2128 if you have any questions regarding the Firm's comments.

Respectfully Submitted,

/S/

John S. Markle
Deputy General Counsel, Regulatory Operations