



Cornell University
Cornell Law School

William A. Jacobson, Esq.
Associate Clinical Professor
Director, Securities Law Clinic
G57 Myron Taylor Hall
Ithaca, New York 14853
t. 607.254.8270
f. 607.255.3269
waj24@cornell.edu

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Via Electronic Filing

Ms. Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority
1735 K Street, NW
Washington, DC 20006-1506

**RE: FINRA Request for Comment 09-25 (Proposed Consolidated FINRA Rules
Governing Suitability and Know-Your-Customer Obligations)**

Dear Ms. Asquith:

The Cornell Securities Law Clinic (the "Clinic") welcomes the opportunity to comment on the proposal (the "Rule Proposal") of the Financial Industry Regulatory Authority ("FINRA") to consolidate FINRA rules governing suitability and know-your-customer obligations. The Cornell Securities Law Clinic (the "Clinic") is a Cornell Law School curricular offering, in which law students provide representation to public education as to investment fraud in the largely rural "Southern Tier" region of upstate New York. For more information, please see <http://securities.lawschool.cornell.edu>.

The Rule Proposal seeks to better protect investors by incorporating modified forms of NASD Rule 2310, addressing suitability obligations, and Incorporated NYSE Rule 405, addressing know-your-customer obligations, in the Consolidated FINRA Rulebook. Consequently, two rules are proposed: (1) The new suitability rule, proposed FINRA Rule 2111, which will replace the NASD Rule 2310; and (2) the new know-your-customer rule, proposed FINRA Rule 2090.

The Clinic would like to note as an initial matter that the suitability and know-your-customer obligations are critical to protecting investors. In light of this, the Clinic generally supports the Rule Proposal because the Rule Proposal effectively addresses various loopholes that member firms have used in the past to avoid these obligations. The Clinic, however, believes that a few terms in the Rule Proposal require additional clarification to facilitate successful implementation of the new rules and minimize possible future litigations that may arise from ambiguous language.

A. The Clinic Generally Supports the New Suitability Rule (FINRA Rule 2111)

The proposed FINRA Rule 2111 introduces four material changes. First, the proposed FINRA Rule 2111 applies suitability obligations to a recommended transaction *or* investment strategy involving a security or securities. Second, the proposed FINRA Rule 2111 heightens the standard for gathering and use of information as part of suitability analysis. Third, the proposed FINRA Rule 2111 clarifies the partial exemption for transactions or investment strategies recommended to institutional customers. Fourth, the proposed FINRA Rule 2111 requires firms to use reasonable efforts to collect more information about their customers than enumerated under NASD 2310(b); namely, firms must use reasonable efforts to obtain the customer's age, other investments, investment experience, investment time horizon, liquidity needs, and risk tolerance in addition to the customer's financial status, tax status, and investment objectives.

Furthermore, the new Supplementary Material codifies in the Consolidated FINRA Rulebook the requirement of fair dealing, the three general types of suitability obligations, and the requirement that a recommendation of a transaction or investment strategy involving securities be consistent with the reasonable expectation that the customer has the financial ability to meet such a commitment.

The Clinic believes that the proposed FINRA Rule 2111 effectively addresses a loophole that member firms have used in the past to escape the suitability obligations. Firms that recommended a strategy arguably could have escaped the suitability obligations if they were not recommending a particular transaction. Under the proposed FINRA Rule 2111(a), those firms will be subjected to suitability obligations because the obligations extend to recommended investment strategies.

The Clinic, however, believes that the term "recommended investment strategy" in the proposed FINRA Rule 2111 requires additional clarification. Non-exclusive examples of what constitutes a "recommended investment strategy" would offer clear guidance to firms regarding when suitability obligations apply. For instance, codifying a "hold" recommendation as one of the examples of a recommended investment strategy would clear any alleged confusion as to whether or not "hold" recommendations are part of an "investment strategy."

Also, the Clinic is concerned that the disappearance of certain examples used in NASD IM-2310-2, explaining what activities constitute a violation of the fair dealing responsibility, may create unnecessary confusion. Recommendation of speculative low-priced securities (NASD 2310-2(b)(1)), excessive trading activity (NASD 2310-2(b)(2)), trading in mutual fund shares (NASD 2310-2(b)(3)), and fraudulent activities (NASD 2310-2(b)(4)) will not be enumerated in the proposed FINRA Rule 2111. NASD 2310-2(b)(5), addressing the customer's financial ability, is the only example that will be enumerated under the Supplementary Material .03 of the proposed FINRA Rule 2111.

The Clinic is concerned that firms may assert that activities which fall under the old NASD 2310-2(b)(1)-(4) will no longer violate the responsibility of fair dealing under the proposed FINRA Rule 2111 if such activities are not enumerated in the new rule or Supplementary Materials. To safeguard against this, the Clinic encourages the proposed FINRA Rule 2111 to include all the examples enumerated under NASD 2310-2(b).

Lastly, the Clinic is concerned that quantitative suitability, according to the Supplementary Material .02 of the proposed FINRA Rule 2111, is applicable only if firms have actual or *de facto* control over the account. The Clinic believes that a recommendation that is excessive in light of the customer's profile will always be unsuitable for the customer regardless of whether the member firm has control over the account. Moreover, the term "*de facto*," which is not defined in the Supplementary Material, may cause unnecessary confusion. Consequently, the Clinic recommends that the control requirement be deleted.

B. The Clinic Generally Supports the New Know-Your-Customer Rule (FINRA Rule 2090)

The proposed FINRA Rule 2090 differs from Incorporated NYSE Rule 405 in that the new know-your-customer rule requires firms to use due diligence, in regard to the opening *and* maintenance of every account, to know and retain essential facts concerning every customer.

The Clinic believes that the new know-your-customer rule, proposed FINRA 2090, is a positive improvement from the Incorporated NYSE 405 in protecting investors. The know-your-customer obligations would now apply regardless of whether there had been a recommendation.

The Clinic, however, believes that the proposed FINRA Rule 2090 can be improved in a few different ways. First, the proposed FINRA Rule 2090 removes the old Incorporated NASD 405(1) requirement that firms must use due diligence to learn the essential facts relative to every "order" and "cash or margin account." Although the proposed FINRA Rule 2111's "recommended investment strategy" or the proposed FINRA Rule 2090's "maintenance of every account" seems intended to incorporate the concept of learning the essential facts relative to every "order" and "cash or margin account," the language of the proposed FINRA Rule 2090 could be more clear on this matter. The Clinic is concerned that firms may mistakenly assert that the deletion of the terms "order" and "cash or margin account" means that their know-your-customer obligations will only extend to learning about the customer.

Second, the proposed FINRA 2090 states that the customer's financial profile and investment objectives or policy are essential to knowing the customer. The Clinic, however, believes that further clarification of the term "essential facts" is desirable. For instance, the Clinic encourages the proposed FINRA Rule 2090 to incorporate the nine factors enumerated in the proposed FINRA Rule 2111(a). The Clinic believes that each of these nine factors is essential to knowing the customer. Furthermore, these nine factors, if incorporated, will provide a clearer guideline as to the meaning of "essential facts."

C. Conclusion

The Clinic greatly appreciates the opportunity to comment on this Rule Proposal. The Clinic generally supports this Rule Proposal because the Rule Proposal addresses various loopholes that firms could have used to skirt the suitability and know-your-customer obligations. The Clinic, however, believes that additional improvements can be made. Clarification of terms such as "recommended investment strategy," in the proposed FINRA Rule 2111, and "essential facts," in the proposed 2090, will provide a clearer guidance to firms regarding what is expected of them. Also, importation of non-exclusive examples from old rules would address the confusion which may arise from removal of certain terms in the new rules.

Respectfully submitted,

William A. Jacobson

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

Sang Joon Kim

Sang Joon Kim
Cornell Law School '11