

June 29, 2009

VIA ELECTRONIC MAIL

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

**Re: Regulatory Notice 09-25: Proposed Consolidated FINRA Rules
Governing Suitability and Know-Your-Customer Obligations**

Dear Ms. Asquith:

We are submitting this letter on behalf of our clients, John Hancock Life Insurance Company, MetLife, Inc., and The Prudential Insurance Company of America (together, the "Companies"), in response to Regulatory Notice 09-25, "Proposed Consolidated FINRA Rules Governing Suitability and Know-Your-Customer Obligations" (the "Notice" or "09-25").

The Notice requests comment on two proposed rules (collectively, the "Proposed Rules"): Rule 2111 ("Proposed Rule 2111" or "Proposed Suitability Rule"), which 09-25 explains is modeled on NASD Rule 2310 and addresses member firm suitability obligations; and Rule 2090 ("Proposed KYC Rule"), which 09-25 explains is based on a modified version of NYSE Rule 405(1) and addresses know-your-customer ("KYC") obligations.

Our clients appreciate the opportunity to provide comments on the Proposed Rules. The comments herein focus on the Proposed Rules' impact on the retirement plan marketplace. The Companies, together with their affiliated broker-dealer firms are significant participants in this specialized yet important marketplace, including through the sale of variable and fixed annuities and mutual funds to 401(k), 403(b), 457, and other types of tax-qualified retirement plans. We note that each of the Companies is commenting separately through various trade groups and other associations on broader aspects of the Proposed Rules.

As set forth below, the Companies have comments on the following two aspects of Proposed Rule 2111:

- (1) the exemption for “institutional customers;” and
- (2) the expansion reflected in Proposed Rule 2111 to subject recommendations of “investment strategies” to a suitability obligation.

In addition, the Companies want to respond to the Notice’s request for comment on whether the Proposed Suitability Rule should be applied to any recommendation made by a member firm, regardless of whether such recommendation is related to a security. We also wish to comment on Proposed Rule 2090’s imposition of a KYC obligation “in regard to the . . . maintenance of every account” (emphasis added). Each of these comments is set forth below.

PROPOSED RULE 2111 – SUITABILITY RULE

1. Proposed Rule 2111’s Exemption for Recommendations to Institutional Customers

Proposal. As 09-25 notes, the suitability obligation currently applicable to institutional customers is outlined in NASD IM-2310-3, which discusses relevant factors for exempting a member firm from a suitability obligation when effecting transactions for such customers. Proposed Rule 2111 takes a different approach, identifying three critical factors for such an exemption, one of which is whether the institutional customer affirmatively indicates that it is willing to forego the protection of the customer-specific obligation of the Proposed Suitability Rule. The other two factors, which are rooted in NASD IM-2310-3, focus upon the firm’s reasonable basis for believing that the institutional customer is capable of analyzing the risks of investments independently and for believing that the institutional customer is exercising independent judgment. According to the Notice, FINRA also seeks to eliminate “internal inconsistency” by substituting the definition of “institutional account” in NASD Rule 3110(c)(4) for the definition of “institutional customer” currently set forth in NASD IM-2310-3.

Comments. At the outset, we note that NASD IM-2310-3 has been of crucial importance to member firms conducting business in the retirement plan marketplace. In that marketplace, the member firm generally has a customer relationship with the plan sponsor or trustee, not the plan participant. In many cases, the plan sponsor or trustee meets the definition of “institutional customer” in NASD IM-2310-3. Further, in the usual situation, the member firm makes an “open architecture” platform of mutual funds and group annuity products available to the plan sponsor. Thus, the member firm’s role is very limited and the products being offered are straightforward investment products. Finally, many plan sponsors and trustees have demonstrated a preference for independent judgment in the case of securities transactions. All of

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these factors generally support a determination that the member firm providing broker-dealer services to the retirement plan customer can rely on NASD IM-2310-3 with reference to any suitability obligation, yet they would be disregarded under Proposed Rule 2111. Accordingly, any changes to the approach reflected in NASD IM-2310-3 are likely to have significant impact on business practices in the retirement plan marketplace.

Affirmative Waiver. In light of the nature of the retirement plan marketplace, we urge that FINRA not advance that aspect of the proposal that would require an institutional customer to affirmatively indicate that it is willing to forego the protections afforded by the Proposed Suitability Rule. The Companies are concerned that retirement plans and/or their fiduciaries would refuse to sign affirmative waivers, even in circumstances where member firms clearly are not making recommendations, simply because signing such a waiver would in-and-of itself raise significant concerns for retirement plans and their fiduciaries, and would require analysis under fiduciary standards established by the Employee Retirement Income Security Act of 1974, as amended ("ERISA") – both a burden and a hypothetical exposure that plan fiduciaries might simply decline to undertake. This would create significant disruption in the retirement marketplace.

Rather, instead of the "affirmative waiver" requirement, FINRA should follow the existing framework, which has worked well since 1996 and appropriately and directly provides that the member firm must make a determination of an institutional customer's capability to analyze investment risk and exercise independent judgment, which is affected by the totality of the written or oral understandings between the broker-dealer and the institutional customer. Where a broker-dealer has a reasonable belief that an institutional customer is capable of evaluating risk and is exercising independent judgment, a member's obligation to determine suitability under Proposed Rule 2111 should be deemed to be satisfied. A written "waiver" of suitability should not be required.

Definition of Institutional Account. Also, we urge that FINRA not advance that aspect of Proposed Rule 2111 that would substitute the definition of "institutional account" that appears in NASD Rule 3110(c)(4) in place of the definition of "institutional customer" that appears in NASD IM-2310-3. The "institutional account" definition is limited to banks, savings and loans associations, insurance companies, registered investment companies, registered investment advisers, or any other entity with total assets of at least \$50 million. However, IM-2310-3 allows for a broader class of investors, indicating that it is more appropriately applied to an institutional customer with at least \$10 million invested in securities in its portfolio or under management.

We believe that the current class of institutional customer eligible under NASD IM-2310-3 should be retained. As indicated above, member firms operating in the retirement plan marketplace have had long and extensive experience operating under that interpretive material. In their experience, that IM has afforded flexibility and has appeared to operate effectively. We

note that 09-25 does not express any concerns with the current class of institutional customers, other than its inconsistency with other NASD rules.

If FINRA determines that it is necessary to harmonize the “institutional customer” concept in the Proposed Suitability Rule with other rules, we would urge that FINRA refer to the definition of “institutional investor” in NASD Rule 2211(a)(3), instead of relying solely on NASD Rule 3110(c)(4). Under NASD Rule 2211, institutional sales material may be distributed only to “institutional investors,” who are defined to include several different categories of persons, including those identified in NASD Rule 3110(c)(4). We believe this definition is better tailored to address the structure of the retirement plan marketplace since it adds the following entities:

- employee benefit plans meeting the requirements of Section 403(b) or Section 457 of the Internal Revenue Code with at least 100 participants;
- qualified plans with at least 100 participants; and
- governmental entities or subdivisions thereof.

We request that FINRA revise Proposed Rule 2111(b) to be consistent with standards for communications with institutional investors to ensure that the types of plans identified above are clearly covered by the portion of the Proposed Suitability Rule applicable to institutional investors.

We further request that FINRA confirm that an entity that is outside the list of plans identified above (e.g., a 403(b) plan with 90 participants) may be determined by a broker-dealer to be an “institutional customer.” We note that FINRA may wish to advance such a standard in terms of there being a rebuttable presumption against determining that an entity that is outside the list of plans identified above is an institutional customer. The rebuttable presumption could only be satisfied by the broker-dealer undertaking and formalizing a due diligence review of the plan sponsor. We further note that such due diligence determinations would be subject to the review of FINRA examiners.

2. Applicability of Rule 2111 to Recommendations of “Investment Strategies”

Proposal. Proposed Rule 2111 would apply the suitability obligation to recommendations of “investment strategies” involving securities. According to the Notice, this change “would codify longstanding SEC and FINRA decisions and other interpretations stating that NASD Conduct Rule 2310 covers both recommended securities and investment strategies.”

Comment. Our clients have serious concerns about a proposal to apply the long-standing “suitability” obligation to something other than a securities transaction. The Notice has offered no guidance or explanation regarding what constitutes an “investment strategy,” let alone what constitutes a “suitable” investment strategy recommendation. Accordingly, we urge FINRA to remove the reference to “investment strategy” in Proposed Rule 2111(a).

If FINRA determines to proceed with a rule proposal that would extend the suitability rule to recommendations of “investment strategies,” we ask that FINRA explicitly acknowledge that any information determined to be “investment education” under ERISA is specifically excepted from coverage. By way of background, in 1996 the Department of Labor published detailed guidance regarding the following four categories of information that were determined to be of an educational nature:

- descriptive information about the plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan;
- general financial and investment information, including basic investment concepts, historic differences in the return of asset classes, effects of inflation, and assessment of investment horizon and risk tolerance;
- generic asset allocation models (including models relating to specific plan investment options if specified disclosures are provided) that are based on generally accepted investment theory, are not individualized, and are accompanied by specified disclosures; and
- interactive investment materials that, essentially, incorporate the above.¹

Providing for this type of an exception would allow for continued use of material of an educational nature that has long been accepted in the retirement plan marketplace and sanctioned by the Department of Labor.

3. Applying Proposed Rule 2111 to Non-Securities Product Recommendations

Proposal. The Notice requests comment on whether Proposed Rule 2111 should apply to recommendations by member firms of transactions in non-securities products.

Comment. We believe that there is no basis to apply Proposed Rule 2111 to recommendations of non-securities products. In many cases, non-securities products are subject to separate bodies of law governing their sale and marketing. We further believe that any serious consideration about extending the rule to non-securities products should only be undertaken after

¹ See 29 C.F.R. Sect. 2509-96-1(d).
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careful analysis and deliberation. Advancing an issue of this magnitude in the context of an isolated rule proposal is likely to lead to fragmented, overlapping and/or conflicting regulation.

PROPOSED FINRA RULE 2090 – KNOW YOUR CUSTOMER

Proposal. Proposed Rule 2090, modeled after NYSE Rule 405(1), would impose certain KYC obligations on FINRA firms. While Rule 2090 borrows heavily from Rule 405(1), it does impose an additional obligation on member firms to meet the standards of the rule “in regard to the . . . maintenance of every account.”

Comment. We believe that Proposed Rule 2090’s requirement to meet the standards in regard to the maintenance of an account is vague and, as such, would lead to practical implementation issues, particularly in the retirement plan marketplace. Accordingly, we urge FINRA to revise Proposed Rule 2090 to delete the requirement that a firm be subject to a KYC obligation with respect to the maintenance of every account.

Alternatively, if FINRA determines to impose the KYC obligation on the maintenance of accounts on an ongoing basis, we believe that FINRA should propose additional guidance regarding what that requirement would entail, and provide an opportunity for further comment. For example, FINRA should propose guidance regarding the nature of an account in the 403(b) market, 401 market and 457 market, as well as other markets, and the elements of essential facts that should be maintained about each account.

CONCLUSION

John Hancock Life Insurance Company, MetLife, Inc., and The Prudential Insurance Company of America, appreciate the opportunity to comment on the Proposed Rules under FINRA’s consolidated rulebook project.

Please do not hesitate to contact me (212.389.5052) if you have any questions.

Sincerely,

Clifford E. Kirsch 
Clifford E. Kirsch

cc: Paul Cellupica, MetLife, Inc.
Jack Ewing, The Prudential Insurance Company of America
Thomas Tagliamonte, John Hancock Life Insurance Company
Susan Krawczyk