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June 29, 2009

**VIA EMAIL @ [pubcom@finra.org](mailto:pubcom@finra.org)**

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

**RE: FINRA Regulatory Notice 09-25**

Dear Ms. Asquith:

The purpose of this correspondence is to comment on FINRA's Regulatory Notice 09-25, which proposes consolidating FINRA's Suitability Rule with NYSE's Know Your Customer Rule. Levin Papantonio focuses its practice representing both retail and institutional investors who have been harmed by the misconduct of the securities industry ("Industry"). We are encouraged by FINRA's efforts to clarify Industry suitability obligations, and have taken this opportunity to not only show our support for a portion of the proposed revisions, but also to recommend additional changes that will promote investor protection and close significant gaps in the regulatory structure.

We strongly agree with the provisions of Rule 2111(a), which would require registered representatives to not only have a reasonable basis for "any recommended transaction," but include "investment strategies" as well. In addition, the proposed rule broadens the current information gathering process to now require the Industry to make reasonable efforts to obtain information regarding the "customer's 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 to be reasonable in making recommendations." This is an important and long overdue improvement that more accurately reflects an appropriate pre-recommendation analysis.

The recognition that the proposed Suitability Rule includes recommended investment strategies is also a very important improvement. The incorporation of investment strategies more accurately reflects the current relationship of many broker-dealers with their clients. Many of our clients do not go to their broker-dealer to place an order. Rather, they predominately seek advice on how to invest their life savings given their current employment status and need for income.

The Suitability Rule, however, fails to define what a recommendation is. For years the Industry has contended that a recommendation should be interpreted narrowly and only cover a buy or a sale. The fact that the proposed Suitability Rule does not capitalize on an opportunity to incorporate a recommendation to hold nor does it confirm that a suitability analysis includes a duty to review and approve a portfolio when it is "accepted" at a new broker-dealer. These two fact scenarios are common defenses used by the Industry. The problem, however, is that no one from the Industry typically explains to the investor that a recommendation to hold or a request for an investor to follow his/her registered representative to a new broker-dealer when a recommendation to hold is made that this type of advice falls outside the suitability requirements.

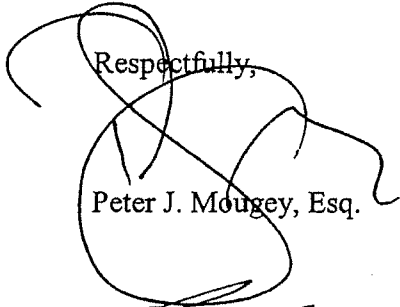
FINRA now has an opportunity to define what constitutes a recommendation in a way that provides additional protection for investors. Although the proposal is a step in the right direction, it does not go far enough to include the foregoing examples. We propose that a "recommendation" be defined to include the foregoing examples. Failing to define what constitutes a recommendation creates a significant gap in investor protection that could easily be closed.

The proposed rule changes would mistakenly allow institutional customers the option to forego suitability protection. Our firm represents many institutional investors. Although the definition of institutional client includes banks, insurance companies, and investment advisors, it also includes accounts which have assets of at least 50 million. As opposed to common belief, these types of investors are in need of FINRA's protection and not commonly as sophisticated as the member of the Industry they consistently rely on. Instead, institutional investors rely heavily on investment advice to meet their needs. Reducing protection for investors of any type, let alone investors who frequently manage large portfolios, is not a wise course of action. If we have learned anything from the unregulated world of structured finance it is that "self-regulation" is not consistently a wise choice. Institutional investors should not be able to waive suitability requirements any more than an off duty peace officer should be able to waive the protection of the police force. Institutional investors are frequently the recipients of inappropriate financial advice. If anything, because of the size of the funds managed by these investors, reducing or removing protection will invite additional problems and some may be the size and scope that will be difficult to manage the ramifications. There is no legitimate reason to reduce institutional client protection that outweighs the potential problems.


Included in FINRA's Regulatory Notice 09-25 is an invitation to comment on whether suitability obligations should include all investment recommendations of investment products, services and strategies made in connection with the firm's business. We support the expansion to cover all investment recommendations. Many firms market financial products that are not defined as securities. Investors, however, are often not sophisticated to understand that a complex financial product is not a security and the financial institution they are dealing with may have a lower standard of care because they are selling one product over another. Instead, many investment firms hold themselves out to their customers and the public as entities which offer solutions to their customers' financial needs. The Industry should not be allowed to market products that may be unsuitable for its securities customers and avoid liability because the products fall outside what is covered by the Suitability Rule.

We appreciate the opportunity to comment on FINRA Regulatory Notice 09-25. We are hopeful that the proposed revisions set forth in this letter will be implemented into the Rules and submitted to the SEC.

Respectfully,



Peter J. Moughey, Esq.



Kristian P. Kraszewski, Esq.

PJM/KPK/ml