

August 3, 2009

VIA ELECTRONIC MAIL

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

**Re: Regulatory Notice 09-34: Investment Company Securities: FINRA Requests  
Comment on Proposed Consolidated FINRA Rule Governing Investment  
Company Securities**

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 09-34, *FINRA Requests Comment on Proposed Consolidated FINRA Rule Governing Investment Company Securities* (the “Notice”). The Notice proposes new FINRA Rule 2341 and related Supplementary Material (the “Proposed Rule”) for incorporation into the FINRA Consolidated Rulebook. The Proposed Rule would replace NASD Conduct Rule 2830.

Our clients appreciate the opportunity to provide comments on the Proposed Rule. The comments herein focus on the Proposed Rule’s impact on member firms operating in the retirement plan marketplace (“retirement plan broker-dealers”). The Companies, together with their affiliated broker-dealer member firms, are significant participants in this specialized yet important marketplace, which utilizes mutual funds as investments for 401(k), 403(b), 457, and other types of tax-qualified retirement plans, many of which are subject to the Employee Retirement Income Security Act of 1974, as amended (“ERISA”). We note that each of the Companies and/or its affiliates may be commenting separately through various trade groups and other associations on broader aspects of the Proposed Rule.

The Companies are concerned that the Proposed Rule, as applied to retirement plan broker-dealers, would overlap and potentially conflict with existing and proposed elaborations of disclosure standards for plans subject to ERISA, that are under consideration by all three branches of the Federal government. This concern is discussed in detail below after a general description of retirement plan broker-dealer services and the ERISA disclosure regime. In light of this concern, the Companies recommend that the Proposed Rule be revised to exclude from its coverage any customers entitled to receive compensation disclosure documents under regulations applicable to plans subject to ERISA.

## **BACKGROUND**

### **Retirement Plan Broker-Dealers**

A substantial portion of retirement plans utilize the “mutual fund platform,” in which an extensive array of mutual fund portfolios is made available as investment options for the investment of contributions in the retirement plans. These mutual fund platforms have several unique characteristics when considered in the context of the Proposed Rule. First, establishing a typical “mutual fund platform” for a retirement plan ordinarily requires the integration of a variety of services and products offered by multiple parties, including plan design and installation, plan qualification testing services, plan trustee services, plan investment option education services, plan recordkeeping and reporting, plan participant communication and enrollment services, and mutual fund servicing and net settlement services. Parties providing these integrated services may agree to work together on a “bundled” basis, in which one provider may act as the coordinator of all the service providers. Ordinarily, a retirement plan broker-dealer’s involvement in a bundled arrangement is primarily limited to introducing a prospective plan to a bundled arrangement and/or handling purchase, redemption and exchange orders for shares of the mutual funds selected for the retirement plan’s investment option platform. Second, a typical mutual fund platform is composed of a number of mutual fund portfolios, managed by different managers, and each with its own unique fees and charges structure. Third, as a matter of common practice, mutual fund portfolios and their affiliated service providers, such as investment advisers, underwriters, fund administrators and other affiliated persons (“offerors” under the Proposed Rule), may provide payments to the parties providing services for the retirement plan platform, in part in recognition of administrative costs savings realized by the funds and offerors because of the services so provided. In these circumstances, the retirement plan customer is generally evaluating the “bundled” package of products and services, and not an isolated mutual fund investment transaction or the services of, and compensation received by, a solitary member firm.

### **ERISA Disclosure Requirements**

ERISA provides existing and well-developed rules requiring disclosures to retirement plan fiduciaries and participants comparable in purpose and effect to those in the Proposed Rule. This ERISA disclosure structure is built around:

- The ERISA fiduciary standards to which plan sponsors or other persons responsible for plan-level investment decisions are subject, which obligate them to ascertain and evaluate the fees, costs and other monetary compensation associated with plan investments both prior to acquisition and on a ongoing, periodic basis;
- Disclosures to plan participants and beneficiaries, to the extent they are making investment decisions for their own retirement accounts; and
- Annual plan reports filed with the U.S. Department of Labor (“DOL”) and other agencies, which include information on investment fees, expenses and compensation and are available to plan participants and beneficiaries.

Enhancements to these disclosure requirements have been proposed by the DOL specifically in respect of indirect monetary compensation. These proposals are the culmination of a substantial undertaking and priority of DOL, dating back several years. Finally, Congress is considering legislation specifically to require more disclosure about plan investments for plan participants and beneficiaries.

As described more fully below, this ERISA structure, particularly after the pending enhancements are fully implemented, results in an integrated, continuous system of disclosures, from point of sale through the entire period of time for which the retirement plan holds an investment, that:

- Broadly requires both advance disclosure and retrospective reporting of indirect monetary compensation, in any form, received by broker-dealers and other types of companies providing bundled services to retirement plans;
- Is specifically tailored to the needs and circumstances of plan sponsors and participants;
- Recognizes the differences in the form and content of the disclosures that are appropriate and useful for (i) plan sponsors and (ii) plan participants and beneficiaries. There is, for example, the challenge of how best to inform plan participants about indirect monetary compensation without creating the misimpression that such compensation is in addition to the fees and expenses charged under the investment product;
- Takes into account the multiplicity of product types in which retirement plans invest. That is, because retirement plans invest in a range of products other than mutual funds, these ERISA rules are not limited to mutual funds or broker-dealers, and are intended to disclose indirect monetary compensation in respect of securities and non-securities on a consistent and comprehensible basis;

- Makes use of a common set of concepts and methodologies, to promote both the accessibility and the efficiency of the disclosures; and
- Otherwise reflects a careful cost-benefit balance by DOL, in the understanding that, in the retirement plan market, the costs of disclosures ultimately are borne by plan participants.

**Disclosures to Plan Sponsors and Other Fiduciaries.** DOL has long ruled that the plan sponsors or other fiduciaries, responsible either for the investment of retirement plan assets or the selection of the investment menu from which participants and beneficiaries direct their own accounts, have a duty to inform themselves of the fees, expenses and compensation payable under those investments. This duty arises from the exacting fiduciary standards established under ERISA for persons responsible for the investments or administration of retirement plans.<sup>1</sup> Fiduciaries are to evaluate these fees, expenses and compensation both in advance of the acquisition of an investment and as part of their continuous monitoring of investments on a periodic basis. DOL has provided a number of resources to assist fiduciaries in satisfying this duty.<sup>2</sup> That duty in turn creates a business imperative for retirement service and investment providers, including broker-dealers, to be responsive to plan fiduciaries.

DOL has proposed to augment that existing structure with additional, specific disclosures by broker-dealers and certain other service providers to retirement plans. On December 13, 2007, DOL proposed new regulations<sup>3</sup> to require these service providers:

- To provide their services pursuant to a written contract; and
- To provide in that contract (including any extension or renewal) advance written disclosure of, among other things:
  - The monetary compensation or fees to be received by the service provider (or its affiliate, agent or employee) for each service provided to the plan. “Compensation or fees” are defined broadly to include money or any other thing of monetary value, including indirect compensation received from a party other than the plan, plan sponsor or service provider;

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<sup>1</sup> See ERISA § 404(a) (2009).

<sup>2</sup> See, e.g., DOL’s publications *Understanding Retirement Plan Fees and Expenses* (available at <http://www.dol.gov/ebsa/publications/undrstndgrtrmmt.html>) and *401(k) Plan Fee Disclosure Tool* (available at <http://www.dol.gov/ebsa/fiduciaryeducation.html>). DOL has also published *A Look at 401(k) Plan Fees* (available at [http://www.dol.gov/ebsa/publications/401k\\_employee.html](http://www.dol.gov/ebsa/publications/401k_employee.html)) for plan participants.

<sup>3</sup> See DOL Notice, *Reasonable Compensation or Arrangement under Section 408(b)(2) – Fee Disclosure*, 72 Fed. Reg. 70988 (Dec. 13, 2007).  
8498186.1

- Whether the service provider or an affiliate expects to participate or acquire a financial or other interest in any transaction to be entered into by the plan in connection with the contract, and, if so, a description thereof;
- Whether the service provider or an affiliate has any material financial, referral or other relationship with a money manager, broker, other client of the service provider, other service provider to the plan or any other entity that does or may create a conflict of interest for the service provider in performing its services, and, if so, a description thereof;
- Whether the service provider or an affiliate will be able to affect its own direct or indirect compensation, without prior approval of an independent plan fiduciary, in connection with the performance of the services, and, if so, a description of the nature of such compensation; and
- Whether the service provider or an affiliate has any policies or procedures designed to prevent the above compensation or fees, relationships or conflicts from adversely affecting its services to the plan, and, if so, a description thereof.

The contract must require the service provider to disclose any material change in the foregoing information to a responsible plan fiduciary within 30 days of acquiring knowledge of the material change.

In addition, the contract must require the service provider to disclose all information related to the contract and compensation and fees received thereunder that is requested by the responsible plan fiduciary or plan administrator to comply with ERISA reporting or disclosure requirements.

In this respect, DOL has already amended the Form 5500 annual report filed by retirement plans with DOL and other agencies to require additional reporting of the fees and monetary compensation directly or indirectly received by broker-dealers and other service providers, particularly in the case of larger plans (plans with 100 participants or more). This reporting generally takes the form of the specific dollar amount of direct or indirect compensation received in the plan year for which the report is filed.

**Disclosures to Plan Participants.** On July 23, 2008, DOL proposed comprehensive regulations (“Proposed Participant Disclosure Rule”) to require the disclosure of certain plan and investment-related information to participants and beneficiaries in all participant-directed individual account plans (*e.g.*, 401(k) plans).<sup>4</sup> The Proposed Participant Disclosure Rule is the

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<sup>4</sup> See DOL Notice, *Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans*, 73 Fed. Reg. 43014 (July 23, 2008) (hereinafter, the “Participant Disclosure Rule Proposal Notice”).  
8498186.1

result of a two-year development process,<sup>5</sup> and is intended to “ensure that all participants and beneficiaries in participant-directed individual account plans have the information they need to make informed decisions about the management of their individual accounts and the investment of their retirement savings.”<sup>6</sup>

The Proposed Participant Disclosure Rule seeks to accomplish this goal by requiring all fiduciaries or their designees, among other things, to provide plan participants and beneficiaries with a written document disclosing certain information about each “designated investment alternative” offered under the plan (the “DOL Proposed Disclosure”).<sup>7</sup> With respect to “designated investment alternatives” with no fixed return, the DOL Proposed Disclosure would provide information including, among other things, detailed fee and expense disclosures. The fee disclosures would have to encompass all fees charged directly against a participant’s or beneficiary’s investment (*e.g.*, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, purchase fees, and mortality and expense fees). The expense disclosures would have to represent the total annual operating expenses (*e.g.*, all expenses related to investment management fees, distribution, service and administrative expenses of the investment) expressed as a percentage (*e.g.*, an expense ratio).<sup>8</sup> The Proposed Participant Disclosure Rule would require that the DOL Proposed Disclosure be delivered to each participant by a fiduciary or its designee:

- On or before the date of a participant’s plan eligibility to participate in the plan;
- Annually thereafter; and
- Within 30 days of any material change to the plan disclosure document.

The Proposed Participant Disclosure Rule would supplement (i) existing regulations under the ERISA §404(c) safe harbor for participant directed plans, mandating certain disclosures about investments to participants and beneficiaries;<sup>9</sup> (ii) the duty of plan fiduciaries, under the general fiduciary standards of ERISA, to provide information about investment fees,

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<sup>5</sup> See DOL Request for Information, *Fee and Expense Disclosures to Participants in Individual Account Plans*, 72 Fed. Reg. 20457 (Apr. 25, 2007) (requesting suggestions, comments and views from interested persons on a variety of issues relating to the disclosure of plan and investment-related fees and expenses to participants and other beneficiaries in participant-directed individual account plans).

<sup>6</sup> See Participant Disclosure Rule Proposal Notice at 43014.

<sup>7</sup> Paragraph (h)(1) of the Proposed Participant Disclosure Rule would define a “designated investment alternative” as “any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts.”

<sup>8</sup> Paragraph (h)(1) of the Proposed Participant Disclosure Rule would define “total annual operating expenses” to mean “annual operating expenses of the designated investment alternative (*e.g.*, investment management fees, distribution, service, and administrative expenses) that reduce the rate of return to participants and beneficiaries.”

<sup>9</sup> 29 C.F.R. § 2550.404c-1(b)(2)(B) (2009).  
8498186.1

expenses and monetary compensation to plan participants and beneficiaries, which is currently the subject of substantial litigation in federal court; and (iii) the right of participants and beneficiaries to review information about investments collected by plans and reported on the annual Form 5500 filed with DOL and other agencies.<sup>10</sup>

In addition, there are no fewer than four significant bills currently pending in Congress, including bills introduced by chairmen or influential members of the responsible committees, proposing enhancements to ERISA's requirements for disclosure to plan participants and beneficiaries of investment fees and compensation;<sup>11</sup> that is, the form, scope and content of such disclosures is under active consideration by Congress.

### COMMENTS ON PROPOSED RULE

**Proposed Rule.** The Companies wish to comment on three aspects of the Proposed Rule: (i) the requirement to disclose compensation received by a member firm on a bifurcated basis; (ii) the requirement to disclose offerors making revenue sharing payments to a member firm; and (iii) the timing requirements of these disclosure requirements. More particularly, paragraph (I)(4) of the Proposed Rule contemplates that sales charges and service fees received by the member firm would be disclosed in the mutual fund prospectus, but that other forms of cash compensation, such as "revenue sharing" payments, would be disclosed by the member firm in a separate document (the "FINRA Proposed Disclosure").<sup>12</sup> Thus, in this respect, disclosure of compensation received by the member firm would be "bifurcated" between the mutual fund prospectus and the separate document containing the FINRA Proposed Disclosure. In addition, the Proposed Rule would require that the FINRA Proposed Disclosure name each offeror that made a cash payment to the broker-dealer in the preceding 12 months, listing these offerors in descending order based upon the amount of compensation received. Finally, the Proposed Rule would require a member firm to provide the FINRA Proposed Disclosure at account opening, and would impose a continuing obligation to update the disclosure and communicate such updates to customers by either: (i) maintaining a public web page or toll-free telephone for customers to access the updates; or (ii) sending a semi-annual updated disclosure to all customers who previously received the disclosure. This continuing obligation would apply only to the information required to be disclosed in the FINRA Proposed Disclosure.

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<sup>10</sup> ERISA §104(b) (2009) expressly accords participants and beneficiaries this right.

<sup>11</sup> These bills include H.R. 2989, introduced by Chairman George Miller and approved by the House Education and Labor Committee on June 24, 2009; H.R. 1984, also introduced by Chairman Miller and voted out of the relevant subcommittee on June 17, 2009; H.R. 2779, introduced by Representative Neal on June 9, 2009; and S. 401, introduced by Senator Harkin on February 9, 2009.

<sup>12</sup> See Proposed Supplementary Material .01 to Proposed FINRA Rule 2341.  
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**Comments.** The Companies, as a policy matter, do not object to the disclosure of fees and charges. However, the Companies anticipate that the disclosure approach outlined in the Proposed Rule would be potentially misleading in the retirement plan marketplace, duplicative and unnecessarily costly and burdensome.

First, the Companies note, as applied to plan participants, that the FINRA Proposed Disclosure would overlap and possibly conflict with the DOL Proposed Disclosure. As noted above, the DOL Proposed Disclosure would require written disclosure of: (i) various fees including all sales charges and (ii) the total annual operating expenses including all investment management fees, distribution, service, and administrative expenses. These disclosures would have to be provided by plan fiduciaries or their designees to all plan customers for each “designated investment alternative” under a plan, such as mutual funds. In contrast, the FINRA Proposed Disclosure would effectively call for disclosure of a subset of what would be disclosed in the DOL Proposed Disclosure – those forms of cash compensation paid to the member firm that are not disclosed in the mutual fund prospectuses. Multiple disclosure documents addressing the same subject matter but on a different basis and scope, are likely to confuse, not enlighten, retirement plan customers. These differences are heightened by the bifurcated approach contemplated by the Proposed Rule, and could even lead retirement plan customers to conclude that the fees and charges reflected on the FINRA Proposed Disclosure are in addition to those shown on the DOL Proposed Disclosure. This perception could discourage them from investing in such options or, worse still, from investing in their retirement plans altogether. Moreover, creating multiple disclosure documents with overlapping disclosures would result in duplicative costs that would ultimately be borne by investors in the form of increased costs.

Second, the Companies are concerned that the listing of offerors paying “cash compensation” to a retirement plan broker-dealer from every offeror in descending order, based upon the amount of compensation received from each offeror, is likely to contribute further to confusion. This listing of offerors may bear no relationship to the mutual funds offered on the retirement plan platform for a retirement plan customer. Further, as noted above, in many cases, the retirement plan broker-dealer that would be required to provide the FINRA Proposed Disclosure under the Proposed Rule may not have played any role in the process of selecting the funds for the retirement plan platform. In these circumstances, furnishing retirement plan customers with a list of offerors would not only compound the confusion, it would be irrelevant.

Third, the DOL Proposed Disclosure and FINRA Proposed Disclosure would be required to be provided to retirement plan customers at different times. As discussed above, the DOL Proposed Rules, for example, would require the delivery of the DOL Proposed Disclosure to plan participants: (i) upon eligibility to participate in the plan; (ii) annually thereafter; and (iii) within 30 days of any material change to the disclosure. The Proposed Rule would require delivery of the FINRA Proposed Disclosure: (i) upon account opening; and (ii) semi-annually unless the member maintains a public web page or toll-free telephone number where plan customers can



Marcia E. Asquith  
August 3, 2009  
Page 9

access disclosure updates. This discrepancy in delivery obligations would again place unnecessary administrative and financial burdens on retirement plan broker-dealers providing the overlapping disclosures, which would ultimately be borne by investors in the form of increased costs.

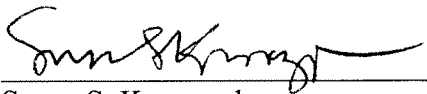
Finally, if anything, the Proposed Rule will be even less constructive when applied in the context of plan sponsors. ERISA requires particularly robust disclosures and reporting to plan sponsors, in furtherance of their fiduciary responsibilities. Each of the counterproductive results noted above with respect to participants – the potential for confusion, the inconsistencies in form and timing, the differences in scope, and the unnecessary cost and burden – would be amplified if the disclosure approach in the Proposed Rule was required for plan sponsors.

### CONCLUSION

To resolve these concerns, the Companies recommend that the Proposed Rule be revised to exclude from its coverage any customers entitled to receive compensation disclosure documents under applicable DOL regulations. This approach would prevent confusion, avoid placing unnecessary administrative and financial burdens on retirement plan broker-dealers, and still serve the Proposed Rule's goal of apprising retirement plan customers of the various fees and expenses associated with certain investments.

The Companies appreciate this opportunity to comment on the Notice. Please do not hesitate to contact Susan Krawczyk (202.383.0197) or Mark Smith (202.383.0221) if you have any questions.

Respectfully submitted,

  
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Susan S. Krawczyk

  
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cc: Paul Cellupica, MetLife, Inc.  
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