

Public Investors Arbitration Bar Association

VIA E-MAIL To: pubcom@finra.org

March 28, 2011

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

Re: Regulatory Notice 11-08
Markups, Commissions and Fees

Dear Ms. Asquith:

On behalf of the Public Investors Arbitration Bar Association (“PIABA”)¹, I thank FINRA for the opportunity to comment on the proposed consolidated rules governing markups, commissions and fees. The proposal contemplates eliminating two key provisions currently contained in the rules: the “5% Policy” and the “Proceeds Provision”. PIABA believes that these two provisions should not be eliminated, but rather, should be modified to address FINRA’s concerns.

In the Regulatory Notice, FINRA explains that the “5% Policy” was based on data from a 1943 survey of market participants, which indicated that transactions were typically executed at a markup of 5% or less. FINRA proposes not transferring this policy to the consolidated rule because it is based on data that is over 70 years old. A current survey of costs indicates that average markups are now 2%, and average markdowns are 1.3%. Rather than eliminating the policy altogether, we believe the policy should be adjusted to reflect current data, i.e. a “2% Policy”. While we appreciate that FINRA has stated that the elimination of the “5% Policy” does not invite members to raise markups/markdowns and commissions, having an accurate policy as a reference point for what is or has been historically a reasonable limit on markups/markdowns and commissions provides important protection to both honest industry practitioners and the investing public. Eliminating the guideline entirely may invite abuse by unscrupulous industry practitioners and tempt even honest industry practitioners to raise their markups/markdowns and commissions to meet the never-ending demand to make profits.

¹ PIABA is a national, not-for-profit bar association comprised of attorneys, including law school professors and regulators, both former and current, who devote a significant portion of their practice to the representation of public investors in securities arbitrations.

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PIABA does support the inclusion of factors which a firm must take into consideration in determining if a markup/markdown or commission is reasonable, which further clarifies that the inclusion of a “policy” is simply meant as a broad guideline and is not determinative of reasonableness. FINRA should be clear that the reasonableness of markups/markdowns and commissions should be reviewed on a case by case basis.

With regard to the “Proceeds Provision”, FINRA proposes eliminating the provision because it is “confusing and raises concerns that it represents a standard that may not be susceptible to consistent application.” However, rather than eliminate the provision entirely because it is confusing, we believe it would be more prudent to issue guidance regarding how the provision should be applied. FINRA may provide that transactions falling within a set period of time, such as a purchase occurring within the settlement period of a sale, should be subject to the provision. To address another concern that FINRA has raised, FINRA may also provide that sales and purchases occurring at different firms are not subject to the provision. Eliminating investor protection because it may be confusing may set a worrisome precedent for future rule proposals.

PIABA therefore requests that FINRA review the proposal with regard to the elimination of the “5% Policy” and the “Proceeds Provision”, and rather than eliminate these two provisions, modify them accordingly. I would like to thank you once again for the opportunity to comment on this rule proposal.

Respectfully submitted,



Peter J. Mougey,
President
PUBLIC INVESTORS ARBITRATION
BAR ASSOCIATION

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