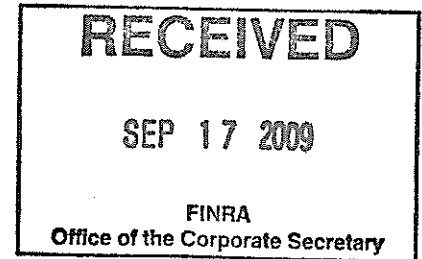


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September 14, 2009

Marcia E. Asquith  
Senior Vice President and Corporate Secretary  
FINRA  
1735 K Street NW  
Washington, DC 20006-1500

Re: Regulatory Notice 09-15

Dear Ms. Asquith:

I realize that the comment period regarding the above has long since expired. However, in a recent letter from FINRA, I was told that FINRA, continually seeks to improve regulation and operation of the markets. If you would route this letter to the proper person or department, the suggestions contained herein might possibly be considered in the near future.

I was in the securities business for many years. I was a former Chairman of my District of the NASD (New York/New England) and served on various committees regarding market-making. I sold my business several years ago and am now an investor and am not connected with any securities broker/dealer. You will note that in this letter I mention Knight Securities ("NITE"). This is because the majority of the orders that I place are routed to NITE and the majority of the business I do is with NITE (albeit indirectly), far more than any other firm and even many times greater than the business I do with the securities firm that I once owned. My referring to NITE should not be taken as an aspersion against that firm. In fact, from what I have observed, NITE takes its regulatory obligations seriously. There may be occasional errors and lapses but on the whole, they are compliance-conscious. I am sending a copy of this letter to the Director of Over-the-Counter Trading at NITE.

It is my belief that the current regulation does very little to protect my interests as an investor. This is very frustrating and unfortunate because I know that FINRA is trying very hard to look out for the interests of the investor while retaining a profitable environment for its members. I have analyzed the underlying causes of my discontent and I will go into them in this letter along with possible solutions I propose. I recognize that these solutions would be difficult to implement but are necessary if the investor is to be protected.

Among other things, I purchase for investment the preferred stocks of public utility companies. I rarely sell. The dividends from these stocks provide my income. My account is not a small one. Often, someone will advise me of the availability of shares and I will place an order with my broker to buy them. I am one of a fairly small number of investors who buys this kind of security and very possibly the largest so I do receive calls. These securities are not listed. They are quoted on the OTC Bulletin Board, in the Pink Sheets and sometimes there is no quoted market.

The main cause of the problem I have in purchasing these securities is FINRA's best-execution rules in general and the "price-improvement" rules in particular. These rules are designed to protect the investor in penny-stocks—by far, the greatest population of the Bulletin Board and Pink Sheets. But they hurt the investor in higher quality securities as I hope I am able to illustrate in this letter.

Preferred stocks of public utility companies are purchased by dealers at the lowest possible price that the competitive market will allow. They are then sold to investors like me who purchase them on a yield basis. It is not at all uncommon for me to purchase a stock at \$65 that a dealer has just purchased at \$64. Sometimes, the dealer has paid \$60 for the stock and if the yield makes sense at \$65, I will buy it—a \$6 per share profit. Therefore, a price-improvement rule that allows a dealer to not fill my buy order by paying one cent more is absolutely absurd. In my day, paying a little more than the customer was known as "running-ahead". Now it is perfectly legal and is known as price-improvement. In this letter, I am going to give some actual examples of how the price-improvement rule hurts me. But my reasoning for mentioning it now is that the first step to have regulation work is to realize that different kinds of securities populate the OTC market and require different kind of regulation. So that is Step # 1 – There is not a one-size-fits-all effective regulation of OTC securities. A \$60 preferred stock needs to be treated differently than a stock selling for 5 pennies.

Does FINRA really want a regulatory system where "running-ahead" is institutionalized and legalized? Even worse, does FINRA really want a regulatory system where the only way that a customer can get an execution is to himself engage in trickery? I say that FINRA doesn't want that but that is exactly what we have and I will give an example of how I have to engage in trickery to get an execution.

I received a call from a dealer. A stock that was quoted at \$40.50 had a low offer of \$45. This was not a preferred stock. I will sometimes but not often purchase OTC common stocks. The dealer had purchased 1,600 shares at \$40.50 and asked what I would pay for them. I agreed to pay \$41.25. The dealer would make a profit of \$1,200 and this kind of profit is not at all unusual. I put in an order to purchase the 1,500 shares at \$41.25 and just as I did it, I realized that I had made an error by proceeding in a straight-forward way. The order went to NITE. NITE instantly went \$41.25 bid to represent my order and the dealer offered 500 shares to NITE. But NITE purchased the shares at \$41.26 and executed zero shares for me. NITE subsequently found a buyer at a higher price. The dealer had not offered the entire number of shares to NITE. Now, I realized that in order for me to get the shares that I had agreed to buy, being straight-forward wouldn't work. I

told the dealer that I would pay \$41.50. The dealer this time put an offering on the stock at \$41.50 and I instantly entered my buy order. Now, NITE had to give me all of the shares that could be purchased. As the dealer sold NITE 1,000 shares, NITE filled me on 1,000 shares. What did NITE do wrong here? They did nothing wrong. They followed the regulations to the letter. Do you see the difference here? NITE goes \$41.25 bid to represent my offer and is offered stock at \$41.25. They have the right under the rules to pay \$41.26 and can actually be commended for this because they gave “price-improvement”. But if the stock is offered by the other dealer at \$41.25, then NITE has to fill my order for all that they purchase at \$41.25.

Let me add a few notes to this sorry state of affairs. First, when I say I have to resort to “trickery” perhaps that is too strong a word. Maybe “cleverness” would be a better word. All I know is that if just put in the order to buy stock at the price I agreed to pay, I do and did get zero. If the dealer “engineers” the order a different way, I do and did get a proper execution.

Second, when I say that NITE did nothing wrong, I am speaking of a regulatory obligation. The Rules refer a great deal to the fact that when a dealer accepts an order from a broker, the dealer assumes a fiduciary obligation. What kind of fiduciary in any other business would be authorized to go up 75 cents in his bid to represent my order and then pay 1 cent more and take it for himself? This state of affairs exists in no other fiduciary business.

Third, it can be seen here that the reference to “price-improvement” is often total and complete nonsense. In the example I have given here, the 1 cent price improvement given by NITE was not only meaningless but did not benefit any customer. It merely resulted in more money to the market-maker.

In the business of market-making, the name of the game is getting the order flow. A dealer gets good orders (e.g. an order to sell 10,000 shares “at the market” on a \$40 stock will enable a dealer to make a lot of money) and poor orders that don’t furnish much chance to make a profit. In real life, the dealer cannot refuse an order as your Rules allow him to do. If he does so, the routing broker has to go somewhere else and a new relationship is established. Whether the order is good or bad, the dealer realizes benefits in receiving an order. First, he may make money and maybe a lot of it. Second, if he gets enough order flow, he can get a feel for what kind of buying and selling interest there is and that is valuable. Third, in receiving an order, he receives a clue, an option at no charge and an edge. What do I mean by this? A stock is quoted at \$50 bid and I put in an order to buy 500 shares at \$51. At no charge, the dealer is given a clue that the stock is a safe one to buy. In addition, he has a \$51 bid in hand. If he is offered stock at \$51, he can purchase the stock at \$51.01. He quickly sees if there is a way that he can sell the stock at a profit. If he sells the stock at \$53, he makes nearly \$1,000. If he cannot find a buyer, he fills the buy order at \$51 and losses \$5—an excellent risk-reward ratio. In addition, he now has a 1-up on his competitors. They can only pay \$50 if they don’t want to stick their necks out. But he is \$51 bid and is much more likely to see a sell order than his competitors.

I will give an example of this. I saw that a stock was \$800 bid and put in an order to purchase 25 shares at \$810. The order went to NITE. NITE went \$810 bid and they had their 1-up. That is, my being willing to pay \$810, gave them the edge on their competitors. Sure enough, shortly thereafter, 25 shares came along and were purchased at \$810.05. I received no execution of course because no stock traded at \$810. Around 1 hour later, the shares were sold at \$925, a profit of around \$115 per share. I think that what hurt the most on that one was not the profit made but the price paid of \$810.05. Yes, they only had to pay \$810.01 but I would have felt a little better if they had paid \$815.

With one more example, I will be able to wrap up the first section of this letter. Often, I will resort to this device to purchase stock. A stock is quoted at \$50 bid and I would be glad to purchase stock at \$51.50. But if I put in a buy order for 500 shares at \$51.50, I will not obtain a single share. In real life, NITE will go \$51.50 bid. Stock will come along and the order will most likely go to them because not only are they the biggest but now they have an edge on the competitors. I will not receive a single share.

What I instead do is to place an order to purchase 100 shares at \$51.50. NITE will not go \$51.50 bid because they would have to purchase 200 shares and that would involve risk, something that market makers these days appear to be averse to. They stay at \$50 bid. 1,000 shares comes along at \$50. NITE now has to make a decision. Do they pay \$51.51 for 1,000 shares in order to cut me out? That would involve paying \$1,510 more than they need to and could possibly result in their not being able to make any money on what otherwise would be a very profitable trade. If they decide to pay \$51.51 just to cut me out, I have no problem with that. If they pay \$50 for the 1,000 shares and sell me 100 shares at \$50, that's great. If they pay \$51.50 for 150 shares and fill my order at \$51.50 and buy the rest for themselves at \$50, that's okay too. If they buy the 1,000 shares at \$50 and then fill my buy order at \$51.50, then of course they have done something they shouldn't have done. If they buy the 1,000 shares at \$50 and don't fill my buy order, again, they have done something they shouldn't have done.

This completes the first part of this letter – the description of the problem-- summed up as follows:

1. The Rules especially the Rule regarding price improvement are designed to benefit the investor but they actually hurt an investor like me. If there is anything that I am missing in making this statement and if you know of any way that the Rules are helping me, I earnestly implore you to tell me what those benefits are because there may be something I am missing here. I am sure that these same rules work very well for penny stocks.
2. NITE, by and large, except for occasional lapses caused by their sheer size or maybe by occasional individual lapses of judgment, follows the rules. In fact, I would venture to say that they are probably more compliance-conscious than many dealers out there.

3. In placing any order on the kinds of stocks that I buy, unless the stock is offered at the price I am willing to pay, I have to try to figure out how I might be able to get an execution if the stock is available at the price I'm willing to pay. This shouldn't be.
4. Maybe it's because my account is so large and maybe it's because they are service oriented, but my brokerage firm tries so hard to please me that it is almost embarrassing. They will do literally anything I ask so long as it is legal. I am sure that they would direct my orders away from NITE if I asked them to and maybe that would be the right route for me to follow but I have already said that NITE may very well be better than most. All roads appear to lead to one inescapable conclusion – the fault is not NITE's, or mine or my brokerage firm. The fault is in the Rule.

If I have successfully shown that the Rules in general and the price-improvement rule in particular is hurting me, the very investor that the Rules aim to protect, what is the solution?

There are a few possibilities. As I see it, the solution that makes the most sense would be to allow the dealers to make a profit. It is a very unnatural state of affairs for a firm with high expenses of Pink Sheet and Bulletin Board listings, equipment rental and the like to be told that they cannot make a profit unless they "connive". In such a case, they will connive. They will not willingly accept their role as a fiduciary or a no-profit conduit. If NITE purchases 1,000 shares of a preferred stock at \$50 and they display an offering of \$53, I will pay \$53 if the yield is what I am looking for. Or in the case where I put in an order to buy 1,000 shares at \$53 of a stock that is bid at \$50, let them go \$51 bid and if they purchase stock at \$51 and fill me at \$53, let them make \$2,000.

If FINRA is determined to have price-improvement on these kinds of stocks, there is another possibility and that would be to have a price-improvement rule with teeth in it. As I said earlier, to say that NITE, in accepting my order, accepts a fiduciary obligation to work for me and then is allowed to purchase shares for 1 cent more for its own account is absolutely absurd. The Rule should be that once NITE accepts my order, they cannot purchase shares that are offered to them within my limit without giving them to me and they cannot pay more than my limit unless they have to. Let's examine this a little more carefully.

First, remember that NITE could refuse to accept my order. If this happened, my broker would have to go elsewhere. It is possible that this would allow some other dealer to get a foot in the brokerage firm's door. In real life, they would most likely accept the order. Assume that the high bid is \$40 and I put in an order to buy 1,000 shares at \$41. NITE goes \$41 bid and is offered 1,000 shares at \$41. They would have to pay \$41 and sell it to me at \$41. Even if they paid \$41.01, they would have to fill my \$41 order. They would not be allowed to pay \$41.01 for the stock and purchase it for their own account. In placing my buy order, I have already provided \$1 to the seller of the stock in price improvement.

After NITE receives my order and goes \$41 bid, they receive another bona fide buy order at \$41.10. They then have no obligation to me so long as that new order is open. What they can't do is be my fiduciary and out-compete me for their own account.

Assume that NITE receives my order and goes \$41 bid and a competitor goes \$41.25 bid. Could NITE react to competition? I don't know how this would or should work. More consideration would be required.

(As much as I don't want to complicate this discussion, the best thing from the standpoint of the buyer would be if the market-maker does not go up after receiving an order. If I put in an order to buy a preferred stock at \$41 and the high bid is \$40, NITE goes \$41 bid. This higher bid will not bring out sellers. Sellers will be brought out only if the bid really jumps – say by 5 points or more. As soon as NITE goes \$41 bid, another market-maker will go \$41.25 bid. Stock is going to come along when it comes.)

My conclusion—On the kinds of higher quality stocks quoted in the Pink Sheets and the OTC Bulletin Board that are more likely to be purchased by serious investors, market-makers should be allowed to make the profit that the market will allow them to make.

In the event that FINRA is determined to have the requirements apply to these kinds of stocks, then the rules should have much more teeth in them and should require a market-maker who accepts an order to be a true fiduciary of the customer and not work against him. I believe there is a solution within this framework even though the simplest solution would be to remove the requirements and allow the market-maker to make a profit.

I want to commend FINRA for the work it is doing in attempting to maintain market integrity and look after the interests of the investor. It has been shown that to protect the investor, the broker/dealer community needs to remain financially viable. Therefore, it is completely legitimate for FINRA to want to maintain an atmosphere where brokers and dealers are profitable.

I appreciate the time you will be taking to read this letter. If future happenings give me additional ideas that I feel I should present to you, I will write again. Thanks for listening.

Sincerely,

Jack Rubens

CC: Knight Securities

PS – In my opinion, requiring the dealer to represent my bid is even more of a farce and frankly, even more insulting. So let's see. The high bid on a stock is \$40.50; I put in a buy order at \$41.25; NITE now goes \$41.25 bid and my order is represented. Now, stock is offered to NITE at \$41.25 and I get the stock, right? Wrong! NITE merely pays \$41.26 and buys it for its own account. All this does is to add insult to injury in that by my being high bid, I might fanaticize that I will actually be buying the stock.