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March 26, 2013

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

Re: Regulatory Notice 13-07; Markups, Commissions, and Fees

Dear Ms. Asquith:

The Public Investors Arbitration Bar Association ("PIABA") appreciates the opportunity to provide the Commission with comments regarding FINRA Regulatory Notice 13-07 and the proposed rule changes regarding mark-ups, mark-downs, and commissions. PIABA is an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in FINRA rules relating to both investor protection and disclosure.

After FINRA proposed amending these same rules with Regulatory Notice 11-08, FINRA received a number of comment letters. In Regulatory Notice 13-07, FINRA has made changes to the rule proposals based on the comments responding to Notice 11-08.

Notice 13-07 proposes to retain the prior "5% Policy" under proposed FINRA Rule 2121. The proposed rule continues to make clear that the "5% Policy" is a guide, not a rule. The proposed rule requires the firm to buy or sell at a price which is fair and reasonable, taking into consideration a number of factors that would be codified in proposed rule 2121(c). Under proposed Rule 2121, a mark-up or mark-down of over 5% would be considered unreasonable and unfair, but the firm would be allowed to rebut that presumption and provide justification that such a mark-up or mark-down is fair and reasonable.

While PIABA supports the use of some threshold as guidance, PIABA believes that a 5% guide is simply too high. The 5% Policy came from a 1943 survey, to which Notice 13-07 alludes. FINRA acknowledges that advancements in technology have significantly reduced execution costs and that 5% is "significantly higher" than the average markup.

An April, 2011, study by Harvard Law School estimates that the average mark-up in today's markets is about 40% lower than in 1943. *See* Ferrell, Allen, "The Law and Finance of Broker-Dealer Mark-Ups", Harvard Law School (Apr. 6, 2011), at 12 (hereinafter "Ferrell"). The study also estimates that the average mark-up (weighted by the size of the trade) is 1.6%, and the weighted average mark-down is 1.2%. *Id.* at 14. Not taking into account the size of the trade, the average mark-up is 2.2% and the average mark-down is 1.9%. *Id.* at 13.

The study by Harvard also indicated that of the sample size taken, only 1.2% of mark-ups were above the 5% threshold, and about 1.7% of all mark-downs were above the 5%. *See* Ferrell at 14. Based on FINRA's own acknowledgements and this recent study, the 5% Policy is unfair and unreasonable.

FINRA needs to lower this threshold not only in light of technological advancements and market data, but its own regulatory investigations, as well. The Harvard study indicated that FINRA fined a number of firms in the last ten years for charging excessive mark-ups and mark-downs. This included $5 million in fines, each, for Goldman Sachs, Deutsche Bank Securities, Miller Tabak Roberts Securities, and Citigroup in 2004. A 2007 investigation into Morgan Stanley, resulted in a $1.5 million fine and $4.6 million in restitution to customers. *See* Ferrell at 3; citing NASD Letters of Acceptance, Waiver, and Consent with Deutsche Bank Securities, Inc., Miller Tabak Roberts Securities LLC, Citigroup Global Markets, Inc., and Goldman Sachs & Co. (July 28, 2004); and FINRA, News Release (Aug. 2, 2007). Similarly, in April, 2012, FINRA fined David Lerner Associates $1 million and ordered restitution to affected customers in the sale of municipal bonds and collateralized mortgage obligations. *See In re David Lerner Associates, Inc.*, Case No. 20050007427 (Apr. 4, 2012). There are numerous other regulatory matters involving excessive mark-ups, mark-downs, and commissions.

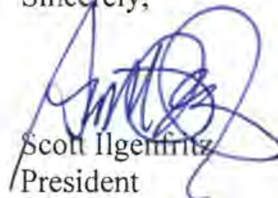
In light of the regulatory history, market data concerning mark-ups and mark-downs, and the data demonstrating the reduced costs, which mark-ups and mark-downs are intended, in part, to cover, PIABA believes that FINRA should lower the "5% Policy" to a "2% Policy". This reduction would be consistent with the prevailing market mark-ups and mark-downs. PIABA supports the proposition that the fairness and reasonableness of mark-ups, mark-downs, and commissions must be determined on a case-by-case basis, considering the factors enumerated in Rule 2121(c). The reduction of the upper limit guidance would be fair and equitable to member firms, as it would still allow a firm to overcome this presumption after consideration of the enumerated factors in proposed Rule 2121(c).

Regulatory Notice 13-07 also proposes the deletion of the "Proceeds Provision". When a customer sells one security and then buys another at or about the same time, using the proceeds of the sale to purchase the second security, the current "Proceeds Provision" rules require that both trades are treated as a single transaction for mark-up and mark-down purposes. PIABA can understand the difficulty in consistent enforcement of this provision without additional guidance. That difficulty could be addressed by setting a fixed time period, such as one week or a purchase within a specified number of days from the trade date of the sale transaction. PIABA urges the retention of the "Proceeds Provision" with a direction that FINRA issue interpretive guidance.

Conclusion

In sum, PIABA believes that the 5% threshold is far too high in light of technological advances and market data. FINRA should lower this threshold to a number that more accurately reflects the reality of the securities markets. This reduced threshold should continue to serve as a "guide", and the fairness and reasonableness of mark-ups, mark-downs, and commissions should continue to be assessed on a transaction-by-transaction basis. Thank you again for the opportunity to comment on these rule proposals.

Sincerely,



Scott Ilgenfritz
President