Regulatory Affairs
1 North Jefferson Ave
St. Louis, MO 63103
HO004-11D
314-955-6851 (t)
314-955-4308 (f)

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Via E-mail to pubcom@finra.org

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

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

Dear Ms. Asquith:

Wells Fargo Advisors ("WFA") appreciates this opportunity to comment briefly on FINRA's Regulatory Notice 11-08, concerning markups, commissions and fees. While it is always helpful to make changes where they are needed, the basic markups rule has worked well for over 70 years such that FINRA should gather more information to determine whether any changes are required. We also suggest that certain other aspects of the proposal probably are not needed, at least in its current posture or, alternatively, FINRA should modify the proposals in important ways. We file this brief comment letter to outline these thoughts.

WFA consists of brokerage operations that administer almost $1 trillion in client assets. It accomplishes this task through 15,088 full-service financial advisors in 1,100 branch offices in all 50 states and 4,569 licensed financial specialists in 6,610 retail bank branches in 39 states.[1]

[1] WFA is a non-bank affiliate of Wells Fargo & Company ("Wells Fargo"), a diversified financial services company providing banking, insurance, investments, mortgage, and consumer and commercial finance across North America and internationally. Wells Fargo has $1.2 trillion in assets and more than 278,000 team members across 80+ businesses. Wells Fargo's brokerage affiliates also include HD Vest Financial Services with 5,100 independent advisors and First Clearing LLC which provides clearing services to 98 correspondent clients and WFA. For the ease of discussion, this letter will use WFA to refer to all of those brokerage operations.

The Current Rules Have Worked Well

WFA acknowledges that as FINRA assesses rules which should be a part of a combined rulebook, it is important that it do more than "rubber stamp" existing rules. Though we appreciate the effort put forth on this proposal, we believe the decision to eliminate the "5% policy" may not be well-supported. The "5% policy" in NASD rules states in essence that while there is no definitive answer of what is the proper markup, in most cases a markup of 5% or less would fall within the "fair and reasonable" standard of the rule.[2] Even with the policy, the SRO made it clear that the "5% policy" was a guide and that patterns of markups under 5% could still be unfair or unreasonable.[3]

Acknowledging this text and the clear caveat that the "5% policy" was not a "rule," FINRA nonetheless proposes eliminating the policy. It contends that a recent study shows that a sample of equity transactions indicates that the mean markup was 2.2%, with a median markup of 2%.[4] Markdowns were even lower, with a mean of 1.9% and a median of 1.3%. While there is room to question the reliance on the cited survey of equity transactions, rather than establishing that the "5% policy" is "outdated," the "5% policy" has actually worked according to this data to aid the industry, regulators and investors. Rather than firms "pegging" markups artificially at 5% in the hopes that customers are unaware and regulators will not detect them, the industry works to incorporate the principles underlying the "5% policy" as a guide. Market professionals, including their supervisors and compliance departments, understand that a markup under 5% is the mere beginning of the analysis. The actual success of the 5% policy in addition to benefitting investors, aids regulators in performing their job as well. There simply does not appear to be a solid basis for eliminating a rule that works. FINRA is making a proposal that is akin to eliminating a red light because studies have shown most drivers are stopping their vehicles when they see that the intersection has an illuminated red light.

The argument for maintaining the "5% policy" is strengthened when one considers FINRA's intention to propose *no* new percentage based on its view of the survey data. While one never anticipates running afoul of a FINRA rule, this proposal likely fails to put individuals on sufficient notice of how to guide their conduct and comply with regulatory directives. It is difficult to envision why a new policy of 4% or 3% would do violence to the FINRA regulatory scheme. Given the far greater market participation today than 70 years ago when NASD developed the "5% policy," it seems to follow that greater clarity in rules and guidance would be essential to have a fair and efficient trading market place. With the "5% policy" in place, firms are able to use automation to assist in the surveillance and protection of investors. Automated exception reports, indicating transactions that are worthy of extra scrutiny, form a key component of many effective compliance systems. Simply abandoning the "5% policy" likely

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[2] *NASD IM-2440-1*
[3] *NASD-IM-2440-1(a)(4))*
[4] *Regulatory Notice 11-08* at p.4 appears to confuse "average" and "median" when discussing markups. We assume the reference is to median only.

will not aid in the effective management of markups and markdowns. We would urge that FINRA retain the "5% policy." Failing that, it either should offer a new percentage guideline or table the rule proposal entirely until it gives the marketplace much more detailed guidance than would currently exist if the proposal goes forward unaltered.

FINRA Should Study the 5% Policy More

It appears that the issue of whether the "5% policy" should disappear at a minimum deserves closer scrutiny and analysis. While one could not call 167,000 equity transactions "meager," it is fair to note they are certainly a slight measure of the millions of equity transactions that occur weekly. Even accepting the analysis that the mean and median fall within the 2% range, there is the real mathematical conclusion that several transactions within that study universe likely approach zero[5] as well as reaching (or exceeding) the 5% range. As noted above, that half of transactions are above 2.2% and half are below is a good indication that the "5% policy" actually works. One likely could view even this limited study to show that there is a robust and competitive marketplace today that is far more extensive than that of 70 years ago. With this factual and historical foundation, the question of the policy's benefits or obsolescence seems perfectly suited for the robust study by academics, investor advocates, regulators, traders and other interested parties. With a concept like the "5% policy," it would seem that a four to five week comment letter period alone would not foster the robust studies and mathematical and economic analyses that would help furnish a thorough empirical backdrop upon which to draw conclusions about the future prospects of the policy. There does not seem to be a compelling regulatory reason to rush forward with the current proposal. Accordingly, we would ask FINRA to consider studying the "5% policy" in a more comprehensive fashion before declaring it obsolete.

Regardless of FINRA's decision on studying the "5% policy" in more detail, part of any rulemaking should be more transparency concerning markups in the industry. FINRA should provide to all industry participants aggregated data concerning markups. It could also form a joint industry/regulator/academic group that offers to the public periodic analysis of trends concerning markups and commissions. In this fashion, all industry participants could be aware of information indicating the current state of markups among their peer firms. FINRA would have access to millions of trades so that the analysis could be thorough, refined and current. Coupled with guideline percentages on markups, a transparent database of the actual markups charged on an aggregate basis will benefit investors, the industry and regulators.

The Commission Schedule

The proposal also puts forth a requirement that, for the first time, firms create and publish a commission schedule for equity transactions by retail customers. We are concerned that there is no substantial analysis warranting the creation of this rule and believe that there is a real

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[5] It is unclear how equity transactions occurring in "wrap" accounts are accounted for as well as transactions that occur at or below cost as an accommodation or other competitive situation.

possibility that the costs for this industry wide change will far outweigh any perceived benefit. The proposal seems to suggest that this requirement of a commission schedule will allow retail customers to compare schedules among firms and "may, by competition, result in lower commissions (and markups and markdowns)."[6] As noted in the discussion above, if one credits the study of equity transactions, the existing "5% policy" has already created the competitive landscape where commissions are lower. There appears to be no evidentiary support for the need to have commission schedules. The proposal also seems contradictory as it explains that the reason FINRA limits the concept of a fee schedule to equities only is that "such commissions are more easily compared" suggesting that the information library on equity securities is pretty robust already. Investors currently receive clear information of costs on the confirm. In addition, one can state that numerous advertisements and other public information has made it clear to many retail customers that there are different commission rates offered at different firms and through different business models, e.g., online versus a retail "storefront". There does not appear to be anyone who states that those retail customers interested and willing to invest are unaware that lower commissions, even at the very firm they are working with, are available. Again, there appears to be a rule proposal to address an issue that has not arisen in the marketplace. With prospectuses, confirmations, commission schedules along with other proposals all combining, the sheer volume threatens to inundate investors and possibly paralyze them with information overload. We would suggest that FINRA decline to proceed with the commission schedule proposal. Alternatively, we would offer that it is important that there at least be a more detailed study providing evidentiary support for the proposed commission schedule.

Should FINRA move this proposal forward, there are some other provisions that may warrant additional scrutiny. FINRA proposes that the commission schedule be provided to all new customers and offered annually to every customer. It would seem preferable that after a schedule is offered to a new customer, a firm should make any new offers of commission schedules only to customers who are actually engaged in or have recently engaged in a commission generating transaction. It would not be cost efficient to notify customers who are not trading or who have equity transactions through fee based or wrap fee arrangements about schedules which are of no current application to them. Such schedules could always be accessible on the firm website, and the firm could readily accommodate any customer that actually requests the schedule. The proposal also asks that a firm give a customer 30 days notice prior to any change in the commission schedule. We feel obligated to point out that there does not appear to be any documented abuse such that firms need to give almost a month's notice of changes. This provision could be cumbersome to implement, and in any event, 30 days seems excessive. Should a firm decide to *lower* commissions, this provision on its face appears to require the firm to charge the higher rate for 30 days. FINRA should eliminate this provision in its entirety or reduce the time period to 5 days.

[6] *Regulatory Notice 11-08* at p.8.

Conclusion

We appreciate the work FINRA has done to date in consolidating SRO rules, and we support its efforts to review rules before merely adding them to the new rule book. We suggest that the current system for markups, commissions and fees probably does not need the changes contained in the current rule proposal. We hope that FINRA will give consideration to declining to make any changes, or make such changes only after a more extensive review of the current state of the policies and guidelines and the costs and benefits of the suggested changes.

If you have any questions regarding this comment letter, please do not hesitate to contact me.

Sincerely,

Ronald C. Long
Director of Regulatory Affairs