



St. John's University School of Law
Securities Arbitration Clinic

8000 Utopia Parkway
Belson Hall, 2nd Floor
Queens, NY 11439
Tel (718) 990-6930
Fax (718) 990-6931
www.stjohns.edu/law/sac

March 28, 2011

Via E-Mail

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

Re: Proposed Consolidated Rules Governing Markups, Commissions and Fees

Dear Ms. Asquith:

The Securities Arbitration Clinic at St. John's University School of Law is very pleased to accept this opportunity to comment on the proposed changes to the FINRA Rules governing markups, markdowns, and commissions and fees. The Clinic supports the rule proposal to the extent that it provides customers with transparent disclosure of commissions. However, we believe that disclosure of commissions combined with the deletion of the "5% Policy" may cause a possible conflict. Thus, we believe that there should be a revision of the "5% Policy" rather than a complete deletion.

The Clinic is a not-for-profit organization where second and third year law students provide free legal representation to public investors in their securities disputes who are otherwise unable to obtain legal representation. Our clients are generally of modest means and if the Clinic did not represent them, they would likely be forced to proceed *pro se*. In addition to representing aggrieved investors, the Clinic is committed to investor protection. Accordingly, we have a strong interest in the rules that affect investors.

Overall, the Clinic supports the proposed rule on commission schedules. The new disclosure requirements are similar to the Truth in Lending Act, which requires lenders to

disclose Annual Percentage Rates and finance charges to consumers seeking credit. We believe customers should be afforded the benefits of transparent disclosure. We do suggest, however, that the disclosures be required to be presented in a uniform way, similar to the mutual fund summary prospectus that the SEC initiated in 2007. That rule was finalized in 2009 and required the disclosures to be in plain English and organized in a particular way. Adopting similar requirements here will allow customers to be aware of a firm's commission schedules, as well as to be able to compare schedules of various firms.

Our concern with the way the proposed rule is drafted is how the commission schedules and deletion of the "5% Policy" will coexist. Specifically, we are concerned with a possible conflict between the disclosure of commissions and justifying that those fees are "fair and reasonable." For example, if a broker charged an 8% commission fee, but disclosed this fee to customers in advance, would FINRA find that charge "fair and reasonable" in light of the disclosure? Mainly, we are concerned that the disclosure requirement combined with the deletion of the "5% Policy" may give brokers free reign to charge higher prices simply by disclosing them in advance. Accordingly, it may be appropriate to issue guidance to firms that disclosure is not at all determinative of the reasonableness of fees, and that firms should endeavor to charge the lowest possible fees.

The Clinic opposes the deletion of the "5% Policy." Instead of omitting the 5% cap entirely, we believe FINRA should consider instituting a lower cap, consistent with current data, for example, a cap of 3%. The "5% Policy" is likely outdated if the mean markup rate is 2.2%; however, we think that having a cap is an important factor in keeping the mean rate low. Otherwise, prices may tend to rise with the removal of the 5% cap. We believe that in order for any cap to be meaningful, the rule must be clear that all markups, markdowns and commissions should never the less be judged on a case-by-case basis at the same level of scrutiny to determine if they are "fair and reasonable." Overall, we think that revising the "5% Policy" to a "3% Policy" would help keep markups, markdowns and commissions low, while preventing brokers from charging higher without challenge.

We welcome any questions you may have regarding our position. Please do not hesitate to contact us should you have any questions or wish to discuss this matter.

Respectfully submitted,
ST. JOHN'S UNIVERSITY SCHOOL OF LAW
SECURITIES ARBITRATION CLINIC

/s/

Kyle DiGangi & Aileen Kim
Legal Interns

Lisa A. Catalano
Director, Associate Professor of Clinical Legal Education

Christine Lazaro
Supervising Attorney