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Invested in America

November 9, 2011

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

Re: Regulatory Notice 11-43: Indications of Interest

Dear Ms. Asquith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on FINRA's proposed amendments to Rule 5210, as described in Regulatory Notice 11-43 ("Notice"). In its proposal, FINRA would require that member firms receive a customer order in a security before displaying a quotation or indication of interest ("IOI") in a way that purports to represent that the quotation or IOI originated with a customer. Similarly, a firm could not continue to display a quotation or IOI as representing a customer order once the customer order was executed or cancelled. As discussed in detail below, SIFMA believes FINRA's existing guidance in this area appropriately addresses the concerns FINRA raises about misleading, untruthful or inaccurate statements about quotations or IOIs. Moreover, SIFMA believes that FINRA's proposal would introduce unnecessary confusion to a reasonably settled area, would impose significant implementation costs on some member firms, and could decrease available liquidity for customers. Therefore, SIFMA urges FINRA to continue to rely on its existing guidance to address any concerns about quotations and IOIs.

1. Current Approach to Regulation of IOIs Remains Appropriate

SIFMA believes that FINRA's current approach to the regulation of IOIs, as set forth in its Regulatory Notice 09-28, adequately addresses the regulatory concerns raised in the new Notice, and thus does not believe that any additional or new regulation of IOIs is necessary.

[1] The Securities Industry and Financial Markets Association ("SIFMA") brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA"). For more information, visit www.sifma.org.

a. No Evidence of Significant Concerns or Confusion with Existing Approach

In its earlier Regulatory Notice 09-28, FINRA reminded firms that, to the extent that they disseminate or use services to communicate IOIs, IOIs must be truthful, accurate and not misleading. FINRA stated that it could view as untruthful, inaccurate or misleading a firm's representation of firm proprietary interest as a "natural" IOI in a manner that is inconsistent with disclosures made by a firm with respect to the content of its IOIs, or alternatively through a service provider's system in a manner contrary to the service provider's guidelines. In keeping with this guidance, certain member firms drafted, and provided to their customers, disclosures describing how each firm uses the term "natural" with regard to IOIs and quotations. Despite significant experience with this disclosure approach, SIFMA is not aware of any significant customer confusion or concerns regarding the existing disclosures currently used in connection with natural IOIs and quotations. We also note that customers are free to instruct their brokers with respect to their expectations regarding IOIs and remain free to choose to interact with only those brokers whose approaches and disclosures comport with their expectations. Therefore, SIFMA does not believe that this is an area which merits new or additional regulation.

b. Existing Approach is Appropriately Flexible

Moreover, the guidance provided in Regulatory Notice 09-28 provides firms with the much-needed flexibility to tailor their policies and procedures to their individual businesses and client bases. Under the existing regulatory approach, member firms are free to establish terms of business with their clients, provided the firms accurately disclose such practices to their customers. For example, many clients are primarily concerned with the extent to which a broker-dealer may seek to compete with the client after executing a client trade. In such instances, provided that there has been clear disclosure to the client, the designation of an IOI as "natural" by a broker-dealer facilitating another trade or otherwise acting in a manner that is not adverse to the client's interest should not be precluded. In contrast, FINRA's proposal would dictate the terms under which firms may use the term "natural." Given the sophistication of institutional clients, variety of business needs of member firms and their clients, and use of appropriate disclosure, SIFMA believes the existing approach is the more appropriate approach.

c. FINRA Has Ample Authority to Combat Fraud in this Area

In its Notice, FINRA indicates that it is seeking comment on its proposed amendments to Rule 5210 because it "remains concerned that firms are disseminating misleading information regarding IOIs, including not accurately labeling them to reflect their origination." To the extent that this is the case, SIFMA maintains that FINRA already has ample authority to address fraudulent disclosures by member firms. As FINRA notes in its Notice, the communication of untruthful, inaccurate or misleading information relating to IOIs would be considered conduct inconsistent with high standards of commercial honor and just and equitable principles of trade under FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade) and, depending on the nature and content of the communication, could also violate FINRA Rule 5210 (Publication of Transactions and Quotations), FINRA Rule 2020 (Use of Manipulative,

Deceptive or Other Fraudulent Devices), NASD Rule 2210 (Communications with the Public) and the anti-fraud provisions of the federal securities laws. Therefore, SIFMA does not believe that additional regulation in this area is necessary.

2. Proposed Definitions of Natural IOIs and Quotations are Unnecessary and Inaccurate

In its Notice, FINRA proposes to define natural IOIs and quotations. Specifically, FINRA states that "firms would not be permitted to label an IOI or quotation in any way that indicates the IOI or quotation represented customer interest until the firm had received a customer order and had recorded the order on its books and records by, for example, creating an order ticket or entering the terms of the order into the firm's order management system. Similarly, a firm could not continue to display such a quotation or IOI as representing a customer order once the customer order was executed or cancelled." As discussed in detail above, SIFMA does not believe that adopting definitions of natural IOIs and quotations is necessary to address any concerns about fraudulent misinformation in the market. SIFMA believes that the current disclosure approach to defining what is meant by a natural IOI and quotation is appropriate. Nevertheless, if FINRA moves forward with its proposal, SIFMA urges FINRA to reconsider its proposed definitions of natural IOIs and quotations. SIFMA believes that FINRA's proposed definitions would need significant revisions to appropriately reflect common usage of natural IOIs and quotations.

a. Definition of "IOI"

SIFMA believes that FINRA's proposed definition of a natural IOI conflicts with the accepted understanding of the definition of IOI. Although neither FINRA nor the SEC have explicitly defined the term "IOI," FINRA correctly notes that IOIs are generally "non-firm expressions of trading interest that contain one or more of the following elements: security name, side, size, capacity and/or price." As such, an IOI reflects a market participant's interest in a trade, but not necessarily an actual order. FINRA's proposed definition would directly conflict with this common understanding by requiring a natural IOI to represent an actual customer order. Such a requirement is more appropriate for a quotation or an order than for an IOI. Therefore, SIFMA cannot support such a fundamental, material change in the purpose and function of an IOI.

b. Definition of "Natural"

Similarly, SIFMA is concerned by the limited nature of FINRA's proposed definition of "natural." Although some firms may view "natural" IOIs in the manner reflected in the Notice, a survey of market participants that utilize "natural" IOIs would likely yield a variety of interpretations as to the meaning of that term. For example, some member firms may disseminate an IOI when a client expresses a significant buy or sell interest in a security, but is unwilling to place an order until a counterparty is found. Certain member firms may also consider IOIs related to certain principal activities as "natural." Moreover, some members treat

broker-dealer clients in the same way as buy-side clients for purposes of defining an IOI or quote as a "natural."[2] In this regard and as FINRA is aware, a broker-dealer's order does not always represent the proprietary trading interests of the broker-dealer. On the contrary, a substantial portion of the order flow received by a broker-dealer could be customer orders of a broker-dealer client or a mix of customer and proprietary orders from that broker-dealer client. Hence, a broker-dealer would have no way of knowing the ultimate source of the orders received from a broker-dealer client.[3] In light of these variations, we do not believe that FINRA should define the term "natural." Member firms should be free to establish terms of business with their clients and, subject to appropriate disclosure and conforming behavior, such terms should encompass the definition of the term "natural."

3. The Cost of Implementing the Proposed Rule Outweighs Any Benefits

SIFMA also notes that FINRA's proposal would impose significant implementation costs on some member firms. The proposal would require all firms to link any advertised natural IOI to the corresponding customer order, including cancelling the IOI when the customer order is cancelled or executed. As such, member firms would not only need to program their IOI systems to coordinate with, and be integrated into, their order execution systems (which currently may not be centralized within a firm), but also would need to establish a means to systemically surveil and test for compliance. While some firms may already have such systems in place, others may not. For the latter firms, such a connection would require substantial, complex technology changes at a time when most firms' regulatory technology resources are being taxed to their limit with other regulatory initiatives, including Exchange Act Rule 15c3-5 (Market Access Rule) and Rule 13h-1 (Large Trader Reporting). In assessing the costs and benefits of the proposed rule changes, SIFMA believes that the costs of implementing the proposal far outweigh the proposed benefits.

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[2] In addition, some clients permit member firms to route IOIs based on the firm's scraping of the client's trade blotter, and it is not clear how such arrangements would be handled under the proposed rule.

[3] Note that the proposed Rule 5210(d) refers to a "customer order." Since NASD Rule 0120(g) excludes broker-dealers from the definition of a "customer," it would appear that proposed Rule 5210(d) would not permit the use of the term "natural" in reference to broker-dealer orders.

Based on the foregoing, we do not believe that any changes from FINRA's existing guidance contained in Regulatory Notice 09-28 are warranted or appropriate. If you have any comments or questions, please do not hesitate to contact me at 202-962-7300 or avlcek@sifma.org.

Sincerely,

Ann L. Vlcek
Managing Director and
Associate General Counsel
SIFMA

cc: Thomas Gira/FINRA
Stephanie Dumont/FINRA
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