July 14, 2017

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
Financial Industry Regulatory Authority
1735 K Street NW
Washington, DC 20006

Re: FINRA Regulatory Notice 17-16--Proposal for Desk Commentary Safe Harbor

Dear Ms. Mitchell:

The Equity Dealers of America (EDA) appreciates the opportunity to comment on the Financial Industry Regulatory Authority's (FINRA) regulatory notice 17-16 regarding the Desk Commentary Safe Harbor Proposal (Proposal). We also greatly appreciate and value the time that FINRA staff has given us to discuss this Proposal.

The EDA represents the retail and institutional equity capital markets interests of middle market financial services firms who provide Main Street businesses with access to capital and advise hardworking Americans how to create and preserve wealth. The EDA's mission is to promote efficient and competitively balanced equity capital markets that advance financial independence, stimulate job creation, and increase prosperity. The EDA has a geographically diverse membership base that spans the Heartland, Southwest, Southeast, Atlantic, and Pacific Northwest regions of the United States.

The EDA strongly recommends that FINRA not move forward with its Proposal to provide a safe harbor for desk commentary. The Proposal is not workable, it lacks an adequate cost-benefit analysis, it misconstrues how the sales and trading business of its membership works in practice, and it puts examiners in the unenviable position of evaluating desk commentary under the subjective "I know it, when I see it" standard. The Proposal imposes the exact type of regulatory overreach that we believe FINRA's new leadership should seek to avoid.

General Concerns

The U.S. Securities and Exchange Commission (SEC), who is the primary regulator on issues of what is and what is not research in the equity capital markets, has declined to move forward with any formal process to address the "confusion" in this area. We believe that FINRA should not move forward with any type of direct or indirect re-writing of the equity research rules unless such action is first taken by the SEC.

The Proposal fails to articulate a public policy concern that necessitates a rulemaking, and more importantly, why any such concern is not already addressed by existing rules. FINRA conducts examinations of its membership using a risk-based analysis, not a rule-based analysis. As previously mentioned, FINRA has grounded its justification for this Proposal on "confusion" that was created by its own examiners, and not on any risk to investor protection or to the maintenance of market integrity. In our view, existing regulations are more than adequate to address the purported industry "confusion" about desk commentary that FINRA seeks to resolve. Specifically, if desk commentary contains false or misleading information, then FINRA has existing authority under a variety of anti-fraud/market manipulation regulations to discipline both the firm and the author. Additionally, even if the desk commentary is substantive enough to be a research report under the existing research rules, then the author would automatically be considered a research analyst who would undoubtedly be acting in an unlicensed capacity and the report would violate multiple rules regarding required content, such as conflicts disclosures. For these reasons alone, this Proposal is unnecessary.

The Proposal's introductory statements acknowledge that desk commentary generally includes trade ideas and other timely information selectively incorporated by institutional investors who understand the types of potential conflicts that may exist and are capable of exercising independent judgment in evaluating recommendations and reaching investment decisions. Given this, the EDA requests that FINRA specifically identify what the risk of an institutional investor receiving sales commentary that could be construed as research is to that an investor. Is FINRA worried that institutional investors are relying on one piece of information distributed from the sales desk of a single firm to make their investment decisions? Who is harmed if this happens? As set forth in the Proposal, FINRA's response to this question is that commentary that falls within the research report definition is "technically" a violation of Rule 2241. Our view is that technical rule violations are not issues that a risk-based regulator like FINRA should be concerned about. FINRA holds itself out to the public as a risk-based regulator, not a rule-based one. Consequently, if its examinations are risk-based, and not rule based, then a technical violation of rule that does not pose a risk to retail investors or to the markets should not justify a rule-making designed to address the technicality. We believe that if FINRA chooses to go forward with a final rule in this area, then it must define the exact risk associated with sales desk commentary distributed to an institutional investor that has the characteristics of research and why such risks are not sufficiently covered under existing regulations.

Substantive Concerns

The "author" requirements, particularly where authors of desk commentary would be prohibited from "report[ing] directly or indirectly to research department personnel", will present significant challenges for small and medium-sized firms, where one individual may head both the research and sales and trading departments. Additionally, where the "author" requirements prescribe limitations with respect to registration, the Proposal is confusing as to whether an author of desk commentary situated within a firm's sales and trading department, who holds the Series 86/87, would incur the undue presumption that he or she is in fact a research analyst. It seems that FINRA may be approaching the issue top-down rather than bottom-up (i.e. requiring

that authors of desk commentary not to have the Series 86/87 rather than indicating which licenses such persons must have (i.e. Series 7)). FINRA should address this confusion.

The Proposal's eligible "content" description applies to communications that are already excluded from the definition of a research report (e.g., commentary regarding market conditions, including economic statistics, or even providing innocuous company-specific information) and are not considered research under any circumstances. Furthermore, the Proposal does not provide a meaningful interpretation on what is an "analysis" and what is "information reasonably sufficient upon which to base an investment decision." This Proposal will make it impossible for firms to guide salespeople when the firms can't give them clear instructions as to what content they can and can't include in their commentary. Consequently, any meaningful rulemaking in this area must protect communications that could technically be considered research. We don't believe FINRA cannot articulate such a standard, which is another reason why we believe this Proposal should not move forward.

The Proposal's broad restrictions on investment banking activity or investment banking department influence over salespeople are overbroad and unnecessary. The prohibition on sales persons participating in pitches and other solicitations of investment banking activities reflects a fundamental misunderstanding of how FINRA member firms serve their clients. This function is essential to how the sales and trading business operates and we strongly oppose any direct or indirect limitation of it. Additionally, it is not uncommon for firms to have equity specialists, who provide sector specific expertise or who provide general market expertise, attend meetings with issuers and investment bankers. This is a central feature of client service. Issuers, especially small and mid-size issuers who lack the insight provided by these specialists, appreciate and expect this interaction. Any adoption of this conduct prohibition would substantially interfere with the basic day-to-day business conducted by broker-dealers. Even if FINRA could adjust the content requirements so that the safe harbor did protect commentary that is probably research, the investment banking conflict management requirements render the safe harbor useless to EDA firms.

The Proposal seems to have created needless uncertainty regarding the term "recommendation" and whether an author of desk commentary may include his or her own opinion in the content of the commentary and whether that opinion will be construed to be an opinion for purposes of evaluating desk commentary as research.

The conflicts management section is overly burdensome, particularly for small and medium-sized firms. For example, the requirement that desk analysts be insulated from "pressure by persons . . . including sales and trading personnel . . . who might be biased in their judgment or supervision" would seem to significantly limit the scope of the safe harbor or force a number of risk-based decisions, particularly where firms have limited numbers of personnel who perform varying duties. Also, the prohibition against "explicit or implicit promises of favorable research" – currently applicable to bona fide research analysts who regularly issue opinions, rating, price targets, and estimates with respect to covered companies – seems out of place in the context of desk commentary, which, by definition, is not research. Finally, certain verbiage used in the Proposal (i.e. "research analyst" rather than "desk analyst") also causes unnecessary confusion.

The restrictions or limitations with respect to participating in marketing activities on behalf of an issuer related to an investment banking services transaction will present challenges, again, particularly for small and medium-sized firms where sales and trading personnel may perform varying duties. While comment letters submitted by others may support the Proposal, we would strongly encourage FINRA to think about the basis for such support (i.e. is it to create a competitive advantage, does it create an opportunity to impose disproportionate costs on small-to-mid-size firms that can be easily absorbed by other firms, would the imposition of additional costs on small-to -mid-size brokers lead to further consolidation, etc.). FINRA should be mindful of the competitive landscape and avoid adopting rules that could favor certain broker-dealer members over others.

Cost-Benefit Concerns

The EDA believes that there is no need for this Proposal from an investor protection perspective because the desk commentary is only provided to institutional investors who, by their very definition, are aware of the obvious conflicts of interest and capable of looking out for themselves. On the other hand, the cost of implementing compliance programs to comply with the Proposal's wall between investment banking and sales and trading would be consequential and it would far outweigh any purported benefits to the public.

The cost of this Proposal would fall disproportionately on small and medium sized firms. While large firms have the economies of scale to endure another costly regulation that imposes material changes to their business operations, small and medium sized broker-dealers do not. We also believe that FINRA has not considered the cost impact of this Proposal on *all* of its members because it seems to have concluded that a one-size-fits all solution that is workable for large member firms will also be workable for the rest of its members. That is simply not true. This Proposal does not objectively quantify its cost impact on small and medium sized broker-dealers. The Proposal also fails to address the costs members will incur as they comply with the Proposal for FINRA examinations, while not being subject to similar obligations under SEC rules.

The lack of a thorough fact-based cost benefit analysis and the questionable legal basis justifying this Proposal highlight exactly why the EDA has recommended, in the past and will continue to strongly recommend in the future, that FINRA voluntarily submit itself, its rules, its guidance, its FAQs, and its governance to the Administrative Procedure Act.

Conclusion

This Proposal will disproportionately and negatively impact the business operations of small and medium sized broker-dealers, and it will make the IPO and capital formation processes for small and medium sized companies who create American jobs more difficult. The EDA does not support this Proposal and would not support any rulemaking in this area that simply adds additional layers of regulation to FINRAs existing rule set without any meaningful benefit to the public or investors. We believe that this Proposal threatens the free flow of information necessary for the U.S. equity markets to function as an accurate and dependable price discovery mechanism. If FINRA insists on moving forward in this area, then we would suggest that it do so in lock-step with the SEC and that both, FINRA and the SEC, hold a public roundtable to publicly determine whether this is an issue that requires a rulemaking.

We look forward to engaging with you on this issue, and we appreciate the opportunity to submit comments on this Proposal.

Sincerely,

Christopher A. Iacovella
Chief Executive Officer
Equity Dealers of America