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December 9, 2008

Via E-mail: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

WACHOVIA

Florence E. Harmon, Acting Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**Re: File FINRA SR-2008-055  
Recommendations to Customers in OTC Securities**

Dear Ms. Harmon:

Wachovia Securities, LLC ("Wachovia Securities") is pleased to submit the below comments concerning FINRA's proposed Rule 2114 which modifies the former NASD Rule 2315 concerning over-the-counter ("OTC") equity securities.

Wachovia Securities is a full service brokerage firm serving clients in 50 states. It assists active retail clients in managing assets approaching \$1 trillion. Wachovia Securities supports generally the proposed Rule 2114 as firms and investors benefit from the rule's goal of policing recommendations of securities not listed on an exchange and other higher risk securities. Mandating that a broker conduct a due diligence review of the issuer when recommending such a "covered security," the rule supplements existing FINRA requirements such as suitability assessments while expanding the types of securities covered. The rule requires that the review must include "current financial statements" and "current material business information". Proposed Rule 2114 makes a key change from NASD Rule 2315 by including an explicit definition of current material business information, defining it as "information that is ascertainable through the reasonable exercise of professional diligence and that a reasonable person would take into account in reaching an investment decision." The addition of a "reasonableness" standard is an improvement over Rule 2315 which simply defined the same term as meaning information that was "available" or related to events "occurred" during the

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year prior to the recommendation. As proposed, a Series 24 or someone supervised by a Series 24 must conduct the required review under Rule 2114. This requirement raises significant concerns about the proposed rule.

The Series 24 is the main supervisory registration under the former NASD system, whereas the NYSE required that firms have virtually the same sales supervisory activity performed by those possessing a Series 9/10 registration. The primary concern with the rule is that it nowhere makes for allowances for the supervisors who today possess only the Series 9/10 license. In so doing, FINRA may have failed to apply one of their stated objectives for rule consolidation by not fully considering the NYSE firm business model. Specifically, FINRA declared in a March 12, 2008, Information Notice titled "Rulebook Consolidation Process" that its approach would "include both a principles-based and tiered approach to the application of rules according to firm size and *business model* as well as recognizing possible distinctions in application between retail and institutional customers" (emphasis added). It appears that in proposing Rule 2114, FINRA has failed to account for the NYSE firm business model which includes the use of Series 9/10 individuals to principally supervise recommendations and sales activities.

Additionally, the Proposed Rule is silent and fails to address at all what identifiable skill set a Series 24 brings to the equity recommendation review that is absent in the Series 9/10. Specifically, Rule 2114 mandates that a principal exhibit a "reasonable exercise of professional diligence" in reviewing the "current material business information." The principal conducts the review as the "designated person" who must have the "requisite skills, background and knowledge to conduct the review" to conclude that there is "a reasonable basis under the circumstances for making the recommendation." The principal's review of business information and the decision rendered (i.e., satisfactory company information exists) are tasks that by all appearances Series 9/10s could perform equally as well as Series 24s. There is no unique "skill" that the Series 24 possesses that is not present in the Series 9/10. The rule as drafted fails to permit reciprocal recognition of the Series 9/10 as a principal capable of performing the required review.

There is also the precedent for providing limited reciprocity of the Series 24 and the Series 9/10. On December 10, 2007, the NYSE recognized the NASD Series 24 as a registration that could satisfy supervisory requirements in certain circumstances. As the Commission has noted in the context of this recognition, "the NYSE and NASD rulebooks have converged significantly in the last six years, and individuals who took the Series 24 Examination before July 1, 2001 have been subject to regulatory standards that have, to a large degree, been harmonized." (SEC Release 34-56936). In short, while regulatory standards have converged significantly and have largely been harmonized, it appears that proposed Rule 2114, by explicitly recognizing only the Series 24 license, strays from the harmonizing principles under FINRA's own rule consolidation plan.

There is also a cost-benefit concern that the SEC should weigh as it considers proposed Rule 2114. A number of firms may have relied solely on Series 9/10 supervisors to conduct required supervisory activity or set up a consolidated review process so that a Series 24-

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licensed individual could oversee a recommendation that a Series 9/10 supervisor typically reviewed as part of their responsibilities. This costly redundancy complied with the letter of the former NASD rule but not the spirit nor efficiency of the rule requiring a single level of supervisory principal review of the equity recommendations. None have posited that Series 9/10 individuals lack the training or skills necessary to supervise the due diligence review of a proposed equity recommendation. With adequately trained personnel on hand, the costs of having firms re-license Series 9/10 supervisors is probably greatly outweighed by any perceived benefit in having the Rule 2114 due diligence review performed only by Series 24 licensees.

We trust that these comments will assist you in your review of the proposed rule. Please feel free to contact me if you wish to discuss this letter.

Very truly yours,

Ronald C. Long  
Director of Regulatory Affairs

RCL:aab