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Barbara Z. Sweeney
Office of Corporate Secretary
NASD
1735 K Street, NW
Washington, DC 20006-1500

*Re: NASD Request for Comment on Proposal to Require
Pre-Use Filing of Advertisements and Sales Literature for
New Types of Securities and of Television, Video and Radio
Advertisements (NASD Notice to Members 05-25)*

Dear Ms. Sweeney:

Fidelity Investments¹ appreciates the opportunity to comment on two proposed amendments to NASD advertising rules which would require members to file on a pre-use basis additional categories of advertisements and sales literature with the NASD.² Specifically, the proposed amendments would require member firms to pre-file (1) advertisements and sales literature concerning new types of securities and (2) television, radio and video advertisements.

Fidelity's comments are intended to address critical issues raised by the amendments for member firms who actively advertise their products through national media outlets and who develop innovative new financial products for their customers. In

¹ Fidelity Investments is comprised of a group of financial services companies, including several NASD registered broker-dealers as well as one of the largest mutual fund complexes in the United States.

² See NASD *Notice to Members 05-25* (April 2005) ("Notice").

2004, Fidelity produced 15 unique commercials that were broadcast through major television networks and created numerous radio and video advertisements that were used across retail, institutional, and intermediary channels. Also, in addition to offering more than 300 Fidelity mutual funds, Fidelity routinely introduces new security products to our customers. For example, in recent years, Fidelity has introduced access to ETFs, IPOs and individual bonds, new retirement and insurance products, and college savings and charitable gift programs to our customers. In summary, our comments are as follows:

- We seek greater clarity in determining what “new types of securities” will be subject to the proposed pre-filing requirement. We suggest that NASD identify specific types of securities on which they would require member firms, when offering these securities for the first time, to pre-file sales material. We also recommend that NASD delay the proposal until after member firms have had an opportunity to work with recently published NASD best practices on “New Products.”
- We object to the proposed pre-filing requirements for television and radio “storyboards” and in addition do not believe that video, particularly web video, should be subject to the pre-filing requirement.
- We strongly believe that both proposed amendments will result in an exponential increase in filings by member firms with the Advertising Regulation Department of the NASD. If the Advertising Regulation Department is not equipped to handle these filings in a timely manner, we believe that there will be a significant negative business impact to member firms.
- If approved, we recommend that NASD provide a reasonable compliance date for the proposed amendments.

Our comments on each aspect of the rule proposal that we believe NASD needs to reconsider follows.

Sales Material Concerning New Types of Securities

Under NASD’s first proposed amendment, NASD member firms would be required to file the initial advertisement or sales literature concerning “a type of security

that the member has not previously offered” at least 10 business days prior to first use or publication. Member firms would also be required to pre-file all advertisements and items of sales literature for this type of security that are used or distributed during 90 calendar days following the filing of the initial advertisement or sales literature. These pre-filed communications would need to be withheld from publication or circulation until any changes specified by the Department have been made.³ According to the Notice, NASD has proposed these amendments to (i) alert the NASD when the industry promotes a new type of security to retail investors, and (ii) allow the Advertising Regulation Department to review on a prior to use basis, sales material a member firm has had no prior experience producing.⁴

Fidelity agrees with the NASD that there are a large number of increasingly complex financial products entering the marketplace, some of which may not be appropriate to particular classes of investors. We fully support the NASD’s efforts to ensure that sales materials in the marketplace are compliant with applicable advertising regulations and provide prospective investors with the information necessary to make informed decisions. However, we believe that the proposed amendments do not provide member firms with sufficient guidance concerning the types of new securities that will be subject to pre-filing obligations. We believe the proposal potentially subjects new securities developed by member firms to merit regulation by NASD analysts and question

³ Proposed Rule 2210(C)(4)(D). Advertisements or sales literature (i) that any member has previously filed with the Department, and that has not been materially changed; (ii) that is already required to be filed with NASD pursuant to 2210(c)(2) and 2210(c)(3); (iii) concerning securities that previously have been traded in the secondary market; and (iv) concerning a type of security “that the member has previously offered,” would be excepted from the proposed filings requirements. Proposed Rule 2210(c)(4)(D)(i)- (iv).

⁴ Because the proposed amendments levy pre-filing obligations at the member firm level, they fail to take into account large financial service firms offering new types of securities through multiple broker-dealers. Many large financial service firms have separate broker-dealers that offer products to specific channels. For example, one broker-dealer may exclusively serve a retail channel, a separate broker-dealer may exclusively serve an intermediary channel and a third broker-dealer may exclusively serve an institutional channel. Often if new types of securities are successful in one channel, if appropriate, they may be marketed in a different channel, through a different, affiliated, broker-dealer. Under the proposal, in the case of multiple broker-dealer firms, each broker-dealer of the firm would have to pre-file communications on the “new types of security” despite the fact that an affiliated member firm under the same parent corporation had pre-filed similar content. Since, in these cases, the NASD would have already been alerted to a new security in the marketplace and reviewed, on a pre-file basis, communications of an affiliated member firm, if the amendments are approved, we seek an exception for marketing content of affiliated broker-dealers.

whether the analysts will have the expertise and time to review sales material for these securities promptly. Moreover, we believe that the proposed amendments are premature given recently published NASD guidance to member firms on the subject of “New Products.”

The language of the proposed amendments raises interpretive issues with regard to the type of securities that member firms must file on a pre-use basis. Without a clear meaning of the statements--“a type of security that the member has not previously offered” or “new categories of investments that the member has not previously offered”—the NASD analysts may likely engage in philosophical discussions with member firms on what constitutes a “new category of investment” and “not previously offered.”⁵ Such interpretive questions not only concern the type of security offered but also how and to what extent it may have previously been marketed.⁶

For this reason, we recommend that NASD specifically identify those types of securities for which it would like member firms, when offering these securities for the first time, to pre-file sales material. For example, if NASD believes that asset back securities, distressed debt or derivative products pose certain advertising and sales practice issues for member firms offering these securities for the first time, NASD should specifically identify these securities as requiring special filing obligations for their sales material.⁷ This proposal follows existing practice in NASD Rule 2210 to assign specific requirements to specific types of securities and would provide needed clarity in this area.⁸

⁵ See NASD *Notice to Members* 05-26, which asks member firms to develop procedures to include “clear, specific, and practical guidelines for determining what constitutes a new product.” In this regard, we believe that the NASD should do what NASD is asking member firms to do - develop practical guidelines for determining what constitutes a new type of security that the member has not previously offered for purposes of proposed rule 2210(c)(4)(D).

⁶ For example, if a member firm previously offered but did not advertise a security, would sales material for the security be subject to the proposed amendments? If a member firm previously offered a particular security, stopped offering it for some period of time, then decided to offer it again – would sales material for the security be subject to the rule?

⁷ Because all communications with the public are subject to NASD’s Content Standards under 2210(d)(1)(A), Fidelity does not believe that the pre-use filing requirement should also apply to advertisements and sales literature for products that the member has previously offered but is now offering to a new class of investors, or in a different channel, for the

Fidelity is further concerned that the proposed amendment will potentially subject new types of securities developed by member firms to merit regulation through the advertising review process. If for example, an NASD analyst determines that a new type of security should be examined more closely, the analyst may take their time in reviewing advertising and sales material for the security - slowing down the launch process. Likewise, NASD analysts may not currently have the expertise to review the new security. We believe that if NASD wishes to perform merit based reviews on new types of securities, such reviews should be performed through an investigative, not advertising review, process. While the review of new types of securities through advertising review may be useful to the NASD as a way to insert itself into the review process, we believe that it may slow innovation and result in slower time to market for certain types of new securities.

Additionally, Fidelity believes that regulation in this area is premature given recently published guidance from NASD concerning member firm review of new products. *Notice to Members 05-26* (posted to NASD's Web site the same day as *Notice to Members 05-25*), provides member firms NASD recommended best practices for reviewing new products. The self-described purpose of the Notice is "to remind firms of the kind of questions they should be asking before offering a new product, and to highlight a number of best practices employed by some firms that NASD believes others should consider in reviewing their current procedures." Importantly, the Notice provides member firms with specific questions to ask that are relevant to the marketing of a new product.⁹ We strongly believe that member firms should have an opportunity to review

first time. We do not believe that standards applicable to communications to one audience pose such material differences as to require specialized filing obligations for a different audience.

⁸ See requirements governing Communications with the Public regarding content for Variable Annuities (NASD IM-2210-2), Options (NASD Rule 2220); Securities Futures (NASD IM- 2210-7) and Collateralized Mortgage Obligations (NASD IM- 2210-8).

⁹ In a section marked "Ask the Right Questions," Notice to Members 05-26 states that "every firm should ask and answer the following questions before a new product is offered for sale....How will the product be marketed? What promotional and sales materials will be used? What risks must be disclosed, and how will that disclosure be made?"

these best practices and integrate them into their business models before member firms are subject to regulation in this area.

Pre-Use Filing of Television, Video and Radio Advertisements¹⁰

Under NASD's second proposed amendment, NASD member firms would be required to file all television, video (including Web site video), radio, or similar broadcasts of 15 seconds or longer at least 10 business days prior to the date of first use or broadcast in addition to filing the final filmed version of the advertisement within 10 business days of first use. Member firms would also be required to "withhold use of the advertisement until changes specified by the department have been made."¹¹

Fidelity does not believe the proposed amendment to require member firms to file all television, radio or similar broadcasts is necessary or practical given NASD's current filing program and the current practices of member firms. Based on our extensive experiences in the area of television, radio and video advertising, we offer the following comments.

When member firms create television commercials they embark on a complex and costly process that requires extensive scheduling and planning, often months in advance.

¹⁰ As we mentioned in our Comment Letter on the NASD's proposed amendments relating to disclosure of fees and expenses in mutual fund performance sales material (File No. SR-NASD-2004-043), to the extent that the NASD wishes to adopt regulations on member firm "Advertisements," greater clarity should be provided to the definitions of "Advertisements" and "Sales Literature" under NASD Conduct Rule 2210(a)(1) and Rule 2210(a)(2), respectfully. Advertisements and Sales Literature are two very similar forms of communications with the public and existing definitions of these terms are vague and subject to interpretation by NASD Advertising Regulation analysts. For example we believe that a video communication posted on a password protected Web site or an enrollment video distributed to a group of retirement plan participants should be considered Sales Literature under the NASD Conduct Rules, and seek clarification for this assumption in the existing definition or commentary to a final rule. Furthermore, the definition of "Investment Company Sales Literature" under SEC Rule 156 and the definition of "Sales Literature" under NASD Rule 2210 are not consistent. Should this proposal be adopted, Fidelity requests that further guidance be provided concerning which materials are considered "Advertising" and "Sales Literature" under existing NASD definitions.

¹¹ Proposed Rule 2210(c)(6).

Member firms use of creative content for television commercials in the design phase is constantly changing based on market research, advertising design concepts and direction given from senior management. Moreover, once the creative content is developed in the form of a storyboard, based on events that occur during the production of the commercial, additional changes might be made to the commercial. For example, during the course of filming a commercial, a director may determine that an actor should appear on the left hand of the screen rather than the right hand of the screen. This seemingly minor change can result in a change in the placement of disclosure or impact the pre-established sequence of events in the commercial. Above all, television commercials are the most costly form of member firm advertising, with production costs generally running in excess of \$300,000 per commercial. Placement of the commercial on television is also scheduled months in advance and can be equally costly.

We are concerned that language in the proposed amendments requiring members to “withhold use of the advertisement until changes specified by the Department have been made” will stifle member firm communications to only those ideas shown to NASD in the pre-filed storyboard. Television commercial storyboards are similar to concept drawings; they typically evolve and are refined over time. In requiring members firms to file television, radio and video advertisements twice with the NASD, the NASD has two opportunities to comment on the filed material. Based on the production, talent and media costs involved in producing these advertisements, member firms will be hesitant to make any changes to pre-filed and NASD approved storyboards, for fear that if the NASD does comment on their final advertisement, use of the advertisement and existing media obligations must immediately cease. For this reason, Fidelity urges NASD to reconsider this language in this context.

Fidelity is also concerned that this proposal will insert NASD analysts into the creative process – placing them in awkward and difficult situations in which they must make judgment calls on whether to prevent the use of commercials that have been vetted and approved through the storyboard process but that contain changes in the final video

version based on creative design issues. We are not aware of other situation in which NASD requires that the staff take part in the creative process based on the media of the advertisement. For example, print advertisements appearing in major national magazines and newspapers reach numerous retail audiences, yet absent specific types of content, are not subject to a pre-filing requirement with NASD.¹²

Additionally, Fidelity does not believe that video advertisements should be treated in the same manner as radio and television advertisements and disagrees that this form of sales material requires pre-filing with NASD Advertising Regulation. Videos are often created for specific audiences and are not used in public media. For example, Fidelity often creates video advertisements for its 401(k) plan participants and for targeted messages on its Web site. Unlike radio and television advertisements in which the potential investor is often a passive recipient of the advertisement, video advertisements are usually viewed by potential investors who actively choose to view a specific video, at a specific location. Based on the real differences between television, radio and video advertisements, we do not believe that video advertisements deserve the same degree of oversight as radio and television advertisements and do not believe that they should be subject to the pre-filing requirement.

Fidelity believes that a requirement to pre-file video advertisements is particularly inappropriate in the case of web videos. A major purpose of the World Wide Web is to provide investors with timely access to information. Web videos are often created to respond to major events or current issues in the marketplace to enable member firms to provide immediate information to investors. In this regard, they function much in the same way, but in a different medium, as a written letter to investors posted on a Web site. The timeliness by which certain information could be conveyed to investors in the form

¹² Regardless of whether member firms are subject to a pre-filing requirement on television and radio advertisements, the NASD should work with member firms to streamline the amount of disclosure required on these materials. We believe that the current disclosure requirements for television and radio are cumbersome and extremely difficult to apply in practice. Fidelity welcomes the opportunity to work with NASD on streamlining advertising disclosures, particularly as they affect television and radio advertisements.

of a web video would be significantly diminished if a pre-filing requirement were in place. For this reason, Fidelity urges NASD to remove video advertisements from a pre-filing requirement under the proposed amendments to 2210(c)(6).

Both proposed amendments will result in an exponential increase in filings by member firms with the Advertising Regulation Department of NASD

Fidelity is very concerned that the proposed amendments will create a very significant increase in filings of sales material with the NASD and will strain the already overtaxed NASD Advertising Regulation analysts. Like most member firms, Fidelity files sales materials with NASD Advertising Regulation on both a regular and expedited basis. In 2004, for regular filings, the average response time for NASD to return comment letters to Fidelity on filed sales material was 56.2 days. Over the past year, Fidelity has also been denied requests for NASD review of material on an "Expedited Basis" due to analyst workloads and/or complexity of materials filed.

Member firms need NASD comments on filed materials promptly for business and compliance purposes. Financial intermediaries and third parties who offer Fidelity products using Fidelity's sales material will typically not use the sales material until we can demonstrate that the NASD has had no comments on the materials. Also, in the case of web content, changes can be made to web content only during pre-established times of the year in order to ensure the accuracy and stability of changes made. Delayed comment letters may mean that opportunities to change content quickly have been lost. For these reasons, Fidelity is very concerned that NASD proposals to add additional review requirements, potentially without adding more experienced analysts, will be to the detriment of member firms.

This concern is particularly acute in the case of television commercials where we believe the proposed amendments will result in a substantial increase in filings with the NASD Advertising Regulation Department that may be unnecessary and may delay the

return of comment letters on pre-filed commercial storyboards. Because the proposed requirement is content neutral, member firms will be required to file *all* television, radio and video advertisements regardless of content. This will result in complex and simple ads being filed, when the NASD may only be interested in a subset of this advertising population. Moreover, in producing a television commercial, Fidelity typically pre-files storyboards on an expedited basis with the NASD and allows for an established period of time to receive and resolve NASD comments on the proposed commercial. Delays in receiving NASD comments can impact scheduled filming dates, locations, and actor/actress availability. For these reason, we strongly urge NASD to consider the impact this proposal will have on analyst workloads and hire additional experienced analysts as appropriate.

Compliance Date

If the proposed amendments are adopted, member firms will need to change existing policies and procedures regarding the filing of sales material for new products, television, video and radio commercials. For this reason, we join the Investment Company Institute in recommending that NASD provide a compliance period of approximately six months. Such a time period will enable us to change existing procedures and help educate personnel on the new requirements.

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Fidelity appreciates the opportunity to comment on this important rule proposal. If you have any questions about our comments or need additional information, please contact the undersigned at 617-563-6308 or 617-563-4497, respectively.

Sincerely yours,

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