



Via e-mail: pubcom@nasd.com

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

Re: NASD Notice To Members 05-40 – Proposed Rule Governing Sales Contests and Non-Cash Compensation

Dear Ms. Sweeney:

This letter is submitted by AXA Advisors, LLC ("AXA Advisors") and AXA Distributors, LLC ("AXA Distributors") in response to the solicitation of comments by the National Association of Securities Dealers Inc. ("NASD") with respect to Notice to Members 05-40 regarding a proposed rule ("Proposed Rule") that would prohibit all product-specific sales contests and apply non-cash compensation rules to the sales of all securities.

Background

AXA Advisors and AXA Distributors (together, "we" or "our") are registered broker-dealers under Section 15(b) of the Securities Exchange Act of 1934 and members of the NASD. Both AXA Advisors and AXA Distributors are wholly-owned subsidiaries of AXA Financial, Inc. ("AXA Financial"). AXA Financial is a diversified financial services company. Its principal operating subsidiaries, in addition to AXA Advisors and AXA Distributors, include AXA Equitable Life Insurance Company ("AXA Equitable"), MONY Life Insurance Company, MONY Life Insurance Company of America, U.S. Financial Life Insurance Company, the Advest Group, Alliance Capital Management L.P. and Enterprise Capital Management.

AXA Advisors distributes variable annuities, other fixed and variable insurance products, mutual funds and other investment products through more than 5,000 registered representatives nationwide. In addition to products issued by AXA Equitable and other AXA Financial affiliates for which it acts as principal underwriter and distributor, AXA Advisors also distributes, through its retail sales force, insurance and investment products issued and/or managed by dozens of the country's leading financial service firms.

AXA Distributors distributes fixed and variable annuity and life insurance products issued by AXA Equitable, for which it acts as principal underwriter and/or general agent, on a wholesale basis through a broad range of national and regional securities firms, banks, and other broker-dealer distributors.

Proposed Rule

We appreciate the opportunity to comment on the Proposed Rule. We recognize and support NASD's efforts to broaden the scope and improve the clarity of the non-cash compensation rules. We also recognize NASD's continuing efforts to protect investors by examining various means to reduce inappropriate incentives at the point of sale. For the reasons set forth below, however, we cannot support the rule as currently proposed.

 AXA FINANCIAL

Principal Concerns

A. *The Proposed Rule Falls Well Short of Accomplishing Its Investor Protection Goal; Will Actually Harm Investors and Member Firms*

While perhaps well-intentioned, the Proposed Rule cannot achieve the goal of neutralizing a registered representative's potential conflicting personal interests at the point of sale because it stops well short of addressing the inherent commission differentials across the spectrum of securities. Were it only an imperfect effort to achieve greater investor protection, perhaps it would not be so objectionable. Unfortunately, its effects are not so benign. While it fails to meaningfully reduce the inherent point of sale conflicts caused by compensation differentials across products,¹ it also deprives member firms of a time-honored tool that has provided considerable value in their efforts to cause producers to diversify and expand the range of securities that they offer to customers. These efforts, we submit, can most assuredly be in the best interests of investors, particularly when employed to promote the introduction of new and innovative products designed to help customers meet their investment goals (e.g., managed separate account products, retirement planning products, etc.).

As the NASD is well aware, customers today have available an ever-increasing array of different securities to meet their investment needs, ranging from individual stocks and bonds, to a wide range of so-called "packaged" investment products, to even more sophisticated structured finance and derivative securities. Each of these different choices is characterized by its own set of unique risk/return features. Each offers different features and benefits and often has its own unique cost structure. Particularly in the case of packaged products, each security may be structured for a different holding period. As a result of these differences, among others, there can be a fairly substantial divergence in the range of sophistication, skills and effort required to sell and/or service them. These differences, among others, results in wide variations in sales and servicing compensation, reflecting the operation of market forces. The proposed rule would do nothing to address the inherent conflict posed at point of sale by the widely disparate sales and servicing compensation. Nor would we suggest that it should. Such conflicts are, we submit, an inherent by-product of the wide range of choices available to investors.

Of course, not every product is offered by every member firm. Perhaps more importantly, within a particular firm, not every product offered by the firm is actually sold by every registered representative of that firm. Indeed, the breadth of choices available to a particular investor typically depends largely on the breadth of products with which his/her registered representative is most familiar and comfortable. Convincing registered representatives to venture beyond their comfort zone and expand their product portfolios is a considerable challenge for member firms, but one which they must continue to meet in order to assure that they are delivering a broad range of state of the art solutions to their clients. Promotional incentives have long been one of the most important tools used by member firms to accomplish this objective. By eliminating the ability of member firms to provide temporary incentives to spur registered representatives to spend the time to learn about and become

¹ Those commission differentials can range from small fractions of a percent of the investment in the case of, e.g., government securities, to double digit percentages in the case of certain direct investments and other securities.

comfortable with a particular category of products, the proposed rule has the potential to significantly harm investors.

Moreover, the rule will also retard the ability of member firms to utilize temporary, category-specific promotions to diversify its own revenues; something that every well-run business strives to accomplish. Depriving member firms of the kinds of tools available to every other category of business in America has consequences not only to the owners and employees of such firms, but to its customers as well – since customers have a substantial interest in the financial health of the member firm with which they do business.

Again, if the proposed rule had the potential to meaningfully reduce point of sale conflicts, perhaps these negative implications might be an acceptable price to pay to achieve such goals. However, as noted above, the proposed rule actually will do little to eliminate such conflicts.

B. Existing Rules and Practices Already Offer Considerable Protections

The Proposed Rule discards the carefully developed constraints on sales contests in the areas of investment company securities and variable products. Those constraints have enhanced the ability of NASD to hold firms accountable for inappropriately promoting the sale of particular products within a product category.² We believe that the construct of the existing non-cash compensation rules has considerable merit, and should be applied more broadly across all types of securities. In particular, the requirement in those rules that product category sales contests must equally weight all products in the category, in our view, strikes the right balance between prohibiting inappropriate single product promotions, and recognizing the inherent impracticality of attempting to regulate out of existence point of sale conflicts.

Moreover, recent changes to the SEC books and records, which require more comprehensive recordkeeping for cash and non-cash compensation, have further enhanced regulatory efforts to root out inappropriate promotions. These recent changes will provide the SEC, NASD and state regulators a clearer record of sales promotions and contests. Expansion of the coverage of the existing non-cash rules to all securities, coupled with vigorous enforcement of these rules would, we submit, be a far more effective approach to limiting point-of-sale abuses, rather than the draconian limitations set forth in the proposal.

What's more, in response to regulatory mandates and other proposed rulemaking, member firms have substantially increased the level of disclosure to customers about point of sale conflicts, rendering more transparent the potentially divergent interests of members and their registered representatives on the one hand, and customers on the other. Both NASD and the SEC have recently proposed various forms of enhanced point-of-sale disclosure documents. The proposals include the provision of additional disclosure about potential point of sale conflicts of interest. While not without some practical problems, in concept these initiatives by NASD and the SEC appear to be a preferable and more constructive approach to address potential conflicts of interest at the point of sale.

² See, e.g., the NASD's recent disciplinary actions against Hornor, Townsend & Kent, [Waddell and Reed], and [First Command Financial Planning Inc.].

C. The Proposal is Fraught with Potential Unintended Consequences

Certain Forms of Cash and Non-Cash Compensation Cannot Be Awarded on Total Production by Insurance-Affiliated Members. Tax considerations applicable to insurance-affiliated member firms like AXA Advisors and a large percentage of our registered representatives preclude the payment of certain forms of cash and/or non-cash compensation (including traditional employee benefits such as health benefits) on production of non-insurance products. The NASD recognized this by excluding employee benefits from the definition of non-cash compensation when it adopted the non-cash rules. [See NTM 98-75] The majority of registered representatives who are associated with insurance affiliated member firms are independent contractors. Federal tax law has long provided an exception to the restrictions on providing FICA matching contributions and benefits coverage solely to common law employees, by recognizing these representatives as "statutory employees", if they sell primarily life and annuity products of the insurance affiliate of a member firm. As a result, it would appear that the proposed rule would prohibit insurance-affiliated firms like ours from continuing to utilize a production-based formula which recognizes the sale of only life and annuity products for determining qualification for such benefits, since they are not permitted to utilize production of non-insurance securities consistent with our understanding of the tax law. As a result, insurance-affiliated firms would be faced with the unenviable dilemma of choosing not to offer such benefits or to offer them without regard to production levels. This, of course, would put firms like AXA Advisors at a considerable competitive disadvantage.

Managerial and Executive Compensation Plans. In banning sales contests not based on total production, the proposed rule makes no distinction between point of sale incentives offered to registered representatives dealing with customers and those offered to associated persons acting in managerial capacities. We would submit that there is a qualitative difference between the potential conflicts posed by providing an incentive to a salesperson versus providing such incentives to a manager or an executive, and important reasons why the rule should not be applied to managerial and executive personnel. Managers and executives are attenuated from the customer interaction. Their role is to help assure the effective and profitable operation of the firm. In that capacity, they are frequently called upon to help assure that the firm is delivering a broad and profitable range of products and services. Given that managerial and executive performance traditionally has focused heavily on profitability, which is impacted directly and indirectly by product mix, the proposed rule has the potential to significantly and adversely impact member firms' ability to structure annual managerial and executive compensation programs. For the reasons noted above, we think it would be particularly inappropriate to deprive firms of the ability to use various incentives with its managerial and executive personnel to further diversify the firm's product offerings and revenue streams.

D. Areas Requiring Further Clarification

In the proposing release, NASD solicited comments regarding the clarity of the Proposed Rule. Without minimizing our strong objection to the proposal, we do wish to comment on a number of areas that appear to us to lack clarity.

The proposal invites comment on changes that would eliminate the ability of non-member companies or other members to contribute to the cost of a non-cash arrangement between a member company and its associated persons. Such contributions are not uncommon in the insurance industry whereby insurance affiliates may contribute toward the cost of programs permitted by NASD rules (meaning that, among other things, they comply with

the equal weighting requirements) and covering persons who are its insurance agents. The inability of insurance-affiliated firms to continue to receive such contributions could place insurance-affiliated firms at a substantial competitive disadvantage.

The rule clearly seeks to outlaw "sales contests" not based on "total production." We assume that NASD will continue to permit contests based on criteria other than sales under the Proposed Rule. For example, the Proposed Rule does not appear to prohibit broker-dealers from holding contests based on the number of new applications for products, or new accounts opened, or new clients introduced to the firm. Certainly NASD must recognize that there are many ways, other than sales production, to reward a sales force for their efforts to increase, e.g., activity, productivity and client base. We would certainly hope that broker-dealers could continue to reward performance in ways that are based on factors other than sales, particularly when such programs tend to raise far fewer point-of-sale conflicts.

Conclusion

Although we respect the NASD's efforts to reduce point of sale conflicts, we submit that the Proposed Rule does not and cannot meaningfully further that goal in light of the substantial and continuing disparity in cash compensation across the spectrum of securities. While not achieving its stated objectives, the proposed rule instead would substantially and materially reduce the ability of member firms to effectively deliver new products to customers. It would also deprive firms of a time-honored tool used to effectively manage their businesses and impose inappropriate economic restraints upon the securities industry. The Proposed Rule also suffers from the very real potential for unintended consequences, including the fact that tax law considerations would likely preclude insurance-affiliated member firms from being able to utilize any sales contests at all, leaving them at a manifest competitive disadvantage relative to other firms.

We urge NASD to retain and extend to all securities the existing non-cash rules for investment company securities and variable contracts. These rules have proven to be an effective restraint on the most insidious single product sales contests.

In the alternative, if NASD decides that the Proposed Rule should be adopted, we urge NASD to apply the final rule on a prospective basis. Further, the Proposed Rule should not apply to programs that are currently in force and were permissible under the rules in effect at the time they were initiated. The delayed effective date will be critical for broker-dealers to develop appropriate implementation strategies and minimize the negative effect for the sales force.

We thank you for the opportunity to offer our comments on this proposal, and appreciate your consideration of the matters set forth herein. If you have any questions about our comments or would like to discuss them further, please contact St. Clair Davis at (212) 314-3835.

Sincerely,



Robert S. Jones
Chairman of the Board
AXA Advisors, LLC



James F. Mullery
Senior Vice President and Chief Distribution Officer
AXA Distributors, LLC