



AMERICAS

August 5, 2005

VIA ELECTRONIC MAIL

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

**Re: NASD Notice to Members 05-40 –
Sales Contests and Non-Cash Compensation**

Dear Ms. Sweeney:

Thank you in advance for providing us with an opportunity to comment on proposed NASD Rule 2311 (the "Proposed Rule"), as described in NASD Notice to Members 05-40 (the "Notice"). We applaud the efforts of the NASD in attempting to eliminate the potential for registered persons of member firms from acting in any manner other than in the best interests of their clients. However, it is our strong belief that any new regulatory requirement, or amendments to existing requirements, should be reasonably designed to achieve a clearly articulated purpose and that the proposal not be so broad as to have a chilling effect on legitimate business activities or innovation. In other words, the benefits of any regulatory requirement should not be significantly outweighed by the burden it would impose on the financial services industry. In addition, any rule being considered for adoption by the NASD must be clear and unambiguous so that member firms and others in the industry reasonably are able to comply.

As described more fully below, we believe that the Proposed Rule, as described in the Notice, creates the potential for confusion in connection with the regulation of non-cash compensation and unnecessarily limits the ability of registered representatives to earn legitimate compensation by banning certain forms of sales incentives. In addition, the Proposed Rule would place certain categories of registered representatives and member firms at a substantial competitive disadvantage relative to others.

I. Introduction

The application of the provisions of NASD Rules 2820 ("Rule 2820") and 2830 ("Rule 2830") related to non-cash compensation (collectively referred to herein as the "Comp Rule") are not consistently understood by variable insurance product or mutual fund product manufacturers (together, "Product Manufacturers"), respectively, or NASD member firms. As a result of this, widely varying interpretations of the Comp Rule exist within the industry, among both Product Manufacturers/offerors and NASD member firms offering these

investment products. We urge the NASD particularly to develop clearly articulated and objective guidelines in connection with non-cash compensation. We also would suggest that the NASD work with the SEC to develop rules regarding non-cash compensation that would apply to both Product Manufacturers and member firms. To facilitate introduction of any amendments to the Comp Rule, we would encourage the NASD to clarify the applicability of prior interpretive guidance, including, but not limited to, NASD Notice to Members 99-55, in light of the Proposed Rule.

II. Definitions

Several of the definitions set forth in the Proposed Rule lack a sufficient degree of precision and specificity, and, as currently worded, have the potential to create a substantial degree of uncertainty. In particular, we would suggest that the following issues or definitions be clarified:

- The Notice states that the Proposed Rule replaces, among other provisions, existing NASD Rule 2820(g)(4) for variable insurance products and NASD Rule 2830(l)(5) for mutual fund products. The Proposed Rule contains definitions of “compensation,” “cash compensation” and “non-cash compensation” that differ from the definitions of such terms as set forth in Rule 2820 and Rule 2830. It is not clear why these definitions would differ between the current and proposed rules. We would observe that other provisions of Rule 2820 and Rule 2830 dealing with compensation do not appear to be changing as a consequence of the Proposed Rule. It is reasonable to expect that different definitions of the same terms between the current and proposed rules will lead to confusion and inconsistency within the industry.
- It is unclear whether or not the definition of “non-cash compensation” set forth in the Proposed Rule is intended to prohibit Product Manufacturers and other offerors from providing training materials, among other things, to member firms and their representatives. As proposed, the definition could be interpreted to apply to, among other items, training materials, advertising and general revenue sharing. In proposing the existing Comp Rule, the NASD noted that clarification would be forthcoming, but has failed to provide it. See generally Sec. Exchange Act Rel. 34-37374 (June 26, 1996). As explained more fully below, it is our fervent belief that registered representatives should be afforded access to as many educational and training opportunities as possible. In our opinion, it is critical that, in the best interests of consumers, Product Manufacturers/offerors have the flexibility to continue to support bona fide training and educational initiatives. Accordingly, we urge the NASD not to impose any additional limitations on access to such training and educational opportunities by registered persons whether provided by Product Manufacturers or otherwise.
- The clarification of the definition of “Pre-conditioned on the achievement of a sales target” as set forth in the Notice and Proposed Rule is helpful; however, including the

subjective element regarding the “understanding” of a registered person as to the criteria of a sales contest seems unnecessary, potentially confusing and impossible to administer. We would suggest revising the definition to say “pursuant to which the member firm has established a dollar denominated goal . . .” or similar language.

- The definition of “sales contest” should not include any “contest” that *does not* involve the sale of a specific security. Such criteria as assets under management, opening of new accounts, and similar measures are permissible under the Comp Rule. We would suggest revising the definition to expressly permit these measures. In addition, the sort of recordkeeping required in order to comply with the Proposed Rule should be specified and the effect of any such requirements on current NASD Rules 2820(g)(3) and 2830(1)(3) clarified.

III. Restrictions on Sales Contests and Non-Cash Compensation Arrangements

A. Prohibition on Product-Specific Sales Contests

As proposed, the prohibition of product-specific sales contests seems overly broad and unduly restrictive. The NASD has established specific requirements regarding the obligations of registered representatives to determine the suitability of any proposed investment, including, for example, variable insurance products, for their clients. See generally NASD Notice to Members 96-86 (Dec. 1996). In addition, each registered representative has a “fundamental duty of dealing fairly with . . . customers.” Id. at 2. The rationale underlying the current proposal suggests that a representative would sell a client one type of (unsuitable) product instead of a different type of (suitable) product based on an incentive program. Current suitability rules prohibit such conduct. In addition, we are not aware of any study or report that suggests that current incentive programs in the industry have brought about any such conduct.

Assuming arguendo that there is some support for the concerns expressed in the Notice, limiting sales contests to incentives based on “production” of all types of securities does not cure the perceived problem. Different types of securities have different commission structures and, as a result, it would be difficult, if not impossible, to achieve equal weighting across all products. Thus, to the extent that a potential conflict could exist as a result of a sales contest targeting a particular type of security, it would seem that a similar or greater conflict would continue to exist with respect to individual securities based on the commission structure of the particular product which arguably provides a more direct and immediate benefit to the representative.

A prohibition on product-specific sales incentive programs also has the potential of having a disparate impact on different classes of member firms. For instance, larger, full service firms, such as wirehouses, would be prohibited from product specific sales contests. However, single product or limited purpose broker-dealers, in effect, would be permitted to hold product specific sales contests. If this prohibition were retained, we feel that the Proposed Rule could have the effect of further fragmenting the broker-dealer community by

creating a greater number of single purpose broker-dealers where consumers would be presented with a greatly reduced number of investment options. If the motivation of the NASD in proposing to prohibit such sales contests is as described in the Notice, this result would seem incongruent with that motivation.

In addition to the foregoing, we would offer the following additional observations:

- The Notice does not make clear whether or not “commission specials” offered by Product Manufacturers would be prohibited under the Proposed Rule.
- Not all representatives of member firms are qualified and/or registered to sell all of the securities products offered by their member firm. Thus, it would seem that representatives only registered to sell mutual fund products, for instance, would be prohibited from participating in any “sales contest” offered by their broker-dealer under the Proposed Rule.
- Certain broker-dealers, such as wholesale broker-dealers, often are organized by division along various product distribution channels (e.g., bank, wirehouse, regional independent broker-dealers, etc.). Under such an organizational structure, registered persons typically are assigned to one distribution channel or another and often are limited in the products they may offer or distribute within their assigned distribution channel. In addition, each distribution channel generally operates independently of the other channels (e.g., separate marketing strategies, product offerings and commission structures). In certain cases, distribution channels also may be in competition with one another with respect to assets or “shelf-space” within a retail broker-dealer. The current interpretation of the Comp Rule permits not only product-specific sales contests, but also sales contests limited to divisions (or distribution channels) within a member firm. We urge the NASD to continue to permit sales contests based on the criteria described above. In our opinion, eliminating the current interpretation of the Comp Rule would not add any meaningful protections for consumers, but could incent wholesale broker-dealers to restructure their distribution organizations at *significant cost* to the broker-dealer. In addition, Product Manufacturers may be forced to restructure their product offerings to the disadvantage of both wholesale and retail broker-dealers.

B. Elimination of Certain Arrangements Related to Non-Cash Compensation

Under the Comp Rule and subject to certain limitations and conditions, the following types of arrangements, among other arrangements, are permitted:

1. Non-cash compensation arrangements between a broker-dealer and an affiliated offeror, such as an insurance company; and

2. Contributions by non-affiliated offerors as long as those offerors do not participate in the organization of the meeting.

The Proposed Rule would eliminate these arrangements. As part of the Notice, the NASD has requested specific comment on this part of the proposal. In our opinion, elimination of these exceptions to the non-cash compensation rules would have *severe* negative consequences on member firms and consumers.

With respect to the above-noted currently permissible arrangements, we would observe the following:

1. Insurance Companies and Affiliated Broker-Dealers

The NASD previously addressed this issue when it proposed Rule 2820. Sec. Exchange Act Rel. No. 34-38993 (Aug. 29, 1997). At that time, the NASD noted, appropriately, that insurance companies hold sales incentive programs for their sales personnel who are also associated persons of an affiliated broker-dealer and are licensed to sell both non-securities and securities insurance products. Sales of both variable products and fixed products are often part of the total compensation package for these individuals. Whether the relationship of the salesperson to the insurance company is that of employee, statutory employee or independent insurance agent, the NASD has elected not to intervene in this area in the past. We would encourage the NASD to continue its past practice in this area in connection with the Proposed Rule.

2. Non-Affiliated Offeror Contributions

Prohibiting non-affiliated offerors from contributing to a broker-dealer's sales incentive program would have significant adverse consequences for many broker-dealers. This change would have particular impact on those broker-dealers whose registered representatives are independent contractors. Many larger broker-dealers tend to offer a number of sales meetings during the course of the year. These meetings provide valuable educational opportunities not otherwise available to the independent contractor representatives. These sales meetings are often incentive in nature, in that they reward higher producing representatives by paying all or a portion of the costs of attending the meeting. In other circumstances, firms hold such meetings for their top producers (who usually account for the vast majority of total sales). Because there are incentive aspects to attendance at these meetings, they do not qualify under the rules relating to training and educational meetings.

These incentive meetings represent important opportunities to offer independent contractor representatives education and training in products, operations, technology, regulatory issues and any number of other topics important to the conduct of their business. This education ultimately benefits consumers who are purchasing financial and investment products through registered representatives. Given the increasing complexity of many of the securities products offered by broker-dealers, we believe it is critical to allow registered representatives to participate in as many educational opportunities as possible. Independent

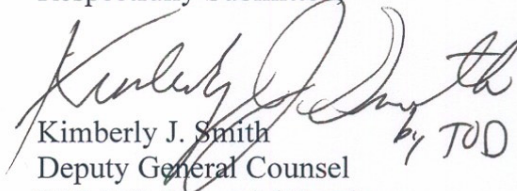
contractor registered representatives would no longer have access to many training and educational opportunities if they were forced to pay for such programs with their own funds. Thus, it would appear that the public interest is best served by allowing these meetings to continue because of their educational value to the sales force.

Broker-dealers generally cannot afford to pay for these meetings without offeror participation. Although qualification for attendance at the meetings is often based on total production of all securities, various offerors contribute to the meetings through cash payments, provision of training materials, payment for industry and motivational speakers and other contributions. Nonetheless, the fact that these meetings may have an incentive element should not outweigh the important benefits to registered representatives and their clients that are derived from the education and training the registered representatives receive.

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For the reasons set forth above, we respectfully request that the NASD reconsider certain provisions of the Proposed Rule, both with regard to the clarity of the requirements of the Proposed Rule and the impact of certain provisions of the Proposed Rule upon the financial services industry and its customers.

Respectfully Submitted


Kimberly J. Smith
Deputy General Counsel
ING U.S. Financial Services
by TJD

Submitted on behalf of:

Directed Services, Inc.
ING America Equities, Inc.
ING Financial Advisors, LLC
ING Funds Distributor, LLC
ING Life Insurance and Annuity Company
ING USA Annuity and Life Insurance Company
ReliaStar Life Insurance Company
ReliaStar Life Insurance Company of New York
Security Life of Denver Insurance Company