

## VIA E-MAIL DELIVERY

May 27, 2005

Ms. Barbara Z. Sweeney  
Office of Corporate Secretary  
NASD  
1735 K Street, NW  
Washington, DC 20006-1506

RE: "Principal Pre-Use Approval of Member Correspondence";  
NASD Notice to Members #05-27

Dear Ms. Sweeney:

Edward D. Jones & Co., LP ("Edward Jones" or "the Firm") hereby submits its comments on the above-referenced rule proposal ("the Proposal"). As always, the Firm greatly appreciates the opportunity to share its observations on industry regulations while such are in the formative stage.

The Proposal would amend NASD Rule 2211 to require pre-use approval of all correspondence "distributed by a member to 25 or more existing retail customers within any 30 calendar-day-period," and thus obligate firms to have virtually all communications with 25 or more individuals reviewed by a supervisory principal. Overall, Edward Jones believes that the sales-oriented nature of a communication outweighs its number of distributees for purposes of supervisory review. While the Firm understands and appreciates NASD's desire to close an apparent "loophole" for form letters that encourage investment by existing customers, Edward Jones questions the need to reform a rule that is less than four years old, and respectfully submits this letter to request modification of the proposed rule to exempt correspondence of a purely administrative, service, and/or clerical nature.

### I. Background

The Firm is a full-service, self-clearing broker dealer, headquartered in St. Louis and registered with NASD, the Chicago Stock Exchange, and the New York Stock Exchange ("NYSE"). Edward Jones services over 5 million customer accounts, operates over 8,500 branch offices throughout the 50 States,<sup>1</sup> and employs over 8,900 registered representatives, called Investment Representatives ("IRs"). The overwhelming majority of branch offices are staffed by a sole IR and a non-registered sales assistant titled a "branch office administrator" ("BOA").

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<sup>1</sup> Industry rankings consistently place the Firm first in terms of number of branch offices. *See, for example*, "Edward Jones Continues Office Growth," The State Journal Register (February 2001); "The Jones Financial and Service Companies, L.L.P.," Hoover's Company Profiles (2005); and The Securities Industry Yearbook, 2004-2005.

Generally speaking, customer correspondence can emanate either from Firm headquarters (*e.g.*, a “verification letter” confirming a request for a third party check) or from the branch office (*e.g.*, an invitation to a lecture by a local CPA). Individual pieces of correspondence prepared by IRs are required by Firm procedures to be approved by teams within the Compliance Division, which is based at headquarters in St. Louis.

IRs and BOAs do not currently possess e-mail capabilities, but the Firm will commence a pilot program of such capacities next month, and expects that a significant number of branch offices will commence using e-mail in 2005. As a member of the NYSE, the Firm is subject to Rule 472, which, has in recent years, been held applicable to all mailings sent to two or more customers;<sup>2</sup> accordingly, Firm procedures require the prior approval of all advertisements, sales literature, and sales letters, regardless of the number or nature of distributees.

## II. Current “Group Correspondence Rule”

In the main, the topic of correspondence review implicates three NASD rule provisions:

(i) Rule 2210(a) defines “communications with the public” as including *correspondence*. Rules 2210(a)(1) and (2), respectively, define *advertisement* and *sales literature*, two categories of items requiring principal, pre-use review pursuant to NASD Rule 2210(b)(1).

(ii) Rule 2211(a)(1) defines *correspondence* (*i.e.*, items not requiring principal pre-use approval) as any letter or e-mail sent to 1) one or more existing customers, and 2) fewer than 25 prospective customers within 30 days. As a result, all *correspondence* sent to 25 or more prospects in 30 days must be pre-approved by a principal pursuant to Rule 2210(b)(1).

(iii) Rule 3010(d)(2) (“Review of Correspondence”) obligates each firm to develop written procedures “appropriate to its business, size, structure and customers”, adding that, where such procedures do not require the review of all correspondence prior to use or distribution, “they must include provision for the education and training of associated persons...”

Thus, the current NASD framework for correspondence review, which is less than 10 years old, strikes a balance between strict, numeric thresholds (which trigger principal review) and flexible guidelines (which require commensurate spot-checking and training of supervisory and sales personnel). Implicit in this balance is the recognition that a firm must be trusted to best utilize its supervisory resources – a conclusion all the more supported as both the number of e-mails and avenues for e-communication have grown

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<sup>2</sup> See *In the Matter of Jennifer Byron*, NYSE Board Review of Hearing Panel Decision 01-135 (April 4, 2002)(“Distribution to two or more persons satisfies the ‘generally distributed’ or ‘made available...to customers or the public’ standard of [NYSE] Rule 472(a)...”), at page 2.

dramatically in recent years. Of course, the penalties for an inadequate allocation of such resources are clear and common in the form of publicized NASD disciplinary decisions.<sup>3</sup>

Now, less than four years after this framework was finalized,<sup>4</sup> and in the cause of closing a loophole for group mailings to existing customers, the Proposal would re-strike the balance in favor of the strict numeric guidelines. However, this proposed remedy effectively blurs any distinction between *correspondence* and *sales literature*, thus raising, among other questions, legitimate inquiry into whether correspondence concerning mutual funds, variable contracts, or collateralized mortgage obligations would now become subject to filing requirements present elsewhere in Rule 2210.<sup>5</sup>

More importantly, the Proposal would unseat the flexibility expressly embraced by NASD's prior rule proposals in that member firms would be forced to delay all "group" mailings, regardless of content, until receiving approval from a registered principal. Such a rigid classification was expressly rejected by NASD in 1999 when proposing the existing definition of *correspondence*:

#### **Form Letters And Group E-Mail**

**The use of group e-mail has become commonplace in many firms. For example, registered representatives may provide customers with information concerning their accounts, changes in market conditions, or current economic conditions. Given the volume of form letters and group e-mail that members and their associated persons may send and the speed with which this material can be dispatched to customers, a pre-use approval requirement may be less effective than standards that are more specifically tailored to these forms of communication...NASD Regulation believes that Rule 3010(d), which governs the approval and review of correspondence, provides a more effective means of supervising form letters and group e-mail.<sup>6</sup>**

While the Firm is aware that in the same Notice quoted above NASD stated that, "It would seem that a content-based approach would be difficult to implement due to the

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<sup>3</sup> See, for example, Legacy Financial Services, CRD #38697 (firm fined for, among other things, failing to prevent a registered representative from distributing unbalanced sales literature; reported in NASD disciplinary decisions for May 2005), and Harrison Securities, Inc. (CRD #14103) (firm expelled for, among other things, permitting advertisements and sales literature to be disseminated that contained material misstatements and omissions; reported in decisions for February 2005).

<sup>4</sup> The latest relevant revisions to the NASD rules governing the supervision of correspondence were announced in Notice to Members #03-38 ("Advertising Modernization"; July 2003).

<sup>5</sup> Specifically, those requirements established by NASD Rules 2210(c)(2-5).

<sup>6</sup> NASD Notice to Members #99-79 ("NASD Regulation Requests Comments on Proposed Amendments to Provisions Governing Communications with the Public"), at pages 10-11. The Notice clearly outlined the compromise proposed by NASD at that time, namely, subjecting group mailings to prospective customers to a numeric threshold (thus triggering approval and filing requirements) while applying the supervisory standards of Rule 3010 to mailings to existing customers (the "Group Correspondence Rule"). At pages 12-13. NASD's proposed treatment of Group Correspondence was formally approved by the Securities and Exchange Commission in 2003. S.E.C. Release No. 34-47820 (May 9, 2003).

inherently subjective nature of determining which communications are intended to solicit products and services”, the Firm respectfully requests that NASD revisit its concurrent conclusion concerning the efficacy of number-based exceptions from supervisory review – to wit, NASD’s concern that “an exemption based solely on the number of recipients may not address the practical issues related to the supervision of group e-mail and form letters.”<sup>7</sup> Further, when the current rule was approved by the S.E.C., NASD expressly urged firms to consider requiring principal, pre-use approval of “Group Correspondence that presents a higher risk to investors based on factors such as its content, purposes, or targeted audience,”<sup>8</sup> thus again endorsing a distinction between types of correspondence as well as a member’s discretion in promulgating supervisory practices relating thereto.

### III. Suggested Modification

Accordingly, Edward Jones respectfully submits that the “loophole” can be closed through a means less inconsistent with recent NASD rulemaking and less onerous to NASD firms. The Firm hereby suggests that the following sentence be inserted before the last sentence of proposed Rule 2211(b)(1)(A):

*“This obligation shall not apply to mailings solely of an administrative, service, and/or clerical nature.”*

Such a distinction based upon content already exists in the context of individual mailings, as the Proposal itself acknowledges when it states “NASD recognizes that correspondence with existing retail customers sometimes involves matters other than the promotion of a member’s products or services and, therefore, may not require the same level of customer protection as correspondence to prospective retail customers.”<sup>9</sup> Moreover, this proposed hierarchy of supervisory reviews would appear to be in lock step with prior guidance NASD has provided for supervisory review of instant messenger communications (“Members should evaluate instant messaging according to the ‘content and audience’ of the instant messaging communications.”<sup>10</sup>).

Indeed, other SROs have long recognized the distinction between sales-oriented and administrative correspondence. The NYSE employs a content-oriented definition of *sales literature*<sup>11</sup> that has proven to be a ready resource in the battle against improper e-communications.<sup>12</sup> Moreover, in 2002 the MSRB announced a guideline for supervisory

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<sup>7</sup> Notice to Members #99-79, at page 12.

<sup>8</sup> S.E.C. Release No. 34-47820, at page 11.

<sup>9</sup> Notice to Members #05-27, at page 4.

<sup>10</sup> NASD Notice to Members #03-33, at page 5.

<sup>11</sup> NYSE Rule 472.10(5) defines sales literature as written or electronic communications “discussing or promoting the products, services, and facilities offered by a member organization.”

<sup>12</sup> See, for example, Arnold Alan Winters, NYSE Hearing Panel Decision [“HPD”] 04-112 (Rule 472 violation found since e-mails “constituted sales literature because they discussed services such as cash management, corporate lending, and stock ownership), Thomas E. Kaplan, HPD 04-84 (472 violation caused by the issuance of public communications via the internet that were “unapproved research reports”), and Bruce Emory Carlson, HPD 02-233 (speculative Internet postings).

reviews which acknowledged that online communications “of a generalized or administrative nature” might not require supervisory review.<sup>13</sup>

In today’s environment, brokers use e-mail. And that resource is, on an ever-growing number of occasions, going to serve as the quickest and most efficient means of providing to blocks of customers details on a stock dividend, of communicating extended office hours, or of advising that the markets have closed in observance of a holiday. To ignore these likelihoods is to deny the convenience afforded by the electronic media to our everyday lives. Concomitantly, to subject all e-mail communications sent to 25 or more customers to principal pre-use review and approval not only turns back the clock but also undermines the flexibility recognized by both NASD and the S.E.C. in recent years as a necessity of modern regulation.<sup>14</sup>

#### IV. Request for Clarification of Licensing Requirement

If the Proposal is not amended to exempt correspondence of an administrative, service, and/or clerical nature, the Firm would respectfully request a broad enough interpretation of the term “registered principal” so as to include individuals possessing various supervisory licenses. While the Series 24 examination would appear to be the immediate inference of proposed Rule 2211(b), NASD Notices to Members in recent years have indicated enough flexibility<sup>15</sup> as to raise questions on whether a substitute or combination of licenses may qualify various supervisory professionals as the principal intended by NASD for supervisory review of correspondence. In light of the noteworthy burden of e-mail review occasioned by the Proposal, such flexibility would appear to be not only advisable but also outright necessary. Additionally, the NYSE has long accepted the General Securities Sales Supervisor examination as a sufficient registration for individuals supervising correspondence.

The Firm thanks NASD for its consideration of these comments. If further elaboration is required, please contact the undersigned at (314) 515- 9737.

Sincerely,

Tim Kelly  
Principal  
Field Supervision

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<sup>13</sup> See “MSRB Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding the Application of Rule G-19, on Suitability of Recommendations, to Online Communications,” S.E.C. Release No. 34-46639 (October 10, 2002), at 21.

<sup>14</sup> See NASD Notice to Members #98-11: “On December 31, 1997, the Securities and Exchange Commission approved amendments to NASD Rules 3010 and 3110. The amendments will allow firms to develop flexible supervisory procedures for the review of correspondence with the public.” At page 1.

<sup>15</sup> See, for example, Notice to Members #03-37, explaining that the Series 23 examination – in conjunction with the Series 9/10 – would constitute “an acceptable qualification alternative to the General Securities Principal Examination...”