

March 18, 2004

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

**RE: Comments on NASD Notice to Members 04-07: Proposed Amendments to NASD Rules 2710 (Corporate Financing) and 2810 (Direct Participation Programs)**

Dear Ms. Sweeney:

The Massachusetts Securities Division has the following comments on the proposed amendments to NASD Rules 2710 (Corporate Financing) and 2810 (Direct Participation Programs) in Notice to Members 04-07.

1. **Background.** Both the NASD and the states have a strong interest in assuring that selling persons are not paid unreasonable selling compensation. Notice to Members 04-07 applies much-needed caps on selling compensation for some of the riskiest and most expensive financial products sold to retail investors. The NTM also appropriately curtails the practice of charging commissions for reinvested distributions.

2. **Commodity Pool Trail Commissions.** Massachusetts supports the Corporate Financing Department's proposal to make trail commissions payable for commodity pool sales subject to the general 10% limit on DPP underwriting compensation. The Division is not convinced that brokerages and agents provide ongoing services to customers that would justify uncapped trail commissions. And we note that uncapped trail commissions

are payable only to Series 31 licensed representatives, while non-series 31 representatives cannot receive such uncapped compensation.

Uncapped trail commissions create severe conflicts of interest for associated persons, to the detriment of customers. The 10% cap on underwriting commissions is already a very liberal cap, making the compensation payable for sales of DPPs higher than the selling compensation for most other investments. Against the backdrop of this already-high compensation, it makes no sense to allow for uncapped trail commissions for commodity pool sales.

We also note that the selling costs for commodity pool investments often are not well disclosed. In many pools, the program's ongoing "commodity brokerage commissions" are the source for the trail commissions paid to associated persons. Because the compensation paid to the selling person is buried in the costs of ongoing commodity trading costs, investors frequently do not have a clear picture of the amount of selling compensation they are paying.

**3. Proposed Amendments to Prohibit Sales Loads on Reinvested Dividends in REITs, DPPs, and Closed-End Funds.** Massachusetts supports prohibiting sales loads on reinvested distributions from these products. We note that, for most customers, the reinvestment of distributions typically does not involve a separate investment decision. We also note that the distributions paid in DPP investments often involve substantial returns of capital, so charging a commission for reinvesting those funds can amount to double selling compensation.

#### **4. Non-Cash Compensation.**

**Proposed Amendments to the Non-Cash Compensation Provisions in the Rules Regarding Training and Education Meetings.** Massachusetts supports this proposed amendment, which would strengthen the prohibitions against program sponsors using "education" meetings as bonuses to selling agents for selling DPP products. We note that the NASD has recently taken disciplinary action in this area. We support the rule change as a pro-active measure against these abuses.

**Proposed Amendments to Require 'Equal Weighting' and 'Total Production' Limitations for Internal Sales Contests.** While we support initiatives to reform sales contests, we urge the NASD to go further and ban sales contests entirely because of the sharp conflicts of interest contests create for sales personnel.

#### **5. Public Offering Review Issues.**

**Due Diligence Fees.** Massachusetts supports the proposed amendments as a useful measure to prevent "due diligence" fees from becoming additional form of selling compensation.

The Massachusetts Securities Division appreciates the opportunity to comment on these rule proposals. If you have any questions about this letter please contact me or Peter Cassidy, Attorney, Corporate Finance Section, at (617) 727-3548.

Sincerely,

Matthew J. Nestor  
Director  
Massachusetts Securities Division

cc: Diane Young-Spitzer, Esq.  
Peter Cassidy, Esq.