Merrill Lynch

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May 24, 2005

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

Re: **New Products Sales Material and Television, Video and Radio Advertisements (Notice to Members 05-25)**

Dear Ms. Sweeney:

Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch")[1] appreciates this opportunity to comment on the proposal to amend the Association's advertising rules to require members to file certain additional categories of advertisements and sales literature with NASD. Merrill Lynch generally supports the comments submitted by the Securities Industry Association and wishes to offer the following comments of our own.

Sales Material Concerning New Types of Securities

While Merrill Lynch supports NASD's stated goal of having more time to address sales practice issues that new types of securities may present, we strongly disagree with the means proposed to accomplish that objective for several reasons.

First, we believe that a 10 day pre-use filing with the NASD's Advertising Regulation Department would not provide the appropriate venue or necessary time for the NASD to review <u>sales practice issues</u> with respect to entirely new types of securities, which often may require extensive analysis and understanding by qualified professionals, such as securities lawyers and financial analysts.

[1] Merrill Lynch, Pierce, Fenner & Smith Incorporated is an NASD member firm and one of the largest broker-dealers in the United States.

The NASD Advertising Department's examiners, who are not attorneys or financial analysts, currently are trained to apply established rules and standards to certain existing securities products. We believe that they would be ill equipped to quickly and efficiently analyze sales practice issues that may be presented by new types of securities in a brief pre-use filing period. For this purpose, we believe that the NASD might be better advised to require post-use new product filings for review in a more deliberative and more analytical fashion by a dedicated staff of attorneys and financial analysts located somewhere within NASD, similar to the resources the SEC devotes to review of initial public offering registration statements.

Second, we are very concerned that the addition of this proposed new burden on the Advertising Regulation Department, if adopted, would significantly impair the existing program for review of currently required filings in a timely manner. The NASD might be forced to reexamine its priorities in regard to Advertising Department review of other filings, which may require an opportunity for further industry comment as well as consideration by the SEC.

Third, we are concerned that the proposed pre-use filing requirement would create the potential for significant delays in bringing new ideas to market, which would result in significantly adverse business consequences and affects on competition. Review by the existing Advertising Department examiners of new types of securities would almost certainly cause delays beyond a 10 day pre-use filing period due simply to the unfamiliarity and newness of the new securities, and would cause significant difficulty for firms in having to deal with ill-informed comments precisely because of this unfamiliarity and newness.

Finally, because Merrill Lynch is frequently an innovator of new types of securities as well as variations and "twists" on existing securities, we are concerned about the definitional and interpretive issues surrounding the concept of "a type of security that the member has not previously offered." This further argues for a post-use filing requirement rather than pre-use filing so that firms can err on the side of caution and alert the NASD staff to securities that may or may not constitute "new types of securities" and the NASD staff can judge whether it considers them as such in a more deliberative and less time pressured way.

Television, Video, and Radio Advertisements

Merrill Lynch also strongly disagrees with the proposed pre-use filing requirement for most TV, radio and video advertisements.

We understand that the NASD has in the past, on a few rare occasions, believed that certain TV ads presented regulatory concerns or received criticism about the content of specific TV or other broadcast media advertisements. We do not believe that a few rare instances of problems provides an empirical justification for requiring an entire industry to have to pre-file every TV, radio and video ad of more than 15 seconds for review by a time-pressed and already overburdened advertising review staff.

Even more so than with regard to new securities products discussed above, we are concerned that a pre-use filing requirement for media ads will cause intrusive and costly delays for an already a time-pressed and iterative creative process for member firms' marketing staffs and their compliance and legal departments.

We would urge NASD to consider a more focused approach to addressing concerns about the occasional renegade media ad. One alternative approach that might be considered would be to create an Advertising Appeals process -- similar to that which the National Advertising Review Council's National Advertising Review Board provides for the ad industry -- whereby a panel of senior supervisors in the NASD Advertising Department would be responsible for reviewing complaints about particular media ads, whether received from the industry, the public or from internal NASD sources such as the Regional NASD offices. Such an appeals board should have the power to issue administrative cease and desist orders with respect to ads that are found to raise significant regulatory concerns or that otherwise severely violate SEC or NASD standards for advertising communications. We believe that such an appeals process would be a far more effective and far less costly means of dealing with NASD's concerns in this area than the pre-use filing requirement now proposed.

We would welcome the opportunity to participate in a direct dialogue with the NASD staff, along with the SIA, in a more detailed discussion of the issues raised by this important rule proposal.

Sincerely,

/s/ Kevin J. Moynihan

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cc: Mr. Thomas M. Selman
Mr. Joseph P. Savage
Philip A. Shaikun, Esq.
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