SMITH BARNEY
citigroup

May 31, 2005

Via e-mail to *pubcom@nasd.com*

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

Re: Comment on Proposal to Require Pre-Use Filing of Advertisements and Sales Literature for New Types of Securities and of Television, Video and Radio Advertisements
Notice to Members 05-25, April 2005

Dear Ms. Sweeney:

Citigroup Global Markets Inc. ("CGMI") appreciates the opportunity to comment on proposed revisions to Rule 2210, which would require member firms to file certain additional categories of advertisements and sales literature with NASD.

We would like to make several general observations about the proposed revisions to the rule and then comment on some specific provisions that we believe need clarification.

General comments

While we agree with NASD's goals of addressing sales practice issues presented by new products offered by member firms as well as preventing the distribution of materials that present significant compliance issues under NASD's advertising rules, we believe that the proposed rules as currently formulated are unnecessarily broad and will overburden NASD and its member firms and will ultimately result in the reduced flow of timely, market sensitive information to retail investors. When considering the "types of securities" and advertisements to be subject to pre-filing, we urge NASD to consider limiting the scope of each of these categories to those that present high risk to retail investors. In all cases, we believe that NASD's concerns can be addressed through additional training and education by member firms of appropriate personnel even as member firms gain experience with the NASD's Guidance on New Product Practices.

Proposed Rule 2210(c) Filing of Advertisements or Sales Literature for a "type of security that the member has not previously offered"

The proposed rule requires that all advertisements and sales literature for a "type of security that the member firm has not previously offered" be pre-filed with NASD 10 business days prior to first use and thereafter during the following 90 calendar days. We concur with NASD that the "type of security that the member has not previously offered," absent further clarification, will raise significant interpretative issues. Without further guidance in the definition, in order to avoid violating such rule, member firms will feel compelled to overfile materials regarding their products (and all variations thereof) thereby requiring NASD's staff to expend time and resources in order to divine which of these many filings relate to products that are truly "new." This scenario would most likely introduce uncertainty and cause delay to the launch of any product while placing undue burden on NASD and its member firms and, ultimately, disadvantaging retail investors.

We request that NASD clarify with specificity the "type of security" that would trigger pre-filing.[1] In addition, we request that NASD consider whether and to what extent changes to or the addition of features or business terms to a new or existing "type of security" would constitute another "new type of security" requiring pre-filing and starting another 90-day period and provide member firms specific guidance with respect thereto.

When considering any additional types of securities that may trigger pre-filing, we ask that NASD consider the impact that the imposition of any filing requirement may have on types of products that include terms or features that are market sensitive, such as structured products. The delay in the ability to offer a product brought on by pre-filing would potentially disadvantage investors seeking to invest in these and other market sensitive products.

We note that NASD, in its Notice to Members 05-26 (April 2005), recently set forth a number of factors for member firms to consider when developing and vetting a new product (rather than a new "type of security").[2] Although these factors would certainly offer a more concrete indication of what a new "type of security" might be, these parameters still lead to a broader than necessary definition for purposes of determining which new offerings by a member firm might warrant pre-filing with NASD.

[1] It should be noted that the term "security" has been defined very broadly both statutorily and by judicial interpretation. See, e.g., Section 2(1) of the Securities Act of 1933, as amended, and Section 3(a)(10) of the Securities Exchange Act of 1934, as amended, and Reves v. Ernst & Young, 494 U.S. 56 (1990).

[2] The list, which the NASD noted in the NTM was not exhaustive, included considerations based on the business terms of the product, risk to customer or members, operational or systemic impact and whether such product raises conflicts, or results in changes or additional sales practices, for the member. See NTM 05-26, p. 6.

We agree that, in certain cases, pre-filing of materials is warranted, including, for example, in the case of a newly established member firm that presumably has no experience with advertising compliance or in the case of the enumerated products that today require pre-use filing. We do not believe such pre-review is warranted in the case of experienced member firms who have in place across product lines long established advertising compliance policies and procedures and the well-trained staff to develop and review advertising and sales materials. In addition, as noted in NTM 05-26, a member firm's new products review process serves to focus a member firm's business, legal, risk assessment and compliance functions on new offerings by such member firm. We believe that these and other controls member firms have in place obviate the need for the heightened scrutiny of a pre-filing process of either a member firm's sales practices or advertising and sales literature as proposed in NTM 05-25. Given the guidance provided by NASD in NTM 05-26, we believe that, if any filing is warranted, a post-use filing standard would suffice to serve the NASD's purposes.

Type of Security vs. Asset Class test

As an alternative to the broad term "type of security," NASD might consider an approach based on an "asset class" test for determining whether pre-use filing is indicated for any new offering by a member firm. Such asset classes would include: equities, fixed income, mutual funds, hedge funds, private equity, real estate (to the extent a security), commodities and derivatives. In fact, NASD has used asset class in other contexts including when qualifying broker dealers for types of business to be conducted as set forth on Form B-D in the Types of Business section. Of course, the classes listed on the Form B-D would need to be updated and augmented since the list does not purport to be exhaustive and does not track exactly with the list of asset classes enumerated above. But, once updated, if a member firm approves the offering of a new asset class and amends its B-D to add such asset class to its inventory, it might be appropriate, after taking into account the type of new asset class and experience of the member firm, to require such member to pre-filing for such newly offered class of security.

Investor Type and Method of Offering

We believe that any definition (whether based on asset class or otherwise) of the "type of security that the member has not previously offered," should take into account the investor class of a new offering but should not be driven by the method of such offering. For instance, if a member firm offers a new product to retail investors by means of a registered offering and subsequently determines to offer that product to eligible investors through a private placement, then any materials for such subsequent offering that fit within the definition of "sales literature" should not be subject to any filing requirement since NASD would have already had an opportunity to review such materials when the product was initially offered.

On the other hand, if a new security is offered initially to institutional investors and a member firm thereafter seeks to offer such security to retail investors, we believe that, in certain circumstances based on the type of security being offered and the type of retail investor to whom such security is being offered, at most, a post-use filing is warranted. In fact, in cases where a product is offered to a limited number of high net worth or accredited

investors rather than retail investors generally, we believe--again, depending on the type of product--that only post-use filing is warranted.

We believe that our positions serve to address NASD's goals to learn about new products being offered by its member firms as well as providing NASD with the opportunity to comment on advertising and sales literature used by such member firms with respect thereto.

Proposed Rule 2210(c)(4) Pre-Use Filing of Television, Video and Radio Advertisements

The proposed rule would require that a member firm pre-file all of a member firm's "television, video (including web site video), radio and similar advertisements." We believe that this proposed requirement is unnecessarily broad and would place excessive burden on NASD and its member firms. Additionally, absent further clarification and narrowing of the scope of the proposed rule, we believe that such requirement would serve to greatly reduce the amount of educational, and often market sensitive, material that would make its way to retail investors.

If any expanded pre-use filing requirement is adopted with respect to advertisements, we believe it should be limited to only those types of advertisements that present high regulatory risk or have the most potential to harm retail investors. By way of example, the National Futures Association ("NFA") addressed this issue in 2000 when it amended NFA Compliance Rule 2-29 to require its member firms submit to the NFA for its review and approval at least 10 days prior to first use, any radio or television advertisement that makes any specific trading recommendation or refers to or describes the extent of any profit obtained in the past or that can be achieved in the future. As such, the NFA determined through such rulemaking that its regulatory focus would be on the substance of the claim made in the advertisement rather than triggered by the much broader method of communication or type of product.

Consistent with our comments regarding new product offerings, we believe that, except in limited cases, the industry is best served by continuing the allocation of member firm resources to the development and review of marketing materials rather than diverting time and resources to establishing and complying with a pre-filing program. In addition, member firms should continue to train and educate firm personnel responsible for the development and review of such materials. Experienced and well-trained staff, together with sufficient controls and established advertising policies and procedures, serve NASD's goal of providing compliant communications to the retail investor.

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We appreciate the opportunity we have been given to comment on these proposed rules as NASD works with its member firms with the shared goal of providing retail investors with timely, useful and compliant information about member firms and their product offerings through the use of advertising and sales literature materials.

Please contact me if you need any additional information.

Sincerely,

/s/ Michael J. Sharp

Michael J. Sharp
General Counsel
Smith Barney