

March 3, 2006

Barbara Z. Sweeney  
Office of the Corporate Secretary  
NASD, Inc.  
1735 K Street, NW  
Washington, D.C. 20006-1506

**Proposed Interpretive Material IM-3060**

Dear Ms. Sweeney:

I am writing on behalf of The Midtown Regulatory Group to comment on NASD, Inc.'s Proposed Interpretive Material ("IM-3060").

The Midtown Regulatory Group is a voluntary membership group composed of experienced compliance and legal professionals in the brokerage industry throughout the United States. Its over 300 members, representing a wide variety of brokerage firms, meet monthly, in person and by means of conference telephone, to discuss a broad array of current compliance issues, including proposed and newly adopted SRO rules, SRO initiatives, and experiences with various compliance-related vendors. The group's meetings are hosted by Debevoise & Plimpton LLP. The purpose of the Midtown Regulatory Group is to provide a venue for members to assist each other in determining practical solutions to compliance issues raised by the membership at large. The following comments reflect the views of a self-selected subcommittee of the Midtown Regulatory Group and do not purport to represent the views of any particular member of the Midtown Regulatory Group or of Debevoise & Plimpton LLP.

IM-3060, together with its New York Stock Exchange companion, proposed NYSE Rule 360A, represents a much needed and long awaited revision of compliance standards related to business entertainment by the brokerage industry. We applaud the NASD's decision to remind members of their ethical duty not to influence improperly the decision making process of their customers, although we recognize that much of the decision making process is governed by best execution requirements and Regulation NMS, as well as other similar fiduciary obligations. We agree with the determination of the NASD and the New York Stock Exchange to leave the actual setting of specific standards to the members themselves, in recognition of the fact that standards will vary

widely based on a firm's size and geographic location, the business entertainment's intended audience and purpose (philanthropic, educational, purely recreational), and other factors.

We do have several comments intended to clarify the operation of IM-3060.

Under the Section entitled "Written Policies and Procedures", IM-3060 states that each member must have written policies and procedures that determine and define forms of business entertainment that are appropriate or inappropriate. We suggest that not all forms of entertainment that may be appropriate (or inappropriate) will be envisioned upon the initial drafting of a member's Business Entertainment Policy, and that to attempt to do so could stifle creativity, for example, with respect to charitable events. Nor is it reasonable for the Business Entertainment Policy to be revised every time someone has a new idea for generating business. Therefore, we suggest that IM-3060 permit (in a manner similar to its permitting a member to establish thresholds for obtaining supervisory approval for additional dollar amounts) a member to give ad hoc review and written approval by appropriate supervisory or compliance personnel for types of entertainment, venues, etc. not set forth in the member's Business Entertainment Policy.

In Item 5 under Written Policies and Procedures, IM-3060 states that periodic monitoring for compliance with the written policies and procedures must be conducted (by an independent reviewer when practicable). The NASD, in the context of other rules, has stated that an independent review should be conducted by someone outside the line of supervision or pecuniary benefit, and that, in the case of money laundering, the review can be conducted by firm personnel or an outside, unaffiliated auditor. The proposed language of Item 5 is confusing in this regard. We suggest that IM-3060 expressly provide that the review can be conducted either by firm personnel or an unaffiliated third party, such as the firm's auditors. If an outside review were required, the costs would be prohibitive for most firms and, unlike the case of money laundering, national security or detection of criminal activity is not driving the process.

In the section entitled "Acceptable Forms of Business Entertainment", IM-3060 provides that members may determine that certain "junket" features require "senior management" approval. The term "senior management" is vague and has the potential to be burdensome. Even though the language of IM-3060 is not specifically prescriptive, we believe that members can be subject to criticism upon regulatory examination of a luxury junket if the junket's features have not been approved by someone deemed by an examiner to be sufficiently senior to grant approval. We suggest that rather than "senior management", the term "appropriate supervisory or compliance personnel" be substituted.

Finally, IM-3060 makes no change to the current \$100.00 limit on gifts. The reasoning of the NASD and the New York Stock Exchange for permitting firms to set standards with respect to business entertainment is equally applicable to issue of gifts.

What is a reasonable gift for a line employee or a retail customer might be considered inappropriate by a managing director or other senior executive of an institutional firm. Members should be permitted to exercise their reasonable, ethical judgment in determining the appropriate levels of gifts in the same manner as they will be permitted to with respect to business entertainment. Member firms should, similar to the requirements for business entertainment, express such guidelines in their written supervisory procedures, utilizing, if they deem it appropriate, procedures for senior supervisory approval if threshold levels would be exceeded. We believe that it would be more logical to permit the firm to set its own reasonable standards, in accordance with the ethical guidelines announced, taking into consideration such factors as the frequency of gift giving, the number of recipients, the status of the firm's or customer's employee, the event in question, the going rate for good seats at the event or the usual cost of the item in question, etc.

The distinction made in the proposed IM between business entertainment and gift giving is, we believe, not compelling. For example, the limitation on gifts prohibits a member firm from giving a customer a courtside seat to a professional basketball game (because the cost would exceed the \$100.00 limit), but permits a firm employee to take that customer to the game and sit in the very same seat, even though the employee and the customer spend the entire night drinking beer and talking about basketball and other non-business related matters. It is difficult to understand the justification for this distinction. One could even argue that the presence of the firm employee is the more difficult case because the employee's presence reinforces for the customer that the customer should feel grateful, if not indebted to the member for being able to attend the game.

If a representative of the customer or the member firm were sent a plant for his/her new office, a reasonable holiday gift later that year would likely be out of the question. And Rule 3060 is ambiguous. What if a gift is sent to an entire department? Has each member of the department received the entire gift or only a pro rata portion? Furthermore, if no one in that department is authorized to make decisions, but merely provides services, what difference does it make, from an ethical point of view, that the department or any individual in it received a \$300.00 holiday food basket?

If the NASD does determine to retain a gift limit, rather than permit members to develop appropriate standards for gift giving, we believe the current limit of \$100.00 is impractical and unrealistic. Suppose, for example, a member sponsors a golf outing and the low gross golfer is awarded a prize of say, two dozen golf balls, the value of which is \$22.00 per box. Unless the prize doesn't count, because it is awarded during business entertainment (which point should be clarified one way or the other), this means that the member's customary holiday gift basket to the prize winner that year may not exceed \$56.00. The sum of \$100.00 is simply inadequate in 2006. The annual limit has not been increased in 13 years. We respectfully suggest that if there is an annual limit, that it be

substantially increased and that the NASD consider setting different limits for institutional and retail recipients. Although we are loathe to suggest numbers, because we believe so strongly that gifts should be treated in the same manner as business entertainment, we believe that a \$500.00 annual limit on gifts to an institutional employee and a \$250.00 limit on gifts to a retail client would offer member firms at least some appropriate additional flexibility in this regard.

The Midtown Regulatory Group appreciates the opportunity to comment on IM-3060. If the NASD has any questions regarding these comments, please contact the undersigned.

Very truly yours,

A handwritten signature in cursive script that reads "Linda Lerner".

Linda Lerner  
Counsel