

Notice to Members

MAY 2006

SUGGESTED ROUTING

Executive Representatives
Institutional
Internal Audit
Legal & Compliance
Registered Representatives
Senior Management

KEY TOPICS

Charitable Giving
Charitable Solicitation

GUIDANCE

Charitable Contributions

NASD and NYSE Issue Joint Guidance on Charitable Contributions

Executive Summary

The solicitation of substantial charitable contributions by employees or agents of a customer acting in a fiduciary capacity raises potential conflicts of interest that deserve careful consideration by member firms. NASD and NYSE have jointly issued this *Notice* to suggest some of the policies and procedures that firms should consider adopting to address these conflicts. As discussed below, the joint guidance provided in this *Notice* does not address customary charitable giving initiated by member firms or their foundations, solicitations received directly from charitable organizations, nor charitable giving by persons in their individual capacities.

Questions/Further Information

Questions concerning this *Notice* should be directed to Gary L. Goldsholle, Vice President and Associate General Counsel, Office of General Counsel (OGC), Regulatory Policy and Oversight (RPO), at (202) 728-8104; or Brant K. Brown, Assistant General Counsel, OGC, RPO, at (202) 728-6927.

Discussion

The solicitation of substantial charitable contributions by employees or agents of a customer acting in a fiduciary capacity raises potential conflicts of interest that deserve careful consideration by members.¹ This Joint Memorandum is intended to suggest some of the policies and procedures that firms should consider adopting to address these conflicts.² This guidance does not address charitable giving by persons in their individual capacities.³

Many of the same concerns that led to the adoption of NYSE Rule 350 (Gifts and Gratuities) and NASD Rule 3060 (Influencing or Rewarding Employees of Others), and the proposal of NYSE Rule 350A⁴ (Business Entertainment) and NASD IM-3060⁵ (Entertainment of the Employees of Persons who are Customers of a Member) are present when employees of a customer acting in a fiduciary capacity (e.g., employees of an investment company, pension fund or investment manager) solicit substantial charitable contributions⁶ from members with whom they conduct or intend to conduct business. Making substantial charitable contributions in response to these types of solicitations raises potential conflicts of interest that require members to act carefully, and in a manner consistent with the best interests of the customer.

To address these conflicts, we encourage members to establish written procedures concerning their charitable giving. The written procedures should take into account a firm's structure and its manner of charitable giving. For example, certain procedures that may be appropriate for firms with a practice of decentralized charitable giving may not be necessary for firms in which all charitable giving is centralized (e.g., approved by the CEO).

In many cases, a member's procedures could require appropriate approval for charitable contributions that exceed specific dollar thresholds or certain intervals of frequency or that are made by a member's associated person on behalf of the firm. These thresholds could distinguish customary and minor charitable contributions from substantial contributions that could, by their size or frequency, create potential conflicts of interest. Any dollar thresholds established by a member should take into account the nature of the firm's business and its customary practice of charitable giving. Under no circumstances should the threshold for charitable contributions be based upon the level of actual or anticipated business done by the customer soliciting the charitable contribution since that customer is acting in a fiduciary capacity.⁷

Members may find that establishing a dollar threshold for charitable contributions resolves many of the potential conflicts raised by charitable solicitations from employees of a customer. However, for requests that exceed the specified thresholds, firms may wish to implement additional procedures, including obtaining specific approval from an appropriate representative of the customer (*i.e.*, a person who is not involved in soliciting the charitable contribution or in conducting business with the member firm), and reviewing the business received from the customer employing the person soliciting the charitable contribution. After being alerted to the request, the customer will be in a position to take necessary steps to ensure that any charitable contribution made by the member in response to the request does not cause the person who made the solicitation to act in a manner contrary to the interests of his or her employer. Such procedures should also recognize the greater potential for a conflict of interest arising from solicitations for contributions on behalf of charities that are closely aligned with the employee making the request (e.g., an organization in which the employee serves as an officer, or a charity sponsored by the employee) rather than those aligned with the ultimate client for whom the employee works.

Endnotes

- 1 Members, in this context, are NASD member firms and NYSE member organizations.
- 2 This guidance does not address customary charitable giving initiated by members or their foundations (provided such giving does not raise the conflicts addressed below and is not intended to circumvent a firm's procedures in addressing these conflicts), nor does it address direct solicitations from charitable organizations.
- 3 However, NASD and NYSE remind firms that they must not seek to circumvent this guidance by making charitable contributions through their employees (or other personnel) in their personal capacity, nor should an employee's (or other personnel's) personal charitable contributions be indirect contributions by the firm.
- 4 See SR-NYSE-2006-6.
- 5 See SR-NASD-2006-044.
- 6 For these purposes, a "charitable contribution" refers to a donation to an organization exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code.
- 7 No such issue is raised, of course, where a retail customer investing his or her own funds solicits a charitable contribution.

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