

By E-mail: Pubcom@nasd.com

March 3, 2006

Barbara Z. Sweeney
NASD, Office of the Corporate Secretary
1735 K. Street, N.W.
Washington, D.C. 20006-1500

Re: Request for Comment, Proposed IM-3060
Proposed Interpretive Material Addressing Gifts and Business Entertainment

Dear Ms. Sweeney:

This comment letter is submitted on behalf of Transamerica Capital, Inc. (TCI, CRD #8217), a limited broker-dealer which wholesales mutual funds, variable life insurance and variable annuities to retail broker/dealers. The following comments raise some concerns about the proposed Interpretive Material addressing NASD Conduct Rule 3060 gifts and business entertainment, IM-3060 ("Proposed IM").

Definitions: Business Entertainment and Customers, Employees

Business Entertainment

We believe that the proposed definition of "business entertainment" by its very nature is overly broad. It states, in relevant part,

The term "business entertainment" means providing entertainment to an employee in the form of any social event, hospitality event...meal, leisure activity or event of like nature or purpose...in which a person associated with a member accompanies and participates with such employee irrespective of whether any business is conducted during, or is considered attendant to, such event. Any thing of value given to an employee that is not defined as entertainment is a gift under Rule 3060.

The question arises as to what lengths a member or an associated person would have to go to in order to ensure compliance. For example, would a registered representative who invites family, friends and business associates (including employees of customers) to an event have to keep track of expenses and pro-rate them according to the number of persons at the event, even though no business was conducted at that time? Such a broad definition could very well preclude legitimate social gatherings where no an employee of a customer is only one of numerous invitees.

Customers and Employees

TCI is concerned with the definitions of "Customers" and "Employees." By broadly defining those receiving the business entertainment as anyone employed by, or representing, the customer, the Proposed IM could unintentionally extend the rule to natural person customers. Any natural person customers, who have accounts for themselves, could also be employed by, or otherwise represent, an employer or other customer who is the target of the Proposed IM.

Natural person customers are not intended to be restricted by the Proposed IM. However, many if not most natural person customers are employed by, or otherwise represent, a company or other third party. In order to comply with this interpretation of the rule, natural person customers would need to disclose to the member whether they are employees, officers, agents or representatives of any third party. The member would then have to determine whether the company or other third party has any type of account with member before allowing its registered representatives to provide that natural person customer with any entertainment. Since much of the entertainment provided by registered representatives is for prospective natural person customers, the disclosure of their company or third party affiliations would

need to be asked prior to the person becoming a customer. Since this disclosure would not be directly related to a request to do business with the member, it appears to TCI that this is inappropriate disclosure of personal, non-public information. As such, TCI believes that the member would then be out of compliance with Gramm-Leach-Bliley.

Footnote 5 of Proposed IM, states: “members can not circumvent this proposed interpretive material by providing business entertainment to a natural person customer who also is an employee, agent or representative of a customer, by claiming that such business entertainment applies only to the ‘natural person’ relationship.” This further restricts the member’s ability to provide entertainment to natural person customers. Not only would a natural person who represents an employer or third party be ineligible for entertainment, this footnote would extend the restriction to any natural person who just happened to be employed by a company who also has an account with the member. We believe it is discriminatory to withhold benefits from customers due to their otherwise unrelated relationship to a certain class of the member’s customers, e.g., employers.

The result of these restrictions would force the member to disallow entertainment by a registered representative for any customers, including natural persons. Therefore, the Proposed IM would have the unintentional affect of putting natural person customers under the restrictions of NASD Conduct Rule 3060.

A further concern with the definition of “customer” within the context of the Proposed IM would be where a member B/D and its associated person has as a customer a charitable, non-profit or community organization. Many of these organizations have elected boards whose members are serving on a voluntary basis, without any compensation for services. This typically leads to a large turnover of board members that could be, at the best, difficult to track, update and modified if a natural person becomes a customer and then becomes involved in one of these organizations without the registered representative’s knowledge. In effect, the definition of “customer” under IM-3060 would be so broad as to require the member and its associated persons to constantly monitor a natural person customer’s outside relationships in order to avoid unintentional violations.

Finally, the definition of “employee(s)” raises a question under the phrase “...agents or representatives of a customer.” Does this refer only to a common law relationship, or does this include registered representatives and/or insurance agents. Further, is this term only applicable to institutional customers or would it include, for instance, someone who represents a customer due to authority under a power of attorney? If “employee(s)” applies to institutional customers, then the clause reference receipt of business entertainment by an employee (“...or whose employee receives business entertainment for the purpose of having such person prospectively maintain...”) would not apply to the representative given power of attorney. However, because the later clause references not just employees, but also agents and representatives (“...and has an employee, agent or representative act n behalf of the account...”), the definition may very well have a bifurcated result with respect to the application of the Proposed IM.

In short, we are concerned that the only way to comply with the requirements of the Proposed IM given the definitions of “business entertainment,” “customer” and “employee” is to prohibit any form of business entertainment by registered representatives and associated persons.

Written Policies and Procedures (Paragraphs 2 and 3)

Proposed IM 3060 requires members to have written policies and procedures governing the entertainment of agents, representatives, employees, of customers. Such policies and procedures, must, among other things, “determine and define forms of business entertainment that are appropriate and inappropriate, including the appropriate venues, nature, frequency, type and class of accommodation and transportation. “

This language provides little guidance on how to apply each factor with respect to the varying methods of business entertainment, whether it is an invitation to a meal or a night at the theatre. Moreover, where a certain type of entertainment or accommodation might be considered reasonable in New York City or San Francisco, that same type of entertainment or accommodation might be considered lavish in a small mid-western town. Therefore, a dollar threshold across the board is unworkable. Members are additionally cautioned not to “set standards that are so unbounded or vague that no reasonable determination of

propriety can be discerned.” When read together, these provisions appear to be requiring firms to provide detailed, location specific, expense guidelines for what representatives can spend for dinner, lunch, sports tickets and cab fare any customer or third party who may represent a customer. This isn’t practical and will be difficult for firms to enforce without requiring prior approval of all expenses.

The second clause of paragraph (2) is also vague, stating that a member’s written policies and procedures must be “designed to promote conduct of the member and its associate persons that is consistent with their obligations under Rule 2110 and *does not undermine the performance of an employee’s duty to a customer.*” (Emphasis added). How does a firm or representative gauge the point at which one would be undermining the performance of an employee’s duty to his employer? Is this a test of proportion – the value of the entertainment v. the employee’s salary? The requirement appears to place a fiduciary duty on the member and its associated persons to monitor the conduct of the employee and ensure that such employee is acting in the best interests of the employer. Furthermore, the question arises as to how a member would monitor the conduct of a third party through its written policies and procedures? Would the member have a legal duty to report the employee’s conduct to the employer?

Paragraph (3) requires that the written policies and procedures be “designed to effectively supervise compliance with a member’s written compliance policies and procedures concerning business entertainment.” However, no guidance is provided as to how “supervision” should be carried out. Would an independent registered representative have to get approval each time he or she wanted to take out a customer’s employee? Obtain home office verification that the client is not a customer’s employee or representative? Should a questionnaire be requested from the customer’s employee?

Training and Independent Review (Paragraphs 5 and 6)

The Proposed IM would require that members “establish standards to ensure that persons designated to supervise, approve and document business entertainment expenses are sufficiently qualified and that periodic monitoring for compliance with the written policies and procedures is conducted (by an independent reviewer, when practicable).” What specific qualifications would be required, and what training would establish the appropriate qualifications (for instance, accountants, economists or does this include administrative personnel handling relevant expense reports)? Further, what is an “independent reviewer?” Is it someone within the member or outside the member firm? If outside the member, what qualifications are required and when would it be practicable (or allowable) not to hire an outside reviewer? Does this impose yet another annual review requirement upon members?

Record Retention (Paragraph 4)

The Proposed IM would require written policies and procedures that “maintain detailed records of the nature and expense of business entertainment and make such information available upon written request to a customer in respect of its employees.” No guidance is provided as to whether the records are to be kept by the member, an OSJ or registered representative. How can a member firm maintain documents related to expenses paid for a customer’s employee without requiring every customer to provide lists of all of their employees, agents, representatives, etc. and requiring prior home office approval of all representative expenses? Moreover, the requirement that records be produced upon request of a customer may raise privacy issues where the registered representative provides entertainment to a person who is a client as well as an employee or representative of another client, such as where the representative is also a CPA. If an employer or customer wants this information, it should be required by the customer of the employee, who is supposed to be acting in the customer’s best interest.

We submit that the effect of this IM would be to unnecessarily restrict the ability to provide business entertainment. Thank you for the opportunity to comment on the Proposed IM.

Sincerely,

Tamara Barkdoll, Assistant General Counsel