FINANCIAL SERVICES INSTITUTE

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MEMBER BRIEFING AND CALL TO ACTION

March 23, 2005

SEC Proposal on Point of Sale & Confirmation Disclosures

Point of Sale Disclosure Requirements and Confirmation Requirements for Transactions in Mutual Funds, College Savings Plans, and Certain Other Securities, and Amendments to the Registration Form for Mutual Funds

Comment Deadline: April 4, 2005

Introduction

On January 29, 2004, the SEC issued Release Nos. 33-8358; 34-49148; and IC-26341 (Proposing Release)[1]. The Proposing Release proposed the adoption of SEC Rules 15c2-2 and 15c2-3 under the Securities Exchange Act of 1934 (34 Act) to require broker-dealers to provide customers with targeted information, at the point of sale and in transaction confirmations, regarding the costs and conflicts of interest that arise from the distribution of mutual fund shares, 529 college savings plan interests, and variable insurance products (Covered Securities or Covered Security). The SEC has also proposed conforming amendments to SEC Rule 10b-10 and Form N-1A under the Investment Company Act.

The SEC received over 1,000 individualized comments and over 4,000 comments that came on a variety of standard letter types. FSI commented on the Proposing Release. The SEC also met with public investor focus groups and engaged a consulting firm to test the model point of sale disclosure forms and confirmations. The SEC substantially revised its model forms and disclosure parameters as a result of these comments. The SEC reopened the comment period for the Proposing Release on March 1, 2005. (Supplemental Release)[2]. The SEC requests additional comments on the rule proposals in the Proposing Release as well as comments to issues presented in the Supplemental Release.

Call to Action – Submit Comment Letters

We believe that the adoption of the rules described in the Proposing and Supplemental Releases will have substantial unintended consequences for our members and their clients. We are primarily concerned that compliance with the proposed rules, principally the creation and maintenance of the point of sale disclosure, will be so extremely burdensome and costly that members will be forced to limit significantly the number of Covered Securities they approve for sale. Therefore, we urge every member to submit individualized comments to the SEC. Although the Institute will submit a comment letter on behalf of all members, we cannot over emphasize the importance of your individual comment letters. Your letters carry immeasurable weight with the SEC Commissioners and staff. Instructions for submitting comments, as well as suggested talking points that you may wish to incorporate into your comment letters, are included below.

Executive Summary

[1] The Proposing Release may be found at the following link: http://www.sec.gov/rules/proposed/33-8358.htm

[2] The Supplemental Release may be found at the following link: http://www.sec.gov/rules/proposed/33-8544.htm

We have provided links in the footnote above to the Proposing Release, Supplemental Release and the model point of sale disclosure forms and confirmations. We encourage you to review these materials, especially the proposed model forms. SEC Chairman William Donaldson has made it clear that the first and most pressing agenda item for the person who replaces Paul Roye as Director of the Division of Investment Management will be a top-to-bottom, full scale review of the mutual fund disclosure regime. Central to this effort will be the extensive work the staff has already done in connection with the Proposing Release and Supplemental Release. We must assume that the adoption of the rules described in the Proposing Release will be extraordinarily important to Chairman Donaldson and the staff because they essentially form the foundation upon which will reside the SEC's entire mutual fund disclosure initiative. It is equally clear from the comment letters on the Proposing Release that virtually every constituency except the broker-dealer industry supports the proposed rules, including the Investment Company Institute.

Most commentators based their objections to the rules outlined in the Proposing Release on two principles. First, commentators suggested that the cost of implementation and continuing updating of the point of sale disclosure forms will be substantially greater than the SEC projects. Second, commentators urged the SEC to permit broker-dealers to make point of sale disclosures by posting the information on their web site. The SEC has so far chosen to ignore both arguments.

Therefore, our comments to the Supplemental Release will concentrate on four primary issues, each of which will be discussed in more detail below.

A. We will argue forcefully that the SEC has failed to meet its legal obligations under the Paperwork Reduction Act of 1995, Section 3(f) of the 1934 Act, the Small Business Regulatory Enforcement Fairness Act of 1996 and the Regulatory Flexibility Act to ensure that the SEC considers, as part of its rule making process, whether its rule making will promote efficiency, competition, and capital formation and whether its actions will have an adverse impact on small business.

B. We will stress that the point of sale disclosure system, as proposed, will have the unintended consequence of substantially limiting the broad universe of mutual funds and variable insurance products currently available to investors. We also believe it will encourage broker-dealers to limit the use of or curtail entirely mutual fund asset allocation programs, which even the NASD has acknowledged are beneficial to investors[3].

C. We will emphasize that the mutual fund industry is in the best position to make the point of sale disclosures and, before the SEC radically changes the entire concept of disclosure with respect to products sold by prospectus, it should conduct a thorough review and evaluation of current prospectus disclosure and, at a minimum, implement its revised disclosure regime by creating a new, simplified prospectus.

D. The SEC's emphasis on cost structure will have the unintended consequence of causing investors to equate suitability and appropriateness with the lowest cost product. We believe that investors will be misled into believing that suitability can be determined solely on the basis of a product's internal expenses.

Summary of Proposed Rules 15c2-2 and 15c2-3

[3] See NASD Notice to Members 98-98.

To save time on this most critical SEC initiative, we will not re-examine the original rule proposal (Release No. 33-8358) or our previous comment letter. The fact that the SEC has ignored issues of cost and complexity raised in comments to the Proposing Release indicates that the SEC has every intention to adopt these rules in virtually their present form. Therefore, we believe our supplemental comments must focus on the harm the proposals will do to investors, the postponement of adoption of the proposed rules until the SEC can complete a thorough review of the entire disclosure regime, and the SEC's failure to comply with its statutory obligations primarily under Section 3(f) of the 34 Act.

The SEC has requested additional comments on various aspects of proposed rule 15c2-3, including:

A. The content and format of the disclosure that would be required, including the disclosure of "management fees" and "other expenses" of the Covered Security;

B. The manner in which oral point of sale disclosures would be made;

C. The timing of delivery of point of sale disclosures;

D. Exceptions to the requirement to deliver point of sale disclosures; and

E. Special issues related to variable insurance products.

Similarly, the SEC has requested additional comments on proposed rule 15c2-2 in connection with confirmation requirements, including:

A. Format of confirmation disclosure;

B. Confirmation disclosure of comprehensive ownership cost information;

C. Confirmation disclosure of broker-dealer compensation; and

D. Confirmations for 529 plan and variable insurance products.

The SEC has also requested comments on whether broker-dealers should be permitted to make internet-based disclosure of information about specific revenue sharing payments and other broker compensation practices. When preparing comments please read carefully Attachments 1-7 (proposed point of sale disclosures), Attachments 8-14 (proposed confirmation), and Attachment 15 (proposed internet-based revenue sharing disclosure)[4]. We urge you to read these documents carefully before drafting your comment letters to ensure that they accurately reflect the impact these proposed disclosure forms will have on your firm's business.

Talking Points for Comment letters

Since this is the second round of comments, we recommend that members direct their comments primarily to the questions posed by the SEC in the Supplemental Release. However, we believe that all comment letters should address the following issues:

A. **Benefits of Disclosure** - FSI supports enhanced disclosure of commissions and other remuneration received by broker-dealers in connection with the sale of Covered Securities,

[4] Attachments 1-15 may be found at the following link: http://www.sec.gov/rules/proposed/33-8544attach.pdf

including sales loads and deferred sales loads, 12b-1 fees, revenue sharing, portfolio brokerage arrangements and differential compensation. We agree with the SEC that investors should have more detailed information about anything that might pose a conflict of interest to the broker-dealer recommending the Covered Security.

B. Disclosure Documents Too Complex - SEC Chairman William Donaldson and Paul Roye, Director of the Division of Investment Management, have recently stated that current mutual fund disclosure documents are too long and complicated. The same could be said of disclosure documents for 529 plans and variable annuities. Messrs. Donaldson and Roye have called for a "top-to-bottom review of the mutual fund disclosure regime". We believe this initiative by the SEC is long overdue. We also believe that the SEC should postpone any action on its point of sale disclosure and confirmation initiative detailed in the Proposing Release until this more comprehensive review is complete. Otherwise, the SEC and the securities industry will expend substantial resources duplicating efforts and creating disclosures that may subsequently prove to be ineffective, conflicting, or simply not helpful to investors.

C. Disclosures More Properly Made in the Prospectus - We believe that the prospectus is the best vehicle for disclosure of the costs, expenses and conflicts of interest associated with a registered security. We are not aware of any situation wherein the SEC has required an issuer, underwriter or selling dealer in connection with a public offering of securities to provide disclosure in any document or other medium outside the four corners of the prospectus. Section 10 of the Securities Act of 1933 (33 Act) mandates the information that must be in a prospectus for it to be complete. Of course, there are no such guidelines for the SEC model point of sale disclosure and confirmation forms. We are extremely concerned that the SEC is establishing a questionable and potentially dangerous precedent. It is not unreasonable to assume that investors will rely primarily on the SEC's model disclosure forms, rather than the prospectus, to make their informed investment decision, regardless of the proposed reference to the prospectus. This will not serve the best interest of investors. The better solution would be to restructure the prospectus for each of the Covered Securities so that the investor receives both summary and detailed disclosure information in the same document and the document is subject in its entirety to the structures of Section 10.

D. Unintended Consequences to Investors - FSI is concerned that the proposed rules will create adverse, unintended consequences for investors. First, it is axiomatic that large broker-dealers will not absorb the costs involved in printing and updating the point of sale disclosures. They will have the leverage to require the issuers of the Covered Securities to pay directly or otherwise absorb these expenses. Therefore, investors will ultimately pay the Fund's cost to prepare and update both the fund prospectus and the point of sale disclosure documents. Second, independent broker-dealers will face pressure to substantially reduce the number of Covered Securities they distribute. Most independent broker-dealers will not have sufficient influence to require the issuers of Covered Securities to create and update the point of sale disclosure forms. The cost associated with this process will have the unintended consequence of prohibiting these broker-dealers from continuing to offer investors a broad selection of Covered Securities. This will be particularly true if a point of sale disclosure form is required to be given for each fund that is merely discussed with investors, rather than funds that are the subject of a recommendation.

E. Clarity of Model Disclosure Forms – If the SEC insists on proceeding with the point of sale disclosure forms, we suggest revising the forms as follows:

- Change the caption on each disclosure form to read as follows "fees you pay to us and to the (product sponsor) and our conflicts of interest to purchase and own _____".

- Under "Fees" in the mutual fund and 529 Plan disclosures change the term "other expenses" to "other fees" to maintain consistency and insert under management fees, other fees and state administrative fees the phrase, "(we do not receive any of these fees)".

- Under "you pay when you sell" in the variable annuity disclosure modify the first sentence to read as follows, "you pay a surrender charge if you withdraw more money than a permitted minimum from your contract within a certain period of time".

We suggest that the SEC mandate the format and the language of the disclosure forms and confirmations. We suggest that the SEC add signature and date lines to the disclosure forms. We believe broker-dealers will require this in order to provide evidence of disclosure delivery.

F. Identification of Securities Underlying the Covered Security - We do not believe sub account holdings or portfolio holdings should be included on the disclosure forms for the Covered Securities. We believe that this information is readily available from the issuer and will merely contribute to information overload. Additionally, such disclosure is not consistent with the primary purpose of the disclosure forms, which is to disclose fees and conflicts of interest. If the SEC decides to require such disclosure, would it consider mandating the disclosure of the holdings in each mutual fund's portfolio or the sub accounts available in each variable insurance product? We believe this level of disclosure would be virtually impossible to deliver on the point of sale disclosure form and is easily obtainable from other sources. We agree that the disclosure forms for 529 plans should contain a general disclosure concerning the eligibility to receive tax benefits. We believe the language on the SEC's model disclosure form is adequate.

G. Combined Use of Standardized and Transaction-Specific Cost Disclosure - Previously, FSI advised the SEC that we believe the presentation of transaction specific data will be significantly more expensive than the cost estimates provided by the SEC. Adding the standardized data and making the transaction specific data optional will not reduce these costs. We believe our members will have to expend substantial amounts to access the standardized data, to apply it to the disclosure form and to manipulate the data to convert percentages into specific dollar amounts based on the three samples purchased. The SEC has not determined whether product sponsors can and will provide the standardized data and at what cost. We also believe that presenting the standardized data on the disclosure forms will unnecessarily duplicate information readily available in the prospectus in summary form. Investors will also assume that they no longer need to read the prospectus because the SEC has concluded by its creation of the model disclosure forms that investors need only review the information on the disclosure forms to have a complete understanding of the product. Investors will assume that if other information was important to their investment decision, the SEC would mandate its disclosure on the disclosure forms. The disclaimer that investors should rely on the prospectus will do nothing to disabuse them of the belief that the disclosure forms mandated by the SEC contain all material information about the product. In effect, the SEC will be conveying to investors the message that it is appropriate to ignore the prospectus because it is too complicated to be meaningful and relevant to an investment decision.

H. Comprehensive Annual Cost Disclosure - As discussed in G above, FSI has serious reservations about disclosing comprehensive annual product fees on the disclosure forms. If the SEC chooses to require disclosure of these fees, we agree that the disclosure form should include a statement that such costs would not be deducted directly from the investor's account with their broker-dealer, but would be paid continuously out of the investor's assets in the investment portfolios they selected. FSI strongly believes that the best way to inform

investors about product fees and the economic consequences of these fees on their investment is through the prospectus. Therefore, we urge the SEC to postpone the approval of these proposed rules until it can conclude a thorough review of the disclosure regime for Covered Securities. Since it is clear from Chairman Donaldson's most recent statements on this issue that the SEC will embark on such a review very shortly, we believe the added cost and manpower burdens to implement these proposed rules cannot be justified under Section 3(f) of the 34 Act. We also urge the SEC to reconsider its reluctance to placing greater reliance on the internet to disclose material information to investors.

FSI believes that the SEC's emphasis on fees in the model disclosure forms will have the unintended consequence of misleading investors into believing that the primary determinant of product value should be the lowest internal fees. Investors will get the message from the SEC that the lowest cost product is always the best investment. The SEC's approach to fee disclosure assumes that financial advisors always recommend the highest cost product, regardless of the investor's other personal and financial goals and objectives. FSI is not aware of any empirical data that would support this assumption with respect to our members. By placing so much emphasis on internal fees, the SEC also sends the message that the SEC places little or no value on services provided by the product's investment manager and the advice provided by the investor's financial advisor. FSI vehemently disagrees with this message and believes that the SEC's actions do a tremendous disservice to small investors who have the greatest need professional advice for to help them achieve their financial goals.

Finally, FSI urges the SEC to adopt a safe harbor from civil liability, so long as the broker-dealer does not change or modify the form or substance of the SEC's model disclosure forms. Additionally, FSI urges the SEC to make clear that disclosure forms that are not changed or modified from the SEC's model forms will not be considered a prospectus under Section 2(a)(10) of the 33 Act, by virtue of the provisions of Section 2(a)(10)(b).

I. Disclosure of All Share Classes under Consideration - FSI believes that point of sale disclosure forms, if mandated at all, should not be provided specifically for all share classes or all mutual funds discussed with investors until the point at which a recommendation is made. For example, our members often discuss a substantial number of share classes and mutual funds in connection with the establishment of an asset allocation/diversification plan. Investors could reasonably expect to receive twenty to thirty disclosure forms if they are to be provided at the earliest point that specific mutual funds are discussed. We believe that this would merely serve to confuse investors and provide information that is not relevant at that point of the process.

J. Disclosure of Special Incentives - FSI agrees that it will be more meaningful to investors and more achievable for broker-dealers to move as much standardized information about fees, dealer concessions and revenue sharing as possible to an internet-based disclosure system. To the extent that the SEC agrees to move the aforementioned information to the internet, we believe the reference in the model disclosure forms should be moved to the top of the form and made more prominent.

K. Reference to the Fund Prospectus - As discussed in G above, FSI remains convinced that the best, most comprehensive vehicle for disclosure is the prospectus. We urge the SEC to focus its efforts on developing a more "user friendly" prospectus before adopting any rules that provide for supplementary disclosure. We do not, therefore, agree that the mere reference in the disclosure forms to the prospectus as the primary source of disclosure will be effective in ensuring that investors read the prospectus. We believe investors will ignore the prospectus,

based on a belief that the SEC has made certain that all pertinent information to their investment decision is in the SEC's model disclosure forms.

L. Oral Disclosure of Point of Sale Information - FSI opposes the requirement to make oral disclosures by telephone in any context. It will be extremely problematic to require investors to sit through such a presentation. As the SEC suggests, telephonic disclosure of complex information will be ineffective. If the SEC decides to adopt some form of telephonic disclosure, FSI urges the SEC to require the disclosure to be made only at the point specific Covered Securities are recommended. At this point, the investor will be engaged in the transaction and should be more willing to take the time to hear the disclosure. FSI will vigorously oppose as anti-competitive SEC's proposal to permit broker-dealers that use an automated telephone system to receive orders to program their system to convey minimal information about sales fees and then permit investors to elect not to listen to all other disclosure information. This gives the broker-dealer using an automated telephone order system and providing no investment advice, a clear competitive advantage over other broker-dealers that provide substantial investment advice through financial advisors. The fact that the SEC may require these broker-dealers to later send written disclosures to investors who opt out of telephonic disclosure does not lessen their competitive advantage. FSI urges the SEC to adopt internet-based disclosures as an alternative to telephonic disclosures. This should include email disclosures wherein the investor permits the broker-dealer to deliver information by email. FSI believes that short of actual prospectus delivery, the internet and email are the best vehicles by which to deliver point of sale disclosures. This also provides a more level playing field for all broker-dealers that must make such disclosures.

M. Timing of Point of Sale Disclosure - FSI members sell Covered Securities primarily by "check and application". Applications and new account opening documents are typically completed by financial advisors in the field for the initial transaction and are then transmitted with the investor's check directly to the sponsor of the Covered Securities. Copies of the application and the new account opening documents are transmitted to the financial advisor's broker-dealer. Therefore, FSI urges the SEC not to require the delivery of a point of sale disclosure until the application and new account opening documents are received by the broker-dealer. Subsequent investments in the same Covered Security may also be made by "check and application." The investor can transmit these subsequent investments direct to the issuer without informing either their financial advisor or the broker-dealer. Since the broker-dealer has no way to know immediately when subsequent investments are made by "check and application" in existing Covered Securities, there should be no further requirement to provide point of sale disclosures in connection with these transactions.

N. Exception for Transactions Subject to Investment Advisor Discretion - FSI urges the SEC to carefully consider the more troublesome scenario in which investment advisers manage assets on a platform provided by a mutual fund supermarket. Who is to provide the point of sale disclosure for transactions in Covered Securities effected through the supermarket? These transactions will involve many of the same Covered Securities sold through retail broker-dealers. Should investors who purchase their Covered Securities through an investment advisor and mutual fund supermarket be disadvantaged by being excluded from coverage under the proposed point of sale disclosure and confirmation rules? The proposed rules appear to require the supermarket broker-dealer to make point of sale disclosures even though they do not make the investment recommendation. FSI is satisfied with this outcome and urges the SEC to ensure that it interprets proposed rule 15-2-3 in this manner.

O. Special Issues Relating to Point of Sale Disclosure for Purchases of Variable Insurance Products - FSI opposes requiring point of sale disclosures for variable insurance products. As the SEC knows, these Covered Securities are extremely complex. FSI believes the most

effective way to provide meaningful information to investors is through the prospectus. If the SEC is concerned that the prospectus for variable insurance products is too complex to be meaningful to investors then it should defer the implementation of point of sale disclosure until it can complete its proposed review of the prospectus disclosure regime. If the SEC determines to impose point of sale disclosure with respect to these Covered Securities, FSI recommends adopting the SEC's model disclosure form. However, as with mutual funds and 529 plans, variable product disclosure will have the unintended consequence of greatly limiting the variable insurance products that will be available to investors.

Also, large broker-dealers will have a financial advantage in that they will have the leverage to influence the insurance company sponsors to create and update the variable product disclosures. Smaller broker-dealers will have to self-fund the cost of creating and updating these disclosures. Of course, costs assumed by insurance companies will ultimately be passed along to investors in the form of higher M&E charges. Therefore, investors will not only pay the cost of producing the prospectus and registering the securities, but also the cost of creating and updating the SEC mandated disclosure forms. FSI believes that the terminology used in any disclosure materials for variable products should be consistent with the product's prospectus and marketing materials. If the SEC is concerned that investors cannot understand or appreciate disclosures unless they are made in "plain English", then the SEC should focus its attention on enforcing its "plain English" prospectus rule for these products.

P. <u>Confirmation Proposal</u> - FSI strongly opposes the confirmation proposal in its entirety. Many of our members place a substantial portion (in some cases more than 50%) of their Covered Securities business, including 529 plan sales, by "check and application". To the best of our knowledge, most of our members place all of their variable product business by "check and application". As such, our members will not be able to rely on their clearing firms to create and transmit confirmations for these transactions. Our members will be required to either buy or develop internally systems to create, print and mail confirmations for most of their transactions in Covered Securities. This will require a substantial new investment in equipment and technology. It will also require additional staffing and substantially increased postage expenses. Many of our members, including smaller members, will be financially unable to comply.

The SEC describes the perceived impact the proposed rules will have on the industry in connection with its obligations under the Paperwork Reduction Act of 1995, Section 3(f) of the 1934 Act, the Small Business Regulatory Enforcement Fairness Act of 1996 and the Regulatory Flexibility Act. The SEC's discussion sadly reflects its lack of knowledge and understanding about the independent broker-dealer segment of the securities industry. Most telling is its analysis under Section 3(f) of the 34 Act. The SEC, in its evaluation of the cost to comply with the confirmation requirement, states as follows,

> "The proposals should not hinder efficiency because firms should be able to use present confirmation delivery systems, after making appropriate adjustments, rather than having to build new information delivery systems. In addition, the Commission preliminarily believes that the new rules and the proposed amendments would improve investor confidence and, therefore, would promote capital formation".

The SEC is simply wrong on both issues. First, as we discussed above, the new rules and amendments will, if anything, cause a substantial reduction in capital formation. This is true because many, if not most of our members, will have to bear all of the direct and indirect costs associated with creating, updating and transmitting the proposed confirmations. This will inevitably lead many broker-dealers to substantially reduce the number of these products they offer investors. As is typical with government's intervention in business process, broker-

dealers will offer only those products that either reimburse or otherwise pay directly the costs associated with the point of sale disclosures and confirmations or that increase their revenue sharing to cover these costs. This will likely eliminate access of many small and medium sized product sponsors to the marketplace.

Second, our members do not have "confirmation delivery systems." Our members clear their securities business on a fully disclosed basis through a larger broker-dealer. The clearing broker-dealer records, executes and confirms all securities transactions placed through it. Covered Securities purchased by "check and application" are not placed through the clearing broker-dealer. Rather, they are transmitted directly to the product sponsor. The product sponsor records, executes and confirms each such transaction. Virtually all variable insurance product sales are processed by "check and application". Unless our members can reach agreements with variable insurance and mutual fund sponsors to create, send and update the point of sale disclosures and confirmations that will be mandated by the proposed rules, they will have to build proprietary systems to create, update and transmit these disclosure documents. We are convinced from discussions with our members that this will entail a substantial financial undertaking. It is not as simple as the SEC would have us believe. To the best of our knowledge, there are presently no turn-key systems that can be purchased to prepare, update and transmit point of sale disclosures and confirmations for the Covered Securities. Each FSI member will have to create its proprietary system.

How to Submit Comments

Comment letters should be addressed as follows:

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Comments letters may be sent by:

- E-mail: send your comment letter as an e-mail attachment to rule-comments@sec.gov;
- Regular Mail: send your comment letter in triplicate to Mr. Katz at the address above.