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April 4, 2005

Via Electronic Mail to Rule-Comments@sec.gov

Jonathan G. Katz, Secretary
U.S. Securities and Exchange Commission
450 Fifth St. N.W.
Washington, D.C. 20549-0609

Re: Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, Reopening of Comment Period and Supplemental Request for Comments, File No. S7-06-04

Dear Mr. Katz:

The Securities Industry Association ("SIA")[1] strongly supports timely, Internet-based point of sale disclosure of important information to mutual fund investors that is clear, concise, balanced and cost effective. In our original comment letter,[2] SIA outlined specific recommendations as to how these key objectives can be achieved and we hereby supplement those recommendations in response to the Commission's reopening of the comment period to address the new elements of the proposal.[3]

[1] The Securities Industry Association brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. At its core: Commitment to Clarity, a commitment to openness and understanding as the guiding principles for all interactions between investors and the firms that serve them. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated an estimated $227.5 billion in domestic revenue and $305 billion in global revenues. (More information about SIA is available at: www.sia.com.)

[2] A copy of SIA's original comment letter dated Apr. 12, 2004, from George R. Kramer, Vice President and Acting General Counsel, SIA to Jonathan G. Katz, Secretary, Securities and Exchange Commission, is available at http://sec.gov/rules/proposed/s70604/sia041204.pdf.

[3] In this letter we refer to the Commission's most recent release on this issue, Securities Act Rel. No. 8544 (Mar. 1, 2005) as the "new release" or the "new proposal", and the Commission's initial release, Securities Act Rel. No. 8358 (Jan. 29, 2004) as the "original release" or the "original proposal".

SIA agrees that investors should have access to information about the economic relationships between mutual funds and all of the firms that sell those mutual funds, including brokerage firms, investment advisers, banks, insurance companies and retirement plan administrators and record-keepers.[4] To accomplish this goal, certain fundamental principles should apply:

- Investors should have access to information in advance of their purchase so that they can consider it when deciding which mutual fund to purchase, rather than having access to the information solely after the fact (as in a trade confirmation received after the transaction is completed).

- Information should be easily accessible and readily comparable, so that investors who want this information can use it to make the best informed choices.

- Information should be readily available from the distributor (whether a brokerage firm, investment adviser, bank, insurance company or retirement plan administrator), and should not require investors to hunt down and compare different mutual fund prospectuses and statements of additional information.

- The information should be presented in a way that meshes with other important information about the investor's potential mutual fund purchase - the investment objectives and strategies of the fund, the risks of the fund, and the overall expenses of an investment in the fund.

SIA believes that these objectives and principles are all valid and achievable. The question is not whether to provide better information to mutual fund investors - that is clearly the shared goal of regulators and industry participants - but rather *how* to make this information available, in a way that is cost-effective and transparent for the investors who must ultimately bear the costs of these new regulations.

SIA notes and appreciates that the Commission and its staff have considered many of the ideas and concerns we raised in our prior comment letter on the original proposal. SIA suggested that Internet disclosure would be the most effective way for investors to compare a seller's relationship with different mutual fund families; the new release includes Internet disclosure. SIA suggested that disclosure in terms of standard dollar amounts would best enable investors to compare mutual funds; the new release proposes standard dollar amount disclosure. SIA suggested that distribution fees should be put into the context of a mutual fund's overall expense structure; the new release includes overall mutual fund expense disclosure. SIA suggested that 529 plan securities and variable annuity and insurance products present unique

[4] This comment letter generally will refer to "mutual funds," although we recognize that the proposed rules also cover unit investment trusts or "UITs" (including insurance company separate accounts that offer variable annuity contracts and variable life insurance policies) and securities issued by education savings "529" plans, and the proposed rules do not cover some closed-end or exchange-traded mutual funds.

disclosure issues; the new release contains forms tailored for these products. SIA suggested that live telephone calls and automated telephone systems presented special implementation problems; the new release asks questions about these order entry channels. SIA suggested a broader review of mutual fund disclosure, and we are happy to see that the Commission is now committed to undertaking such a review, although not until after this rulemaking project is completed. Unfortunately, however, by the Commission's failing to embrace SIA's recommendations in full, or otherwise attaching significant restrictions to them, in our view the new proposal misses the mark.

Thus, while there are many areas of improvement in the new release, SIA cannot support the new proposal primarily for two reasons. First, the new proposal still does not provide investors with enough information to make a reasoned decision about whether to invest in a mutual fund. Second, the cost to investors of providing the disclosures remains so enormous that the result would be a substantial diminution in the mutual fund choices available for investors. SIA believes that a better alternative exists that addresses both of these issues: the NASD Mutual Fund Task Force's "Profile Plus" proposal,[5] and particularly its recommendation that all such disclosure be Internet-based.

As mentioned above, SIA supports the decision in the new release to include information about a mutual fund's operating and management expenses in addition to distribution expenses. Customer research conducted by SIA, the NASD and the SEC found that investors preferred to have all of their mutual fund expenses readily accessible in a front end disclosure, and that investors found distribution expense information standing alone to be confusing and misleading. However, SIA also suggested in our original comment letter that investors need information about the basic investment strategies and risks of the mutual fund which they are purchasing. The SEC's new proposal would include a legend indicating that investors should consider these factors and that information about them can be found in the mutual fund prospectus. By contrast, the NASD's Profile Plus proposal would summarize the fund's investment strategies and risks as part of the disclosure, and would provide standardized tabular and graphical information about the fund's historical performance. The NASD tested its Profile Plus proposal against the SEC's current proposal - and investors overwhelmingly found the NASD Profile Plus proposal to be superior. Investors need and deserve to have this information highlighted for them in a way that is easily accessible *before* they purchase a mutual fund. Simply providing the information buried in a lengthy prospectus, delivered after the transaction occurs, is less effective.

Moreover, one of SIA's primary concerns about the original proposal was its enormous cost - a cost which would ultimately be borne by investors in mutual funds. The SEC's own estimate was that Rules 15c2-2 and 15c2-3 would cost at least $1.3 billion to implement,[6] and

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[5] *See* NASD, Report of the Mutual Fund Task Force: Mutual Fund Distribution (Mar. 30, 2005) (available at http://www.nasd.com/web/groups/rules_regs/documents/rules_regs/nasdw_013690.pdf). SIA participated as an observer in the deliberations of the NASD Mutual Fund Task Force.

[6] *See* Initial Proposing Release, Initial Regulatory Flexibility Act Analysis Section D (sum of $850 million implementation cost estimate for Rule 15c2-2 and $450 million implementation cost estimate

nearly $3 billion in annual recurring costs after initial implementation, all of which would be new.[7] As explained in our original comment letter, SIA believes that the SEC's estimates were too low, and the likely actual cost of the proposed rules would be at least double those estimates.[8] The SEC has consistently tended to underestimate the costs of its rulemaking initiatives, with the implementation costs for Sarbanes-Oxley Section 404 being the most noteworthy recent example.

Unfortunately, the proposals in the new release do little to address these staggering costs - if anything, the cost of implementing the new versions of the disclosures may be *greater* than those of the original proposals. The new release accepts SIA's suggestion of Internet disclosure - but in addition to, not instead of, paper-based disclosure at point of sale. The new release accepts SIA's suggestion for standardized cost disclosure - but requires an option for personalized cost disclosure in addition to the standardized costs. The new release would require additional data to be ported from mutual funds to brokerage firms (an issue discussed further below) beyond that required by the original release, but unaccountably fails to include new cost estimates (another issue discussed further below). SIA believes the new release proposals likely would be somewhat more expensive to implement even than the original proposal. By contrast, the NASD Mutual Fund Task Force's Profile Plus proposal is explicitly conditioned on the Profile Plus document being made available solely by the Internet, and not in paper form. SIA believes that the NASD's Profile Plus proposal, together with a drastic rethinking of the confirmation requirements in proposed Rule 15c2-2, can reduce the cost of the proposals from the "multi-billions" per year range to the "hundreds of millions" per year range - a cost, while still substantial, that we believe could reasonably be borne by investors.

In sum, SIA urges the Commission to take the following steps:

- The SEC should require that brokerage firms and other sellers of mutual funds make available a document modeled on the NASD's Profile Plus proposal.

- The NASD Profile Plus document should be available over the Internet, with a customer option to request a physical copy by toll-free telephone number. But as the NASD explicitly proposes, there should be no requirement to physically deliver paper copies of the Profile Plus document to all mutual fund customers.

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for Rule 15c2-3). Attached as an Appendix to SIA's original comment letter were summaries of the SEC's cost estimates for the various rules, and SIA's cost estimates.

[7] *Id.*, *see also* Initial Proposing Release, Costs and Benefits of the Proposed Rule and Rule Amendments. The confirmation proposal alone would account for $2 billion in annual incremental costs.

[8] *See* the Appendix of SIA's April 12, 2004 comment letter on the original proposal for a summary of SIA's cost estimates and a comparison to the SEC's own estimates.

- If, contrary to our strong recommendation, the SEC insists on some paper document physically delivered at point of sale, that document should require disclosure only in terms of standardized amounts, without any personalization option.

- If, contrary to our strong recommendation, the SEC insists on some paper document physically delivered at point of sale, the SEC should provide reasonable exceptions such as for sales to institutional customers, unsolicited transactions, and repeat investments in mutual funds for which the customer already received a disclosure.

- The SEC also should mandate that brokerage firms and other sellers of mutual funds make available over the Internet information about revenue-sharing and compensation practices, similar to that in the new release.

- The SEC should require that information about sales loads (both actual dollar amounts and in percentage terms) be added to mutual fund confirmations.

- But the SEC should drop any other proposed changes to mutual fund confirmations, in light of the fact that the information will already have been available to investors before the transaction.

By taking the above steps, the Commission will ensure that the best interests of investors will be met by providing them with the clear, concise, cost-effective, and balanced Internet-based disclosure they desire and deserve. Such a result would also be consistent with the Commission's stated objective of utilizing technology to improve disclosure.

I. The Commission Should Issue a Formal Re-proposal Before It Adopts Final Mutual Fund Transaction Disclosure Rules

The Commission styles the new release as a "reopening of the comment period" on its original proposal, rather than as a re-proposal. This choice makes commenting on the new release more difficult.[9] As discussed above, the new release lacks any cost-benefit analysis of the new (and in some cases quite different) proposals it contains. This is a particular weakness given the fact that the cost of the proposed rules was one of the critical issues discussed in response to the original release. The new release does not contain any proposed regulatory text - so it is impossible to understand how some of the new concepts discussed in the release might be implemented. Indeed, in many portions of the new release, it is difficult to determine what the

[9] SIA requested an extension of the unusually short 30-day comment period on the new release but it has not been granted. The new release is 75 pages long, with 15 attachments and some 125 questions. Many of its provisions are radically different from those in the original release. The questions raise many issues even more different from those in the original release. We may supplement this letter with additional comments directed to specific questions raised in the new release. It is simply not possible to obtain input from hundreds of SIA member firms and respond to these questions in the short time allotted.

proposal actually is - the new release asks questions without any indication (in the form of actual proposed regulations) as to how the Commission believes those questions should be resolved.

The new release does not discuss the effect on small broker-dealers or small mutual funds as required under the Regulatory Flexibility Act; it does not discuss the effect on efficiency, competition or capital formation as required under the National Securities Markets Improvement Act, and it does not discuss the recordkeeping burdens as required by the Paperwork Reduction Act. Moreover, many of the innovations contained in the new release, such as the proposed Internet disclosures and the proposed inclusion of mutual fund operating expenses, are clearly outside of the scope of the original proposal. While SIA supports some of these innovations, the Administrative Procedures Act requires that the SEC must formally re-propose those ideas, with the text of proposed implementing regulations and all of the analyses discussed above, before it can adopt these rules.[10] SIA urges the SEC not to attempt to short-circuit the statutorily-mandated federal agency rulemaking process. We look forward to commenting on a formal, fully documented re-proposing release.

II. The Commission Should Not Require Physical Delivery of Paper Point of Sale Disclosure Documents

As discussed above, SIA supports the concept of the NASD's Profile Plus proposal - and we agree with the NASD's conclusion that the proposal should be conditioned on allowing Internet delivery of the disclosure. In SIA's view, the Profile Plus approach is a more useful disclosure than that contained in the new release. The Profile Plus would provide important, specific information about the investment objectives and risks of a mutual fund, as well as specific, standardized information about the fund's historical performance in tabular and graphical form. As SIA pointed out in our original comment letter, these are among the most important factors investors should consider when choosing a mutual fund - demonstrably more important than some of the issues highlighted in the SEC's proposed disclosures. The NASD's Profile Plus disclosure is far preferable to simply including a point of sale legend stating that an investor should review the fund's prospectus for such information. Highlighting the information in the SEC's proposed disclosure, without providing this more important fund-specific information, creates the risk of misleading investors about what information they should consider most carefully when purchasing a mutual fund. The ultimate proof is in the test results: when the NASD tested the two proposals with actual investors, those investors overwhelmingly preferred the Profile Plus proposal over the Commission's proposal. And critically, the customers surveyed by the NASD preferred Internet access to physical paper delivery of the proposed disclosures.[11]

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[10] *See, e.g., American Waterworks Assn. v. EPA,* 40 F.3d 1266 (D.C. Cir. 1994); *Horsehead Resource Devel. Co. v. Browning,* 16 F.3d 1246 (D.C. Cir. 1994), *cert. denied,* 513 U.S. 816 (1995).

[11] Notably, the Commission did not ask investors in its focus-group research whether they preferred receiving the point of sale information in paper form or over the Internet. We suggest this means that the SEC would have no basis for disregarding the NASD's finding that customers prefer Internet-based disclosure.

It simply would not be practical for investors to read the NASD Profile Plus disclosure, or the Commission's proposed disclosure, in paper form during meetings with their registered representatives. Much less would it be practical for brokerage firm personnel to read either proposed disclosure before accepting telephone orders.[12] Both disclosures simply contain too much information for an individual to process in a one-on-one meeting or conversation (especially if a registered representative has to read the information to the investor). Consider an ordinary interaction where a registered representative suggests three different possible mutual funds to an investor. Under the Commission's proposal, the registered representative would have to give the investor nine separate pieces of paper - one of each of the share classes (A, B and C shares) under consideration for each of the three funds.[13] Under the Commission's proposal, if the discussion occurred over the telephone, the registered representative would have to read all nine sheets of paper to the investor. While important, it is simply too much information - the investor could not hope to read it all and make a decision while the registered representative waited for a decision. And in particular, any such telephone call simply would take too long. As there is only a finite amount of time in a trading day, if the SEC requires each customer interaction to take substantially longer, the brokerage firm will not be able to serve as many customers.[14] In a sudden market downturn, when customers may desire to switch to more conservative mutual fund investments, customers may be unable to reach their registered representatives.

While SIA supports more timely and comprehensive disclosure, the longer the required disclosure, the more impractical it is to deliver it physically at point of sale and expect a customer to be able to read it and understand it (much less when it is read over the telephone). The Commission's new proposal, by including additional information about the mutual fund's fees, and by including the legend about consulting the prospectus, would take longer to deliver (and therefore would cost more) than its original proposal. The NASD Profile Plus, while far superior as a source of information to customers, would be even more impractical to read while meeting with a registered representative, or for the registered representative to read to the investor over the telephone. As the NASD's Mutual Fund Task Force recognized, **the practical realities all point in the same direction: the Commission should create a short, succinct but**

[12] It is important to note that the vast majority of mutual fund orders today are placed over the Internet or by telephone; we estimate that well under ten percent of mutual fund orders are placed during in-person meetings with registered representatives.

[13] The new release does not explain when a different share class should be treated as "under consideration" and subject to additional disclosure requirements. We urge the Commission to drop the "under consideration" concept. This concept would be superfluous in any event if the Commission pursues the NASD Profile Plus alternative - disclosures for all share classes would be equally available over the Internet.

[14] The new release does not mention the lengthy mandatory "definitions" which the initial release would have required be included on all point of sale disclosures. Consumers found the disclosures to be confusing, dense and off-putting. We urge, as we did in our original comment letter, that the mandatory definitions be omitted from any final rule.

thorough disclosure document and make it available to customers over the Internet. In that way, investors who are interested in the document can consult it at their leisure - without the pressure of having to read it while a registered representative waits for them to finish it, and without the pressure of trying to understand a detailed document being read to the investor over the telephone. Customers will understand the document better, with less pressure, and will make better informed decisions as a result.[15]

In the real world, if the Commission proceeds with the physical paper point of sale disclosures as proposed, representatives would simply choose different investment classes (for example equities, bonds, ETFs, closed-end funds, or separately managed accounts) for which the point of sale disclosure is not required. As SIA stated in response to the original release, even the critics of the mutual fund industry agree that mutual funds have the best disclosure, the strictest governance structure, the best diversification requirements and the most thorough oversight of any investment class. The Commission should be careful not to create disincentives so strong that brokerage firms and investors avoid mutual funds altogether. Such a result would not benefit mutual funds, brokerage firms, investors or the American economy.

III. If the Commission Requires Physical Paper Delivery of Point of Sale Disclosures, Contrary to SIA's Recommendation, It Should Require Only Standardized Dollar Amount Cost Disclosures

As set forth above, SIA strongly recommends that the Commission adopt the NASD's Profile Plus point of sale disclosure alternative approach, with Internet delivery. However, if the Commission chooses to disregard our and the NASD Task Force's recommendations, we urge the Commission to require only a standardized dollar amount cost disclosure at point of sale. The Commission's new release recognizes the benefit of standardized dollar amount cost disclosure: it allows investors to make the best apples-to-apples comparison of the costs of different funds.[16] However, adding a "personalization" alternative dramatically increases the cost of such a disclosure.[17] A standardized dollar amount disclosure can be produced centrally and provided consistently throughout a brokerage firm. Requiring the personalization alternative

[15] SIA's prior comment letter, at footnotes 17 through 22, lists a variety of examples where the Commission already has required or approved Internet-only disclosure.

[16] As the SEC has previously recognized, "personalized expense disclosure . . . would not assist investors in making comparisons among funds because it would be based on different investment amounts and different rates of return" and standardized disclosure "avoids certain costs and logistical complexity that individualized disclosure . . . might entail." Investment Company Act Rel. No. 26,372 (Feb. 27, 2004).

[17] As discussed in SIA's original comment letter, in many situations, such as "same-day exchanges" of mutual funds, it would be simply impossible to provide a personalized cost disclosure. The investor's personalized cost depends on the exact amount of the customer's investment in the new fund. But this amount is not known at the time of sale, because it depends on the proceeds of a simultaneous sale. The sale proceeds are not known until the fund being sold sets its NAV after the end of the trading day.

would mean that the form must be capable of being generated at as many as hundreds of different locations within the firm. A standardized dollar amount disclosure can be centrally supervised and overseen. The personalization alternative imposes much more difficult and burdensome supervisory requirements. While it is generally possible to offer a personalized "cost calculator" on a website, requiring physical paper production of personalized point of sale disclosures adds tremendously to the expense of the point of sale rule, without adding any benefit in terms of easing an investor's ability to distinguish different funds.[18] Furthermore, there seems even less justification to require personalization if standardized amounts are employed.

The new release requests comment on whether point of sale disclosure should include information about both an introducing firm's and a clearing firm's relationship with a mutual fund family. SIA supports making available by Internet information about the relationship between mutual funds and clearing firms. However, we strongly oppose requiring physical paper disclosure concerning both introducing and clearing firm's relationships. Producing such a physical paper point of sale disclosure document with accurate, current information about both the introducing firm and the clearing firm will be difficult and expensive - a burden that will fall disproportionately on the small introducing broker-dealers who will be responsible for delivering it to customers. Moreover, the information that is most relevant to customers concerns the incentives and practices of the firm that is making a mutual fund recommendation to that customer. Including information about the clearing firm's relationships will confuse most customers and may serve to distract them from the information that is most important to their investment decision.

IV. If the Commission Requires Physical Paper Delivery of Point of Sale Disclosures, Contrary to SIA's Recommendation, it Should Establish Reasonable Exceptions to that Requirement

If, contrary to SIA's strong recommendation, the Commission goes forward with the physical paper point of sale disclosure requirements, it should impose that requirement only in the situations where it believes the disclosure is absolutely necessary. The Commission should exempt all other situations. Reducing the number of investors to whom the physical paper point

[18] In our original comment letter, SIA urged that disclosure be phrased in terms of cost per $1,000 invested, which is comparable to the mutual fund cost disclosures which the Commission already has adopted for mutual fund prospectuses. In the new proposal, the Commission suggests disclosure at three different investment levels: $1,000, $50,000 and $100,000. We understand the potential utility of such a disclosure for mutual fund A shares, where breakpoint discounts mean that the potential fees vary based on the amount invested. However, for share classes without breakpoints, SIA believes the three different levels are confusing and do not provide investors with useful information. We suggest that the Commission limit the three-level disclosures to A shares (or any other share classes with breakpoint features). The ICI has recommended that all point of sale disclosures should be phrased in terms of costs per $1,000 because even for A shares, only a very small percentage of mutual fund orders are eligible for breakpoints, and therefore the added customer confusion from the three-level disclosure is not worth the incremental benefit. We urge the Commission to carefully consider this view.

of sale disclosure requirement applies will reduce (at least incrementally) the cost of the proposed regulations.

For example, the new release requests comment on the concept of excluding institutional customers from the physical paper point of sale disclosure requirements. SIA concurs that such an exception is desirable. The point of sale disclosure requirement is a highly paternalistic measure designed primarily to protect the most inexperienced and unsophisticated investors - investors who are most likely to get their initial investing experience by purchasing mutual funds. If, as the Commission has now proposed, information about the relationships between mutual funds and the firms which sell them is available by Internet, then institutional investors certainly will have the ability to obtain and evaluate that information. SIA urges the Commission to adopt the broad, Regulation D definition of institutional investors for this purpose - with full recognition that this definition includes some individuals. Regulation D investors, who are wealthy and have established relationships with their financial institutions, are less subject to sales pressure and are more likely to ask about and be able to evaluate potential conflicts of interest - this is exactly why the Commission has long exempted offerings to these investors from Section 5 of the Securities Act of 1933. For the same reasons, the Commission should exempt these investors from the physical paper point of sale mutual fund disclosure requirements.

We agree with the suggestion in the new release that purchases in accounts with investment discretion, either on the part of the brokerage firm or some third party manager such as an independent investment adviser, should be exempt from the point of sale disclosures. If a professional money manager is making the investment decision, providing point of sale information to the customer is superfluous. We also agree that mail-in orders cannot reasonably be subject to the point of sale disclosures, and this exception should not be limited to accounts where there has been "no prior contact" with the customer. We do not believe it would be consistent with the concept of best execution to refuse to execute a customer's mailed-in mutual fund order until the brokerage firm could locate the customer and send a point of sale disclosure.

SIA also urges that unsolicited mutual fund transactions be excluded from any physical paper point of sale disclosure requirement. The potential for conflicts of interest or undue sales pressure is greatly reduced in unsolicited transactions. Investors typically conduct unsolicited transactions after they have done their own research on the mutual fund in question. Assuming the Commission goes forward with some type of Internet disclosure, self-directed investors can consult that disclosure if they wish to do so before placing an unsolicited trade. It would be duplicative, excessively costly and unnecessary to require physical paper point of sale disclosure for unsolicited mutual fund transactions. Because of the lack of potential for sales pressure or other conflicts of interest, the Commission did not impose point of sale disclosure requirements for unsolicited penny stock transactions.[19] Eliminating physical paper point of sale disclosure

[19] The exception to point of sale for transactions as part of a "covered securities plan" in Rule 15c2-3 should be expanded to include money market transactions – it would make no sense to require point of sale disclosure for money market transactions where the Proposal would not even require an immediate confirmation (compare Rule 15c2-2(d)(1)). Most brokerage firms only offer a single proprietary set of money market funds. The minimal potential conflicts of interest that exist with

requirements for unsolicited mutual fund transactions would limit some of the extraordinary costs of the proposal, especially for customers of firms specializing in self-directed investors.

Finally, SIA urges that point of sale disclosure should not apply to an investor's subsequent purchases of a fund in which he or she already has a position. Once again, the potential for conflict of interest or undue sales pressure is diminished since the investor has already received the information about the brokerage firm's relationship with the fund complex. The Commission's own proposal would not impose repeat point of sale disclosures for periodic purchases of a mutual fund, or dividend reinvestments in a mutual fund, for precisely the same reason. Having made a fully informed investment decision once (and with the ability to check that information on the Internet at any time), the incremental benefit of repeating exactly the same physical paper disclosures to that investor is simply not worth the substantial cost. We urge the Commission to follow its own logic and not impose the physical paper point of sale disclosure requirement on an investor's subsequent purchases of a mutual fund in which he or she has already invested.

Granting these exemptions - for institutional investors, for accounts with investment discretion, for unsolicited trades, for repeat purchases of the same mutual fund, and for money market funds - would not change our overall view that the Commission should pursue the Internet-disclosure NASD Profile Plus proposal instead. But if the Commission rejects that approach, SIA believes that these exceptions have some potential to lower the extraordinary cost of the proposed rules. However, even with these exceptions, the savings may be marginal because of the costs associated with identifying and monitoring exemption qualifying situations. Also, investors should be permitted to "opt out" of receiving the disclosures - whether in automated telephone calls (as the new release suggests), and in live telephone calls, or in one-on-one meetings. There can be no legitimate justification for refusing consumers the ability to choose whether they want to spend their time reading or hearing this information - just as consumers can choose whether or not to read prospectuses or other disclosure documents.

V. The Commission Should Rethink the Proposed Confirmation Disclosures

SIA supports including sales load information, both on a dollar amount and percentage basis on mutual fund transaction confirmations. This sales load information is important in assisting investors in determining whether they received the breakpoint discounts which they expected and to which they are entitled. This is a substantial change to mutual fund confirmations, and will come at substantial expense. However, SIA believes there is near unanimity in the brokerage industry in support of such a change, especially in light of the breakpoint issues that have arisen in the past two years.

However, SIA believes the remaining proposed changes to mutual fund confirmations in the new release are not warranted. Information about ongoing fees and expenses and potential conflicts of interest should be available to investors when they can use that information - before

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respect to money market funds do not justify the enormous cost of imposing point of sale disclosure for those funds.

the transaction. Both the NASD Profile Plus disclosure and the Commission's proposed point of sale disclosure would make that information available when the investor actually can use it - before the investor makes his or her purchase. We fail to understand the utility of repeating the same information in a transaction confirmation, when it is too late for the investor to do anything with that information.[20]

Trade confirmation production systems are among the most expensive and most difficult to alter anywhere in the brokerage industry, because of the mass nature of confirmations, the sensitive and private nature of the information, and the extremely short deadlines for their production and mailing. Sales load information could be included (with some difficulty) on the existing trade confirmation systems used by brokerage firms. The Commission's proposal would require brokerage firms to create a completely new production system for mutual fund confirmations, separate from trade confirmations for all other products. The need to keep two separate trade confirmation systems in production would impose a massive cost on the securities industry - a cost that would have to be passed on to investors.[21]

In our view, it is far more preferable to add only the sales load information to confirmations, because that information can be accommodated within the existing single confirmation production system. This is particularly true because, as explained above, investors have little if any use for the ongoing cost and potential conflict information after they have already made their investment decision. The minimal incremental benefit of repeating that information again in a confirmation, is not worth the enormous incremental cost of forcing brokerage firms to create dual production streams for confirmations.

VI. SIA Supports the Commission's Proposed Internet Disclosures with Some Suggested Modifications

SIA generally supports the Commission's proposed Internet disclosures about brokerage firm relationships with mutual funds.[22] As we stated in response to the original release, we

[20] SIA concurs with the Commission's decision in the new release to omit personalized calculation of revenue-sharing fees and compensation information from trade confirmations - investors found this information confusing and unhelpful.

[21] The Commission's proposed forms for confirmation disclosure present other substantial problems. They do not maintain a place for the customer's name and address to appear in a glassine window in the mailing envelope. They do not include information about the customer's branch, or how to contact the firm if the customer believes the confirmation reflects an error. They do not include space for any other disclosures a firm may believe it should make to its mutual fund customers.

[22] This is not to say that we believe the Commission's proposed Internet disclosures would be easy or inexpensive to provide. In fact they are likely to be time-consuming and expensive to provide initially as well as to maintain on an ongoing basis. However, we believe the proposed disclosures provide information that at least some investors will find useful, and are cost-effective at least when compared to physical paper-based disclosure. Some of the specific implementation challenges, such as obtaining reliable current automated information from mutual funds about the costs associated with those funds, are discussed further below.

believe these issues are better suited to Internet disclosure than paper-based disclosure. Internet disclosure allows investors to compare different mutual funds available through a brokerage firm, and also to compare brokerage firms to one another. We believe the NASD Profile Plus disclosure could easily be incorporated in this structure. We do have some additional comments on the Internet disclosures, which follow.

As stated in our original comment letter, we believe "revenue sharing" should include payments from mutual funds themselves (for example, Rule 12b-1 fees or sub-transfer agency fees) as well as from the fund affiliates (advisers or distributors). Only if all payments from all members of the fund family are included can investors truly compare one fund to another. By contrast, the disclosures about "anticipated" payments may be more difficult. Just because a mutual fund purchased a booth at a registered representatives' conference last year, should the brokerage firm anticipate that it will purchase another booth next year? We would urge some sort of materiality standard for those sorts of expenditures. Frankly, in the absence of any proposed regulation implementing these disclosures, we are at a loss to understand how the new release intends to treat disclosure of payments from a mutual fund affiliated with the brokerage firm. We look forward to commenting on this difficult issue in response to a formal re-proposal.

As discussed above, we believe introducing brokers should disclose their relationships with mutual funds on their websites, and clearing brokers should disclose their relationships on their websites - we do not believe the Commission should try to force both disclosures onto a single website.

Finally, while SIA strongly supports the disclosure of differential compensation, we believe the concept of comparing dealer concessions for "comparable" mutual funds suffers from the same shortcomings as the "comparison range" disclosures in the original release.[23] We urge the Commission to focus simply on requiring disclosure of the relationship of every brokerage firm with every mutual fund, and not to require brokerage firms to try to determine what mutual funds are "comparable" to each other.[24]

VII. The Commission Should Address How Brokerage Firms Will Receive Information from Mutual Funds to Facilitate the Disclosures

The Commission's new release would require brokerage firms to obtain substantial amounts of information from mutual funds. Today, a typical brokerage firm may offer thousands

[23] The new release spends only one footnote on the "comparison range" disclosures referenced in the original release, which are postponed for consideration to some indefinite point in the future. For the reasons stated in our original comment letter, SIA urges the Commission to drop the unworkable "comparison range" concept.

[24] SIA believes that redemption fees, whether payable to the mutual fund or the brokerage firm, are much more susceptible to Internet disclosure than to physical point of sale disclosure - for all of the reasons discussed above why we believe the NASD Profile Plus disclosure is preferable to the Commission's physical paper point of sale alternative.

of mutual funds from hundreds of mutual fund families. Mutual funds are constantly adjusting their costs and fees in response to competitive pressures and changes in the industry. There is no simple source from which brokerage firms can obtain the information which the proposals would require be disclosed to customers. For the Commission's point of sale proposal to work, there needs to be a single, current authoritative source for this information.[25] It would be too costly and subject to error for brokerage firms to rely on a manual process to input information about thousands of mutual funds. We understand that today, the NSCC Profile system allows mutual funds to input some information into a system that can be viewed and retrieved by brokerage firms. However, the NSCC Profile system would have to be substantially modified to include all of the information contemplated by the Commission, and the NASD Profile Plus proposal would require even further modification. We believe these modifications are likely to be feasible as a technical matter, but we also believe it is incumbent on the Commission to determine that is in fact the case, with a high degree of certainty, before imposing an affirmative regulatory requirement to make such disclosures.

Brokerage firms and other sellers of mutual funds must necessarily rely on the mutual funds themselves to provide the information about costs and fees. Obviously this information is not within the control of the brokerage firms. As the new release recognizes, it would be unfair to hold brokerage firms potentially liable for mistakes in this information that are outside of the brokerage firms' control. SIA concurs with the Commission's support for providing a safe harbor from liability for inadvertent errors and mistakes in this type of information. Such a safe harbor should apply both to private liability and to liability in enforcement proceedings. Failing to provide such a safe harbor would be yet another incentive for brokerage firms to avoid transactions in mutual funds in favor of other asset classes without similar disclosure requirements. Finally, we believe that the Commission should explore all reasonable methodologies for making important mutual fund disclosure information available through broker-dealer websites. For example, we believe it is likely to be more practical for the broker-dealer to post broker specific revenue stream (sales charges and 12b-1 payments) and conflict information (differential compensation and revenue sharing arrangements) on its website, together with embedded or hyperlinked information from the applicable fund website through which the investor can obtain fund-specific information (such as operating expenses, risk factors and investment objectives). This approach might well limit the costs associated with having to develop or substantially expand systems for delivery of large additional quantities of data from funds to broker-dealers. Additionally, it would address legitimate broker-dealer concerns that they may incur liability for any inaccuracies in fund specific data they neither originate, or control.

VIII. Implementation Issues for the NASD's Profile Plus Proposal

While, as set forth above, SIA strongly supports the NASD's Profile Plus proposal, this does not mean that the Profile Plus proposal would be without implementation issues of its own.

[25] In our experience, information about mutual fund fees and costs from third-party vendors such as Morningstar, S&P and Lipper is not always updated with sufficient regularity and reliability to be satisfactory for the purposes of the proposed disclosures.

The NASD Profile Plus proposal would require even more information to be ported from mutual fund companies to brokerage firm websites, including investment objectives, risk factors and historical performance information, in addition to information about the mutual fund's costs and fees. Once again, there is currently no authoritative, automated site to obtain such information. While we believe these implementation issues can be overcome, they are not trivial. Again, we believe brokerage firms could best provide this information most easily by embedding in their websites links to the mutual funds' own websites, or by providing hyperlinks to those websites. Alternatively, the Commission would have to find an industry vendor (such as NSCC) that was willing to create such a central depository. We believe that with this enhanced information about mutual funds, it is even more important for brokerage firms to be provided with a viable safe harbor from liability for innocent mistakes in information ported from the mutual funds themselves. We note that one of the major reasons why the Commission's own Profile Prospectus initiative for mutual funds, Rule 498, has not obtained widespread adoption is because the Commission did not provide such a safe harbor from liability. We urge the Commission not to repeat this mistake in connection with the NASD's Profile Plus initiative.

IX. The Proposed Point of Sale Disclosures for 529 Plan and Variable Products Are Too Complex To Deliver Except by Internet

The situation for disclosing costs and fees for 529 plans and variable products is even more difficult than for ordinary open-end mutual funds. There is currently no system anywhere in the securities industry of which we are aware which provides centralized, current and authoritative information about the costs and fees of 529 plans and variable products.[26] The Commission would have to spearhead the creation of such a centralized database for the proposed cost disclosures to be feasible. While such a project may be feasible from a technical perspective, the Commission would need to find a vendor (such as NSCC) that was willing and able to undertake it. The Commission should take into account this current lack of data in establishing a compliance date for the proposed rules.

The new release proposes a legend on 529 plan point of sale and confirmation disclosures suggesting that investors consider whether out-of-state 529 plans can ever be suitable. We believe such a legend would be potentially misleading. Some states do not have state income taxes, so there is no state tax benefit to buying an in-state plan versus an out-of-state plan. Most other states provide in-state tax benefits to some other states' 529 plans (although these benefits vary from state to state and over time). Some state 529 plans charge substantially higher fees than other plans - fees that may negate any state tax advantage, especially for investors in lower tax brackets. The issue of 529 plan suitability is simply too complicated to be addressed by the proposed legend in the new release, and that legend is potentially misleading in too many cases to be a mandated disclosure.

[26] Because of the very short comment period the Commission has allotted for the reopening of the comment period, we cannot be confident that we have addressed all of the issues, particularly with respect to specialized products such as 529 plans and variable products.

The proposed point of sale disclosures in the new release for 529 plans, variable annuity and variable life products are unrealistic for a paper-based disclosure. The new release proposes that at point of sale, a brokerage firm would have to disclose the operating and management costs for every possible sub-account in such products. Many of these products have a dozen or more sub-accounts, each with different operating and management fee structures. We agree that it is important for investors to have access to these fee structures before they invest any money they cannot easily retrieve. Indeed, this fact is precisely why most state laws provide a "free look" period for variable products - so the client can get the prospectus or other offering document and review it carefully before any commission is paid on the client's investment. In light of the existing "free look" period, we question whether additional point of sale disclosure of this information is really necessary.[27] But we also point out that physical paper point of sale disclosure for these products is totally unworkable. Such disclosure is simply too voluminous for an investor to read and understand in a face-to-face meeting with a registered representative, much less for a registered representative to read to an investor over the telephone. Once again, we believe the practicalities of disclosure for these complex products argue for the NASD approach - Internet disclosure - rather than for delivery of physical pieces of paper to prospective investors.[28]

X. The Proposed Rules as Currently Contemplated Would Take at Least Two Years to Implement

SIA repeats what we said in our response to the original release - the rules as currently proposed would require *at least* a two-year period to successfully implement after they are finally adopted. The Commission's current version of the proposal, which would require producing and disclosing even more information from more third parties than the original proposal, would take if anything longer to implement. We believe our proposed alternatives, relying primarily on Internet disclosure instead of physical paper-based disclosure, and making fewer changes to confirmation systems, might shorten this implementation time. Quicker implementation would be another benefit of accepting the recommendations set forth above. In addition, given the complete lack of reliable automated sources of information concerning 529 plan and variable product sub-accounts, we urge the Commission to consider a separate and longer compliance date for those products. With these changes, we believe the remainder of the disclosures could be implemented in a somewhat shorter time, perhaps as soon as 18 months.

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[27] Similarly, given the way 529 plans are typically sold (usually involving substantial lead times with ample opportunity to obtain more information), it is not clear whether the complexity of including 529 plans in the point of sale disclosure requirements is worth the benefit – especially if the Commission insists on physical paper disclosure.

[28] The new release does not give any examples of how the proposed disclosures would work for UITs other than variable products. The Commission should give the mutual fund and brokerage industries an opportunity to comment on such a proposed disclosure before adopting final rules.

XI. The Commission Should Address Other Issues in the New Release To Minimize the Cost and Burden of the Rules

The new release asks a variety of questions about the proposed rules, which, for the reasons discussed above, cannot all be responsibly addressed in the short period of time the Commission has allotted for comment. However, there are several items on which we would like to comment. The release suggests, for example, that it could forbid brokerage firms from changing anything about the proposed disclosures, right down to the formatting and font size. We urge the Commission not to take such a rigid and paternalistic approach to the proposed rules. Indeed, in the initial release, the Commission suggested that it could impose antifraud liability on a brokerage firm that perfectly complied with all of the required disclosures, if the firm omitted additional information necessary to make those required disclosures not misleading.[29] For the Commission to hold that a firm could not vary the disclosures, but could be liable for not including further information in those disclosures, is to create a liability trap that is unfair and unwarranted. Moreover, mandating formats and font sizes certainly is not consistent with Commission's oft-stated preference for "principles-based" regulation.[30]

The new release suggests that in some cases the mutual fund point of sale disclosure should include account-level fees in addition to product-specific fees. SIA believes that combining account-level and product-level fees is extremely problematic. We think that it is important for account-level fees to be transparent and for these fees to be disclosed to customers upon the opening of an account.[31] However, in our view, this disclosure should be separate from the product-level fees in the mutual fund point of sale disclosure. Account-level fees can be complicated, depending (for example) on assets, trading levels, account services (e.g. sweep features, check-writing, or margin) and the existence of other individual or household accounts. Combining account-level and product-level fees will be confusing and potentially misleading (not to mention the fact that it will make the process of reading a disclosure document, in person or over the telephone, more lengthy and confusing). Unless the mutual fund point of sales disclosure is limited to product-level fees, investors will be deprived of a true apples-to-apples comparison of the cost of each potential investment, particularly since most account level fees would be totally unrelated to the mutual fund transaction.

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[29] SIA urges the Commission to retract this position in the initial release, which (as the initial release itself recognized), is inconsistent with the Second Circuit's holding in *Press v. Quick & Reilly, Inc.*, 218 F.3d 121 (2d Cir. 2000). If the Commission determines which facts are presumptively material to be disclosed at point of sale or in confirms, brokerage firms should not face antifraud liability just because the Commission later rethinks its position about materiality.

[30] We concur with the idea of allowing a brokerage firm to omit disclosures that are not relevant to it, for example, potential conflicts of interest where the firm's answer is "no".

[31] In other words, if an investor opened a new account in order to make a mutual fund investment, the brokerage firm should make available two separate disclosures – one concerning the services available and fees charged for that account (information typically included in a new account agreement), and a separate disclosure concerning the mutual fund itself.

The new release also requests comment on requiring a point of sale disclosure form to be signed and dated by each client. Once again, we urge the Commission to grant firms and customers flexibility as to how this information is transmitted and documented. Undoubtedly, some brokerage firms may choose to impose a signature requirement to evidence delivery of the forms. But a signature requirement clearly would be impractical in many interactions, for example by telephone - we do not believe the Commission should want to tell investors that, during a sudden market downturn, they cannot replace their aggressive growth mutual fund with a more conservative mutual fund because they first have to return a signed disclosure document to the brokerage firm. Similarly, in the sales scenario discussed above - three possible mutual fund recommendations, each with three possible share classes - the customer would have to sign nine separate disclosures. It is not apparent to us how such a scenario, equivalent to a real-estate closing, could be in any customer's interest. We urge the Commission not to impose mandatory signature or dating requirements.

Conclusion

SIA shares the Commission's overall goal of improving investors' ability to make informed decisions when investing in mutual funds. We believe the NASD's Profile Plus alternative, available over the Internet, would best satisfy this objective as it would provide better quality information to customers than the Commission's current proposal, and at a lower cost to investors. Focus groups indicate that customers prefer the NASD Profile Plus alternative over the Commission's current proposal - even when the customers are not informed of the greater costs they would bear under the Commission alternative.

SIA remains very concerned that as currently written, the new proposal would have substantial unintended consequences, on mutual funds, the brokerage firms and other distributors that sell them, and most importantly on investors. Among investors, those likely to be the most adversely affected are the ones for whom mutual funds are often the most appropriate investment vehicle – small and beginning investors. These investors will find increased costs eroding their returns. Some of these investors may be deterred from opening brokerage accounts at all; others may end up choosing other investments, when mutual funds might have been a better choice for them. The net result will be to harm these investors' ability to save for homes, their children's education, or for retirement. We believe the NASD Profile Plus alternative would successfully address these unintended consequences.

Additionally, we believe that the proposed amendments to Rule 15c2-2 which would require a separate confirmation for mutual fund transactions, reflects a fatally flawed concept and should be withdrawn. SIA does, however, strongly support the inclusion of sales charge information in both percentage and dollar amount form, which can be accommodated within the existing confirmation process.

SIA looks forward to commenting on a re-proposal of these rules, this time with actual proposed regulatory text, cost-benefit analysis, and analysis of the effects of the proposals on small businesses, paperwork burdens, and on competition, efficiency and capital formation, and

with a more reasonable comment period. We hope that new re-proposal will build on the NASD Profile Plus alternative.

Finally, we ask that the Commission focus on solutions that significantly benefit the vast majority of investors, rather than allow the effectiveness of rulemaking to be severely compromised by attempts to address every possible approach that might conceivably be beneficial to some extreme minority of investors. For example, why is it necessary to require a costly infrastructure to "personalize" fees when the overwhelming majority of investors would have little or no difficulty calculating this information from the standardized investment amount information provided? Furthermore, with Internet access as commonplace as telephone access, there is no compelling rationale for requiring duplicative paper or oral point of sale disclosure, particularly since those without Internet access can call a toll-free telephone number to obtain a paper printout of the applicable web- based disclosure before placing a mutual fund order. To assure that any final rule will provide clear, concise and cost-effective disclosure to mutual fund investors, the Commission must avoid pursuing approaches which impose significant costs and complexity but add little value for the vast majority of investors.

If you have any questions or would like to discuss any of these issues further, please contact the undersigned at 202-216-2000, SIA's Vice President and Associate General Counsel Michael Udoff at 212-618-0509, or our outside counsel on this matter, W. Hardy Callcott of Bingham McCutchen LLP, at 415-393-2310.

Respectfully submitted,

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