ING

ADVISORS NETWORK

By Electronic Mail

April 4, 2005

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

Re: File No. S7-06-04

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

Dear Mr. Katz:

On behalf of our broker-dealers,[1] we are submitting these additional comments on the Commission's reopening of the comment period for the above rule proposals and supplemental request for comments ("Supplemental Proposal"). On April 12, 2004, we submitted comments on the Commission's Proposing Release. To the extent those comments remain relevant to the Commission's Supplemental Proposal we reaffirm them. In addition, we offer the comments below.[2]

At the outset, we note our concern about the very brief comment period given in the Commission's Supplemental Proposal. This proposal goes much farther than merely reopening the comment period and sets forth substantive changes to the proposed rules that are so extensive they change the very purpose and intent of the original proposed rules. Among other things, the Supplemental Proposal now requires disclosure of not only distribution-related costs, but all costs attendant to ownership of the "covered securities." These proposed changes are significant and we are concerned that the Commission has issued the Supplemental Proposal without any additional analysis of the costs and burdens on the securities industry and competition and the effect on small businesses as generally required under the Paperwork Reduction Act of 1995, Section 3(f) of the Securities Exchange Act of 1934, as amended, the Small Business Regulatory Enforcement Fairness Act of 1996, and the Regulatory Flexibility Act.

[1] ING Advisors Network is the marketing name for a group of four retail broker-dealers with a total of over 8,000 registered representatives. Our representatives offer securities services through thousands of branch and non-branch offices.

[2] For simplicity we refer to "mutual funds" throughout this letter. Unless otherwise noted, our remarks are equally applicable to variable insurance products and 529 plans.

Moreover, the brief comment period gives insufficient time to provide comments on each of the over 100 questions posed by the Commission in the Supplemental Proposal. We urge the Commission to give the securities industry an opportunity to comprehensively and constructively respond to all aspects of the Supplemental Proposal and the actual language of the proposed rules, which was not included in the Supplemental Proposal. We also urge the Commission to grant the industry a significant comment period on any future reproposals of these rules.

I. THE POINT OF SALE PROPOSAL

A. Requiring Retail Broker-Dealers to Separately Disclose Costs of Investments is Inappropriate and Potentially Misleading to Investors

As originally proposed, Rule 15c2-3 required disclosure of certain distribution-related costs and payments that could pose a conflict of interest for retail broker-dealers. While we believed that the original proposal was unduly complex and unmanageable, we agreed with the general proposition that investors should have more information about how the selling broker-dealer was compensated and any potential conflicts of interest that might arise from compensation arrangements at or before the time an investment is made. This information is known by retail broker-dealers and of possible significance to investors in deciding whether any actual conflicts of interest exist that might bear on the appropriateness of a recommendation or on whether an investor should do business at all with a particular broker-dealer.

The Supplemental Proposal, however, goes much farther. Rather than requiring point of sale disclosure of broker-dealer compensation and possible conflicts of interest, the Supplemental Proposal now suggests a document that mixes concepts of conflict of interest disclosure with prospectus information and traditional confirmation information. It would require that the selling broker-dealer disclose "comprehensive information about all the costs of owning the securities" at the "point of sale."

We understand that these changes came from investor feedback solicited by the Commission. Apparently, the Commission's study showed that investors were less interested in broker-dealer compensation specifics than they were in information about all the costs of owning securities.[3] While we understand that the Supplemental Proposal attempts to meet those investors' desires, it does not make sense for retail broker-dealers to shoulder this burden. The retail broker-dealers do not have issuer-equivalent information at the time of sale because the securities are unpriced. Further, the imposition of the proposed requirements will expose retail broker-dealers to potentially unfair and unwarranted liabilities and costs.

[3] *Results of In-Depth Investor Interviews Regarding Proposed Mutual Fund Sales Fee Disclosure Forms,* Siegel & Gale, LLC, and Gelb Consulting Group, Inc.

For mutual funds, initial and ongoing costs are matters that are wholly within the knowledge and control of the issuer and are currently required to be fully disclosed in mutual fund prospectuses. Requiring retail broker-dealers to recreate this information in a point of sale document is duplicative and expensive. Further, most selling agreements with issuers limit broker-dealers' use of materials regarding product structure and costs to the prospectus and other issuer pre-approved marketing materials. Issuers control dissemination of product information to lessen the potential for civil and regulatory liability for inappropriate or inaccurate statements and/or omissions of material facts by retail broker-dealers. The Supplemental Proposal interferes with this sensible contractual arrangement by placing the entire burden of new disclosures on retail broker-dealers and mandating the use of a document that could be deemed to be a summary or "additional" prospectus under Section 10(b) of the Securities Act of 1933 ("Act") and Section 24(g) of the Investment Company Act of 1940 ("Investment Company Act").

In this regard, we note that in 1998, the Commission adopted Rule 498 under the Act relating to "Profile" prospectuses for mutual funds. One of the stated purposes of the Profile was to "provide summary information about a fund that would assist an investor in deciding whether to invest in a fund or request additional information…"[4] In adopting the rule, the Commission specifically exercised its authority under Section 10(b) of the Act which allowed for an exemption from the Act's Section 11 strict liability. The Supplemental Proposal does not purport to be issued pursuant to the Commission's specific Section 10 authority or to give any relief from Section 11.[5] The failure to address these issues is extremely troublesome and places retail broker-dealers at potential risk of regulatory and civil liability.[6]

More important is that Rule 498 requires that the *issuer* prepare and deliver the Profile and *not* the retail broker-dealer. This makes sense. As previously noted, the mutual fund companies set the costs and are already required to prepare the appropriate prospectuses for each fund. Those entities control any changes that may occur to costs over time. If the prospectuses prepared by the mutual fund companies are inadequate for investor use, then the more appropriate course of action is to require the mutual

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[4] *See, Securities Act Release No. 33-7513* (March 23, 1998). In adopting the rule, the Commission noted that it "has long encouraged summary prospectuses under section 10(b) of the Securities Act to provide investors with a condensed statement of important information included in the prospectus." *Id.* ft. 22.

[5] Additionally, the SEC rules exclude from the definition of "advertising" under the Investment Company Act any prospectus and makes clear that a Rule 498 Profile is included in this exemption. It is not clear if a similar exemption will be available for this proposed point of sale disclosure document or if there are any ramifications under the advertising rules of the NASD.

[6] These problems are exacerbated when the proposed cost disclosure requirements are applied to variable insurance products. Under these circumstances, consideration of state-by-state insurance laws must be given. Those state laws dealing with filing and prior approval by insurance regulators must be analyzed and the impact on disclosure document development, delivery and sales process assessed.

funds to prepare and deliver information that is more easily understood. Placing this burden and its possible attendant liabilities on retail broker-dealers is not appropriate.

Further, by requiring a document to be delivered to investors at "point of sale" that emphasizes only the costs involved in purchasing and owning mutual funds, there is a substantial and real risk that investors will be misled into believing that the primary determinant of product value should be the lowest internal fees, regardless of the investor's personal financial goals and objectives and the features of the product itself. The proposed disclosure form would send the message that information such as a fund's objectives, strategies, risk factors, managers' experience, purchase and redemption procedures, historical performance and available services are of little consequence when viewed against the costs and fees. This is, however, the same information the Commission noted as "key" in adopting Rule 498. The danger of investors' over-reliance on cost information becomes even more real when the information might be delivered well before the investor receives a prospectus.

We suggest that a better approach to giving investors clear information about key aspects of their proposed mutual fund investments would be to *mandate* the use of Rule 498 Profiles or equivalent documents by mutual fund companies and require clear information concerning expenses and fees in that document, balanced with the other important investment considerations.[7] This would place the responsibility for maintaining and updating important information with the mutual funds, where it belongs, and would represent a far more cost effective solution for investors than requiring the retail broker-dealers to each separately bear this burden.[8]

With respect to possible conflict of interest information, such as compensation in addition to fees, we believe that this information should be available to interested investors as early as possible in the relationship with the broker-dealer rather than at point of sale as the information may bear on an investor's decision on whether to conduct any business with a particular retail broker-dealer, not just whether to purchase a particular security. This information could be provided by the broker-dealer at account opening and/or made available on a continuous basis through websites without involving the complications of attempting to do so through a "point of sale" disclosure form. This method of information delivery would appropriately balance investors' need

[7] Variable insurance products involve issues that are more complex than those involved with mutual funds. Mandating a Profile-equivalent document for these products at this time may not be appropriate. In adopting Rule 498, the Commission specifically declined to apply the rule to variable annuities until such time as the impact of Rule 498 could be assessed. That approach made sense and the Commission should complete its assessment before proceeding with applying this approach to any variable insurance product at this time.

[8] We recognize that part of the proposed Point of Sale Document would require a broker-dealer to "fill in the blanks" upon request for an investor's "estimated" first year fees. We suggest that the benefit to the investor of this transaction-specific information on costs is far outweighed by the costs to the industry of providing it, particularly where those costs in any event would be "estimated" at point of sale because the actual figures would not be known as the mutual fund purchase price would not yet be set.

for conflict of interest information as early as possible without substantial costs to the industry and ultimately to investors.

B. The Difficulties of Timing of Disclosure and Oral Disclosures are Significant

Nothing better illustrates the difficulties involved in requiring retail broker-dealers to disclose specific information concerning fees and costs of a mutual fund investment at the point of sale than the concerns expressed by the Commission in the Supplemental Proposal regarding the timing of providing a point of sale disclosure form and handling oral disclosures.

With respect to timing of disclosure, the Proposing Release called for a point of sale document to be given "immediately prior" to acceptance of a customer's order. We previously pointed out that, like many broker-dealers, a large number of our transactions in mutual funds are accomplished by check and application. Where we have made the initial recommendation, a point of sale document can be provided. Where the investor makes an initial investment without a broker-dealer's recommendation, or decides to make additional purchases of mutual funds shares, the broker-dealer will not know about the transaction until some time after the transaction has already occurred. A point of sale document cannot be provided under these circumstances.[9]

In the Supplemental Proposal, the Commission takes note of some of these difficulties yet is unable to offer a workable solution. This is entirely understandable. In the Supplemental Proposal, the Commission attempts to merge two very different types of information into a single document and then have the concept of "point of sale" drive the timing of delivery of the document. Instead, the *content* of the document should dictate when delivery to investors is made. As previously stated, information that may relate to potential conflicts of interest should be made available as early in the relationship as possible because it is most meaningful when viewed in the context of a retail broker-dealer's shelf as a whole rather than a specific investment. Specific product information should be prepared by the issuer and delivered at the time of the transaction.

With respect to oral disclosure of point of sale information, we believe this idea to be unworkable. From an investor's perspective, oral disclosure of specific information will likely be so complex as to become meaningless. From a retail broker-dealer's perspective, specific oral disclosures are difficult to deliver, supervise and audit, and are challenging, if not impossible, to document for liability purposes. Broker-dealers would

[9] The Commission does propose an exception to the point of sale disclosure requirements for non-periodic subsequent purchases of mutual funds. While this may help with subsequent check and application purchases of a fund, it does not cure the problems of disclosure at the initial purchase where it is made by check and application and not directly through the broker-dealer. Further, the Commission proposes that such an exception be accompanied by periodic standard disclosures for subsequent purchases. It is not certain why investors making subsequent purchases in the same fund would need additional special disclosures. Moreover, such a requirement would be enormously expensive and operationally difficult to administer.

not be willing to risk the possible liabilities of being unable to produce a document to prove that appropriate disclosure was given to an investor in response to regulatory or civil action. The Commission's proposed use of an automated telephone system to provide the proposed information would be enormously expensive and impractical for retail broker-dealers that sell thousands of different funds. This is particularly true if information concerning various share classes must also be included.

As a practical matter, therefore, telephone orders would no longer be acceptable. The result of this is will be delays in processing investor orders and business that is more difficult for the investor to conduct.

C. Disclosure Tailored to Share Classes Needs to be Clarified

We are very concerned with the concept that broker-dealers would have to provide separate point of sale disclosure documents for all share classes "under consideration." First, it is not clear what "under consideration" means. Theoretically, it could mean that any discussion of a share class at any time with an investor would generate a disclosure document. Financial professionals often discuss a large number of mutual funds and share classes in connection with asset allocation and diversification plans. Requiring the generation of a disclosure document at each such discussion would not only be extraordinarily expensive to prepare and maintain the documents, but would result in investors receiving twenty, thirty or more disclosure forms at a time. It is difficult to believe that investors would find this helpful. If the current proposal to mandate precise information about fees and costs is determined to be necessary, then we strongly recommend that a disclosure document not be required until such time as a final recommendation is made.

We are further concerned about the addition of the question on the Class B and C share disclosure forms under "Conflicts of Interest" which asks whether "we pay our personnel more for selling these share classes than others of the same fund." This question is unclear and potentially misleading. The broker-dealer does not determine the fees of a fund; fees are set forth in the prospectus. If a particular class pays a higher fee than another class, that fee is determined by the structure of the fund and not by the broker-dealer. The question is not clear whether it addresses the share class itself paying greater fees or the retail broker-dealer's giving the representative a higher payout on those share classes. Further, the answer will always be "yes" where a no-load fund is offered by the mutual fund company, whether or not it is available to the particular investor for the particular investment being made.

D. Additional Point of Sale Form Comments

We have already stated our strong recommendation against requiring retail broker-dealers to separately disclose the costs of owning an investment. We offer the following additional comments:

- We object to the term "conflicts of interest" in the headings to the forms given that most of the proposed disclosures relate to matters decided by the product issuer and not the broker-dealer. Even if the only subjects covered were retail broker-dealer related, we believe the term should be at most "potential" conflicts of interest.

- We do not believe that the specific amount of an investor's "estimated" fees should be required on any point of sale form for the reasons previously stated. In addition, the costs of preparing and maintaining this specific information for each investor would be enormous, as would the costs of responding to investor inquiries when the actual costs ultimately differ.

- The forms do not make clear that ongoing expenses are paid from the assets in the fund and do not require additional payments by the investor.

- We do not believe that "account fee" information should be included. It is unclear what the terms means and "account fees" are generally not assessed on the individual security level but on the account level. The inclusion of this information will be confusing.

II. THE CONFIRMATION SUPPLEMENTAL PROPOSAL

As with the point of sale proposal, the Supplemental Proposal concerning mutual fund confirmations inappropriately mixes concepts of prospectus disclosure with traditional confirmation disclosures. Consistent with current confirmation disclosure requirements, the Supplemental Proposal requires confirmation disclosures of the security purchased by the investor, the amount of fees paid and the net amount invested as a dollar amount and per share. This information allows an investor, among other things, to detect problems associated with a transaction and check for errors or misunderstandings.

The Supplemental Proposal, however, also requires disclosure of all ongoing costs of ownership. We strongly disagree with inclusion of this information on the confirmation. It is unclear what benefit this information would have to investors inasmuch as the information is already disclosed in the prospectus and, if adopted as proposed, the point of sale disclosure document. Even if the Commission determines not to include this information in a point of sale document, these fees are fixed by issuers and are not subject to mistake or the need to confirm an investor's understanding of the purchase order. Further, as currently presented, the proposed confirmation does not make clear to investors that the ongoing fees are deducted from the assets of the fund and do not represent additional investor payments to either the fund or the retail broker-dealer. Simply providing the cost numbers without accompanying explanatory text, such as can be found in a prospectus, will likely cause substantially more confusion to investors than provide clarity.

Additionally, the costs of providing this information to investors would be enormous and would certainly outweigh any possible benefits to investors. For our brokerage account transactions, the costs to our clearing firms of providing this additional information on the thousands of different products we sell will undoubtedly result in higher transaction costs to us and, therefore, to investors.

Of paramount concern to us is the impact of the proposed confirmation rule on check and application business if information concerning broker-dealer compensation over and above the fees described in the prospectus is required to be disclosed in the confirmation. A substantial portion of our mutual fund business and virtually all of our variable insurance product business is conducted by check and application directly with issuers. For these transactions, we cannot rely on our clearing broker-dealer to create and transmit confirmations, but must rely on the mutual fund companies and other issuers to deliver confirmation-equivalent information to investors through their distributors. It is not economically feasible or practical for retail broker-dealers to deliver these confirmations. If enhanced broker-dealer information is required, it will be administratively difficult, if not impossible, to convey that information for use on confirmations to the numerous issuers with which we do business and keep that information updated. The burden on our supervisory and compliance personnel of monitoring and updating this information will be substantial. These burdens and the increased costs would be disproportionate to any practical benefits to investors.

IV. DISCLOSURE OF INFORMATION RELATING TO "REVENUE SHARING" AND OTHER FORMS OF POTENTIAL CONFLICTS OF INTEREST

As we have previously stated, we agree that "revenue sharing" arrangements could be a potential conflict of interest of which investors should be aware and that investors should have access to this information in advance of point of sale. We believe that the use of the Internet for this information is an expeditious method of information delivery.

We do not think, however, that the level of specificity in the Supplemental Proposal is appropriate or helpful to investors in view of the fact that investors apparently are not as concerned about broker-dealer compensation as they are about costs. The burden to retail broker-dealers of preparing and maintaining this information and the complexity of its presentation to investors and potential for misunderstanding far outweigh any benefit to investors of disclosure of specific amounts and sources of such revenue.

Our concerns about complexity of disclosure are supported by a review of proposed Attachment 15. Page 1 of Attachment 15 requires disclosure of both initial and ongoing distribution fees paid to broker-dealers on a fund-by-fund basis. This would require our broker-dealers to prepare and maintain forms and audit and update the information for each of over 9,000 mutual funds and their various share classes. The costs to retail broker-dealers of trying to maintain current forms for so many funds would be huge and could result in a reduction of the number of funds offered by retail broker-dealers. As previously stated, the total amounts of initial and ongoing fees are disclosed in the prospectus and are solely within the control of the issuer. We may not know that a

particular fund company has changed its fees and/or distribution costs where we have not made a recommendation to a customer and the customer purchases a fund by check and application. The amount of a fund's "load" is in the prospectus and is disclosed to investors in confirmations. The amounts of additional distribution fees are minimal and are also disclosed in the prospectus.

Page 2 of Attachment 15 proposes to require information by "fund family," a term that needs clarification. We have the following specific comments:

- The form proposes to require disclosure of payments to "affiliates." It is not certain how broadly the term "affiliates" is intended to be. For broker-dealers such as ours that are owned by large corporations, there may be any number of other "affiliates" who receive compensation of which we are unaware.

- The use of historical data is problematic as "revenue sharing" agreements may vary widely from year to year.

- The use of projected revenue sharing payments for the upcoming year and a quarterly disclosure of what has been received do not make sense. We may not be able to project in good faith what we expect to receive during the remainder of a given year until well into the year, if at all. What liability may arise from being inaccurate in our projections? Requiring updating of the numerous forms on a quarterly basis to reflect actual payments will be extremely costly.

- The form would apparently require disclosure of *all* payments from an issuer, including reasonable reimbursements for expenses for mailing, recordkeeping, training and education and other similar functions. The form requires a dollar amount of these payments to be stated, but apparently does not anticipate disclosure of the reasons for the payment.

- It is not clear what kinds of payments from an issuer to a broker-dealer might initiate the requirement to maintain Attachment 15, where no asset or sales-based compensation is involved.

- We object to the use of "promotional payment." A better term would simply be "payments received." An investor can determine for himself whether a payment is "promotional" in nature or not.

Within the limited time for comment provided, we cannot give a reasonable estimate of the costs in terms of additional personnel and technology to maintain a document such as Attachment 15. We do know it will *not* be inexpensive.

We believe that a better approach would be to provide investors with a more generic document that describes, in plain English, the kinds of payments that broker-dealers receive from issuers. To the extent that a broker-dealer has specific "revenue sharing"

or other arrangements with an issuer, the name of the issuer could be disclosed. For the vast majority of investors, this would be informative and helpful without being overly complex.

III. THE PROPOSALS CREATE AN UNFAIR DISADVANTAGE TO BROKER-DEALERS

The proposal continues to apply only to mutual funds purchased through broker-dealers. It does not appear to apply to purchases made through banks or other depository institutions. Today, banks and other depository institutions are required to comply with Rule 10b-10 whenever they sell securities. The imposition of such extremely burdensome rules on retail broker-dealers and not on banks represents an unjustified and unwarranted competitive disadvantage. To the extent that revenue-sharing, differential compensation and other issues in the Proposal are perceived to represent conflicts of interest important to investors, those conflicts are exactly the same for banks as they are for broker-dealers and should be equally important to bank customers.

Further, the point of sale disclosure requirements do not apply to investment advisers who make recommendations to investors concerning mutual fund purchases and who may have some of the same potential conflicts of interest as broker-dealers. Rather, the rule proposal would apparently require the broker-dealer that does not make the recommendation but executes the transaction, to make disclosures concerning costs and fees. This, too, puts retail broker-dealers at a competitive disadvantage.

IV. CONCLUSION

As previously stated, we believe that investors should have better information available to them than they currently enjoy. We also believe that the current prospectuses for mutual funds are overly complex and that investors should have access to more clear information concerning the costs and other features of their investments. We respectfully submit, however, that such disclosure should not be forced by piecemeal rulemaking that puts substantial burdens and costs on retail broker-dealers while placing none of the responsibility on the product sponsors. We believe that a comprehensive study of the entire body of mutual fund, 529 plan and variable insurance product disclosure requirements should be made before any rules such as those proposed are enacted.

We note Chairman Donaldson's recent remarks that:

> I have asked the staff to carry out a top-to-bottom review of the mutual fund disclosure regime and how we can maximize its effectiveness on behalf of fund investors. Few would disagree that many mutual fund disclosure documents are too long and complicated. Investors need disclosure that is clear,

> understandable, and in a usable format in order to make informed investment decisions.[10]

We applaud Chairman Donaldson's directive to the staff and submit that the staff should conclude its entire review before enacting any new rules that could cause substantial harm to the industry and to the public. If investors are, indeed, most concerned about investment costs, they should be more completely informed about how much more their investments will cost to obtain the information in the manner proposed in the Commission's Supplemental Proposal and asked to weigh those costs, and the likelihood of reduced product availability, against the possible benefits.

Respectfully submitted,

/s/

John S. Simmers
CEO

[10] *See, Speech by SEC Chairman: Remarks Before the Mutual Fund and Investment Management Conference,* March 14, 2005.