

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-2003-37, and should be submitted by April 24, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-47590; File No. SR-NASD-2003-13]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 by the National Association of Securities Dealers, Inc. Relating to Proposed Interpretive Material Regarding the Use of Investment Analysis Tools

March 28, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 3, 2003, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I, II, and III below, which Items have been prepared by the NASD. On February 27, 2003, the NASD amended the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD proposes to adopt a new Interpretive Material ("IM") to NASD rule 2210(d)(2)(N), to allow NASD member firms to use certain investment analysis tools that show the probability that investing in specific securities or mutual funds may produce a desired result. The text of the proposed rule change is below. Proposed new language is in *italics*.<sup>4</sup>

*IM-2210-6. Requirements for the Use of Investment Analysis Tools*

#### (a) General Considerations

*This Interpretive Material provides a limited exception to NASD Rule 2210(d)(2)(N).<sup>1</sup>*

*No member may imply that NASD endorses or approves the use of any investment analysis tool or any recommendation based on such a tool. A member that intends to offer an investment analysis tool under this Interpretive Material (whether customers use the member's tool independently or with assistance from the member) must, at least 30 days prior to first use, (1) provide NASD's Advertising Regulation Department (Department) access to the investment analysis tool and (2) file with the Department any template for written reports produced by, or sales material concerning, the tool.<sup>2</sup> The member also*

<sup>4</sup> The Commission notes for purposes of clarification that all of the proposed rule language is new language. While some of the language appears in brackets, this does not signify language that is being removed, as is normally the case in proposed rule language that is published in the *Federal Register*.

<sup>1</sup> NASD rule 2210(d)(2)(N) prohibits NASD member firms from making predictions or projections of specific investment results to the public. In the past, the rule also had been interpreted as prohibiting members from providing customers access to investment analysis tools that show the probability that investing in specific securities or mutual funds will produce a desired result. This Interpretive Material allows member firms to offer such tools (whether customers use the member's tool independently or with assistance from the member), written reports indicating the results generated by such tools and related sales material in certain circumstances.

Rule 2210(d)(2)(N) does not prohibit, and this Interpretive Material does not apply to, automated educational tools that are hypothetical or general in nature. For instance, rule 2210(d)(2)(N) generally does not prohibit, and this Interpretive Material does not cover, portfolio-based planning tools that merely generate a suggested mix of asset classes, broad categories of securities or funds, or probabilities as to how classes of financial assets or styles of investing might perform.

<sup>2</sup> Sales material that members disseminate to the public must be in the same form in which it was submitted to NASD for review and approval. Members cannot redact or alter such sales material after receiving NASD approval and must file with the Department any modified version of the sales material, at least 30 days prior to first use of the modified version of the sales material.

*must provide any supplemental information requested by the Department. If the Department requests changes to the investment analysis tool, written-report template or sales material, the member may not offer or use the tool, written-report template or sales material until all changes specified by the Department have been made by the member and approved by the Department. In addition, as in all cases, a member's compliance with this Interpretive Material does not mean that the member is acting in conformity with other applicable laws and rules. A member that offers an investment analysis tool under this Interpretive Material (whether customers use the member's tool independently or with assistance from the member) is responsible for ensuring that use of the investment analysis tool and all recommendations based on the investment analysis tool (whether made via the automated tool or a written report) comply with NASD's suitability rule (rule 2310), the other provisions of rule 2210, and the other applicable federal securities laws and Securities and Exchange Commission and NASD rules.*

#### (b) Definition

For purposes of this Interpretive Material and any interpretation thereof, an "investment analysis tool" is an interactive technological tool that produces simulations and statistical analyses that present a range of probabilities that various investment outcomes might occur, thereby serving as an additional resource to investors in the evaluation of the potential risks of and returns on particular investments.

#### (c) Use of Investment Analysis Tools and Related Written Reports and Sales Material

A member may provide an investment analysis tool (whether customers use the member's tool independently or with assistance from the member), written reports indicating the results generated by such tool and related sales material<sup>3</sup> only if:

(1) the tool presents a range of probabilities that various investment outcomes might occur and does not state that a particular investment outcome will, in fact, occur;

(2) the tool prominently presents a fair and balanced representation of the range of possible investment outcomes

<sup>3</sup> Sales material that contains only an incidental reference to an investment analysis tool (e.g., a brochure that merely mentions a member's tool as one of the services offered by the member) does not need to include the disclosures required by this Interpretive Material and does not need to be filed with the Department, unless otherwise required by another rule 2210 provision.

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See February 27, 2003 letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, and attachments ("Amendment No. 1"). The original proposed rule change was inadvertently submitted without page 5, and contained some technical deficiencies. In Amendment No. 1, the NASD removed pages 1-25 of the original filing and replaced them with new pages 1-25. The Commission did not require the NASD to re-file pages 26-230.