

The definition of "institutional investor" would include persons described in NASD Rule 3110(c)(4), which defines "institutional account" to include any entity with total assets of at least \$50 million.

#### 4. Form Letters and Group Electronic Mail

NASD Rule 2210 currently treats any letter or e-mail sent to more than one person as "sales literature" subject to the content standards applicable to all other sales literature, and to the member pre-use approval and NASD filing requirements. The proposed rule change would define "correspondence" to include form letters and group e-mail sent to existing retail customers and to fewer than 25 prospective retail customers within any 30 calendar-day period ("Group Correspondence"), as well as written and electronic communications prepared for delivery to a single retail customer. The proposed rule change would subject Group Correspondence to the strict supervisory procedures in NASD Rule 3010(d), which governs the approval and review of correspondence, and to those content standards that apply to correspondence.<sup>13</sup> Form letters and group e-mail sent to 25 or more prospective retail customers within any 30 calendar-day period would be subject to the pre-use approval, filing, and record-keeping requirements of NASD Rule 2210, and to all of the content standards applicable to sales literature.<sup>14</sup>

In order to ensure that its review of Group Correspondence meets these

<sup>13</sup> Notice to Members 98-11 provides guidance to members concerning NASD Rule 3010(d). The Notice makes clear that, at a minimum, a member must develop procedures for the review of some of each registered representative's correspondence with the public relating to the member's investment banking or securities business, tailored to its structure and the nature and size of its business and customers.

The Notice provides that members must:

- Specify in writing the firm's policies and procedures for reviewing different types of correspondence;
- Identify what types of correspondence will be pre-or post-reviewed by a registered principal; and
- Periodically re-evaluate the effectiveness of the firm's procedures for reviewing public correspondence and consider any necessary revisions.

<sup>14</sup> The proposed rule change would permit members to treat form letters or group e-mail sent to a combination of existing customers and fewer than 25 prospective retail customers within any 30 calendar-day period as correspondence.

Of course, members could not "sanitize" sales literature by enclosing it with Group Correspondence. For example, an item that a member has distributed as sales literature would remain sales literature for purposes of Rule 2210 when the member encloses it in Group Correspondence.

standards, a member would be expected to review its procedures to ensure that they adequately address potential concerns with the distribution of Group Correspondence. The NASD encourages members to consider whether to adopt stricter procedures that require registered principal pre-use approval of Group Correspondence that presents a higher risk to investors, based on factors such as its content, purposes or targeted audience.

"Existing retail customer" would be defined as any person, other than an institutional investor, for whom the member or a clearing broker or dealer on behalf of the member carries an account, or who has an account with any registered investment company for which a member serves as principal underwriter. The new language would make clear that a person who has opened an account with an investment company or with a transfer agent for such an investment company could qualify as an existing retail customer. NASD also has amended the language to make it more consistent with existing NASD Rule 2211(d).

#### 5. Article Reprints

NASD Rule 2210 currently defines "sales literature" to include "reprints or excerpts of any \* \* \* published article." Article reprints may have to be filed with the Department, depending upon their content, such as whether they pertain to registered investment companies. The proposed rule change would define a new type of communication with the public, an "independently prepared reprint," and exclude independently prepared reprints from the filing and most of the content standards. An independently prepared reprint would consist of any article reprint that meets certain standards that are designed to ensure that the reprint was issued by an independent publisher and was not materially altered by the member. The proposed rule change would provide that a member may alter the contents of an independently prepared reprint in a manner necessary to make it consistent with applicable regulatory standards or to correct factual errors.

An article reprint would qualify as an "independently prepared reprint" under Rule 2210(a)(6)(A) only if, among other things, its publisher is not an affiliate of the member using the reprint or any underwriter or issuer of the security mentioned in the reprint or excerpt that the member is promoting. For purposes of this provision, "affiliate" has the same meaning as that term is defined in NASD Rule 2720(b)(1)(A) and (B). The term "affiliate" as used in NASD Rule

2210(a)(6)(B) (regarding investment company research reports) also has this meaning.

Some, but not all, content standards would apply to independently prepared reprints. For example, NASD Rule 2210(d)(1) would impose various content standards on all communications with the public, including independently prepared reprints. However, paragraph (d)(1)(D) (concerning predictions and projections of performance) would not apply to a statement in an independently prepared reprint that represents the author's opinion about the prospects for a member's business, products or services.<sup>15</sup>

The proposed rule change also would include certain investment company research reports within the definition of independently prepared reprints. NASD Rule 2210 was amended to exclude these research reports from the filing requirements.<sup>16</sup> Because these research reports present essentially the same issues as independently prepared reprints, the proposed rule change would subject these research reports to the same content and other requirements that apply to independently prepared reprints.

Independently prepared reprints would continue to be subject to the pre-use approval and record-keeping requirements of NASD Rule 2210. Moreover, article reprints and research reports that do not meet the definition of "independently prepared reprint" would continue to constitute sales literature that would have to meet all of the requirements applicable to sales literature.

#### 6. Press Releases

NASD Rule 2210 defines "sales literature" to include "any written or electronic communication distributed or made generally available to customers or the public," which the Department has interpreted to include press releases. The proposed rule change would codify this interpretation by amending the definition of "sales literature" to include press releases concerning a member's product or service. The proposed rule change would exclude from the filing requirements press releases that are made available only to members of the media.<sup>17</sup>

<sup>15</sup> Nevertheless, a projection made in the reprint by a person other than the author, such as a mutual fund's portfolio manager or an associated person of a member, would be subject to paragraph (d)(1)(D).

<sup>16</sup> See Securities Exchange Act Release No. 42340 (January 13, 2000), 65 FR 3510 (January 21, 2000).

<sup>17</sup> The proposed rule change would exclude all press releases made available only to members of