

7. Television and Video Advertisements

The proposed rule change would require members that have filed a draft version or "story board" of a television or video advertisement pursuant to a filing requirement also to file the final filmed version within ten business days of first use or broadcast. This rule change would codify an existing Department policy regarding television and video sales material. NASD Rule 2210 would impose a filing fee only when the draft version or story board is filed. No additional fee would be assessed when the final filmed version is filed.

8. Approval and Record-keeping

The proposed rule change would make three additional modifications to the pre-use approval and record-keeping requirements. First, it would clarify that the pre-use approval requirement could be met with respect to a research report concerning any debt or equity security, including non-corporate securities, by signature or initial of a supervisory analyst under New York Stock Exchange Rule 344. Second, the proposed rule change would clarify that members must maintain a file with the name of the registered principal who approved any advertisement or sales literature. Members would not be required to maintain a file with the name of the person who prepared those items, however.¹⁸ Third, the proposed rule change would clarify that members must maintain a file with information concerning the source, but not necessarily the data, of any statistical table, chart, graph or other illustration.

9. Filing Requirements

The proposed rule change would retain the existing provision concerning the obligation of a member that has not filed an advertisement with the Department, to pre-file its advertisements for a one-year period.

The proposed rule change also would clarify that advertisements and sales literature for continuously offered closed-end funds must be filed with the Department. This clarification codifies a long-standing position of the Department.¹⁹

The proposed rule change would clarify that members need not file advertisements and sales literature that previously have been filed and that are

to be used without material change.

This provision would codify existing practice, which excludes from the filing requirement material that has been filed previously, but in which performance data is updated or there are other changes that are not material for purpose of the filing requirement.

The proposed rule change would specifically list institutional sales material as one type of communication that need not be filed. The proposed rule change also would list correspondence, independently prepared reprints, and certain press releases as other types of communications that need not be filed. In addition, the proposed rule change would state that when these items concern investment companies, then they will be deemed filed with the NASD for purposes of section 24(b) of the Investment Companies Act of 1940 and Rule 24b-3 thereunder. This provision would eliminate the need to file this material with the SEC.

The proposed rule change also would exclude from the filing requirement announcements as a matter of record that a member has participated in a private placement.

Members are not required to file shareholder reports that only consist of statistical reporting information such as financial statements and portfolio holdings. However, members must file the management's discussion of fund performance ("MDFP") portion of a report (as well as any supplemental sales material attached to or distributed with the report) with the Department.

10. Standards Applicable to Member Communications

The proposed rule change would substantially shorten and simplify the standards applicable to communications with the public that are contained in NASD Rule 2210(d). The proposed rule change would relocate certain standards from NASD Rule 2210(d) to a new Interpretive Material 2210-1, Guidelines to Ensure that Communications Are Not Misleading.²⁰ New proposed IM-2210-1 would make clear that members have the primary responsibility to ensure that their communications with the public are not misleading, and would rewrite many standards to make them more clear and consistent with the principles of plain English.

Proposed IM-2210-1 would not contain certain of the specific standards currently in NASD Rule 2210. The proposed rule change would eliminate

the specific standards regarding non-existent or self-conferred degrees or designations, offers of free service, claims for research facilities, hedge clauses, recruiting advertising, and periodic investment plans. To the extent that these provisions prohibit statements that are misleading, unbalanced, or inaccurate regarding particular types of communications, the rule already prohibits the use of such statements. Moreover, certain required disclosures, such as those currently applicable to statements concerning periodic investment plans, may not be necessary depending upon the context in which they are made.

The proposed rule change also would clarify which guidelines concerning references to tax free or tax exempt income apply to all communications with the public, and which guidelines apply only to advertisements or sales literature.

11. Legends and Footnotes

NASD Rule 2210 cautions members concerning the placement of footnotes, and in the filing review process the Department has insisted that members adopt an appropriate use of footnotes. The proposed rule change would provide that information may be placed in a legend or footnote only in the event that such placement would not inhibit an investor's understanding of the communication. Thus, for example, footnotes in especially small type in an advertisement might be deemed to inhibit an investor's understanding of the advertisement. Similarly, an advertisement that presents bold claims that are supposedly "balanced" only with footnote disclosure might not comply with this content standard.

12. Hypothetical Illustrations

In proposed NASD Rule 2210(d)(1)(D), NASD Regulation would insert language similar to the existing language. Under the proposed rule change, a member could present a hypothetical illustration of mathematical principles, provided that the illustration does not predict or project the performance of an investment or investment strategy and is not used in such a manner. The proposed rule change thus would permit the use of mutual fund cost calculators and other hypothetical illustrations that are permitted by existing NASD Rule 2210.

13. Testimonials

The proposed rule change would apply testimonial standards to advertisements or sales literature concerning the investment advice or

the media, without limiting the exclusion to press releases concerning investment companies.

¹⁸ Proposed NASD Rule 2211 would require members to maintain all institutional sales material in a file that includes the name of the person who prepared each item.

¹⁹ See, e.g., NASD Regulatory and Compliance Alert (April 1995) at p. 9.

²⁰ The current IM-2210-1 concerning collateralized mortgage obligations would be redesignated as IM-2210-7.