

“participants” rather than “beneficiaries.” The NASD agreed and amended the proposed rule change accordingly.

BMA and Wilmer-Lee objected to the limitation that a member may not treat sales material as institutional sales material if the member has “reason to believe” that the material will be forwarded to retail investors. BMA argued that as long as institutional sales material includes a disclosure that it is limited to institutional investors, that should be sufficient. Wilmer-Lee argued that the standard should be changed to whether a member “knowingly permits” the forwarding of institutional sales material to retail investors. Wilmer-Lee also argued that as long as material includes appropriate disclosure, members should be able to rely on the institutional sales material exceptions. The NASD disagreed with these comments because the proposed changes would not ensure that institutional sales material is kept out of the hands of retail investors, and declined to make the changes recommended.

BMA and Wilmer-Lee also requested that NASD include a “reasonable belief” safe harbor for members relying on the institutional sales material exceptions. In other words, members could treat sales material as institutional sales material as long as they reasonably believed the material is only being distributed to institutional investors. The NASD also disagreed with this comment. The NASD stated that while it recognizes that members may occasionally distribute institutional sales material to retail investors by accident, it expects members to make every effort ensure that institutional sales material does not go to retail investors.

Wilmer-Lee also commented that the definition of “institutional investor” should not include NASD members and their associated persons since broker/dealer-only communications are not covered by NASD Rule 2210. Fidelity had a similar comment. The NASD disagreed with this contention noting that while NASD Rule 2210 excepts internal-use only materials from its filing requirements,²⁸ the NASD has long taken the position that broker/dealer-only materials must meet the rule’s content requirements.²⁹

B. Proposed Definition of “Existing Retail Customer”

The proposed rule change would define “correspondence” to include any written letter or electronic mail message distributed by the member to one or more existing retail customers. As correspondence, these communications would not be subject to NASD Rule 2210’s filing and principal approval requirements. The ICI requested that the NASD “clarify” that the definition of “existing retail customer” includes existing customers of affiliates of NASD members and participants of employee retirement plans. The NASD disagreed with these comments explaining that often there is no nexus between a customer of an affiliate (such as a bank or credit card company) and a member broker/dealer that merits exempting communications with these customers from the filing and principal approval requirements. This exemption is intended to cover routine administrative communications with current brokerage customers.

Further, the NASD noted that retirement plan participants often change regularly as individuals take new jobs with or leave the employment of the employer plan sponsor. Thus, these new employees are new to the products and services of a broker/dealer that services the plan. The NASD believes that these participants should receive the same level of investor protection as any other prospective retail customer.

C. Definitions of “Advertisement,” “Sales Literature,” and “Correspondence”

Sullivan, T. Rowe and Wilmer-Lee had a number of comments on the definitions of “advertisement,” “sales literature” and “correspondence.” Sullivan recommended that the NASD clarify that the term “advertisement” does not include sales literature and that “public appearances” are excluded from the definitions of “advertisement” and “sales literature.” The NASD responded to this comment by stating that while it believes that these concepts should be self-evident, it will provide this clarification in the Notice to Members announcing Commission approval of the proposal to the extent necessary.

Sullivan and Wilmer-Lee also recommended that the NASD clarify that password-protected Web sites of members are sales literature rather than advertisements. Sullivan also commented that the current definition of “advertisement” does not reflect the latest technologies, such as CDs or

DVDs, and recommended that the NASD broaden the definition to include these media. The NASD responded that it recognized that the definitions of “advertisement” and “sales literature” do not list all technologies through which sales material may be delivered, and it does not believe that it is useful to attempt to do so through rule language, especially given how quickly these technologies change. The NASD explained that it has already announced its position with regard to password-protected Web sites,³⁰ and it believes it is best to address these issues going forward through interpretations rather than rule language.

Sullivan also recommended that the NASD exclude various communications from the definitions of “advertisement” and “sales literature” based upon the content of the communication, such as material not related to the member’s products or services, customer-generated material, and governmental material. In response to this comment, the NASD explained that it defined these terms based on the communication medium rather than content. The NASD believes that any attempt to define these terms based on content would raise numerous interpretive issues as to the purpose of a communication, which is secondary to whether a communication is fair and balanced. Accordingly, the NASD stated that it believed that it would not be appropriate or productive to attempt to draft such content-based definitions.

T. Rowe commented that the definition of “advertisement” should be revised from “material published, or *designed for use* in, any electronic or other public media * * *” to “*used* in any electronic or other public media * * *” (emphasis added). T. Rowe pointed out that sales material could be “designed for use” but the member never actually uses it with the public. The NASD amended the proposed rule change in response to this comment.

Proposed NASD Rule 2211(a)(1) would define “correspondence” as any written letter or electronic mail message distributed to one or more existing retail customers and fewer than 25 prospective retail customers within any 30-day period. Wilmer-Lee requested that “correspondence” be defined as “communications with prospective retail customers for marketing purposes.” The NASD declined to adopt this definition for several reasons. First, the NASD noted that correspondence also includes communications with

²⁸ See NASD Rule 2210(c)(7)(D).

²⁹ See, e.g., NASD Regulatory and Compliance Alert, “Ask the Analyst” (September 1998); NASD Regulatory and Compliance Alert, “Ask the Analyst” (July 1996).

³⁰ See “Internet Guide for Registered Representatives,” which can be found on the NASD Web site (<http://www.nasdr.4040b.htm>).