

existing retail customers. Second, the NASD explained that it does not intend this term to be limited to marketing related communications. Third, the NASD explained that the definition would encompass virtually all sales material.

Sullivan inquired whether the fact that a member sent a mail message to 25 or more prospective retail customers during the course of a 30-day period causes the first 24 messages to become sales literature retroactively. The NASD acknowledged that this situation may arise; however, it stated that it would expect members to know in advance whether they intend to send a mail message to more than 25 prospective retail customers within 30 days, and if this possibility is likely, the member would be expected to obtain principal approval of the message before it is distributed, and file it as required. The NASD stated that it intends to deal with these situations on a case-by-case basis.

D. Article Reprints

The proposed rule change would exempt "independently prepared reprints" from NASD Rule 2210's filing requirements. The proposed rule change defines "independently prepared reprint" in part as a reprint or excerpt of any article, provided that "the publisher is not an affiliate of the member using the reprint or any underwriter or issuer of a security mentioned in the reprint." ICI and T. Rowe argued that this requirement is too broad, since a publisher could be affiliated with a security mentioned in an article without compromising its independence. They suggest only that the publisher should not be affiliated with the member. ICI also requested clarification that the requirements apply to any article *or excerpt*. T. Rowe requested that the requirement that the member using the reprint not materially alter its contents except as necessary to make it consistent with regulatory requirements be modified to allow removing information about investment companies not offered by the member.

The NASD acknowledged the concern regarding affiliates, but believes that the deletion proposed by the commenters is too narrow. The NASD noted, for example, an article published by an affiliate of a third-party mutual fund being sold by the member would qualify as "independent" under the proposed test. Therefore, the NASD revised the rule language to indicate that the publisher may not be affiliated with either the member or any underwriter or issuer of a security mentioned in the reprint that the member is promoting. The NASD clarified that the

requirements apply to article excerpts as well as full articles. As for the request to allow removal of information from articles about non-offered investment companies, the NASD stated that it believes that these issues are best addressed on a case-by-case basis.

Wilmer-Lee requested clarification that article reprints that would otherwise constitute correspondence (such as reprints sent to existing retail customers) or institutional sales literature do not require principal approval or filing, even if they do not meet the definition of an "independently prepared reprint." The NASD explained that an article reprint that is sent to existing retail customers may not qualify as correspondence, since this category includes only written letters and group emails sent to existing retail customers. Nevertheless, to the extent clarification is needed, the NASD indicated that it would do so through interpretations in the future.

Wilmer-Lee also requested that the definition not be limited to articles about investment companies, and that the term "reprint" include any type of document. The NASD disagreed with this comment for two reasons. First, the NASD stated that the definition is not limited to articles about investment companies. Second, the NASD explained that it is intentionally limited to independent press articles, noting that if the term were expanded to include "any document," the exception would encompass all sales material regardless of source and lose all meaning.

E. Filing Issues

AIM, Fidelity and ICI all urged NASD to permit electronic filing of sales material as soon as possible. In response, the NASD explained that recently it began implementing an electronic filing system. Currently, members may receive email notifications when the Advertising Regulation Department ("Department") has reviewed filed material, and may view the NASD comments on the filed material online. The NASD explained that it is working on expanding this system to permit electronic filing of sales material in the future. In this regard, it plans to fully implement the electronic filing program in 2003.

ICI and T. Rowe commented that NASD should eliminate the current requirement in NASD Rule 2210(c)(3)(A) to file a copy of any ranking or comparison used in advertisements or sales literature. In response to this comment, the NASD noted that it received this comment in response to Notice to Members 99-79,

and continues to believe that this backup filing requirement is necessary to properly review sales material that includes rankings. The NASD stated that the Department has found through experience that sales material that includes rankings often does not meet the NASD ranking guidelines contained in IM-2210-3, which necessitates review of the backup ranking materials. The NASD explained that the filing requirement expedites the Department's review of this backup material.

Under the proposed rule change, the NASD may require a member to submit pre-filings if it determines that the member has departed from the standards contained in NASD Rule 2210. The NASD also eliminated the restriction of one-year during which it could require a member to submit pre-filings upon such a finding. ICI objected to the deletion of language in current NASD Rule 2210(c)(4)(A) that requires the Department to find that there is a reasonable likelihood that a member will depart again from NASD Rule 2210's standards before the Department may require a member to pre-file all or a portion of the member's sales material. ICI also objected to deletion of language in current NASD Rule 2210(c)(4)(B) that limits the imposition of a pre-use filing requirement to one year. While the NASD stated that it recognizes these concerns, it explained that the pre-use filing requirement is an important tool to ensure compliance with its advertising standards. The NASD stated that it would use this requirement judiciously.

ICI and Wilmer-Lee also commented that NASD should exempt investment company shareholder reports from NASD Rule 2210's filing requirements, and ICI commented that generic investment company advertisements also should be exempt. The NASD stated that it addressed these comments previously in response to Notice to Members 99-79. As the NASD explained at that time, the management's discussion in shareholder reports sometimes contains misleading sales material that triggers comments from the NASD staff. In addition, the NASD stated, members sometimes miscategorize investment company advertisements as "generic" ads. When this error occurs, the sales material will omit the disclosures required by these rules. For these reasons, the NASD continues to believe that shareholder reports and investment company generic advertisements should be filed with NASD.

NASD Rule 2210 requires new members to file advertisements (including Web sites) at least 10 days