

prior to use for a period of one year.³¹ Sullivan commented that NASD should amend the rule to allow the Department to “pre-clear” certain elements of a new member’s Web site so that the member can update the Web site daily or more frequently without a 10-day pre-filing review. The NASD stated that it has found that new members are the most likely to commit violations of Rule 2210’s content standards, which is the basis for the new member pre-use filing requirement. Consequently, it will not relax this standard.

F. Predictions and Projections

Current NASD Rule 2210(d)(2)(N) prohibits member communications from predicting or projecting investment results, but allows the presentation of hypothetical illustrations of mathematical principles such as dollar-cost averaging, tax-free compounding, or the mechanics of variable insurance products. The proposed rule change retains this provision, but the NASD has moved it to proposed NASD Rule 2210(d)(1)(D). ICI expressed concern that the new proposed provision provides that a hypothetical illustration may not “predict or project the performance of an investment or investment strategy.” Similarly, Wilmer-Becker requested that the NASD interpret current Rule 2210(d)(2)(N) to allow members to use certain portfolio analysis tools.

The NASD filed a proposed rule with the Commission on February 3, 2003 that would allow members to provide customers with access to certain investment analysis tools that otherwise would be prohibited by Rule 2210(d)(2)(N).³² The Commission published this proposed rule change for public comment on April 3, 2003.³³ The NASD stated that the outcome of this rulemaking process will address the concerns raised by ICI and Wilmer-Becker.

G. Other Comments

ICI commented that its members have complained about receiving inconsistent comments on filed materials based upon the subjective views of the Department analyst reviewing the material. The NASD responded to this comment by stating that the Department continues to work toward providing uniform guidance through the filing and comment process. It explained that NASD procedures include frequent meetings among managers and analyst

teams to ensure that everyone is interpreting the advertising rules consistently, particularly with respect to new products and advertising campaigns. The NASD represented that as a result of this effort, it receives relatively few complaints concerning inconsistent interpretations, and when it does receive such a complaint, it reviews it to determine whether an inconsistent interpretation has occurred and what if any action should be taken.

Sullivan advocated relaxing the requirement for a principal to pre-approve advertisements and sales literature that are posted on a member’s Web site. Sullivan has argued because this material changes frequently, the pre-approval requirement should be waived in certain circumstances, or members should be allowed to delegate this function to affiliates or others. The NASD disagreed with this comment stating that the principal approval requirement is vital to ensuring that advertising is fair and balanced.

Sullivan also requested that the NASD permit special record retention procedures for Web sites and other new technologies. The NASD addressed certain of these issues in an interpretive letter to T. Rowe Price.³⁴ The NASD plans to address any additional issues as they arise on a case-by-case basis rather than through the rulemaking process.

Proposed NASD Rule 2210(d)(2)(C)(i) would require member sales material to “prominently” disclose the member’s name. T. Rowe commented that this requirement should be changed to require members to “clearly” disclose their names. T. Rowe argued that most members that distribute mutual funds feature the fund’s name rather than the name of the member so that there is little room for confusion as to whom to contact for more information. The NASD acknowledged this concern, but noted that member advertisements that do not prominently indicate the member’s name sometimes suggest that securities products are offered by a non-member entity rather than the member, which can be misleading and confusing to investors. The NASD stated that its staff often cites the current prominence requirement in Rule 2210(f)(2)(A) to comment upon these deficiencies. For this reason, it is retaining the prominence requirement.

Wilmer-Lee commented that the proposed rule change should provide NASD with broader authority to grant exemptions from the filing

requirements. The NASD disagreed, and accordingly declined to amend the proposed rule change to expand this authority.

Wilmer-Lee also opposed a requirement in both current NASD Rule 2210(d)(2)(M) and proposed NASD Rule 2210(d)(2)(B) that any comparison in advertisements or sales literature between investments or services must disclose all material differences between them, including investment objectives, costs and expenses, liquidity, safety, guarantees or insurance, fluctuation of principal or return, and tax features. Wilmer-Lee argued that having to disclose these differences is burdensome on members and that the standard is vague. The NASD disagreed explaining that the standard is quite specific as to the types of differences it is looking for. In addition, any burden on members is justified. Without this standard, the NASD stated, members would be permitted to include misleading comparisons of products or services in sales material that do not disclose material differences.

Wilmer-Lee also objected to proposed NASD Rule 2210(e), which provides that violations of any rule of the SEC, SIPC or MSRB applicable to member communications is deemed a violation of NASD Rule 2210. Wilmer-Lee argued that this provision has no incremental benefit and is “anathema to efficient regulation.” Again, the NASD disagreed with this comment. The NASD explained that its examinations and enforcement actions regularly apply non-NASD rules to member communications, and that proposed NASD Rule 2210(e) will assist regulatory efforts in ensuring compliance with all applicable advertising rules.

Sullivan also had several comments on NASD Rule 2220, which governs member communications about options, however, because the NASD is not proposing at this time to revise Rule 2220, these comments are beyond the scope of this rule proposal.

IV. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.³⁵ In particular, the Commission believes the proposal is consistent with the requirements of

³¹ See NASD Rule 2210(c)(4)(A).

³² See NASD Notice to Members 02–51 (August 2002).

³³ See Securities Exchange Act Release No. 47590 (March 28, 2003), 68 FR 16325.

³⁴ See Letter from Thomas M. Selman, Senior Vice President, NASD, to Forrest Foss, Vice President, T. Rowe Price Associates (January 28, 2002).

³⁵ In approving this rule proposal, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).