

section 15A(b)(6) of the Act,³⁶ which requires, among other things, that the Association's rules are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The primary purpose of this proposed rule change is to modernize and clarify the rules governing member communications with the public. To this end, the NASD has proposed to reorganize NASD Rule 2210 and create new NASD Rule 2211. As discussed in detail below, the proposal also makes changes to several definitions, which affect the filing and pre-use requirements.

A. Definition of "Public Appearance"

The Commission believes that categorizing "Public Appearances" as a type of communication with the public and thus subjecting these appearances to the same content standards as other forms of communications with the public is appropriate. The Commission believes that the proposed rule change will simplify the standards which members must comply with when making public appearances, and will likely enhance compliance with the rules. Further, the Commission believes that codifying the NASD staff's position that Internet chat rooms constitute public appearances rather than advertisements or sales literature for purposes of NASD Rule 2210 by defining "Public Appearance" to include interactive electronic forums will also help to ensure compliance with the Rule.

B. Institutional Sales Material

The Commission believes that the proposed treatment of "Institutional Sales Material," as amended in response to concerns expressed by commenters and Commission staff, adequately balances the needs of members to contact sophisticated institutional investors without being subjected to pre-use approval and filing requirements, while still providing protection to ensure that inappropriate materials do not reach retail customers without first being reviewed for content by the NASD. For example, the proposed definition of "institutional investor" includes any "employee benefit plan that meets the requirements of section 403(b) or section 457 of the Internal Revenue Code and has at least 100 participants, but does not include any participant of such a plan." This provision allows members to use sales

material with the sponsors, administrators or consultants of such plans without having to file the material with the NASD while also preventing such material from reaching individual plan participants who are clearly not institutional investors.

C. Form Letters and Group Electronic Mail

The Commission agrees with the NASD's proposal to treat form letters and group electronic mail sent to existing retail customers and to fewer than 25 prospective customers as a separate category of communication ("Group Correspondence"), and to subject these communications to procedures governing the approval and review of correspondence, and applicable content standards. The Commission notes that the NASD has stated that it expects that each member will review its procedures to ensure that they adequately address potential concerns with the distribution of Group Correspondence and consider whether to adopt stricter procedures that require registered principal pre-use approval and filing with NASD of Group Correspondence that presents a higher risk to investors. The Commission similarly encourages members to be proactive in this regard.

D. Article Reprints

The Commission believes that the NASD's proposal to create a new category of article reprint, "independently prepared reprint" is appropriate. 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 a member.³⁷ The proposed rule would exempt such reprints, and any excerpt therefrom, from filing requirements and most content standards. The new rule recognizes that reprints are often available to the public through large-circulation periodicals that are published by firms that are not NASD members, and that it would not be productive to require members to file such reprints.

E. Press Releases

The Commission believes that it is appropriate to exempt press releases that are made available only to members of the media from the filing

requirements of NASD Rule 2210. The Commission recognizes that often these releases are time-sensitive and that the filing requirements may represent an unnecessary regulatory burden. However, the Commission notes that although these releases do not need to be filed, they are still subject to applicable content, pre-use approval and record-keeping requirements.

F. Television and Video Advertisements

The Commission believes that it is appropriate for the NASD to codify in the proposed rules an existing policy that requires members to file the final filmed version of any television or video advertisement within ten business days of its first use or broadcast.

G. Filing and Record-keeping Requirements

The Commission believes that the NASD's proposed changes to the Filing and Record-keeping Requirements are appropriate. The proposed rules clarify members' responsibilities for retaining documents as well as simplify members' obligations for filing documents with the NASD for approval. Further, the proposed rules appropriately codify current NASD practices regarding the types of materials that must be filed with the NASD. The Commission believes that the proposed change will assist members in complying with filing and record-keeping requirements.

H. Standards Applicable to Member Communications

The NASD proposed to shorten and simplify the standards applicable to communications with the public that are contained in NASD Rule 2210(d). The rules clarify that members will be required to examine their communications with the public to ensure that statements are not misleading, unbalanced or inaccurate. The Commission supports the proposed changes to the rule, as they will make clear to members that they have the primary responsibility for ensuring that their communications with the public are not inappropriate.

I. Legends and Footnotes

The Commission believes that the NASD's proposal to limit information that can be placed in a footnote or legend is appropriate and will aid in the protection of investors from misleading information contained in sales material. Specifically, the NASD proposed rule change provides 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. The Commission

³⁷ The Commission notes that under the proposed rule change, members would be permitted to alter the content of an independently prepared reprint in a manner necessary to make it consistent with applicable regulatory standards or to correct factual errors.

³⁶ 15 U.S.C. 78o-3(b)(6).