

believes that this is an appropriate limitation.

J. Hypothetical Illustrations

The proposed NASD rules would permit a member to present a hypothetical illustration of mathematical principles, but would not permit the illustration to predict or project the performance of an investment or investment strategy. The Commission believes that this rule strikes an appropriate balance in that members may still use, for example, mutual fund cost calculators and other hypothetical illustrations, but they may not make predictions based on those calculations, which could be misleading to investors.

K. Testimonials

The NASD proposed rules regarding establishing standards for testimonials would apply only to advertisements or sales literature concerning the investment advice or investment performance of a member or its products. The Commission believes that the application of these standards is appropriately tailored to ensure that the standards imposed on testimonials on investment performance do not inadvertently encompass testimonials regarding matters other than investment performance, such as the member's general services.

L. Use and Disclosure of Member's Name

The Commission believes that the NASD's proposal to simplify the provisions concerning disclosure of member names is appropriate. The proposed rule requires that all advertisements and sales literature must prominently disclose the name of the member sponsoring the advertisement or sales literature, as well as reflect any relationship between the member and any non-member who is also named. The Commission believes that requiring that such information be provided will help assure that members do not mislead investors about their relationships with non-members involved with an advertisement or sales literature.

M. Ranking Guidelines

The Commission believes that the changes proposed to the NASD's rules regarding ranking guidelines are appropriate. The proposed guidelines are designed to ensure that investors do not receive misleading or inaccurate information in advertisements or sales literature about potential investments, but are also narrowly tailored so that

members are not subject to unduly restrictive requirements in this regard.

N. Communications About Collateralized Mortgage Obligations

The Commission believes that the NASD's proposed changes to the rule governing Communications about Collateralized Mortgage Obligations ("CMOs") will aid retail investors in making informed decisions about these investments products by ensuring that they are provided with appropriate information and disclosure in all advertisements and sales literature regarding these products. Further, the Commission believes that the NASD appropriately simplified the rule, which will likely enhance compliance with provisions thereof.

O. Operational Date

The Commission notes that the NASD will publish a Notice to Members announcing the Commission's approval of the proposed rule change within 60 calendar days of the Commission's order, and that the proposed rule changes will take effect on Monday, November 3, 2003.³⁸

V. Amendment Nos. 3 and 4

The Commission finds good cause for accelerating approval of Amendments Nos. 3 and 4 to the proposed rule change prior to the thirtieth day after publication of notice of the filings thereof in the Federal Register. The Commission is accelerating approval of Amendment Nos. 3 and 4 because these amendments are consistent with section 15A(b)(6) of the Act,³⁹ and address issues raised by commenters and Commission staff on the original proposal. The changes made in these amendments are described below.

First, in Amendment No. 3, the NASD amended the proposed definition of "institutional investor" to include employee benefit plans that meet the requirements of sections 403(b) or 457 of the Internal Revenue Code and also to change the term "beneficiary" to "participant" with respect to qualified plans as defined in section 3(a)(12)(C) of the Act. In Amendment No. 4, the NASD clarified that for purposes of the definition of "institutional investor," employee benefit plans and qualified plans do not include any participant of such a plan. The NASD explained that the purpose of including certain large employee benefit plans within the definition of "institutional investor"

was so that members could use sales material with the sponsors, administrators or consultants of those plans without having to file the material with the NASD or have a registered principal approve the material. The NASD stated that it did not intend to include sales material that is distributed to the participants of those plans in the definition of institutional sales material. The Commission concurs with this analysis, and believes that the proposed changes to the definition of institutional investor are appropriate.

Second, in Amendment No. 3, the NASD revised the definition of "advertisement." In the original proposal, the NASD described an advertisement as "material published, or designed for use in any electronic or other public media * * *" In response to a commenter that pointed out that sales material could be "designed for use" but never actually used, the NASD amended the definition to describe advertisements as "material published, or used in any electronic or other public media * * *" The Commission believes that this change appropriately narrows the scope of the definition.

Third, with respect to the proposal to exempt "independently prepared reprints" from filing requirements, the NASD made two changes to the proposed rule change in Amendment No. 3. The NASD amended NASD Rule 2210 to indicate that to qualify for the exemption, a publisher may not be affiliated with either the member or any underwriter or issuer of a security mentioned in a reprint that the member is promoting in an effort to narrow the exclusion from the exemption. Further, the NASD clarified that the requirements apply to article excerpts as well as full articles. The Commission believes that these changes will appropriately exempt members from filing requirements in situations where there is no regulatory need for review of an advertisement or sales literature.

Fourth, the NASD made changes NASD 2210 and IM-2210-7 to incorporate new requirements relating to securities futures. Specifically, the Commission notes that on October 15, 2002, it approved rule changes that, among other things, amended Rule 2210 and created a new Interpretive Material 2210-7 to regulate communications with the public regarding security futures.⁴⁰ The original Proposal did not include the newly approved provisions concerning security futures. Therefore, in Amendment No. 3, the NASD incorporated the approved changes to

³⁸ See letter from Patrice Gliniecki, Vice President and Deputy General Counsel, NASD, to Katherine A. England, Assistant Director, Division, Commission, dated May 8, 2003.

³⁹ 15 U.S.C. 78o-3(b)(6).

⁴⁰ See Securities Exchange Act Release No. 46663, 67 FR 64944 (October 22, 2002).