

formation.¹⁸³ The Commission believes that the proposed rule change will further these aims by helping to ensure public confidence in the IPO process and, thereby, encouraging investment in new issues. The Commission also believes that the proposal will enhance efficiency, competition, and capital formation by streamlining the Interpretation, making it simpler to administer, and reducing the compliance costs of affected persons.

H. Additional Rulemaking Related to IPO Distribution

In a separate filing (SR-NASD-2003-140), the NASD has addressed other issues relating to the IPO distribution process. Specifically, the NASD in SR-NASD-2003-140 is proposing to prohibit “*quid pro quo* allocations” (i.e., offering or threatening to withhold allocations of IPO shares as consideration or inducement for the receipt of compensation that is excessive in relation to the services provided by an NASD member) and “spinning” (i.e., allocating IPO shares to officers or directors of a company in hopes of winning future investment banking business from that company). In approving this filing (SR-NASD-99-60), the Commission is making no findings and expressing no opinion on the proposals set forth in SR-NASD-2003-140.

VI. Amendment No. 5

Below are the provisions of proposed NASD Rule 2790 that were changed by Amendment No. 5. The base text is that proposed in Amendment No. 4. Text added by Amendment No. 5 is italicized; deleted text is in brackets.

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Rule 2790. Restrictions on the Purchase and Sale of Initial Equity Public Offerings

(a) General Prohibitions

(1) A member or a person associated with a member may not sell, or cause to be sold, a new issue to any account in which a restricted person has a beneficial interest, except as otherwise permitted herein.

(2) A member or a person associated with a member may not purchase a new issue in any account in which such member or person associated with a member has a beneficial interest, except as otherwise permitted herein.

(3) A member may not continue to hold new issues acquired by the member as an underwriter, selling group member, or otherwise, except as otherwise permitted herein.

(4) Nothing in this paragraph (a) shall prohibit:

(A) sales or purchases from one member of the selling group to another member of the selling group that are incidental to the distribution of a new issue to a non-restricted person at the public offering price; [or]

(B) sales or purchases by a broker/dealer of a new issue at the public offering price as part of an accommodation to a non-restricted person customer of the broker/dealer; or

(C) purchases by a broker/dealer (or owner of a broker/dealer), organized as an investment partnership, of a new issue at the public offering price, provided such purchases are credited to the capital accounts of its partners in accordance with paragraph (c)(4).

(b) Preconditions for Sale

Before selling a new issue to any account, a member must in good faith have obtained within the twelve months prior to such sale, a representation from:

(1) Beneficial Owners the account holder(s), or a person authorized to represent the beneficial owners of the account, that the account is eligible to purchase new issues in compliance with this rule; or

(2) Conduits a bank, foreign bank, broker/dealer, or investment adviser, or other conduit that all purchases of new issues are in compliance with this rule.

A member may not rely upon any representation that it believes, or has reason to believe, is inaccurate. A member shall maintain a copy of all records and information relating to whether an account is eligible to purchase new issues in its files for at least three years following the member's last sale of a new issue to that account.

(c) General Exemptions

The general prohibitions in paragraph (a) of this rule shall not apply to sales to and purchases by the following accounts or persons, whether directly or through accounts in which such persons have a beneficial interest:

(1) An investment company registered under the Investment Company Act of 1940;

(2) A common trust fund or similar fund as described in Section 3(a)(12)(A)(iii) of the Act, provided that:

(A) The fund has investments from 1,000 or more accounts; and

(B) The fund does not limit beneficial interests in the fund principally to trust accounts of restricted persons;

(3) An insurance company general, separate or investment account, provided that:

(A) The account [has investments from] is funded by premiums from 1,000

or more policyholders, or, if a general account, the insurance company has 1,000 or more policyholders; and

(B) The insurance company does not limit [beneficial interests in] the [account] policyholders whose premiums are used to fund the account principally to restricted persons, or, if a general account, the insurance company does not limit its policyholders principally to restricted persons;

(4) An account [or joint back office broker/dealer (“JBO”)] if the beneficial interests of restricted persons do not exceed in the aggregate 10% of such account [or JBO];

(5) A publicly traded entity (other than a broker/dealer or an affiliate of a broker/dealer where such broker/dealer is authorized to engage in the public offering of new issues either as a selling group member or underwriter) that:

(A) Is listed on a national securities exchange;

(B) Is traded on the Nasdaq National Market; or

(C) Is a foreign issuer whose securities meet the quantitative designation criteria for listing on a national securities exchange or trading on the Nasdaq National Market;

(6) An investment company organized under the laws of a foreign jurisdiction, provided that:

(A) The investment company is listed on a foreign exchange or authorized for sale to the public by a foreign regulatory authority; and

(B) No person owning more than 5% of the shares of the investment company is a restricted person;

(7) An Employee Retirement Income Security Act benefits plan that is qualified under Section 401(a) of the Internal Revenue Code, provided that such plan is not sponsored solely by a broker/dealer;

(8) A state or municipal government benefits plan that is subject to state and/or municipal regulation;

(9) A tax exempt charitable organization under Section 501(c)(3) of the Internal Revenue Code; or

(10) A church plan under Section 414(e) of the Internal Revenue Code.

(d) Issuer-Directed Securities

The prohibitions on the purchase and sale of new issues in this rule shall not apply to securities that:

(1) Are specifically directed by the issuer to persons that are restricted under the rule; provided, however, that securities directed by an issuer may not be sold to or purchased by an account in which any restricted person specified in subparagraphs (i)(10[1])(B) or (i)(10[1])(C) of this rule has a beneficial interest, unless such person, or a

¹⁸³ See 15 U.S.C. 78c(f).