

## Summary of Comment Letters Received in Response to Notice to Members 99-79

### I. Introduction

In September 1999, NASD Regulation published Notice to Members 99-79 (the “Notice”), which solicited public comment on proposed amendments to modernize, simplify and clarify the rules governing member communications with the public (the “Proposal”). The Notice included a comment checklist that provided commenters with a quick and easy means to comment on some of the major issues raised by the proposal. The Notice also requested written comments on specific provisions of the Proposal. The comment period for the Notice expired on October 29, 1999, although NASD Regulation continued to receive public comments for several weeks thereafter.

The staff received 72 comments: 43 from broker/dealers and their representatives, 15 from mutual fund organizations, six from trade associations, three from insurance companies, two from law firms, and three from other parties.<sup>1</sup> Almost all of the commenters generally supported the Proposal, although many recommended changes to and clarifications of its provisions. These comments are discussed more specifically below.

### II. Discussion

#### A. General Comments on the Proposal

Virtually all of the commenters that expressed an opinion on the issue generally supported modernization of the advertising rules. As discussed below, however, many recommended certain specific changes to the Proposal. One commenter, who described herself

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<sup>1</sup> Comment letters were received from Advest Inc., A.G. Edwards & Sons, Inc., AIM Distributors, Inc. (“AIM”), America’s Community Bankers (“ACB”), Associated Securities Corp., Barclays Global Investors (5 responses), B. Riley & Co. (7 responses), Callahan Financial Services, Inc., Calvert Group, Charles Schwab & Co., Inc. (“Schwab”), Chase Securities Inc. (“Chase”), Comerica Securities (“Comerica”), Davis Polk & Wardwell (“Davis Polk”), The Dreyfus Corporation (“Dreyfus”), Enterprise Fund Distributors, Inc., Evaluation Associates, Fidelity Investments (“Fidelity”), Jaclyn S. Fleming, GE Financial Assurance, Gerard Klaver Mattison, Steve Gleason, Greentree Investment Services, Inc., Hartford Life Insurance Company (2 responses), ING America Equities Inc., Invest Linc Securities, Investment Company Institute (“ICI”), Janus Capital Corporation (“Janus”), John Hancock Funds, Inc. (“John Hancock”), Greg Johnson, John J. Carroll & Co., Liberty Funds Distributor, Inc. (“Liberty”), Magazine Publishers of America, Inc. (“MPA”), Marion Bass Securities Corporation, MassMutual/MML Investors Services, Inc. (2 responses), Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch”), Mosaic Funds Distributor, LLC, Mr. Stock, Inc., National Association for Variable Annuities (“NAVA”), New England Funds, L.P., OppenheimerFunds Distributor, Inc. (“Oppenheimer”), Partners Securities, Inc., Planners Financial Services, Inc., Pointer Investment Co., Provident Distributors, Inc., Prudential Investments Management Services LLC (“Prudential”), Ramirez Inc., Securities Industry Association (“SIA”), Sound Investment Services, Stephens Inc., Sunstone Distribution Services, LLC, SWS Financial Services Inc., Time Inc., Transamerica Financial Resources, T. Rowe Price Investment Services, Inc. (“T. Rowe Price”), Variable Annuity Marketing Company and VALIC Investment Services Company (“VALIC”), The Vanguard Group, Inc. (“Vanguard”), Wall Street Equities, Inc., Wilmer, Cutler & Pickering (on behalf of Credit Suisse First Boston Corporation, Donaldson Lufkin & Jenrette Securities Corporation, Goldman, Sachs & Co., Greenwich Capital Corporation, Inc., J.P. Morgan Securities Inc., Morgan Stanley & Co. Incorporated, and Warburg Dillon Read LLC) (“Wilmer”), Shelly Woodall, and Wright Investors’ Service Distributors, Inc.

as a “novice investor,” did not oppose the Proposal, but recommended that brokers be required to advise investors of any sales charge and additional fees.<sup>2</sup>

## B. Institutional Sales Material

Commenters generally supported the proposed exemption for institutional sales material from Rule 2210’s filing and internal pre-use approval requirements. A number of commenters recommended, however, that the definition of “institutional investor” be broadened to include a wider array of entities and individuals. In this regard, several commenters recommended that the definition of “institutional investor” include any “accredited investor” as defined pursuant to Regulation D under the Securities Act of 1933. The Regulation D definition of “accredited investor” includes, among other entities, qualified retirement plans with more than \$5 million in assets and natural persons whose net worth exceeds \$1 million. These commenters believed that these amounts, rather than the \$50 million asset test currently contained in the Proposal, would more appropriately distinguish which customers are institutional investors.<sup>3</sup> T. Rowe Price argued that, if the asset test threshold is not lowered, related entities should be aggregated for purposes of meeting this threshold.<sup>4</sup> Davis Polk suggested that the Proposal adopt the definition of “qualified purchaser” under the Investment Company Act of 1940 (“1940 Act”).<sup>5</sup> Other commenters suggested that the definition include retirement plan sponsors and administrators, governmental entities and corporations, Certified Financial Planners, Chartered Financial Analysts, and pension consultants.<sup>6</sup>

Several commenters recommended that the definition include material both “distributed” and “made available” only to institutional investors.<sup>7</sup> Davis Polk also requested clarification that the definition includes non-U.S. persons.<sup>8</sup> Several other commenters requested clarification that the institutional exemption extends to individual representatives or agents of institutional investors.<sup>9</sup> Comerica Securities recommended that the definition specifically *not* include unregistered individuals employed by broker/dealers.<sup>10</sup> Vanguard requested clarification that banks that are included within the definition of institutional investor also include state-chartered

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<sup>2</sup> See Comment Letter from Jaelyn S. Fleming.

<sup>3</sup> See Comment Letters from Chase, Fidelity, ICI, NAVA, Oppenheimer, SIA, T. Rowe Price and Wilmer.

<sup>4</sup> See Comment Letter from T. Rowe Price.

<sup>5</sup> See Comment Letter from Davis Polk

<sup>6</sup> See Comment Letters from Evaluation Associates, Fidelity, Hartford, ICI, Janus, Greg Johnson, Oppenheimer, T. Rowe Price, and VALIC. In particular, the ICI, Janus and Oppenheimer recommended that the definition of institutional investor include any qualified retirement plan with 100 or more participants.

<sup>7</sup> See Comment Letters from SIA and Wilmer.

<sup>8</sup> See Comment Letter from Davis Polk.

<sup>9</sup> See Comment Letters from ICI, Oppenheimer and T. Rowe Price.

<sup>10</sup> See Comment Letter from Comerica.

trust companies, and that investment advisers under this definition include entities that are required to be registered as investment advisers (as well as those that actually are registered).<sup>11</sup> Stephens Inc. recommended that the definition of institutional investor include trust accounts over which professionals have investment discretion.<sup>12</sup>

Several commenters objected to the provision that would prohibit members from relying on the institutional sales material exemption if they have “reason to believe” that a communication (or any excerpt) will be forwarded to any person other than an institutional investor. The SIA recommended that this provision be deleted and replaced with a requirement simply to identify on the sales material the audience for which it is intended.<sup>13</sup> Wilmer stated that members should be allowed to rely on the institutional sales material exemption unless they “knowingly permit” sales material to be distributed to non-institutional investors. Wilmer also argued that it is inappropriate to apply this restriction to the independent actions of fiduciaries that receive institutional sales material.<sup>14</sup> Davis Polk requested clarification that institutional sales material may be forwarded to individuals who are not potential investors.<sup>15</sup>

Stephens Inc. suggested that institutional sales material be exempt not only from the filing and pre-use approval requirements, but also Rule 2210’s content standards.<sup>16</sup> Vanguard recommended that institutional sales material should be subject to fewer content standards than advertisements and sales literature.<sup>17</sup> Dreyfus and New England Funds argued that broker/dealer-only material should not be subject to Rule 2210’s content standards; however, Dreyfus opposed exempting institutional sales material from the principal pre-use approval requirement.<sup>18</sup> Davis Polk requested clarification that NASD Regulation does not regard broker/dealer-only material as communications with the public.<sup>19</sup>

Fidelity argued that NASD Regulation should develop a different set of content standards for material that is sent only to retirement plan participants.<sup>20</sup> Several commenters requested that any advertising-related interpretive guidelines that address retail investor concerns, such as those

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<sup>11</sup> See Comment Letter from Vanguard.

<sup>12</sup> See Comment Letter from Stephens Inc.

<sup>13</sup> See Comment Letter from SIA.

<sup>14</sup> See Comment Letter from Wilmer.

<sup>15</sup> See Comment Letter from Davis Polk.

<sup>16</sup> See Comment Letter from Stephens Inc.

<sup>17</sup> See Comment Letter from Vanguard.

<sup>18</sup> See Comment Letters from Dreyfus and New England Funds, L.P.

<sup>19</sup> See Comment Letter from Davis Polk.

<sup>20</sup> See Comment Letter from Fidelity.

related to the disclosure of mutual fund fees, should clearly indicate that they do not apply to institutional sales material.<sup>21</sup>

Finally, while commenters recognized that the Proposal is intended to exclude institutional sales material from Rule 2210's filing requirements, several commenters suggested that this intent be made more clear.<sup>22</sup>

### C. Form Letters and Group Electronic Mail

Most commenters that expressed an opinion generally supported the proposed filing and pre-use approval exemption for form letters and group electronic mail sent only to existing retail customers and fewer than 25 prospective retail customers. Several commenters favored the filing exemption but opposed the exemption from the pre-use principal approval requirement for form letters and group e-mail.<sup>23</sup> One commenter expressed support for a filing exemption for form letters, but felt that, as drafted, the Proposal could negatively affect small firms.<sup>24</sup> A.G. Edwards supported the exemptions, but noted that the proposal to exempt form letters and group e-mail sent to fewer than 25 prospective retail customers within any 90-day period would be difficult to monitor; accordingly, A.G. Edwards recommended shortening the period to 30 days. A.G. Edwards also commented that the pre-use approval and filing requirements should only apply to the form letter or e-mail sent to the 25<sup>th</sup> prospective retail customer, and not to those sent to the first 24 prospective retail customers.<sup>25</sup>

Mr. Stock, Inc. recommended that the Proposal lift the "fewer-than-25" requirement for prospective retail customers when a member is suffering from system problems and operational issues.<sup>26</sup> Wilmer requested clarification that the form letter and group e-mail exemption applies to sales material sent to any combination of existing retail customers and fewer than 25 prospective retail customers.<sup>27</sup>

The SIA suggested that the 25-or-fewer limitation for prospective retail customers be calculated per registered representative. The SIA also requested clarification that the pre-use approval requirements do not apply to communications of registered representatives with persons other than brokerage customers.<sup>28</sup> America's Community Bankers recommended that the filing

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<sup>21</sup> See Comment Letters from ICI, Oppenheimer and T. Rowe Price.

<sup>22</sup> See Comment Letters from ICI, Oppenheimer and Vanguard.

<sup>23</sup> See Comment Letters from Comerica and VALIC.

<sup>24</sup> See Comment Letter from Steve Gleason.

<sup>25</sup> See Comment Letter from A.G. Edwards.

<sup>26</sup> See Comment Letter from Mr. Stock, Inc.

<sup>27</sup> See Comment Letter from Wilmer.

<sup>28</sup> See Comment Letter from SIA.

and pre-use approval exemption for prospective customers be without limit to the number of customers for materials that do not recommend a particular product.<sup>29</sup>

Several commenters had recommendations regarding the proposed definition of “existing retail customer.” Prudential recommended that the Proposal adopt the definition of “existing customer” used in NASD Rule 2211, which includes customers for which either a member or the member’s clearing broker carries an account.<sup>30</sup> Others requested that the definition include customers who have accounts with mutual funds that are distributed by the member firm.<sup>31</sup> Fidelity recommended that the definition of “existing retail customer” include all persons who have accounts with the member or any affiliate of the member.<sup>32</sup> Chase asked that, if NASD Regulation chooses not to adopt the Regulation D accredited investor definition as part of the definition of institutional investor, the proposed definition of “existing retail customer” be amended to explicitly include non-natural persons.<sup>33</sup>

#### D. Article Reprints and Press Releases

A majority of the commenters that expressed an opinion supported the proposed filing exemption for articles reprints that have not been materially altered by the member using the reprint. A few commenters opposed the filing exemption for article reprints, however.<sup>34</sup> Additionally, the ICI and Oppenheimer acknowledged that article reprints should be approved by a registered principal prior to use.<sup>35</sup> On the other hand, NAVA recommended that article reprints also be exempt from the principal pre-use approval requirements.<sup>36</sup>

Numerous commenters recommended that NASD Regulation clarify what “materially altered” means for purposes of this provision. In particular, they inquired whether alterations to the reprint necessary to meet applicable advertising regulatory standards or to correct factual errors in an article would be regarded as material alterations.<sup>37</sup>

A number of commenters recommended that article reprints either be subject to none of Rule 2210’s content standards, or only its most general standards prohibiting misleading

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<sup>29</sup> See Comment Letter from ACB.

<sup>30</sup> See Comment Letter from Prudential.

<sup>31</sup> See Comment Letters from ICI, Liberty, Mosaic Funds Distributor, LLC, Oppenheimer and Stephens Inc.

<sup>32</sup> See Comment Letter from Fidelity.

<sup>33</sup> See Comment Letter from Chase.

<sup>34</sup> See Comment Letters from Ramirez Inc. and Wall Street Equities Inc.

<sup>35</sup> See Comment Letters from ICI and Oppenheimer.

<sup>36</sup> See Comment Letter from NAVA.

<sup>37</sup> See Comment Letters from A.G. Edwards, AIM, Schwab, Davis Polk, ICI, Janus, Liberty, Oppenheimer, Prudential, Stephens Inc., T. Rowe Price, and Vanguard.

communications.<sup>38</sup> America's Community Bankers and Stephens Inc. recommended exempting article reprints from the content standards only if they were written by unaffiliated third party journalists not compensated by the member.<sup>39</sup> Time Inc. and the Magazine Publishers of America recommended that articles not be subject to the content standards if they meet certain industry standards regarding circulation.<sup>40</sup> T. Rowe Price recommended that article reprints sent to institutional customers be exempt from the content standards.<sup>41</sup> Liberty Funds recommended that Rule 2210 specify that article reprints regarding a mutual fund must be accompanied by the fund's prospectus.<sup>42</sup>

Likewise, most commenters that expressed an opinion supported the filing exemption for press releases regarding investment companies that are made available only to members of the media. Several commenters recommended that press releases be exempt from some or all of Rule 2210's content standards.<sup>43</sup> NAVA also favored exempting press releases from the principal pre-use approval requirement.<sup>44</sup> The SIA questioned why the filing exemption applied only to press releases regarding investment companies.<sup>45</sup>

#### E. Other Filing Issues

A number of commenters supported exempting all shareholder reports from Rule 2210's filing requirements. These commenters argued that, since shareholder reports are already subject to content standards under SEC rules and must be filed with the SEC, there is no reason for filing them with NASD Regulation.<sup>46</sup> Dreyfus suggested that shareholder reports be exempted from filing if the manager's discussion of fund performance ("MDFP") does not discuss a fund's ranking or performance other than for the period covered by the report. Dreyfus and Comerica Securities also requested clarification that shareholder reports need not be filed if only distributed to existing shareholders or to prospective investors upon request.<sup>47</sup> Wilmer recommended that shareholder reports be exempted if the fund does not supplement the MDFP with extraneous information.<sup>48</sup>

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<sup>38</sup> See Comment Letters from Calvert, Fidelity, ICI, MPA, NAVA, Oppenheimer, Time Inc., and Vanguard.

<sup>39</sup> See Comment Letters from ACB and Stephens Inc.

<sup>40</sup> See Comment Letters from MPA and Time Inc.

<sup>41</sup> See Comment Letter from T. Rowe Price.

<sup>42</sup> See Comment Letter from Liberty.

<sup>43</sup> See Comment Letters from Dreyfus, Fidelity, ICI, Liberty and Oppenheimer.

<sup>44</sup> See Comment Letter from NAVA.

<sup>45</sup> See Comment Letter from SIA.

<sup>46</sup> See Comment Letters from AIM, ACB, Fidelity, ICI, John Hancock Funds, Inc., SIA, Stephens Inc. and Wright Investors' Service Distributors, Inc.

<sup>47</sup> See Comment Letters from Dreyfus and Comerica.

<sup>48</sup> See Comment Letter from Wilmer.

Several commenters opposed the proposed requirement to file all final filmed versions of television or video advertisements that were initially filed in story board form, unless the final versions are materially different from the story board versions. These commenters argued that this requirement would be costly and unnecessary to protect investors.<sup>49</sup>

Several commenters argued that generic mutual fund sales material should be exempt from filing. These commenters argued that such sales material is normally very general in nature and does not raise investor protection issues.<sup>50</sup> Dreyfus, on the other hand, supported requiring the filing of generic sales material distributed to retail investors.<sup>51</sup>

Other commenters requested clarifications regarding the filing requirements. Davis Polk requested confirmation that the updating of performance in sales material is not a material change that requires refiling of the sales material. Davis Polk also asked for clarification that exempted sales material may still be voluntarily filed with NASD Regulation.<sup>52</sup> NAVA requested confirmation that Rule 2210's filing requirements do not apply to unregistered group variable annuities.<sup>53</sup> Prudential requested clarification as to whether material that is exempt from NASD Regulation's filing requirements must still be filed with the SEC.<sup>54</sup> Merrill Lynch requested that the filing exemptions be expanded to include any sales material that is prepared pursuant to a "template" that was previously filed with NASD Regulation.<sup>55</sup>

A number of commenters expressed support for NASD Regulation allowing electronic filing of sales material. These commenters noted that electronic filing would reduce filing costs and decrease the time necessary to file and receive comments on sales material.<sup>56</sup>

#### F. Ranking Guidelines

Most commenters that addressed the issue generally supported the proposed amendments to IM-2210-3 (the "Ranking Guidelines"), but recommended certain changes. Several members argued that members should not be required to file the backup material that supports rankings contained in filed sales material. These commenters argued this requirement is burdensome to

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<sup>49</sup> See Comment Letters from AIM, Schwab, and Comerica

<sup>50</sup> See Comment Letters from ICI and Vanguard.

<sup>51</sup> See Comment Letter from Dreyfus.

<sup>52</sup> See Comment Letter from Davis Polk.

<sup>53</sup> See Comment Letter from NAVA.

<sup>54</sup> See Comment Letter from Prudential.

<sup>55</sup> See Comment Letter from Merrill Lynch.

<sup>56</sup> See Comment Letters from AIM, Comerica, Enterprise Fund Distributors, Inc., Fidelity, ICI, Oppenheimer, Vanguard and Wilmer.

members and unnecessary given that members must stand behind the truthfulness of the material they file.<sup>57</sup> Several others, however, indicated that the ranking back-up material filing requirements are appropriate and necessary for NASD staff analysts to properly review filed material that contains rankings.<sup>58</sup>

A number of commenters supported revising the Ranking Guidelines to permit fund family rankings. These commenters argued that fund family rankings provide useful information to investors regarding a fund family's overall performance.<sup>59</sup>

Several commenters opposed, however, the proposed changes to the Ranking Guidelines' time period requirements. The Proposal would require that rankings be based on a fund's total return for short, medium and long time periods; these commenters favored retaining the currently required time periods of one, five and ten years. They expressed concern that the Proposal would lead to a lack of uniformity and allow members to manipulate their funds' ranking periods to cast the funds in the most favorable light.<sup>60</sup> Merrill Lynch, on the other hand, favored the Proposal's revisions to the time period requirements. Merrill Lynch also requested that the current requirement to disclose if a waiver of fund fees had a material effect on a fund's performance not apply when ranking information on multiple funds is presented in sales material.<sup>61</sup>

T. Rowe Price requested clarification that the Ranking Guidelines would not apply to rankings contained in institutional sales material.<sup>62</sup> John J. Carroll & Co. recommended that the use of fund rankings be completely banned in sales material because they change every day.<sup>63</sup>

#### G. Standards Applicable to Member Communications

Numerous members opposed the proposal to require that material information appear in the main text of a communication and may not be relegated to footnotes. These members argued that, under certain circumstances, it is appropriate to provide information in footnotes. They also expressed concern that the proposed provision could create litigation risks for members and fund companies.<sup>64</sup> One commenter requested clarification as to what information may appear in footnotes.<sup>65</sup>

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<sup>57</sup> See Comment Letters from AIM, Fidelity, ICI and Vanguard.

<sup>58</sup> See Comment Letters from Comerica and Dreyfus.

<sup>59</sup> See Comment Letters from Dreyfus, Fidelity, ICI, Oppenheimer, T. Rowe Price and Vanguard.

<sup>60</sup> See Comment Letters from Dreyfus, ICI and Oppenheimer.

<sup>61</sup> See Comment Letter from Merrill Lynch.

<sup>62</sup> See Comment Letter from T. Rowe Price.

<sup>63</sup> See Comment Letter from John J. Carroll & Co.

<sup>64</sup> See Comment Letters from Fidelity, GE Financial Assurance, ICI, Oppenheimer, Janus and Vanguard.

<sup>65</sup> See Comment Letter from Shelly Woodall.



Several commenters opposed the proposed new provisions governing testimonials. These commenters felt that Rule 2210's current provisions governing testimonials, which cover only testimonials regarding the quality of a firm's investment advice, are sufficient. They also expressed concern that the proposed provisions, which would cover any testimonial concerning a member's products and services, were overly broad and unnecessary.<sup>66</sup>

Commenters also expressed concern with the proposed provisions that would prohibit member communications from projecting or predicting performance. These members felt that these proposed provisions, as drafted, might bar hypothetical performance illustrations that currently are permitted under Rule 2210.<sup>67</sup> Davis Polk recommended that the proposal include a provision expressly permitting sales material for unit investment trusts to include estimated current and long-term return information, arguing that this type of information has been permitted by SEC releases and no-action letters, and should not be considered a projection of return.<sup>68</sup>

Most commenters that expressed an opinion favored the proposed changes to the provisions governing disclosure of members' names. Chase Securities opposed the provision that would require identification of which entity is offering which product when a non-member entity is named in member sales material. Chase also recommended including a provision that would specifically prohibit a member from misleadingly offering services that the member is not prepared to provide or inflating the perceptions of the member's capabilities.<sup>69</sup> Several commenters also requested that NASD retain the current requirement that any relationship between a member and any non-member entity named in a communication be "clear," rather than requiring an affirmative disclosure of the relationship.<sup>70</sup>

NASD Regulation received a number of comments on the proposed revisions to the provisions governing recommendations of securities in sales material. A number of investors opposed the proposed broadening of the disclosure requirements, particularly the proposed requirement to disclose the nature of any financial interest the member, its officers and directors have in the recommended issuer. These commenters argued that this information would be difficult to compile and burdensome to disclose.<sup>71</sup> Wilmer offered as an alternative a requirement to disclose the types of financial interests the member and its associated persons *may* have. Wilmer also opposed the proposed requirement to disclose the price of the security when recommended.<sup>72</sup>

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<sup>66</sup> See Comment Letters from Fidelity, ICI, Oppenheimer and Vanguard.

<sup>67</sup> See Comment Letters from Fidelity, ICI, Oppenheimer and Vanguard.

<sup>68</sup> See Comment Letter from Davis Polk.

<sup>69</sup> See Comment Letter from Chase.

<sup>70</sup> See Comment Letters from Ted Newton (MassMutual/MML Investors Services, Inc.) and VALIC.

<sup>71</sup> See Comment Letters from Chase, Prudential, SIA and Wilmer.

<sup>72</sup> See Comment Letter from Wilmer.

Prudential opposed the proposed elimination of a current Rule 2210 provision that permits members to offer a list of specifically recommended securities as an alternative to requiring the disclosure of this information in sales material.<sup>73</sup> MML Investors Services suggested that the recommendations provisions not cover recommendations of mutual funds or variable annuities.<sup>74</sup> Chase and Wilmer favored the shortening of the look-back period with regard to the requirement to disclose if the member had underwritten or made a market in the issuer's securities from three years to one year, however.<sup>75</sup>

The ICI made several suggestions regarding the rules governing the use of comparisons. In particular, the ICI recommended that NASD Regulation review its standards that permit the use of comparisons that provide clear, meaningful information and do not raise investor protection concerns. The ICI also recommended that NASD eliminate the proposal to require members to retain the data as well as the source of information used in charts in sales material.<sup>76</sup> Similarly, another commenter requested clarification as to what information members must maintain as backup information.<sup>77</sup>

Several commenters recommended that NASD Regulation make clear that, despite the proposed filing and pre-use approval exemptions, it is not loosening its substantive requirements applicable to sales material.<sup>78</sup> One commenter recommended that NASD Regulation prohibit the use of the term "no-load fund" on the ground that the term is misleading.<sup>79</sup>

#### H. CMO Guidelines

The members that commented generally supported the proposed guidelines governing sales material for collateralized mortgage obligations (CMOs). However, most of these commenters favored exempting institutional sales material from the CMO Guidelines.<sup>80</sup>

#### I. Scope of Rule

Numerous commenters requested clarification or changes regarding the rule's scope. In particular, several commenters objected to the inclusion of public appearances within the

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<sup>73</sup> See Comment Letter from Prudential.

<sup>74</sup> See Comment Letter from Michael L. Kerley (MML Investors Services, Inc.).

<sup>75</sup> See Comment Letters from Chase and Wilmer.

<sup>76</sup> See Comment Letter from ICI; *see also* Comment Letter from Oppenheimer.

<sup>77</sup> See Comment Letter from Shelly Woodall.

<sup>78</sup> See Comment Letters from Advest, Inc. and Comerica.

<sup>79</sup> See Comment Letter from John J. Carroll & Co.

<sup>80</sup> See Comment Letters from A.G. Edwards, Chase, SIA and Wilmer

definition of communications with the public. These commenters argued it would be inappropriate and difficult for members to try to monitor their employees' public appearances to ensure they were in compliance with Rule 2210's content standards.<sup>81</sup>

Other commenters sought changes that would indicate that certain types of electronic communications are not covered by all or part the rule. Prudential requested clarification that password-protected Internet web sites are sales literature and not advertisements.<sup>82</sup> The SIA requested that the Proposal exempt from Rule 2210 electronic communications that are "akin to a meeting or telephone dialogue," such as chat rooms and stock and earnings information.<sup>83</sup> Similarly, Wilmer recommended that the Proposal's definitions of advertisement, sales literature and correspondence exclude communications in interactive electronic forums, such as chat rooms. Wilmer also recommended that password-protected web sites not be regarded as public communications.<sup>84</sup>

The SIA and Wilmer both recommended that the Proposal include provisions that would expand NASD Regulation's authority to exempt communications from any provision of Rule 2210 in its discretion. These commenters felt that this expanded authority would assist NASD Regulation in dealing with new types of communications as they arise.<sup>85</sup>

The SIA also requested that Rule 2210's application should be determined based on the content of the communication rather than the number or nature of the recipients of the communication.<sup>86</sup> Wilmer requested that the definition of "correspondence" should only include communications with the investing public.<sup>87</sup>

## J. Other Comments

The ICI and Oppenheimer requested that the Proposal clarify that members need only keep records of the person who either prepared or approved sales material, but not both.<sup>88</sup>

Wilmer requested a technical change to the provision that permits supervisory analysts that have been approved pursuant to New York Stock Exchange Rule 344 to approve research reports. Wilmer requested that this provision apply to research reports on both corporate and non-corporate securities. Wilmer also opposed proposed Rule 2210(e), which would make a

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<sup>81</sup> See Comment Letters from Dreyfus, Fidelity, ICI and Oppenheimer.

<sup>82</sup> See Comment Letter from Prudential.

<sup>83</sup> See Comment Letter from SIA.

<sup>84</sup> See Comment Letter from Wilmer.

<sup>85</sup> See Comment Letters from SIA and Wilmer.

<sup>86</sup> See Comment Letter from SIA.

<sup>87</sup> See Comment Letter from Wilmer.

<sup>88</sup> See Comment Letters from ICI and Oppenheimer.

violation of any SEC, SIPC or Municipal Securities Rulemaking Board rule also a violation of NASD Rule 2210.<sup>89</sup>

Finally, several commenters asked NASD Regulation to propose similar changes to Rule 2220, which governs communications regarding options.<sup>90</sup>

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<sup>89</sup> See Comment Letter from Wilmer.

<sup>90</sup> See Comment Letters from Mr. Stock, Inc., SIA and Wilmer.

Comment Letters Received in Response to Notice to Members 99-79

1. Advest Inc.
2. A.G. Edwards & Sons, Inc.
3. AIM Distributors, Inc.
4. America's Community Bankers
5. Associated Securities Corp.
6. Barclays Global Investors (Stephanie Aller)
7. Barclays Global Investors (Wendy Beller)
8. Barclays Global Investors (Dennis Ching)
9. Barclays Global Investors (Tim Kohn)
10. Barclays Global Investors (Lois Towers)
11. B. Riley & Co. (Mike Crawford)
12. B. Riley & Co. (Brett Hendrickson)
13. B. Riley & Co. (Tom Kelleher)
14. B. Riley & Co. (David LaSalle)
15. B. Riley & Co. (Jeremy Nowak)
16. B. Riley & Co. (Bryant Riley)
17. B. Riley & Co. (Jeff Van Sinderen)
18. Callahan Financial Services, Inc.
19. Calvert Group
20. Charles Schwab & Co., Inc.
21. Chase Securities Inc.
22. Comerica Securities
23. Davis Polk & Wardwell
24. The Dreyfus Corporation
25. Enterprise Fund Distributors, Inc.
26. Evaluation Associates
27. Fidelity Investments
28. Jaclyn S. Fleming
29. GE Financial Assurance
30. Gerard Klaver Mattison
31. Steve Gleason
32. Greentree Investment Services, Inc.
33. Hartford Life Insurance Company (Christopher Grinnell)
34. Hartford Life Insurance Company (Melinda Robidoux)
35. ING America Equities Inc.
36. Invest Linc Securities
37. Investment Company Institute
38. Janus Capital Corporation
39. John Hancock Funds, Inc.
40. Greg Johnson
41. John J. Carroll & Co.

42. Liberty Funds Distributor, Inc.
43. Magazine Publishers of America, Inc.
44. Marion Bass Securities Corporation
45. MassMutual/MML Investors Services, Inc. (Michael Kerley)
46. MassMutual/MML Investors Services, Inc. (Ted Newton)
47. Merrill Lynch, Pierce, Fenner & Smith Incorporated
48. Mosaic Funds Distributor, LLC
49. Mr. Stock, Inc.
50. National Association for Variable Annuities
51. New England Funds, L.P.
52. OppenheimerFunds Distributor, Inc.
53. Partners Securities, Inc.
54. Planners Financial Services, Inc.
55. Pointer Investment Co.
56. Provident Distributors, Inc.
57. Prudential Investments Management Services LLC
58. Ramirez Inc.
59. Securities Industry Association
60. Sound Investment Services
61. Stephens Inc.
62. Sunstone Distribution Services, LLC
63. SWS Financial Services Inc.
64. Time Inc.
65. Transamerica Financial Resources
66. T. Rowe Price Investment Services, Inc.
67. Variable Annuity Marketing Company and VALIC Investment Services Company
68. The Vanguard Group, Inc.
69. Wall Street Equities, Inc.
70. Wilmer, Cutler & Pickering (on behalf of Credit Suisse First Boston Corporation, Donaldson Lufkin & Jenrette Securities Corporation, Goldman, Sachs & Co., Greenwich Capital Corporation, Inc., J.P. Morgan Securities Inc., Morgan Stanley & Co. Incorporated, and Warburg Dillon Read LLC)
71. Shelly Woodall
72. Wright Investors' Service Distributors, Inc.