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Katherine A. England
Assistant Director
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-1001

Re: File No. SR-NASD-2003-013 – Proposed Interpretive Material Regarding the Use of Investment Analysis Tools: Response to Comments and Amendment No. 2

Dear Ms. England:

NASD hereby replies to the comment letters received by the Securities and Exchange Commission ("SEC" or "Commission") in response to the publication in the *Federal Register* of Amendment No. 1 to Notice of Filing of SR-NASD-2003-013, regarding NASD's proposed Interpretive Material ("IM") for member firms' use of "investment analysis tools." Amendment No. 1, which completely replaced and superseded the original proposed IM, was filed with the Commission on February 27, 2003, and published for comment in the *Federal Register* on April 3, 2003.¹ NASD also hereby submits Amendment No. 2 to SR-NASD-2003-013 (Exhibit A), which is the new proposed rule text, incorporating all amendments made to the proposed IM to date. In addition, for your convenience, Exhibit B displays the additions to and deletions from Amendment No. 1 that have been incorporated in the new rule text, Amendment No. 2.² The proposed IM, as modified by Amendment No. 2, is consistent with recently approved changes to NASD's advertising rules, responsive to various commenters' concerns and designed to provide meaningful disclosure to and protection of investors.

¹ See Notice of Filing of Proposed Rule Change and Amendment No. 1 by NASD Relating to Proposed Interpretive Material Regarding the Use of Investment Analysis Tools, Release No. 34-47590 (Mar. 28, 2003) (SR-NASD-2003-013), 68 FR 16325 (April 3, 2003). The comment period closed on April 24, 2003. *Id.* at 16328. NASD notes that Amendment No. 1 merely made a technical change to the original proposed IM. The original proposed IM was not published for comment in the *Federal Register*.

² The base rule text of Exhibit B is that of Amendment No. 1. The proposed revised rule language of Amendment No. 2 is underlined and the deleted text of Amendment No. 1 is in brackets in Exhibit B.

As the Commission is aware, seven commenters submitted letters in response to the publication of Amendment No. 1.³ All of the commenters were generally supportive of allowing member firms to use and provide customers access to investment analysis tools. A number of the commenters, however, requested that NASD modify the proposed rule change in certain respects. This letter addresses the commenters' concerns and explains NASD's proposed Amendment No. 2, which completely replaces and supersedes Amendment No. 1.

Proposed Amendment No. 2 in Response to Comments and Recently Approved Rule Changes

After reviewing comment letters and recent amendments to Rule 2210, NASD is modifying the proposed IM via Amendment No. 2. The most significant change is to make clear that Rule 2210(d)(1)(D), formerly Rule 2210(d)(2)(N), prohibits predictions and projections involving the likely performance of both specific securities *and investment strategies and styles*. The previous version of the proposed IM focused on projections of specific securities and did not indicate that Rule 2210(d)(1)(D) also applied to predictions and projections involving investment strategies and styles.

In large part, the current changes to the proposed IM are necessitated by recently approved amendments to Rule 2210, which provide that "[a] hypothetical illustration of mathematical principles is permitted, provided that it does not predict or project the performance of an investment *or investment strategy*." Because the term "investment strategy" is new and was not present in the previous rule, the modified proposed rule language clarifies the types of communications that generally are prohibited and makes the proposed IM consistent with the recently amended language of Rule 2210(d)(1)(D).⁴

NASD also is modifying the proposed IM because defining the line between predictions of specific investments and investment strategies is problematic and no meaningful distinction can be made from the perspective of investor protection.⁵ NASD is broadening the proposed IM

³ See The Bond Market Association Letter to SEC, dated May 9, 2003 ("BMA Letter"); Charles Schwab & Co. Letter to SEC, dated April 29, 2003 ("Schwab Letter"); Fidelity Investments Letter to SEC, dated April 24, 2003 ("Fidelity Letter"); Financial Engines Letter to SEC, dated May 1, 2003 ("FE Letter"); Harris Investor Services LLC Letter to SEC, dated April 24, 2003 ("Harris Letter"); Investment Company Institute Letter to SEC, dated April 24, 2003 ("ICI Letter"); and Securities Industry Association Letter to SEC, dated May 7, 2003 ("SIA Letter").

⁴ See SEC Approval of Proposed Rule Change to Rules Governing Member Communications with the Public, Release No. 34-47820 (May 9, 2003) (File No. SR-NASD-00-12), 68 FR 27116, 27123 (May 19, 2003) (stating that NASD would further address the new prohibition on predictions and projections of investment strategies in its investment analysis tools rule filing).

⁵ Several commenters stated that the definition of "investment analysis tool" and scope of the proposed IM were unclear for various reasons. See Fidelity Letter; Harris Letter; Schwab Letter; SIA Letter. Part of the confusion focused on the previous rule filing's statement that automated tools that only projected likely outcomes involving investment strategies were not prohibited by Rule 2210(d)(2)(N), now Rule 2210(d)(1)(D), and therefore not covered by the proposed IM. In particular, the proposed IM's previous focus raised issues regarding where the line between projections of investment strategies and specific securities should be drawn. It is difficult to discern exactly where on the continuum of predictions and projections an analysis of asset allocation and specific securities begins and ends. Consider, for instance, a tool that reviews specific securities held in a customer's account, analyzes

to allow members to use tools that make predictions and projections of investment strategies and styles if the member adheres to the IM's requirements. NASD modified the definition of "investment analysis tool" in the proposed IM to make clear that a member can use or offer a tool that presents the likelihood of various investment outcomes if certain investments are made *or certain investment strategies or styles are undertaken*, as long as the member complies with the proposed IM's requirements.

NASD, moreover, proposes to further modify the IM in response to a number of comments. These additional changes eliminate, modify or clarify certain other provisions that are duplicative, confusing or unduly burdensome. The following summarizes some of these additional changes:

- Eliminate the requirement that members file the tools with NASD's Advertising Regulation Department (Department) 30 days prior to using the tool (i.e., pre-use access and filing); rather, members would need to file the tools with the Department within 10 days of first use (i.e., post-use access and filing). A number of commenters stated that the pre-use access and filing requirement was unnecessary and would severely interfere with the crucial developmental phases of the tools.⁶ Because this is a disclosure regime and NASD will not be conducting a merit review of the tools, NASD agrees with some commenters that post-use access and filing with the Department is sufficient to ensure compliance with the proposed IM's requirements.⁷
- Eliminate the post-use access and filing requirement when members provide investment analysis tools exclusively to *institutional customers* under certain circumstances.⁸ This change is consistent with amendments to Rule 2210 that the Commission recently approved.⁹ The proposed change would apply only if the member's tool is used with or by "institutional investors," as defined in Rule 2211(a)(3), and the member still would have to adhere to the disclosure requirements and would retain suitability obligations to

the securities across asset allocation lines and provides a prediction of whether the customer is likely to achieve a certain goal. As another example, consider a tool that asks a customer for his or her goals and indicates the likelihood of achieving them across various lines of asset allocations and then links the customer to another database of one or more securities that fall within the analyzed categories.

⁶ See FE Letter; Fidelity Letter; Harris Letter; Schwab Letter; SIA Letter.

⁷ Several commenters suggested, as an alternative to a pre-use access requirement, imposing a post-use access requirement. See Fidelity Letter; Harris Letter; Schwab Letter.

⁸ Some commenters requested that the proposed Interpretive Material differentiate between use of an investment analysis tool by an institutional customer and by a retail customer. See BMA Letter; SIA Letter.

⁹ See SEC Approval of Proposed Rule Change to Rules Governing Member Communications with the Public, Release No. 34-47820 (May 9, 2003) (File No. SR-NASD-00-12), 68 FR 27116, 27124 (May 19, 2003) (approving NASD's proposed treatment of "Institutional Sales Material" and stating that the rule change appropriately allows members to contact sophisticated institutional investors without being subjected to pre-use approval and filing requirements).

the extent they arise in connection with the use of the investment analysis tool by such institutional investors.

- Eliminate the requirement that the tool present a range of probabilities, including upside, downside and median projections.¹⁰ NASD staff does not believe that investor protection is necessarily served by limiting the available universe of investment analysis tools to those that present a range of probabilities. This change also will eliminate a number of complex requirements that had limited application and that, upon further review, were deemed to be unnecessary. In brief, this modification makes the proposal's requirements more understandable.
- Eliminate the requirement that the tool use a mathematical process that can be audited and reviewed. NASD is eliminating this provision for a number of reasons.¹¹ First, it would be difficult for NASD examiners to audit and review the mathematical process for compliance with this provision. Second, it is uncertain how a member would keep records of the analytical process. Third, the provision might have led some investors to mistakenly believe that NASD was performing a merit review of the tools. Fourth, the due diligence requirement attendant to the suitability obligation (to the extent it arises) and the requirements of the other Rule 2210 provisions (e.g., good faith and fair dealing and prohibition on making exaggerated, unwarranted and misleading claims) will help ensure that members do not offer or use tools for fraudulent purposes or without an understanding of how the tool's mathematical process works.
- Clarify that a firm needs to provide NASD additional access to the tool or re-file with NASD the written-report template or sales material only if the firm makes a *material* change to the investment analysis tool, written-report template or sales material. Some commenters stated that it would be too burdensome and would not be beneficial to require member firms to provide NASD additional access to investment analysis tools or re-file with NASD related written-report templates or sales material regarding non-substantive changes.¹²

In sum, these changes bring the proposed IM in line with other recent amendments to Rule 2210 and also streamline certain requirements and clarify others while providing important investor protection measures.

¹⁰ A number of commenters asked NASD to modify the definition of "investment analysis tools" by eliminating the requirement that the tools present a range of probabilities, in part, to allow for use of a single probability score. See Fidelity Letter; Harris Letter; Schwab Letter; SIA Letter.

¹¹ Some commenters asked that the "audit" requirement be removed because it was unclear what was being required of firms. See Fidelity Letter; Harris Letter; ICI Letter; Schwab Letter.

¹² See ICI Letter; SIA Letter.

Other Comments

In addition to comments that resulted in proposed revisions, discussed above, NASD considered a number of other comments. Three commenters believed that Rule 2210(d)(2)(N), now Rule 2210(d)(1)(D), does not (and should not be interpreted to) prohibit investment analysis tools unless the tools produce misleading, exaggerated or unwarranted claims.¹³ These commenters noted that former NASD Rule 2210(d)(2)(C), now subsumed within Rule 2210(d)(1)(D), and New York Stock Exchange Rule 472 permit "forecasts" that are clearly labeled as such and that are not exaggerated or unwarranted. According to these commenters, the same or similar standards should be applied to members' use of investment analysis tools.

In general, NASD interprets the term "forecasts" to relate to estimates of economic performance and results. Forecasting economic factors or market conditions is different in kind from predicting or projecting how a particular investment or investing style might perform. NASD believes that in the latter situations, it is appropriate to require firms to provide the disclosures enunciated in the proposed IM, in addition to requiring that the tools not produce misleading, exaggerated or unwarranted claims. Moreover, the revised rule language in Amendment No. 2 substantially reduces the types of disclosures that Amendment No. 1 required firms to make when they offer investment analysis tools. These streamlined disclosure requirements neither create a burden on competition nor impose unnecessary costs.

Some commenters also stated their belief that investment analysis tools are already permitted by the exception in 2210(d)(2)(N) for hypothetical illustrations of mathematical principles, including illustrations designed to show the effects of dollar cost averaging, tax-free compounding, or the mechanics of variable annuity contracts or variable life policies.¹⁴ NASD does not agree. As noted above, amended Rule 2210(d)(1)(D) states, "A hypothetical illustration of mathematical principles is permitted, provided that it does not predict or project the performance of an investment or investment strategy." Investment analysis tools use mathematical formulas to calculate the likelihood or probability that an investment outcome (such as reaching a financial goal) might occur, depending on certain variables. The tools thus clearly make predictions and projections, which the rule prohibits. The "hypothetical illustration" exception to the prohibition in Rule 2210(d)(1)(D) applies to tools that serve the function of a calculator that computes the mathematical outcome of certain assumed variables without predicting the likelihood of either the assumed variables or the outcome. For example, a calculator that calculates a net amount of savings over an assumed period of time with assumed variables of rates of returns, frequency of compounding, and tax rates would meet the exception whereas a calculator that predicted the likelihood of achieving these assumed variables and outcomes would not meet the terms of the exception.¹⁵

¹³ See Harris Letter; Schwab Letter; SIA Letter.

¹⁴ See Harris Letter; SIA Letter.

¹⁵ See SEC Approval of Proposed Rule Change to Rules Governing Member Communications with the Public, Release No. 34-47820 (May 9, 2003) (File No. SR-NASD-00-12), 68 FR 27116, 27125 (May 19, 2003)

A similar comment suggests that some investment analysis tools should be permitted under IM 2210-2, which regulates certain hypothetical illustrations regarding variable insurance and annuity products.¹⁶ This commenter states that it is not clear whether the proposed IM applicable to investment analysis tools would be in addition to, or in lieu of, the requirements in IM 2210-2. For the reasons discussed above, hypothetical illustrations permitted by IM 2210-2 are distinguishable from the investment analysis tools permitted by the proposed IM. Consequently, members would be able to continue to provide these hypothetical illustrations under IM 2210-2, without complying with the provisions of the proposed IM.

As many commenters pointed out, a number of financial services providers (e.g., banks, investment advisers) have been using Monte Carlo simulation techniques and value-at-risk methodology—technology similar to (or the same as) that used by many investment analysis tools—without any history of abuse or investor confusion.¹⁷ NASD acknowledges that such technology can assist investors in making informed investment decisions. Nonetheless, NASD believes that the benefit to investors will be greatly enhanced by requiring firms to provide adequate disclosure of various features of such tools. The revised rule language accomplishes that task without creating a burden on competition or unnecessary costs. The revised rule language also is consistent with recently approved amendments to Rule 2210. NASD urges the Commission to approve the revised rule language.

We hope this response to comments is helpful. If you wish to discuss this matter further, please feel free to contact me at 202-728-8270 or Patrice M Gliniecki, Senior Vice President and Deputy General Counsel, at 202-728-8014.

Very truly yours,

James S. Wrona

cc: Joseph Morra, Esq.
Division of Market Regulation
Securities and Exchange Commission

Attachments

(noting that members may still use "mutual fund cost calculators and other hypothetical illustrations, but they may not make predictions based on those calculations, which could be misleading to investors").

¹⁶ See Harris Letter.

¹⁷ See BMA Letter; FE Letter; Schwab Letter; SIA Letter.

**Amendment No. 2 to SR-NASD-2003-013
Proposed IM-2210-6 – Investment Analysis Tools**

IM-2210-6. Requirements for the Use of Investment Analysis Tools

(a) General Considerations

This Interpretive Material provides a limited exception to NASD Rule 2210(d)(1)(D).¹

No member may imply that NASD endorses or approves the use of any investment analysis tool or any recommendation based on such a tool. A member that offers or intends to offer an investment analysis tool under this Interpretive Material (whether customers use the member's tool independently or with assistance from the member) must, within 10 days of first use, (1) provide NASD's Advertising Regulation Department (Department) access to the investment analysis tool and (2) file with the Department any template for written reports produced by, or sales material concerning, the tool.² The member also must provide any supplemental information requested by the Department. The Department may require that the member modify the investment analysis tool, written-report template or sales material. The Department also may require that the member not offer or continue to offer or use the tool, written-report template or sales material until all changes specified by the Department have been

¹ NASD Rule 2210(d)(1)(D) states that "[c]ommunications with the public may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast." This Interpretive Material allows member firms to offer investment analysis tools (whether customers use the member's tool independently or with assistance from the member), written reports indicating the results generated by such tools and related sales material in certain circumstances.

Rule 2210(d)(1)(D) does not prohibit, and this Interpretive Material does not apply to, hypothetical illustrations of mathematical principles that do not predict or project the performance of an investment or investment strategy.

² After the Department has reviewed the investment analysis tool, written-report template or sales material, a member must notify the Department and provide additional access to the tool and re-file any template or sales material if it makes a material change to the presentation of information or disclosures as required by paragraphs (c) and (d).

made by the member. In addition, as in all cases, a member's compliance with this Interpretive Material does not mean that the member is acting in conformity with other applicable laws and rules. A member that offers an investment analysis tool under this Interpretive Material (whether customers use the member's tool independently or with assistance from the member) is responsible for ensuring that use of the investment analysis tool and all recommendations based on the investment analysis tool (whether made via the automated tool or a written report) comply, as applicable, with NASD's suitability rule (Rule 2310), the other provisions of Rule 2210 (including, but not limited to, the principles of fair dealing and good faith and the prohibition on exaggerated, unwarranted or misleading statements or claims), the federal securities laws, the Securities and Exchange Commission rules and other NASD rules.

A member that offers an investment analysis tool exclusively to "institutional investors," as defined in Rule 2211(a)(3), is not subject to the post-use access and filing requirement in this paragraph if the communications relating to or produced by the tool meet the criteria for "institutional sales material," as defined in Rule 2211(a)(2). A member that intends to make the tool available to, or that intends to use the tool with, any person other than an institutional investor (such as an employee benefit plan participant or a retail broker-dealer customer) will be subject to the filing and access requirements, however.

(b) Definition

For purposes of this Interpretive Material and any interpretation thereof, an "investment analysis tool" is an interactive technological tool that produces simulations and statistical analyses that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices.

(c) Use of Investment Analysis Tools and Related Written Reports and Sales

Material

A member may provide an investment analysis tool (whether customers use the member's tool independently or with assistance from the member), written reports indicating the results generated by such tool and related sales material³ only if:

- (1) the member describes the criteria and methodology used, including the investment analysis tool's limitations and key assumptions;
- (2) the member explains that results may vary with each use and over time;
- (3) if applicable, the member describes the universe of investments considered in the analysis, explains how the tool determines which securities to select, discloses if the tool favors certain securities and, if so, explains the reason for the selectivity,⁴ and states that other investments not considered may have characteristics similar or superior to those being analyzed; and
- (4) the member displays the following additional disclosure: "IMPORTANT: The projections or other information generated by [name of investment analysis tool] regarding the likelihood of various investment outcomes are hypothetical in nature, do not reflect actual investment results and are not guarantees of future results."

³ Sales material that contains only an incidental reference to an investment analysis tool (e.g., a brochure that merely mentions a member's tool as one of the services offered by the member) need not include the disclosures required by this Interpretive Material and would not need to be filed with the Department, unless otherwise required by the other provisions of Rule 2210.

⁴ This disclosure must indicate, among other things, whether the investment analysis tool searches, analyzes or in any way favors certain securities within the universe of securities considered based on revenue received by the member in connection with the sale of those securities or based on relationships or understandings between the member and the entity that created the investment analysis tool. The disclosure also must indicate whether the investment analysis tool is limited to searching, analyzing or in any way favoring securities in which the member makes a market or has any other direct or indirect interest. Members are not required to provide a "negative" disclosure (i.e., a disclosure indicating that the tool does *not* favor certain securities).

(d) Disclosures

The disclosures and other required information discussed in paragraph (c) must be clear and prominent and must be in written or electronic narrative form.

**Amendment No. 2 to SR-NASD-2003-013
Proposed IM-2210-6 – Investment Analysis Tools**

Comparison of Amendment No. 1 and Amendment No. 2

Deletions are in boldface brackets; new text is underlined.

IM-2210-6. Requirements for the Use of Investment Analysis Tools

(a) General Considerations

This Interpretive Material provides a limited exception to NASD Rule [2210(d)(2)(N)] 2210(d)(1)(D).¹

No member may imply that NASD endorses or approves the use of any investment analysis tool or any recommendation based on such a tool. A member that offers or intends to offer an investment analysis tool under this Interpretive Material (whether customers use the member's tool independently or with assistance from the member) must, [at least 30 days prior to] within 10 days of first use, (1) provide NASD's Advertising Regulation Department (Department) access to the investment analysis tool and (2) file with the Department any

¹ NASD Rule [2210(d)(2)(N)] 2210(d)(1)(D) states that "[c]ommunications with the public may not predict or project performance, imply that past performance will recur or make any exaggerated or unwarranted claim, opinion or forecast." [prohibits NASD member firms from making predictions or projections of specific investment results to the public. In the past, the rule also had been interpreted as prohibiting members from providing customers access to investment analysis tools that show the probability that investing in specific securities or funds will produce a desired result.] This Interpretive Material allows member firms to offer investment analysis tools (whether customers use the member's tool independently or with assistance from the member), written reports indicating the results generated by such tools and related sales material in certain circumstances.

Rule [2210(d)(2)(N)] 2210(d)(1)(D) does not prohibit, and this Interpretive Material does not apply to, hypothetical illustrations of mathematical principles that do not predict or project the performance of an investment or investment strategy. [automated educational tools that are hypothetical or general in nature. For instance, Rule 2210(d)(2)(N) generally does not prohibit, and this Interpretive Material does not cover, portfolio-based planning tools that merely generate a suggested mix of general classes of financial assets, broad categories of securities or funds, or probabilities as to how classes of financial assets or styles of investing might perform.]

template for written reports produced by, or sales material concerning, the tool.² The member also must provide any supplemental information requested by the Department. [If the] The Department may require that the member modify [requests changes to] the investment analysis tool, written-report template or sales material[.]. The Department also may require that the member [may] not offer or continue to offer or use the tool, written-report template or sales material until all changes specified by the Department have been made by the member [and approved by the Department]. In addition, as in all cases, a member's compliance with this Interpretive Material does not mean that the member is acting in conformity with other applicable laws and rules. A member that offers an investment analysis tool under this Interpretive Material (whether customers use the member's tool independently or with assistance from the member) is responsible for ensuring that use of the investment analysis tool and all recommendations based on the investment analysis tool (whether made via the automated tool or a written report) comply, as applicable, with NASD's suitability rule (Rule 2310), the other provisions of Rule 2210 (including, but not limited to, the principles of fair dealing and good faith and the prohibition on exaggerated, unwarranted or misleading statements or claims), [and] the [other applicable] federal securities laws, [and] the Securities and Exchange Commission rules and other NASD rules.

A member that offers an investment analysis tool exclusively to "institutional investors," as defined in Rule 2211(a)(3), is not subject to the post-use access and filing requirement in this paragraph if the communications relating to or produced by the tool meet the criteria for

² After the Department has reviewed the investment analysis tool, written-report template or sales material, a member must notify the Department and provide additional access to the tool and re-file any template or sales material if it makes a material change to the presentation of information or disclosures as required by paragraphs (c) and (d). [Sales material that members disseminate to the public must be in the same form in which it was submitted to NASD for review and approval. Members cannot redact or alter such sales material after receiving NASD approval and must file with the Department any modified version of the sales material at least 30 days prior to first use of the modified version of the sales material.]

"institutional sales material," as defined in Rule 2211(a)(2). A member that intends to make the tool available to, or that intends to use the tool with, any person other than an institutional investor (such as an employee benefit plan participant or a retail broker-dealer customer) will be subject to the filing and access requirements, however.

(b) Definition

For purposes of this Interpretive Material and any interpretation thereof, an "investment analysis tool" is an interactive technological tool that produces simulations and statistical analyses that present the likelihood of [a range of probabilities that] various investment outcomes [might occur] if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks [of] and returns [on particular investments] of investment choices.

(c) Use of Investment Analysis Tools and Related Written Reports and Sales Material

A member may provide an investment analysis tool (whether customers use the member's tool independently or with assistance from the member), written reports indicating the results generated by such tool and related sales material³ only if:

[(1) the tool presents a range of probabilities that various investment outcomes might occur and does not state that a particular investment outcome will, in fact, occur;]

[(2) the tool prominently presents a fair and balanced representation of the range of possible investment outcomes that the tool's algorithm determines have a reasonable probability of occurrence;^[4]]

³ Sales material that contains only an incidental reference to an investment analysis tool (e.g., a brochure that merely mentions a member's tool as one of the services offered by the member) need not include the disclosures required by this Interpretive Material and would not need to be filed with the Department, unless otherwise required by the other provisions of Rule 2210.

[(3) the tool uses a mathematical process that can be audited and reviewed;]

[(4)] (1) the member describes the criteria and methodology used, including the investment analysis tool's limitations and key assumptions;

[(5)] (2) the member explains that results may vary with each use and over time;

[(6)] (3) if applicable, the member describes the universe of investments considered in the analysis, explains how the tool determines which securities to select, discloses if the tool favors certain securities and, if so, explains the reason for the selectivity,^{[5]4} and states that other investments not considered may have characteristics similar or superior to those being analyzed; and

[(7)] (4) the member displays the following additional disclosure:

"IMPORTANT: The projections or other information generated by [name of investment

^[4] [The entire range of investment outcomes would encompass a range of numbers that, as a practical matter, cannot be accurately calculated. The IM therefore requires a "*fair and balanced*" representation of the range of possible investment outcomes that the tool's algorithm determines have a reasonable probability of occurrence.]

[However, the tool, or written report of the tool's results, must depict a "fair and balanced representation" of this range. A "fair and balanced representation" would include, at a minimum, the "upside," "downside" and "median" projections of estimated outcomes, but would not require a depiction of every outcome in between. Any representation that, in light of all the facts and circumstances, is misleading will not be considered a "fair and balanced representation" of the range. For example, the presentation of a range of possible outcomes skewed to depict only or to weigh in favor of positive market performance would not be a "fair and balanced representation" of the range. In this regard, whenever the tool, or written report of the tool's results, shows an outcome that the investor has a certain chance of achieving on the "upside," the tool, or written report, must also show the corresponding outcome on the "downside." Moreover, the tool should make clear that the dollar amount representing the "downside" is not the worst-case scenario, and it must include a prominent statement of the estimated probability (for example, a "5% chance" or "1 in 20 chance") that the investor will end up with less than the "downside" amount that the tool generates.]

^{[5]4} This disclosure must indicate, among other things, whether the investment analysis tool searches, analyzes or in any way favors certain securities within the universe of securities considered based on revenue received by the member in connection with the sale of those securities or based on relationships or understandings between the member and the entity that created the investment analysis tool. The disclosure also must indicate whether the investment analysis tool is limited to searching, analyzing or in any way favoring securities in which the member makes a market or has any other direct or indirect interest. Members are not required to provide a "negative" disclosure (i.e., a disclosure indicating that the tool does *not* favor certain securities).

analysis tool] regarding the [probabilities] likelihood of [that] various investment outcomes [might occur] are hypothetical in nature, do not reflect actual investment results and are not guarantees of future results. [[Name of investment analysis tool] only presents a range of possible outcomes.]"

(d) Disclosures

The disclosures and other required information discussed in paragraph (c) must be [written,] clear and prominent and must be in written or electronic narrative form.