

**ACTION REQUESTED BY
OCTOBER 15, 2001**

Regulation Of Shelf Offerings

NASD Requests
Comment On Proposed
Rule Amendments To
Address Shelf Offerings
Of Securities; **Comment
Period Expires October
15, 2001**

SUGGESTED ROUTING

The Suggested Routing function is meant to aid the reader of this document. Each NASD member firm should consider the appropriate distribution in the context of its own organizational structure.

- Corporate Finance
- Legal & Compliance
- Registered Representatives
- Senior Management
- Trading & Market Making

KEY TOPICS

- IM-2440
- Mark-Up Policy
- Merchant Banking
- NASD Rule 2710
- NASD Rule 2720
- NASD Rule 2810
- Shelf Offerings
- Underwriting Compensation

Executive Summary

NASD Regulation, Inc. (NASD RegulationSM) proposes to amend NASD Rules 2710, 2720, 2810, IM-2440, and Schedule A to the NASD By-Laws to adopt filing requirements and fees for shelf offerings of securities, and to otherwise amend those rules to address shelf offerings.

The text of these proposed amendments is included with this *NASD Notice to Members—Request for Comment* (see Attachment A).

Action Requested

NASD Regulation encourages all interested parties to comment on the proposal. Comments must be received by **October 15, 2001**. Members and interested persons can submit their comments using the following methods:

- mailing in the checklist (Attachment B)
- mailing in written comments
- e-mailing written comments to pubcom@nasd.com
- submitting comments using the online form at the NASDR Web Site (www.nasdr.com)

If you decide to submit comments using both the checklist and one of the other methods listed above, please indicate that in your submissions. The checklist and/or written comments should be mailed to:

*Barbara Z. Sweeney
Office of the Corporate Secretary
NASD Regulation, Inc.
1735 K Street, NW
Washington, DC 20006-1500*

Important Note: The only comments that will be considered are those submitted via e-mail or

in writing. Before becoming effective, any rule change developed as a result of comments received must be adopted by the NASD Regulation Board of Directors, may be reviewed by the NASD Board of Governors, and must be approved by the SEC.

Questions/Further Information

As noted, written comment should be submitted to Barbara Z. Sweeney. Questions concerning this *NASD Notice to Members—Request for Comment* may be directed to Joseph E. Price, Director, or Paul M. Mathews, Staff Supervisor, Corporate Financing Department, NASD Regulation, at (240) 386-4623.

Background

NASD Rule 2710 regulates the underwriting terms and arrangements of most public offerings of securities sold through NASD members. The underwriting terms and arrangements of Direct Participation Program (DPP) offerings are regulated by NASD Rule 2810. NASD Rule 2720 regulates public offerings when the securities offered are those of a member, the member's parent company, an affiliate of the member, or a company with which a member has a conflict of interest. Pursuant to the filing requirements in Rule 2710, 2720, and 2810 (collectively the "Corporate Financing Rules") with the Corporate Financing Department of NASD Regulation (Department) for review.

NASD Regulation applies the Corporate Financing Rules to shelf offerings that are made pursuant to Rule 415 under the Securities

Act of 1933 (Securities Act). Certain shelf offerings of issuers with a three-year reporting history, significant float, and high trading volume are exempt from the Rules' filing requirements. The NASD discussed the application of the Corporate Financing Rules to shelf offerings in *NASD Notice to Members 88-101* and stated the following:

“[I]t is the view of the [Corporate Financing] Committee that the participation of a member in any offering of securities distributed pursuant to Rule 415 constitutes participation in a public offering [and]... any member who is named as a potential distribution participant in the registration statement or who may participate in any transaction that takes securities off the shelf is responsible for ensuring that a timely filing is made with the Department... ”

Accordingly, NASD Regulation considers shelf offerings to be public offerings within the scope of the Corporate Financing Rules, and members that take securities off a shelf and sell them to the public must file information about the offering with the Department unless the transaction meets an exemption from the filing requirements provided in the Rules.

The application of the Corporate Financing Rules to shelf offerings has raised a number of practical problems. For example, when more than one member takes securities off a shelf and sells them to the public, it may be unclear which member must make the requisite filing with the Department. Members also have questioned whether filing fees should be based on the entire

amount of securities registered pursuant to Rule 415 or whether filing fees should be assessed only with respect to tranches that actually are taken off the shelf and sold.

Many issuers initially file shelf offerings with the SEC before they enter into underwriting agreements with members for the sale of the securities. Because the NASD filing requirements are the responsibility of its members rather than issuers, the issuer may not file the offering with the Department. Those issuers that do file with the Department often cannot identify, at the time of filing, the members that will be engaged in sales or provide information regarding underwriting discounts, commissions, or other terms and arrangements. In addition, issuers often file shelf-registered offerings on behalf of selling securityholders. Because sales off the shelf would be under the control of the securityholders in those offerings, the issuer may have little or no information regarding the selling arrangements between the securityholders and members.

Another difficult issue in regulating shelf-registered offerings involves the calculation of underwriting compensation. The proper calculation methodology is especially problematic because of the many kinds of transactions in which shelf-registered securities are distributed. For example, shelf offerings can be done as principal or agency transactions, at a fixed price or discount to the market price, or “at the market.” Shelf takedowns may either be made pursuant to an underwriting agreement or without any written agreement, and pricing arrangements may involve complex formulas, such as those found in equity line or PIPE transactions.

Finally, if members do not promptly file shelf-registered offerings prior to their participation in a takedown, the Department's review processes could delay the offering, thus affecting the registrant's ability to take advantage of market opportunities that shelf registration is designed to provide.

Although NASD Regulation recognizes that the Corporate Financing Rules can be amended to better address the issues discussed above, we continue to believe that regulating these transactions provides important investor protections against abusive practices, including fraud and manipulation. The majority of NASD Regulation enforcement actions involving shelf offerings have involved unseasoned and thinly traded issuers, but shelf offerings of larger issuers eligible for Form S-3 also have been the subject of enforcement actions. In addition, shelf offerings of larger issuers sometimes involve compliance issues with regard to the underwriting compensation limitations of Rules 2710 and 2810 and the conflict-of-interest provisions of Rule 2720.

Description Of Proposed Amendments Regarding Shelf Offerings

A. Summary of Proposal: NASD Regulation proposes to amend Rules 2710, 2720, and 2810 to accommodate the special characteristics of shelf offerings while continuing to require pre-filing review of the types of shelf offerings that require closer regulatory oversight. Most shelf offerings would have to be filed either after the transaction has occurred as a “Notice Filing” or prior to the transaction as a “Full Review Filing.” NASD Regulation would retain all of the current

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exemptions for shelf offerings of larger seasoned issuers and we propose a new transaction-based exception called the “Market Transaction Exception.”

We propose to make several conforming and clarifying amendments to the Corporate Financing Rules. For example, we would amend Rule 2710 to clarify how underwriting compensation is to be calculated, and how to apply the review period for underwriting compensation when shelf takedowns occur long after a shelf registration statement has been declared effective. We also propose to amend Rule 2720 to address the definition of investment grade rated debt and provide for coordination with Rule 2710 regarding shelf offering filing obligations and fee requirements. We propose to amend Rule 2810 so that DPP offerings that are registered and distributed pursuant to Rule 415 qualify for the new regulatory treatment of shelf offerings under Rule 2710. Conforming amendments also would include a proposal to amend the NASD’s Mark-Up Policy in IM-2440 so that it applies to takedowns and sales that would be exempt from the compensation limits in Rule 2710 pursuant to the new Market Transaction Exception and an amendment to Schedule A to the NASD By-Laws to address the payment of Corporate Financing filing fees for shelf offerings.

B. Notice Filings: In order to provide members with increased flexibility to quickly take advantage of market opportunities, NASD Regulation proposes to permit members to make “Notice Filings” for certain types of offerings. Members would not need a “no objections” opinion from the Department regarding underwriting terms and arrangements prior

to participating in the offerings. We also propose to create an electronic filing form for the Notice Filing.

1. Filing Requirement: Members would make Notice Filings after any takedown from the shelf that is not otherwise exempt from the filing requirements or required to be filed as a Full Review Filing. Offerings of investment grade rated debt that currently are required to be filed with the Department under Rule 2720 because they involve some conflict of interest also would be eligible for a Notice Filing.

2. Filing Procedure: Each member that participates in a shelf takedown would be responsible for making a Notice Filing that provides information about its participation.

a. General: We propose to require a Notice Filing no later than T+3 after each “takedown and/or sale” by a member. Each member selling securities registered on a shelf registration statement would be obligated to make a Notice Filing and pay a filing fee based on the value of the securities it sells.

b. Multiple Takedowns: If a member participates in multiple takedowns within the T+3 time period, the filing requirement will operate on a rolling T+10 basis. Thus, if additional takedowns occur within T+3 of the first takedown, the member can delay filing the required Notice, but no later than T+10 after the first takedown covered by the Notice. The Notice filed in such a case would provide

information on each of the takedowns. If a member participates in additional takedowns outside of the initial T+3 time period, then the member must make a separate Notice Filing after each takedown.

3. Filing Fee: Members that file a public offering of securities with the Department must pay a filing fee pursuant to the requirements in Section 6 of Schedule A to the NASD By-Laws (Schedule A). The required fee is equal to \$500 plus .01% of the proposed maximum offering price of all securities registered on a registration statement. The fee is capped at \$30,500 per registration statement. NASD Regulation proposes to amend Schedule A to address the payment of filing fees for Notice Filings. The NASD would waive the current minimum \$500 fee and impose a filing fee of .01% of the maximum anticipated sales price of the securities to be offered by the member to the public after each takedown. Members would not be required to pay de minimus fees of less than \$100 and the \$30,500 cap would apply to each takedown of securities off of a particular shelf.

4. Electronic Filing Process: We propose to create a Web-based electronic filing system for Notice Filings. The required information would be significantly less than that currently required for public offerings filed with the Department through COBRADesk. We anticipate that members making multiple Notice Filings could save previous submissions and change only the relevant

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portions in any new filing. We also expect to employ calculators, drop-down boxes, and other technological features to standardize and simplify the filing process. No hard-copy documents would be required to be submitted with a Notice Filing.

C. Full Review Filings: NASD Regulation proposes to continue to require the filing of certain shelf-registered offerings prior to a member's participation in the distribution. These offerings would be subject to the Department's standard review procedures under the Corporate Financing Rules, and members would continue to be prohibited from participating in such a distribution unless the Department has issued an opinion of "no objections" regarding the underwriting terms and arrangements.

1. **Filings Required:** NASD Regulation proposes to require Full Review Filings for non-exempt offerings:
 - a. of securities of "thinly traded issuers," as proposed to be defined below, unless the sales qualify for the Market Transactions Exception;
 - b. subject to Rule 2720, except that shelf takedowns and sales of "investment grade rated debt" will be eligible for Notice Filing;
 - c. otherwise eligible for Notice Filing but in which a participating member:
 - i. has acquired unregistered equity securities of the issuer in the 180-day period prior to the day of the intended takedown;¹ or
 - ii. will receive underwriting compensation that exceeds 8% of the offering proceeds

(defined as "the maximum anticipated sales price of the maximum amount of securities to be offered to the public").

2. **Definition Of Thinly Traded**

Issuer: NASD Regulation proposes to define the term "thinly traded issuer" as an issuer that has publicly held equity securities held by non-affiliates that do not meet all of the following requirements:

- a. at least \$25 million in public float;
- b. at least \$100,000 average daily trading volume over the preceding 60 calendar days; and
- c. listed for at least 90 days on The Nasdaq Stock Market, a national securities exchange, or a "designated offshore securities market," as defined in Regulation S.

3. **Definition Of Investment**

Grade Rated Debt: NASD Regulation proposes to define the term "investment grade rated debt" for purposes of the Corporate Financing Rules as nonconvertible debt or preferred securities rated in one of the four highest generic rating categories by a nationally recognized statistical rating organization.

4. **Review Practices:** The Department proposes to change its review practices for Full Review Filings. Each member that participates in a shelf offering would have to determine whether its participation required a Notice Filing, a Full Review Filing or qualified for the Market Transactions Exception. The Department would no longer issue a "no objections" letter

that addresses all *potential* members that may participate in takedowns and sales. Instead, any opinion of no objections issued by the Department will only cover the arrangements entered into by the member that makes the Full Review Filing unless: (i) a managing underwriter makes the filing on behalf of a syndicate or selling group; (ii) each member that will participate in the distribution is identified; and (iii) detailed information is disclosed in the filing regarding the underwriting terms and arrangements.

5. **Filing Fee:** Filing fees for Full Review Filings would not change from those currently assessed under Schedule A.

D. The Market Transaction

Exception (MTE): In order to facilitate sales of securities from a shelf registration that are more similar to ordinary trading than to a "public offering," NASD Regulation proposes to adopt an exception from filing for market transactions in shelf-registered equity or convertible-to-equity debt securities. To be eligible for the exception, a transaction would be required to meet all of the following standards:

1. **MTE Listing/Reporting Requirements:** The equity securities to be offered or the equity securities underlying a convertible security would have to be listed on The Nasdaq Stock Market, a national securities exchange, or quoted on the OTC Bulletin Board, and the issuer must have been an Exchange Act reporting company for at least 180 days.

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2. MTE Volume Limitations: No member sells securities in an amount that:

- a. on any single trading day is in excess of 5% of the average daily trading volume (ADTV), calculated in accordance with SEC Regulation M;
- b. over 10 trading days that is in excess of 20% of the ADTV; and
- c. exceeds 20% of the shelf-registered securities in the aggregate (A Notice or Full Review Filing would be required once the 20% threshold has been reached).

3. MTE Manner Of Sale

Limitation: The member could not engage in any “special selling efforts” but may engage in ordinary “solicitation.” “Special selling efforts” would include:

- a. “cold calling”;
- b. the payment of commissions to sales persons that are higher than normal for ordinary trading transactions; or
- c. the issuance of a research report with respect to the security that does not comply with SEC Rules 138 or 139.

4. MTE Compensation

Limitation: Transactions eligible for the exception are limited to takedowns and sales in which:

- a. the member does not receive a mark-up, mark-down, or commission greater than is customary for ordinary trading or that

does not comply with the NASD’s Mark-Up Policy; and

- b. the member has not acquired unregistered equity or equity-related securities of the issuer or any other item of compensation within the 180-day period prior to the date of the takedown.²

5. MTE Ineligible Transactions:

Transactions would not qualify for the exception if:

- a. the offering is subject to Rule 2720; or
- b. the transactions occur within 180 days of the issuer’s initial public offering or the issuer has not been a reporting company for 180 days at the time of the transactions.

E. Existing Filing Exemptions:

Rule 2710 currently exempts certain shelf offerings from the filing provisions. All current filing exemptions available for shelf offerings would be retained, including the exemption for offerings of the securities of issuers that meet the 36-month reporting history, public float, and trading volume standards that were used to determine the eligibility to file registration statements on Forms S-3 and F-3 prior to 1992. In addition, the Rule exempts shelf offerings by Canadian issuers that registered on SEC registration statement Form F-10.³ Offerings with conflicts of interest governed by Rule 2720 are not eligible for these exemptions.

NASD Regulation considered whether to expand the exemptions to all shelf-registered offerings filed on Forms S-3 and F-3. We decided not to propose this

expansion, however, because we are aware of manipulative and abusive practices involving listed issuers with less than a three-year reporting history. Accordingly, NASD Regulation proposes to retain the current standards in order to ensure the fairness of underwriting terms and arrangements in the case of less experienced and less well-capitalized issuers.⁴

F. Underwriting Compensation Calculation Methodology:

We propose to permit members to rely on one of several alternative methods to calculate the discount or commission received by members that participate in shelf offerings. The alternatives are intended to take into account the different characteristics of the securities sold in shelf offerings and recognize the different calculations currently used by members.

1. Transactions Governed By An Agreement:

When the shelf takedowns are governed by an underwriting, equity line, PIPE, or similar agreement between the issuer and any selling member, the amount of the commission or discount would be based on the calculation set forth in the agreement. Such agreements may be firm commitment underwriting agreements, best-efforts underwriting agreements, equity lines of credit agreements, purchase agreements, or some other form of agreement for the sale of securities from a shelf registration.⁵

2. Transactions Not Governed By An Agreement:

In the absence of an agreement governing a member’s participation in a takedown

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of securities from a shelf registration, the following alternative methods of calculation would be available.

- i. In an agency transaction, the commission would be the amount of the actual commission that is added to the sale price of the securities paid by investors;
- ii. In a principal transaction not governed by an agreement, we are proposing three alternative methodologies that members could utilize to determine compensation amounts. In order to be eligible to make a Notice Filing, a discount calculated in accordance with the methodologies, when added to any other items of value received by members participating in the offering, could not exceed 8%.

A. Resale Price Method: The discount would be calculated as the difference between the purchase price of the securities off the shelf and their resale price.

B. Prevailing Market Price Method: The discount would be calculated as the difference between the purchase price of the securities off the shelf and the “prevailing market price” of the security in the principal market at the time of purchase, as calculated by reference to IM-2440, the Mark-Up Policy, and *NASD Notice to Members 92-16*.⁶ Because this methodology would not work in a dominated or controlled market, we propose not to make it available for offerings of securities of thinly traded issuers.

C. Bought Deal Method: The discount would be calculated as the difference between the purchase price of the securities off the shelf and the price at which the first significant amount of sales after the takedown were executed. This methodology would take into account market price movements that occur subsequent to a member’s acquisition of the shelf-registered securities that could affect the discount, while ensuring that enough securities are sold to establish a reasonable, bona fide compensation calculation. Using the Bought Deal Method would require either that:

1. the purchase price of the takedown is of at least \$10 million but no more than \$50 million of securities and at least 50% of the securities are sold at the initial resale price or at lower prices; or
2. the purchase price of the takedown exceeds \$50 million and at least 25% of the securities are sold at the initial resale price or at lower prices; and
3. Request for Comment on a Volume Weighted Average Price (VWAP) methodology. NASD Regulation requests comment on whether the alternative calculation methodologies should include one that takes into account the daily volume weighted average price per share of the security in the principal market at the time of purchase as reported by a third-party quotation service.

4. Offering Proceeds. We also propose to amend the definition of “offering proceeds” in Rule 2710(a)(4) to provide that the offering proceeds in a shelf offering, which are used to determine both the filing fee and to calculate the amount of total compensation, shall be the maximum anticipated sales price of the securities that the member making the filing has sold (Notice Filing) or will offer to sell (Full Review Filing). The amount of compensation for a shelf offering would be calculated as follows. If, for example, the maximum discount is 5.5% using one of the methods set forth above, the amount of the discount will be considered to be 5.5% of the offering proceeds calculated in reliance on Rule 2710(a)(4). The value of any other items of value received by members participating in the offering would be factored into the offering proceeds to develop percentage values for each item of compensation. These percentage values would be added to the 5.5% discount in the example to determine the total amount of compensation.

Endnotes

- 1 A member would not lose its eligibility to make a Notice Filing if its acquisition of unregistered equity securities qualified for one of the exceptions from underwriting compensation proposed in the amendments to Rule 2710(c)(5) pending at the SEC, File No. SR-NASD-00-04, Amendment No. 5. A PIPE or similar transaction in which a member or affiliate has purchased private placement securities that are immediately registered for distribution would be eligible for Notice Filing.
- 2 The only types of securities that would be covered by this limitation are the securities considered an item of compensation received in connection with the offering under Rule 2710(c)(3)(A). Thus, a member's purchase of the issuer's straight debt securities would not eliminate the member's ability to rely on the Market Transaction Exemption.
- 3 We propose to adopt new Rule 2710(b)(10)(D) to set out more clearly the eligibility requirements for the filing exemptions for shelf offerings on Forms S-3, F-3, and F-10. While these offerings are exempt from the Rule 2710 filing requirements, they must comply with the substantive requirements of Rule 2710 or Rule 2810, including the limitations on underwriting compensation.
- 4 We propose, however, to rescind an interpretation included in *Notice to Members 93-88* (December 1993) that provided that the exemptions were not available if shelf-registered securities were sold in conventional underwritten offerings within a few days following the effective date of the registration statement.
- 5 In its review of Full Review Filings and its post-effective review of Notice Filings, the Department will analyze the calculations and amounts paid to ensure compliance with the Corporate Financing Rules.
- 6 We propose to amend IM-2440 to clarify that the 5% policy does not apply to Full Review Filings or Notice Filings. Members relying on the Prevailing Market Price Method, however, would be required to calculate the applicable discount in accordance with the methodology for determining "prevailing market price" set forth in the Mark-Up Policy and *Notice to Members 92-16*.

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ATTACHMENT A**PROPOSED AMENDMENTS TO THE CORPORATE FINANCING RULES**

(Note: New text is underlined; deletions are struck out.)

2710. Corporate Financing Rule - Underwriting Terms and Arrangements**(a) Definitions****(1) Investment Grade Rated Debt**

Any public offering of straight debt or straight preferred securities rated in one of the four highest generic rating categories by a nationally recognized statistical rating organization.

(2) Issuer

The issuer of the securities offered to the public, any selling security holders offering securities to the public, any affiliate of the issuer or selling security holder, and the officers or general partners, directors, employees and security holders thereof.

~~(2)~~ (3) Net Offering Proceeds

Offering proceeds less all expenses of issuance and distribution.

~~(3)~~ (4) Offering Proceeds

The maximum public offering price of all securities offered to the public, not including securities subject to any overallotment option, securities to be received by the underwriter and related persons, or securities underlying other securities. In the case of a shelf offering, the maximum anticipated sales price of the securities that the member will offer to the public.

(5) Participating Member(s)

Any NASD member that is participating in a public offering, any associated person of the member, any members of their immediate family, and any affiliate of the member.

~~(4)~~ (6) Participation or Participating in a Public Offering

Participation in the preparation of the offering or other documents, participation in the distribution of the offering on an underwritten, non-underwritten, or any other basis, furnishing of customer and/or broker lists for solicitation, or participation in any advisory or consulting capacity to the issuer related to the offering, but not the preparation of an appraisal in a savings and loan conversion or a bank offering or the preparation of a fairness opinion pursuant to SEC Rule 13e-3.

(7) Securities Act

The Securities Act of 1933, as amended.

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(8) Shelf Offering

Any offering of securities registered with the SEC and offered pursuant to SEC Rule 415, adopted under the Securities Act.

(9) Takedown

In connection with a shelf offering, the securities purchased by a member in a principal transaction or the securities sold by a member in an agency transaction. If a member enters into an underwriting, equity line, or similar agreement with an issuer or selling security holders with respect to a shelf offering, a takedown shall be the entire amount of securities registered on the registration statement that is covered by the agreement.

(10) Thinly-Traded Issuer

An issuer that has publicly held equity securities held by non-affiliates do not have a public float of at least \$25 million, an average daily trading volume (ADTV) of at least \$100,000 over the preceding 60 calendar days, and has not been listed for at least 90 calendar days on The Nasdaq Stock Market, a national securities exchange, or a designated offshore securities market, as defined in SEC Regulation S, under the Securities Act.

(5) (11) Underwriter and Related Persons

Consists of underwriter's counsel, financial consultants and advisors, finders, any participating member, and any other persons related to any participating member.

(b) Filing Requirements

(1) - (3) No change.

(4) No change

(B) No offering of securities subject to this Rule shall commence unless:

(i) the documents and information specified in subparagraphs (5) and (6) below have been filed with and reviewed by the Association; and

(ii) the Association has provided an opinion that it has no objections to the proposed underwriting and other terms and arrangements or an opinion that the proposed underwriting and other terms and arrangements are unfair and unreasonable, except that this requirement shall not apply in the case of a shelf offering subject to Notice filing under subparagraph (1)(B) below. If the Association's opinion states that the proposed underwriting and other terms and arrangements are unfair and unreasonable, the member may file modifications to the proposed underwriting and other terms and arrangements for further review.

(C) No change.

(5) No change.

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(6) Information Required to be Filed

- (A) No change.
- (B) No change.

(7) Offerings Exempt from Filing

Notwithstanding the provisions of subparagraph (1) above, documents and information related to the following public offerings need not be filed with the Association for review, unless subject to the provisions of Rule 2720. However, it shall be deemed a violation of this Rule or Rule 2810, for a member to participate in any way in such public offerings if the underwriting or other arrangements in connection with the offering are not in compliance with this Rule or Rule 2810, as applicable:

(A) securities offered by a corporate, foreign government or foreign government agency issuer which has unsecured non-convertible debt with a term of issue of at least four (4) years, or unsecured non-convertible preferred securities, rated by a nationally recognized statistical rating organization in one of its four (4) highest generic rating categories, except that the initial public offering of the equity of an issuer is required to be filed;

(B) non-convertible debt securities and non-convertible preferred securities rated by a nationally recognized statistical rating organization in one of its four (4) highest generic rating categories;

~~(C) offerings of securities:~~

~~(i) registered with the Commission on registration statement Forms S-3 or F-3 pursuant to the standards for those Forms prior to October 21, 1992 and offered pursuant to SEC Rule 415 adopted under the Securities Act of 1933, as amended; or~~

~~(ii) of a foreign private issuer incorporated or organized under the laws of Canada or any Canadian province or territory, and is registered with the Commission on Form F-10 pursuant to the standards for that Form approved in Securities Act Release No. 6902 (June 21, 1991) and offered pursuant to Canadian shelf prospectus offering procedures;~~

(C) securities offered pursuant to a redemption standby "firm commitment" underwriting arrangement registered with the Commission on Forms S-3, F-3 or F-10 (only with respect to Canadian issuers);

~~(E)~~ (D) financing instrument-backed securities which are rated by a nationally recognized statistical rating organization in one of its four (4) highest generic rating categories;

~~(F)~~ (E) exchange offers of securities where:

(i) the securities to be issued or the securities of the company being acquired are listed on The Nasdaq National Market, the New York Stock Exchange, or the American Stock

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Exchange; or

(ii) the company issuing securities qualifies to register securities with the Commission on registration statement Forms S-3, F-3, or F-10, pursuant to the standards for those Forms as set forth in ~~subparagraphs (C)(i) and (ii) of this paragraph~~ paragraph 10(D); and

~~(G)~~ (F) offerings of securities by a church or other charitable institution that is exempt from SEC registration pursuant to Section 3(a)(4) of the Securities Act.

(8) No change.

(9) Offerings Required to be Filed

Documents and information relating to all other public offerings including, but not limited to, the following must be filed with the Association for review:

(A) direct participation programs as defined in Rule 2810(d)(2);

(B) mortgage and real estate investment trusts;

(C) rights offerings;

(D) securities exempt from registration with the Commission pursuant to Section 3(a)(11) of the Securities Act of 1933, as amended, which is considered a public offering in the state where offered;

(E) securities exempt from registration with the Commission pursuant to Rule 504 adopted under the Securities Act of 1933, as amended, which is considered a public offering in the states where offered;

(F) securities offered by a bank, savings and loan association or common carrier even though such offering may be exempt from registration with the Commission;

(G) securities offered pursuant to Regulation A or Regulation B adopted under the Securities Act of 1933, as amended;

(H) exchange offers that are exempt from registration with the Commission under Sections 3(a)(4), 3(a)(9), or 3(a)(11) of the Securities Act of 1933 (if a member's participation involves active solicitation activities) or registered with the Commission (if a member is acting as dealer-manager) (collectively "exchange offers"), except for exchange offers exempt from filing pursuant to subparagraph (7)(F) above that are not subject to filing by subparagraph (9)(I) below;

(I) any exchange offer, merger and acquisition transaction, or other similar corporate reorganization involving an issuance of securities that results in the direct or indirect public ownership of the member; and

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(J) any offerings of a similar nature that are not exempt under subparagraph (7) or (8) above; and

(K) shelf offerings pursuant to subparagraph (10) below.

(10) Shelf Offerings

(A) General Filing Requirement: A member that anticipates participating in a shelf offering in any capacity shall file with the Association the documents and information with respect to the offering specified in subparagraphs (5) and (6) above no later than one business day after the filing or submission of the registration statement with the SEC or, if the member's participation is to occur at least fifteen business days after effectiveness of the registration statement, no later than fifteen business days prior to the anticipated date on which offers will commence:

(B) Notice Filing: A member that is required to file an offering pursuant to subparagraph (A) above, may instead file a Notice with the Association disclosing information required in the form of Notice no later than T+3 after the date of the takedown or, if more than one takedown occurs during the T+3 time period, no later than T+10 after the first takedown covered by the Notice, if the following conditions are met:

(i) the participating member will not receive compensation in excess of 8%, as calculated pursuant subparagraphs (e)(3) and (4) below,

(ii) the offering is not subject to Rule 2720, except for shelf offerings of only investment grade rated debt;

(iii) the participating member has not acquired any unregistered securities of the issuer within 180 days of its participation in the takedown; and

(iv) the securities offered are not those of a thinly-traded issuer.

(C) Market Transaction Exemption: A takedown of equity securities or convertible-to-equity debt securities off a shelf offering shall be exempt from the filing requirement in subparagraph (A) above if the following conditions are met:

(i) the conditions set out in subparagraph (B)(i)-(iii) above are met;

(ii) the securities offered are not those of a thinly-traded issuer, unless the thinly-traded issuer has been subject to the reporting requirements of Section 12 or 15(d) of the Securities Act for more than 180 days;

(iii) the takedown does not occur within 180 days of the issuer's initial public offering;

(iv) the security is listed on The Nasdaq Stock Market or a national securities exchange or quoted on the OTC Bulletin Board;

(v) no member sells an amount of securities in excess of:

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a. 5% of the average daily trading volume (ADTV), calculated in compliance with SEC Regulation M, on any trading day; and

b. 20% of the ADTV over 10 trading days; and

c. exceeds 20% of the shelf registered securities in the aggregate.

(vi) no member:

a. engages in special selling efforts or unusual solicitation activities, including “cold calling”;

b. grants higher-than-normal commissions to sales persons that are not standard for ordinary trading transactions; and

c. issues any research report with respect to the security that does not comply with SEC Rules 138 or 139.

(vi) no participating member receives compensation (including the mark-up, mark-down, or commission) that exceeds the amount permitted under NASD IM-2440, the Mark-Up Policy; and

(vii) the participating member has not acquired unregistered equity or equity-related securities of the issuer or any other item of underwriting compensation (excluding the mark-up, mark-down, or commission) within the 180 day period prior to the date of the takedown.

(D) Exemption From Filing: Notwithstanding subparagraphs (A) and (B) above, documents and information related to the following shelf offerings need not be filed with the Association for review, unless the shelf offering is subject to the provisions of Rule 2720. Shelf offerings of securities are exempt from the Rule’s filing requirements if the offering is:

(i) by a company that has been subject to the reporting requirements of Section 12 or 15(d) of the Act for at least 36 calendar months, and is current in its reporting obligations, if:

a. the company registers the offering with the Commission on registration statement Form S-3 and the aggregate market value of the company’s voting stock held by non-affiliates is at least \$150 million or, alternatively, at least \$100 million and the stock has had an annual trading volume of at least three million shares; or

b. the company registers the offering with the Commission on registration statement Form F-3 and the aggregate market value worldwide of the company’s voting stock held by non-affiliates is the equivalent of at least \$300 million; or

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(ii) registered with the Commission on Form F-10 by a foreign private issuer incorporated or organized under the laws of Canada or any Canadian province or territory and offered pursuant to Canadian reporting requirements for at least 36 calendar months, and is current in its reporting obligations, and the aggregate market value of the company's outstanding equity is at least (CN) \$75 million.

(10) and (11) renumbered (11) and (12).

(c) & (d) no change.

(e) Application of Rule to Shelf Offerings

(1) Shelf offerings filed under subparagraphs (b)(10)(A) and (B) are subject to subparagraph (c)(4) and subparagraph (c)(7), as follows:

(A) If a takedown occurs less than 15 business days following effectiveness of a shelf registration statement, the review period and lock-up restriction shall be based on the required filing date for the shelf offering under subparagraphs (b)(10)(A) above.

(B) If a takedown occurs 15 business days or more following effectiveness of a shelf registration statement, the review period and lock-up restriction shall be based on the earlier of the takedown or the commencement of sales.

(2) Compensation received by participating members shall include all items of value received and all arrangements entered into for the future receipt of an item of value, as required pursuant to subparagraph (c)(4) above, and shall not be unfair or unreasonable pursuant to paragraph (c) above.

(3) For purposes of determining the maximum amount of underwriting compensation that is considered fair and reasonable under subparagraph (c) (2), the discount or commission paid to members shall be:

(A) the amount calculated pursuant to the terms of an underwriting, equity line, or similar agreement that governs the transaction;

(B) in an agency transaction not governed by an agreement, the amount of the actual commission that is added to the sale price of the securities paid by investors;

(C) in a principal transaction not governed by an agreement, the difference between the purchase price of the securities off the shelf paid by members and either the:

(i) resale price of the security;

(ii) "prevailing market price" of the security in the principal market at the time of purchase, as calculated by reference to IM-2440, the Mark-Up Policy, and NASD Notice to Members 92-16 so long as the securities are not those of a thinly-traded issuer; or

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(iii) initial resale price of the security, so long as:

a. the purchase price of the takedown is of at least \$10 million but no more than \$50 million of securities and at least 50% of the securities are sold at the initial resale price or at lower prices; or

b. the purchase price of the takedown exceeds \$50 million of securities and at least 25% of the securities are sold at the initial resale price or at lower prices.

2720. Distribution of Securities of Members and Affiliates – Conflicts of Interest

(a) & (b) - No change

* * *

(c) Participation in Distribution of Securities of Member or Affiliate

(1) & (2) No Change

(3) If a member proposes to underwrite, participate as a member of the underwriting syndicate or selling group, or otherwise assist in the distribution of a public offering of its own or an affiliate's securities, or of securities of a company with which it or its associated persons, parent or affiliates have a conflict of interest, one or more of the following three criteria shall be met:

No Change

(B) the offering is of a class of equity securities for which a bona fide independent market exists as of the date of the filing of the registration statement and as of the effective date thereof; or

(C) the offering is of a class of securities rated ~~BAA or better by Moody's rating service or BBB or better by Standard & Poor's rating service or rated in a comparable category by another rating service acceptable to the Association~~ by a nationally recognized statistical rating organization in one of its four highest generic rating categories.

* * *

(m) Filing Requirements; Coordination with Rule 2710

(1) No change.

(2) All offerings of securities included within the scope of this Rule shall be subject to the provisions of Rule 2710, and documents and filing fees relating to such offerings shall be filed with the Association pursuant to the provisions of that Rule and Section 6 of Schedule A to the NASD By-Laws. The responsibility for filing the required documents and fees shall be that of the member issuing securities, or, in the case of an issue of an affiliate, the managing underwriter or, if there is none, the member affiliated with the issuer.

(3) No change.

* * *

2810. Direct Participation Programs

* * *

(c) Filing Requirements: Coordination with Rule 2710

All offerings of securities included within the scope of this Rule shall be subject to the provisions of Rule 2710, and documents and filing fees relating to such offerings shall be filed with the Association pursuant to the provisions of that Rule and Section 6 of Schedule A to the NASD By-Laws.

(c) is renumbered (d).

* * *

IM-2440. Mark-Up Policy

* * *

(c) Transactions to Which the Policy is Applicable

The Policy applies to all securities handled in the over-the counter market, whether oil royalties or any other security, in the following types of transactions:

* * *

(6) Transactions in which a member sells securities from an offering registered with the SEC pursuant to SEC Rule 415 that relies on the exemption from filing with the Association under Rule 2710(b)(10)(C) for Market Transactions.

(d) Transactions to Which the Policy is Not Applicable

The Mark-Up Policy is not applicable to the sale of securities where a prospectus or offering circular is required to be delivered and:

(1) the securities are sold at the specific public offering price; or

(2) the securities are registered pursuant to SEC Rule 415 and are subject to the compensation limitations of Rule 2710 or Rule 2810.

Schedule A to the NASD By-Laws

Assessments and fees pursuant to the provisions of Article VI of the By-Laws of the NASD shall be determined on the following basis.

* * *

Section 6 – Fees for Filing Documents Pursuant to the Corporate Financing Rule

(a) There shall be a fee imposed for the initial documents relating to any offering filed with the NASD pursuant to the Corporate Financing Rule equal to \$500 plus .01% of the proposed maximum aggregate offering price or other applicable value of all securities registered on an SEC registration statement or included on any other type of offering document (where not filed with the SEC), but shall not exceed \$30,500. The amount of filing fee may be rounded to the nearest dollar.

(b) There shall be an additional fee imposed for the filing of any amendment or other charge to the documents initially filed with the NASD pursuant to the Corporate Financing Rule equal to .01% of the net increase in the maximum aggregate offering price or other applicable value of all securities registered on an SEC registration statement, or any related Rule 462(b) registration statement, or reflected on any Rule 430A prospectus, or included on any other type of offering document. However, the aggregate of all filing fees paid in connection with as SEC registration statement or other type of offering document shall not exceed \$30,500.

(c) The fee imposed for a shelf offerings of securities filed with the NASD pursuant to pursuant to Rule 2710(b)(10)(A), shall be calculated pursuant to subsections (a) and (b) above.

(d) The fee imposed for shelf offering of securities filed with the NASD as a Notice Filing pursuant to Rule 2710(b)(10)(B), shall be equal to .01% of the maximum sales price of the maximum amount of securities that a member will offer to the public after each takedown off the shelf, but no member shall pay an excess of \$30,500 in connection with any takedown of securities. A member is not required to pay fees in amounts less than \$100 due under this section in connection with a Notice Filing.

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ATTACHMENT B

Request For Comment Checklist

We have provided below a checklist that members and other interested parties may use in addition to or in lieu of written comments. This checklist is intended to offer a convenient way to participate in the comment process, but does not cover all aspects of the proposal described in the *Notice*. We therefore encourage members and other interested parties to review the entire *Notice* and provide written comments, as necessary.

Instructions

Comments must be received by **October 15, 2001**. Members and interested parties can submit their comments using the following methods:

- mailing in this checklist
- e-mailing written comments to pubcom@nasd.com
- mailing in written comments
- submitting comments online at the NASDR Web Site (www.nasdr.com)

The checklist and/or written comments should be mailed to:

Barbara Z. Sweeney
Office of the Corporate Secretary
NASD Regulation, Inc.
1735 K Street, NW
Washington, DC 20006-1500

Proposed Amendments to Rule 2710 to Address Shelf Offerings of Securities

1. Should the NASD change the way shelf offerings are regulated under its current rules?

Yes No See my attached written comments

2. Do you believe that the new approach to regulate shelf offerings is consistent with the NASD's investor protection goal?

Yes No See my attached written comments

3. Should the requirements for the Market Transaction Exception be relaxed to permit members to sell more shelf-registered securities without making a filing?

Yes No See my attached written comments

4. We propose to permit members to make Notice Filings when a conflict of interest exists solely for offerings of investment grade rated debt securities. Should members be permitted to make

more filings subject to Rule 2720 (conflicts of interest rule) as Notice Filings?

Yes No See my attached written comments

5. Should the proposed definition of "thinly traded issuer," which impacts eligibility for Notice Filings and use of the "Prevailing Market Price Method" of calculating underwriting compensation, be revised to include fewer issuers?

Yes No See my attached written comments

6. Should a member receiving compensation greater than 8% but within the compensation table set forth in *NASD Notice to Members 92-53* for offerings of a particular size and type be subject to a Full Review rather than a Notice Filing?

Yes No See my attached written comments

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7. Are the compensation methodologies proposed sufficient to cover the various ways members sell shelf-registered securities?

Yes No See my attached written comments

8. Should the \$10 million threshold for using the “Bought Deal Method” of calculating underwriting compensation be lower?

Yes No See my attached written comments

9. Should a VWAP-based methodology for calculating underwriting compensation be included in this proposal?

Yes No See my attached written comments

10. Should the proposed methodology for calculating filing fees for Notice Filings be adopted?

Yes No See my attached written comments

11. Should members be required to disclose in the “Plan of Distribution” or “Underwriting” section of the Registration Statement the methodology relied on for calculating underwriting compensation under NASD rules?

Yes No See my attached written comments

Contact Information

Name: _____

Firm: _____

Address: _____

City: _____

State/Zip: _____

Phone: _____

E-Mail: _____

Are you:

An NASD Member

An Investor

A Registered Representative

Other: _____
