

Notice to Members

AUGUST 2006

SUGGESTED ROUTING

Advertising
Executive Representatives
Legal & Compliance
Registered Representatives
Senior Management

KEY TOPICS

Correspondence
Rule 2211

GUIDANCE

Correspondence

SEC Approves Amendments to NASD Rule 2211 to Require Principal Pre-Use Approval of Certain Member Correspondence Sent to 25 or More Existing Retail Customers within a 30 Calendar-Day Period;
Effective Date: December 1, 2006

Executive Summary

On July 26, 2006, the Securities and Exchange Commission (SEC) approved amendments to NASD Rule 2211, which governs NASD member institutional sales material and correspondence.¹ The amendments require a registered principal to approve correspondence sent to 25 or more existing retail customers within any 30 calendar-day period if the correspondence makes any financial or investment recommendation or otherwise promotes a product or service of the member.

The effective date of this rule change is December 1, 2006. Included with this *Notice* is Attachment A (text of rule amendments).

Questions/Further Information

Questions or comments concerning this *Notice* may be directed to Joseph P. Savage, Associate Vice President, Investment Companies Regulation, Regulatory Policy and Oversight (RPO), at (240) 386-4534; or Philip A. Shaikun, Associate Vice President and Associate General Counsel, Office of the General Counsel, RPO, at (202) 728-8451.

Background and Discussion

In 2003, the SEC approved as part of NASD's modernization of its advertising rules the creation of new Rule 2211, which included an amended definition of "correspondence." That definition of correspondence included any written letter or electronic mail message distributed by a firm to one or more of its existing retail customers and to fewer than 25 prospective retail customers within a 30 calendar-day period.² Previously, "correspondence" included any written or electronic communication prepared for delivery to a single current or prospective customer, and not for dissemination to multiple customers or the general public.

The definition of correspondence is significant in several respects. Firms generally are not required to have a registered principal approve correspondence prior to use, nor are they required to file correspondence with the NASD Advertising Regulation Department (Department). In addition, correspondence is subject to fewer content restrictions than advertisements and sales literature.

NASD found that some member correspondence to multiple existing customers raised the same regulatory concerns as member advertisements and sales literature, yet it was not required to be filed with NASD or approved by a principal prior to use. In contrast, had those types of form letters been sent to at least 25 *prospective* retail customers, such correspondence would have required both registered principal pre-use approval and filing with the Department. As a result, NASD believes it no longer should apply the principal pre-use approval requirement differently to non-clerical correspondence sent to prospective and existing retail customers.

The amendments to Rule 2211 approved by the SEC require registered principal pre-use approval of any correspondence sent to 25 or more existing retail customers within any 30 calendar-day period if the correspondence makes any financial or investment recommendation or otherwise promotes a product or service of the member. Registered principal pre-use approval will better ensure that this material complies with applicable standards of the advertising rules before reaching current or prospective customers. This correspondence need not be filed with the Department and is not subject to all of the content standards of the advertising rules. Of course, a firm may choose to file this correspondence with the Department to better ensure that it complies with applicable standards, particularly when the correspondence promotes the firm's products or services.

The registration required of a principal that approves correspondence prior to use pursuant to amended Rule 2211(b) is the same as the registration required for a principal that supervises correspondence under Rule 3010(d)(2). Accordingly, a member may opt to utilize a General Securities Sales Principal (formerly Series 8 and now Series 9/10) to perform this function.

This rule change becomes effective on December 1, 2006.

Endnotes

- 1 See SEC Rel. No. 34-54217 (July 26, 2006), 71 Fed. Reg. 43831 (Aug. 2, 2006) (File No. SR-NASD-2006-11).
- 2 NASD has clarified that, for purposes of its rules governing member communications with the public, NASD views instant messaging in the same manner in which it views traditional electronic mail messages. Accordingly, instant messaging may qualify as correspondence or sales literature, depending upon the facts and circumstances. See *Notice to Members 03-33* (July 2003).
- 3 NASD Rule 3010(d)(2) requires each member to develop written procedures that are appropriate to its business, size, structure, and customers for the review of incoming and outgoing correspondence with the public relating to its investment banking or securities business. Where such procedures do not require review of all correspondence prior to use or distribution, they must include provision for the education and training of associated persons as to the firm's procedures governing correspondence, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to.

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ATTACHMENT A

Text of Rule Change

New text is underlined; deletions are in brackets.

* * * *

2211. Institutional Sales Material and Correspondence

(a) No change.

(b) Approval and Recordkeeping

(1) Registered Principal Approval

(A) Correspondence. Correspondence need not be approved by a registered principal prior to use, [but] unless such correspondence is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes any financial or investment recommendation or otherwise promotes a product or service of the member. All correspondence is subject to the supervision and review requirements of Rule 3010(d).

(B) No change.

(2) No change.

(c) through (e) No change.