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June 27, 2002

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

Dear Ms. England:

Re: **File No. SR-NASD-99-60**
Restrictions on the Purchase and Sale of Initial Equity Public Offerings
Amendment No. 4

On March 19, 2001, NASD filed with the Securities and Exchange Commission ("SEC") Amendment No. 3 to proposed Rule 2790, Restrictions on the Purchase and Sale of Initial Equity Public Offerings. In response to questions and comments from SEC staff on Amendment No. 3, we are making several changes to the proposed rule. These changes are described below. Attached as Exhibit 1 is a revised version of the proposed rule change that reflects the changes from the version submitted in Amendment No. 2.

Portfolio Managers and the *De Minimis* Exemption

The SEC staff has asked NASD to address a comment by Mayor, Day, Caldwell & Keeton, L.L.P.¹ ("Mayor") that the 5% *de minimis* exemption for an account that is beneficially owned in part by restricted persons over-regulates certain purchasers, such as passive investors, and under-regulates investment activities by other purchasers, such as portfolio managers. As we have stated previously, the proposed rule change makes substantial changes to the way portfolio managers are treated under the Interpretation. Currently, under the Interpretation, portfolio managers are treated as "conditionally restricted" persons. Conditionally restricted persons may purchase hot issues if a member can demonstrate that the hot issue securities sold are done so in accordance with the conditionally restricted persons' normal investment practice, that the aggregate of the securities sold is insubstantial and not disproportionate in amount as compared to sales to members of the public and that the amount sold to any one of such persons is insubstantial in amount. We explained that as part of the proposed rule change, we have sought to eliminate the "conditionally restricted" status. This approach has had much support from commenters. In Amendment No. 2, NASD defined a portfolio manager as a

¹ Letter from Mayor, Day, Caldwell & Keeton, L.L.P. to Jonathan G. Katz ("Katz"), SEC, dated December 27, 2000.

restricted person except with respect to accounts for which it is acting as portfolio manager and has investment authority. This change responded to commenters to the original proposal, which proposed to treat portfolio managers as restricted without exception and only able to purchase hot issues under the 5% *de minimis* exemption.

Mayor noted that the approach proposed in Amendment No. 2 leaves portfolio managers, who are able to direct business to member firms, with an even greater opportunity to receive new issues in accounts they manage as compared to restricted persons that are passive investors in such funds. To address this comment, NASD is proposing modifications to the *de minimis* exemption and the treatment of portfolio managers. Specifically, NASD is increasing the percentage of a fund that may be owned by restricted persons under the *de minimis* exemption from 5% to 10%. This comports with earlier recommendations of several commenters.² NASD also is amending the proposed rule change to treat portfolio managers as restricted persons – even with respect to the accounts they manage. NASD notes, however, that portfolio managers will be able to purchase new issues under the new, higher, 10% *de minimis* exemption. Finally, in an effort to simplify application of the proposed rule change and to ensure that the *de minimis* exemption would allow portfolio managers to purchase new issues in the funds they manage, we have eliminated the 100 share limitation. We further note that eliminating the 100 share limitation will no longer require members to track the interest of the largest restricted person and to perform calculations to determine on an offering-by-offering basis whether that person would receive more than 100 shares on a pro rata basis.

Joint Back Office Broker/Dealers

The SEC staff has asked that NASD clarify the application of the proposed rule change to joint back office broker/dealers (“JBOs”). NASD staff previously granted an exemption from the current Interpretation for JBOs.³ In light of the restrictions on investment partnerships and investment corporations in paragraphs (f) and (g) of the Interpretation, the staff concluded that it was not necessary to treat a hedge fund that elected to be a broker/dealer for favorable margin treatment as a restricted person. In that letter, however, NASD staff did not provide any exemption for the associated persons of the broker/dealer.

In the proposed rule change, we continue to believe that the election by an investment fund to become a JBO should not by itself preclude the purchase of new issues by investors in that fund who are not otherwise restricted persons. Under the

² See Letter from Katten Muchin Zavis to Katz, SEC, dated Jan. 28, 2000; Letter from Cadwalader, Wickersham & Taft to Katz, SEC, dated Feb. 4, 2000; Letter from Ropes & Gray to Katz, SEC, dated Feb. 8, 2000; Letter from Testa, Hurwitz & Thibault, LLP, to Katz, SEC, dated Feb. 8, 2000; Letter from Sidley & Austin to Katz, SEC, dated Feb. 16, 2000; and Letter from Morgan Stanley Dean Witter to Katz, SEC, dated Mar. 17, 2000.

³ See Letter from Gary L. Goldsholle, NASD, to David Katz, Sidley & Austin, dated January 20, 1999.

proposed rule change, we have preserved the exemption for JBOs by amending proposed paragraph (c)(4). Specifically, paragraph (c)(4) treats JBOs the same as any other investment account and provides that a JBO may purchase new issues if the beneficial interests of restricted persons in the aggregate are less than 10%. We also have made a JBO a defined term, based upon the definition from the initial rule filing.

As noted above, the staff has not exempted associated persons of a JBO from the Interpretation. The current Interpretation and the proposed rule change provide an exception for associated persons and owners of a *limited business broker/dealer*, which is defined as a member firm authorized to engage solely in the purchase or sale of investment company/variable contracts securities and direct participation program securities.

As discussed in Amendment No. 2, NASD does not intend to expand the category of limited business broker/dealers. Accordingly, associated persons of a JBO will be restricted persons under paragraph (i)(11)(B) of proposed Rule 2790. The election to become a JBO bestows certain benefits on the fund, but it also imposes certain obligations, including restrictions on the ability of associated persons to purchase new issues.

Foreign Benefits Plans

The SEC staff has asked that we explain our position with respect to the treatment of foreign employee benefits plans under proposed Rule 2790. As currently proposed, Rule 2790 exempts ERISA plans qualified under Section 401(a) of the Internal Revenue Code, provided that such plans are not sponsored by a broker/dealer. In particular, the staff notes that Capital International, Inc.⁴ recommended an exemption for foreign employee benefits plans. In Amendment No. 3, we stated our concerns with a blanket exemption for foreign benefits plans because of the wide range of regulation governing employee benefits plans of various jurisdictions. Since that submission, the staff has granted an exemption to a foreign benefits plan.⁵ In addition, a foreign benefits plan would be able to purchase new issues if it could satisfy the *de minimis* exemption.

We remain hesitant to adopt a blanket exemption for foreign benefits plans because we are not familiar with the benefit laws in all foreign jurisdictions. In some cases, foreign laws may permit benefit plans to allocate new issues only to certain plan participants, may provide for unequal distribution of profits from new issues, or may benefit a very narrow category of restricted persons. It also may be possible for a foreign benefits plan to be constructed as a means to circumvent the rule, e.g., a benefits plan for

⁴ Letter from Capital International, Inc. to Katz, SEC, dated December 22, 2000.

⁵ In a letter dated May 9, 2001, the staff granted an exemption to a pension fund on behalf of an agency of the Province of Quebec, Canada. See Letter from Philip Shaikun, NASD, to Ernest Lorimer, Finn Dixon and Herling LLP, dated May 9, 2001.

a “shell” corporation that consists entirely or principally of restricted persons. As the staff becomes more familiar with various types of foreign investment plans, we may consider issuing additional guidance in this area.

Publicly Traded Entity Exception

The proposed rule change creates an exemption to allow sales of a new issue to certain publicly traded entities, other than a broker/dealer. The publicly traded entity exemption recognizes the practical limitations in identifying each of the beneficial owners of a publicly traded entity and that the benefits of investments in new issue securities are, indirectly, shared by the public shareholders.⁶ In proposing a publicly traded entity exemption, however, NASD also stated that “broker/dealers, even publicly traded broker/dealers, should not purchase or withhold IPOs.”⁷ When originally proposed, the exemption for publicly traded entities included a provision that the profits and losses from new issues of a publicly traded entity be passed on to its public shareholders. The provision was eliminated in Amendment No. 3.

NASD is concerned that, as drafted, the exclusion for publicly traded entities may be inconsistent with the purposes of the proposed rule change. Many broker/dealers are part of a publicly traded holding company structure (*e.g.*, Merrill Lynch & Co., Inc., Goldman Sachs Group, Lehman Brothers Holdings, Inc.). Thus, the proposed rule change could be construed to permit a holding company parent of a broker/dealer to purchase new issues. While Rule 2750 (Transactions with Related Persons) would prohibit a holding company parent from purchasing new issues from its downstream affiliate, the holding company parent could nevertheless seek to purchase new issues from other broker/dealers, potentially as part of a reciprocal arrangement. Such a result was never intended and, we believe, plainly inconsistent with the purposes of the proposed rule change and the proposed public entity exemption.

We are also reconsidering whether it is appropriate to allow new issues to be sold to or purchased by the various financial services holding companies that have broker/dealer affiliates (*e.g.*, Citigroup, Inc., Bank America Corp.). Though some benefit would go to public shareholders of these entities, we do not believe that revising the rule to permit these types of entities to purchase new issues is consistent with the purposes of the rule. As noted above, the public entity exception was originally proposed to address some of the practical concerns in identifying the shareholders of a publicly traded company.

Accordingly, a general exemption for publicly traded entities of the type outlined in Amendment No. 3 appears too broad. We propose to revise the public entity exemption to apply only to publicly traded entities that are not affiliated with a

⁶ See also Letter from Gary Goldsholle, NASD, to Brian Daughney, Goldstein & DiGioia, LLP, dated April 15, 2002.

⁷ 65 Fed. Reg. at 76324 n.16.

broker/dealer authorized to engage in the public offering of “new issues.” An affiliate for purposes of this provision shall have the same meaning as in Rules 2710 and 2720. We believe that looking to whether a broker/dealer is authorized to engage in public offerings⁸ excludes from the public company exemption the “full service” broker/dealers and their parent companies that the rule is plainly designed to reach. On the other hand, the proposed rule change will allow purchases of new issues by the many publicly traded companies that have broker/dealer affiliates for limited corporate purposes. We recognize that looking into whether a broker/dealer affiliate engages in offerings of new issues is one of many possible tests for determining the scope of the public entity exception. We also have considered looking at the percent of profits or revenues a holding or parent company derives from broker/dealer activities, but concluded that such information is often difficult to determine and frequently varies from year to year.

Carve-outs

In the proposed rule change, as with the current Interpretation, NASD has allowed accounts that wish to purchase new issues to segregate the interests of restricted persons from non-restricted persons. Prior to 1992, NASD prohibited sales of hot issues to any fund that contained a restricted person. In August 1992, NASD established certain “carve-out” procedures whereby an investment fund could segregate the interests of restricted persons and ensure that hot issues purchased by the fund did not benefit restricted persons.⁹ This position also was discussed in an October 1993 Notice to Members,¹⁰ and was codified in amendments to paragraph (g) of the Interpretation in 1994.¹¹ Paragraph (g) of the Interpretation contains specific steps that must be followed to use a “carve-out” account. These procedures include the creation of a “separate brokerage account” and written confirmations, representations and certifications from accountants and/or attorneys.

In the proposed rule change, NASD has eliminated the specific “carve-out” procedures while retaining the flexibility for purchasers to segregate the interests of restricted persons from new issue allocations. In administering the procedures in the current Interpretation, NASD staff has recognized that accounts may employ a variety of methods to carve out the interests of restricted persons and that specifying a particular

⁸ Under NASD member admission rules, a broker/dealer that seeks authority to engage in public offerings must make that part of its membership application. If an existing NASD member that is not authorized to engage in public offerings seeks to do so in the future, such member must make an application under NASD Rule 1017. NASD intends to look to whether a firm is authorized to engage in public offerings of new issues; the information on Form BD may help firms identify those firms that are authorized to engage in public offerings, but the information on a Form BD will not be conclusive since Item 12 does not require an activity to be reported if it is less than 1% of annual revenue.

⁹ NASD Notice to Members “For Your Information” (August 1992) p. 329.

¹⁰ NASD Notice to Members “For Your Information” (October 1993) p. 447.

¹¹ Exchange Act Rel. 35059, 59 Fed. Reg. 64455 (Dec 14, 1994).

method has excluded other equally effective methods. In the proposed rule change, NASD does not intend to prescribe a particular manner for carving out the interests of restricted persons. If NASD determines in the future that additional guidance is needed in this area, it may issue guidance in a Notice to Members.

Owners of Broker/Dealers: Persons Listed on Schedule B of Form BD

Fried, Frank, Harris, Shriver & Jacobson (“Fried”) has commented that all persons listed on Schedule B of Form BD are treated as restricted persons even though some such persons might have only a very small economic interest in the broker/dealer.¹² While some persons listed on Schedule B may have small interests in the broker/dealer, we anticipate that many indirect owners listed on Schedule B will have significant ownership interests. At the first level, each person listed on Schedule B will have at least a 25% ownership interest in the person listed on Schedule A of Form BD. As previously noted, NASD is seeking to aid firms’ compliance efforts by eliminating the need to perform calculations to determine a person’s “ownership interest.” In NASD’s experience, such calculations are often difficult and frequently raise interpretive issues with various classes of ownership and ownership structures. NASD deliberately sought to eliminate that level of complexity of the rule by referencing persons listed on Schedules A and B. There are no special codes or identifiers on Schedule B to identify persons with only a very small economic interest. Finally, the persons listed on Schedule B are included in the information provided to the SEC in connection with a broker/dealer firm’s application.

Closed-End Funds

Charles Schwab¹³ (“Schwab”) believes that the definition of new issue should exclude closed end-funds that invest solely in debt securities. Schwab reasons that if the definition of new issues excludes debt offerings, then a fund that invests solely in debt securities also should be excluded from the scope of the rule. Schwab adds that the trading characteristics of the closed-end fund will be similar to those of its underlying debt instruments. NASD believes that the exclusion from the definition of new issue in paragraph (i)(9)(H) for “offerings of an investment company registered under the Investment Act of 1940” should address Schwab’s concerns about closed-end funds.

Miscellaneous

We also have made several “editorial” changes to the proposed rule change that are designed to clarify the rule. The phrase “selling group” replaces “syndicate” in paragraph (a)(4)(A). Whether a broker/dealer has made a financial commitment to purchase the securities in an IPO is not relevant for purposes of paragraph (a)(4) and,

¹² Letter from Fried to Katz, SEC, dated December 22, 2000.

¹³ Letter from Charles Schwab to Katz, SEC, dated February 15, 2000.

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thus, we have used the more expansive term. We note that the definition of selling group is in NASD Rule 0120(g).

We also have made some non-substantive changes to the issuer-directed securities provisions to reflect the fact that issuer-directed securities are not by themselves subject to the proposed rule change. Issuer-directed securities trigger application of the proposed rule when a sale is made to a restricted person. The proposed rule change exempts sales to and purchases by most restricted persons; however, the proposed rule change applies to issuer-directed securities to broker/dealer personnel and finders except where such persons, or members of their immediate family, are employees or directors of the issuer, the issuer's parent, or a subsidiary of the issuer or the issuer's parent.

For purposes of clarity, we also have exempted a "family investment vehicle" and "investment club" from the definition of "collective investment account." As a result of this change, we have simplified the category of restricted persons in paragraph (i)(11)(D) (Portfolio Managers), and eliminated the separate exclusion for persons who have investment authority over an investment club or a family investment vehicle.

We hope that the foregoing fully responds to SEC staff's questions. If the staff has any additional questions, please contact me at (202) 728-8104.

Very truly yours,

Gary L. Goldsholle

Changes from Amendment 2 to Amendment 4. New text is underlined; deleted text is in brackets.

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

(a) General Prohibitions

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

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

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

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

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

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

(b) Preconditions for Sale

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

(1) Beneficial Owners

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

(2) Conduits

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

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

(c) General Exemptions

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

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

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

(A) the fund has investments from 1,000 or more [trust] accounts; and

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

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

(A) the account has investments from 1,000 or more policyholders; and

(B) the insurance company does not limit beneficial interests in the account principally to restricted persons;

(4) An account or joint back office broker/dealer (“JBO”) if the beneficial interests of restricted persons do not exceed in the aggregate 10% of such account or JBO [that is beneficially owned in part by restricted persons, provided that such restricted persons in the aggregate own less than 5% of such account, and that:

(A) each such restricted person does not manage or otherwise direct investments in the account; and

(B) on a pro rata basis, each such restricted person who is a natural person receives less than 100 shares of any new issue];

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

(A) is listed on a national securities exchange; [or]

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

(C) is a foreign issuer whose securities meet the quantitative designation criteria for listing on a national securities exchange or trading on the Nasdaq National Market; [, provided that the gains or losses from new issues are passed on directly or indirectly to public shareholders;]

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

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

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

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

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

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

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

(d) Issuer-Directed Securities

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

(1) are specifically directed by the issuer to persons that are restricted under the rule; provided, however, that [this exemption shall not apply to] securities directed by [the issuer to]an issuer may not be sold to or purchased by an account in which any restricted person specified in subparagraphs [(i)(10)(B) or (i)(10)(C)](i)(11)(B) or (i)(11)(C) of this rule has a beneficial interest, unless such person, or a member of his or her immediate family, is an employee or director of the issuer, the issuer's parent, or a

subsidiary of the issuer or the issuer's parent. Also, for purposes of this [sub]paragraph (d)(1) only, a parent/subsidiary relationship is established if the parent has the right to vote 50% or more of a class of voting security of the subsidiary, or has the power to sell or direct 50% or more of a class of voting [securities] security of the subsidiary;

(2) are part of a program sponsored by the issuer or an affiliate of the issuer that meets the following criteria:

(a) the opportunity to purchase a new issue under the program is offered to at least 10,000 participants;

(b) every participant is offered an opportunity to purchase an equivalent number of shares, or will receive a specified number of shares under a predetermined formula applied uniformly across all participants;

(c) if not all participants receive shares under the program, the selection of the participants eligible to purchase shares is based upon a random or other non-discretionary allocation method; and

(d) the class of participants does not contain a disproportionate number of restricted persons as compared to the investing public generally; [and

(e) sales are not made to participants who are managing underwriter(s), the broker/dealer administering the program ("Administering Broker/Dealer"), the officers or directors of the managing underwriter(s) or Administering Broker/Dealer, or any employee of the managing underwriter(s) or Administering Broker/Dealer with access to non-publicly available information about the new issue;] or

(3) are directed to eligible purchasers who are otherwise restricted under the rule as part of a conversion offering in accordance with the standards of the governmental agency or instrumentality having authority to regulate such conversion offering.

(e) Anti-Dilution Provisions

The prohibitions on the purchase and sale of new issues in this rule shall not apply to an account in which a restricted person has a beneficial interest that meets the following conditions:

(1) the [restricted person] account has held an equity ownership interest in the issuer, or a company that has been acquired by the issuer in the past year, for a period of one year prior to the effective date of the offering;

(2) the sale of the new issue to the account shall not increase the [restricted person's] account's percentage equity ownership in the issuer above the ownership level as of three months prior to the filing of the registration statement in connection with the offering;

(3) the sale of the new issue to the account shall not include any special terms;
and

(4) the new issue purchased pursuant to this [sub]paragraph (e) shall not be sold, transferred, assigned, pledged or hypothecated for a period of three months following the effective date of the offering.

(f) Stand-by Purchasers

The prohibitions on the purchase and sale of new issues in this rule shall not apply to the purchase and sale of securities pursuant to a stand-by agreement that meets the following conditions:

- (1) the stand-by agreement is disclosed in the prospectus;
- (2) the stand-by agreement is the subject of a formal written agreement;
- (3) the managing underwriter(s) represents in writing that it was unable to find any other purchasers for the securities; and
- (4) the securities sold pursuant to the stand-by agreement shall not be sold, transferred, assigned, pledged or hypothecated for a period of three months following the effective date of the offering.

(g) Under-Subscribed Offerings

Nothing in this rule shall prohibit an underwriter, pursuant to an underwriting agreement, from placing a portion of a public offering in its investment account when it is unable to sell that portion to the public.

(h) Exemptive Relief

Pursuant to the Rule 9600 series, the staff, for good cause shown after taking into consideration all relevant factors, may conditionally or unconditionally exempt any person, security or transaction (or any class or classes of persons, securities or transactions) from this rule to the extent that such exemption is consistent with the purposes of the rule, the protection of investors, and the public interest.

(i) Definitions

(1) “Beneficial interest” means any economic interest, such as the right to share in gains or losses. The receipt of a management or performance based fee for operating a collective investment account, or other fees for acting in a fiduciary capacity, shall not be considered a beneficial interest in the account.

(2) “Collective investment account” means any hedge fund, investment partnership, investment corporation, or any other collective investment vehicle that is engaged primarily in the purchase and/or sale of securities. A “collective investment account” does not include a “family investment vehicle” or an “investment club.”[.]

(3) “Conversion offering” means any offering of securities made as part of a plan by which a savings and loan association, insurance company, or other organization converts from a mutual to a stock form of ownership.

(4) “Family [partnership] means a partnership comprised solely of] investment vehicle” means a legal entity that is beneficially owned solely by immediate family members.

(5) “Immediate family member” means a person’s parents, mother-in-law or father-in-law, spouse, brother or sister, brother-in-law or sister-in-law, son-in-law or daughter-in-law, and children, and any other individual to whom the person provides material support.

(6) “Investment club” means a group of friends, neighbors, business associates, or others that pool their money to invest in stock or other securities and are collectively responsible for making investment decisions.

(7) “Joint Back Office Broker/Dealer” means any domestic or foreign private investment fund that has elected to register as a broker/dealer solely to take advantage of the margin treatment afforded under Section 220.7 of Regulation T of the Federal Reserve. The activities of a joint back office broker/dealer must not require that it register as a broker/dealer under Section 15(a) of the Act.

(8) “Limited business broker/dealer” means any broker/dealer whose authorization to engage in the securities business is limited solely to the purchase and sale of investment company/variable contracts securities and direct participation program securities.

~~[(8)]~~(9) “Material support” means directly or indirectly providing more than 25% of a person’s income in the [current or] prior calendar year. Members of the immediate family living in the same household are deemed to be providing each other with material support.

~~[(9)]~~(10) “New issue” means any initial public offering of an equity security as defined in Section 3(a)(11) of the Act, made pursuant to a registration statement or offering circular[, or other securities distributions of any kind whatsoever, including securities that are specifically directed by the issuer on a non-underwritten basis]. New issue shall not include:

(A) offerings made pursuant to an exemption under Section 4(1), 4(2) or 4(6) of the Securities Act of 1933, or SEC Rule 504 if the securities are “restricted securities” under SEC Rule 144(a)(3), or Rule 144A or Rule 505 or Rule 506 adopted thereunder;

(B) offerings of exempted securities as defined in Section 3(a)(12) of the Act, and rules promulgated thereunder;

(C) offerings of securities of a commodity pool operated by a commodity pool operator as defined under Section 1a(5) of the Commodity Exchange Act;

(D) rights offerings, exchange offers, or offerings made pursuant to a merger or acquisition;

~~[(D)](E)~~ offerings of investment grade asset-backed securities;

~~[(E)](F)~~ offerings of convertible securities;

~~[(F)](G)~~ offerings of preferred securities; and

~~[(G)](H)~~ offerings of [securities of closed-end companies as defined under

Section (5)(a)(2) of] an investment company registered under the Investment Company Act of 1940.

~~[(10)](11)~~ “Restricted person” means:

(A) Members or other broker/dealers;

(B) Broker/Dealer Personnel

(i) Any officer, director, general partner, associated person, or employee of a member or any other broker/dealer (other than a limited business broker/dealer); [, or any]

(ii) Any agent of a member or any other broker/dealer (other than a limited business broker/dealer) that is engaged in the investment banking or securities business; or

~~[(ii)](iii)~~ An immediate family member of a person specified in subparagraph (B)(i) or (ii) if the person specified in subparagraph (B)(i) or (ii):

(a) materially supports, or receives material support from, the immediate family member;

(b) is employed by or associated with the member, or an affiliate of the member, selling the new issue to the immediate family member; or

(c) has an ability to control the allocation of the new issue.

(C) Finders and Fiduciaries

(i) With respect to the security being offered, a finder or any person acting in a fiduciary capacity to the managing underwriter, including, but not limited to, attorneys, accountants and financial consultants; and

(ii) An immediate family member of a person specified in subparagraph (C)(i) if the person specified in subparagraph (C)(i) materially supports, or receives material support from, the immediate family member.

(D) Portfolio Managers

(i) Any person who has authority to buy or sell securities for a bank, savings and loan institution, insurance company, investment company, investment advisor, or collective investment account[, other than with respect to a beneficial interest in the bank, savings and loan institution, insurance company, investment company, investment advisor, or collective investment account over which such person has investment authority;].

(ii) An immediate family member of a person specified in subparagraph (D)(i) that materially supports, or receives material support from, such person [is materially supported by such person, other than with respect to a beneficial interest in the bank, savings and loan institution, insurance company, investment company, investment advisor, or

collective investment account over which such person has investment authority.

Provided, however, that the term “restricted person” under this subparagraph (D) shall not include a person solely because he or she is a participant in an investment club or a family partnership].

(E) Persons Owning a Broker/Dealer

(i) Any person listed, or required to be listed, in Schedule A of a Form BD (other than with respect to a limited business broker/dealer), except persons [with] identified by an ownership [interests] code of less than 10%;

(ii) [any] Any person listed, or required to be listed, in Schedule B of a Form BD (other than with respect to a limited business broker/dealer), except persons whose listing on Schedule B relates to an ownership interest in a person listed on Schedule A [with] identified by an ownership [interest] code of less than 10%;

(iii) [any] Any person listed, or required to be listed, in Schedule C of a Form BD that meets the criteria of subparagraphs (E)(i) and (E)(ii) above;

(iv) [any] Any person that directly or indirectly owns 10% or more of a public reporting company listed [on], or required to be listed, in Schedule A of a Form BD (other than a reporting company that is listed on a national securities exchange or is traded on the Nasdaq National Market, [provided that the gains or losses from new issues are passed on directly or

indirectly to public shareholders);] or other than with respect to a limited business broker/dealer);

(v) Any person that directly or indirectly owns 25% or more of a public reporting company listed [on], or required to be listed, in Schedule B of a Form BD (other than a reporting company that is listed on a national securities exchange or is traded on the Nasdaq National Market, [provided that the gains or losses from new issues are passed on directly or indirectly to public shareholders)] or other than with respect to a limited business broker/dealer).

(vi) An immediate family member of a person specified in subparagraphs (E)(i)-(v) unless the person owning the broker/dealer:

(a) does not materially support, or receive material support from, the immediate family member;

(b) is not an owner of the member, or an affiliate of the member, selling the new issue to the immediate family member;
and

(c) has no ability to control the allocation of the new issue.