

OMB APPROVAL

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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. SR - 2004 - 043
Amendment No. 2

Proposed Rule Change by National Association of Securities Dealers
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial <input type="checkbox"/>	Amendment <input checked="" type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) <input checked="" type="checkbox"/>	Section 19(b)(3)(A) <input type="checkbox"/>	Section 19(b)(3)(B) <input type="checkbox"/>
			Rule		
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action <input type="checkbox"/>	Date Expires <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1) <input type="checkbox"/> 19b-4(f)(2) <input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(4) <input type="checkbox"/> 19b-4(f)(5) <input type="checkbox"/> 19b-4(f)(6)	

Exhibit 2 Sent As Paper Document
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Exhibit 3 Sent As Paper Document
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Description

Provide a brief description of the proposed rule change (limit 250 characters).

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name Last Name
Title
E-mail
Telephone Fax

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date

By
(Name)

(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

PATRICE GLINIECKI,

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

Form 19b-4 Information

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

Add

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

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Exhibit 3 - Form, Report, or Questionnaire

Add

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

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Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”), the National Association of Securities Dealers, Inc. (“NASD”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) Amendment No. 2 to SR-NASD-2004-043, which proposed a rule change to NASD Rules 2210 and 2211 to require mutual fund communications with the public that provide performance data to disclose the fund’s fees, expenses and standardized performance. These new requirements would improve investor awareness of the costs of buying and owning a mutual fund, facilitate comparisons of funds, and make presentation of standardized performance more prominent. Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

2210. Communications With the Public

(a) through (c) No change.

(d) Content Standards

(1) through (2) No change.

(3) Disclosure of Fees, Expenses and Standardized Performance

(A) Communications with the public, other than institutional sales material and public appearances, that present non-money market fund open-end management investment company performance data as permitted by Rule 482 under the Securities Act of 1933 and Rule 34b-1 under the Investment Company Act of 1940 must disclose:

(i) the standardized performance information mandated by Rule 482 and Rule 34b-1; and

(ii) to the extent applicable:

(a) the maximum sales charge imposed on purchases or the maximum deferred sales charge, as stated in the investment company's prospectus current as of the date of submission of an advertisement for publication, or as of the date of distribution of other communications with the public; and

(b) annual fund operating expenses, as stated in the investment company's prospectus described in subparagraph (a).

(B) All of the information required by paragraph (A) must be set forth:

(i) clearly and prominently, and standardized performance information must be in a type size that is at least as large as that used to present any nonstandardized performance;

(ii) with respect to any radio, television or video advertisement, with equal emphasis to that given to any nonstandardized performance; and

(iii) in any print advertisement, in a prominent text box that contains only the required information and, at the member's option, comparative performance and fee data.

(e) No change.

* * * * *

2211. Institutional Sales Material and Correspondence

(a) through (c) No change.

(d) Content Standards Applicable to Institutional Sales Material and Correspondence

(1) All institutional sales material and correspondence are subject to the content standards of Rule 2210(d)(1) and the applicable Interpretive Materials under Rule 2210, and all correspondence is subject to the content standards of paragraph (d)(3).

(2) through (3) No change.

* * * * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by the Board of Directors of NASD Regulation, Inc. at its meeting on November 13, 2003, which authorized the issuance of a Notice to Members and the filing of the proposed rule change with the SEC. Counsel for The Nasdaq Stock Market and NASD Dispute Resolution have been provided an opportunity to consult with respect to the proposed rule change, pursuant to the Plan of Allocation and Delegation of Functions by NASD to its Subsidiaries. The Board of Governors of NASD had an opportunity to review the proposed rule change at its meeting on November 14, 2003. No other action by NASD is necessary for the filing of the proposed rule change. Section 1(a)(ii) of Article VII of the NASD By-Laws permits

the Board of Governors of NASD to adopt amendments to NASD Rules without recourse to the membership for approval.

NASD will announce the effective date of the proposed rule change in a Notice to Members to be published no later than 60 days following Commission approval. The effective date will be six months after the next calendar quarter end following publication of the Notice to Members announcing Commission approval.

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

(i) Background

The proposed rule change would amend NASD Rules 2210 and 2211 to require member communications with the public, other than institutional sales material and public appearances, that present mutual fund performance information (“performance sales material”) to disclose the fund’s fees, expenses and standardized performance. These new requirements would improve investor awareness of the costs of buying and owning a mutual fund, facilitate comparison of funds and make the presentation of standardized performance more prominent. The proposed rule change would require that:

- Performance sales material disclose:
 - the standardized performance information mandated by Rule 482 under the Securities Act of 1933 and Rule 34b-1 under the Investment Company Act of 1940;
 - to the extent applicable, the maximum front-end and deferred sales charges stated in the fund’s current prospectus; and

- the fund's annual operating expenses measured as a percentage of net assets and stated in the fund's current prospectus.
- All required performance information and fee disclosures be set forth:
 - Clearly and prominently, and standardized performance information be in a type size at least as large as that used for any non-standardized performance information;
 - With respect to any radio, television or video advertisement, with equal emphasis to that given to any non-standardized performance information; and
 - In any advertisement (other than radio, television or video advertisements) in a prominent text box that contains only the required information.

The Commission received four comment letters in response to the Federal Register publication of SR-NASD-2004-043.¹ Commenters' concerns with the proposal fell into three principal categories. First, commenters either opposed the text box requirement in its entirety, or believed strongly that, to be workable, NASD needed to modify the proposal to allow greater flexibility when text box performance is shown through electronic media, such as web sites. Second, some commenters argued that ongoing fees should be shown net of fee waivers and expense reimbursements. Finally, commenters urged NASD to provide members with ample time to comply with any new rules that may be approved, and to allow the use of templates when filing revised sales material. We discuss and respond to each of these comments below.

¹ Letter from Fidelity Investments ("Fidelity") (Oct. 12, 2004); Letter from the Investment Company Institute ("ICI") (Sept. 17, 2004); Letter from the Securities Industry Association ("SIA") (Sept. 17, 2004); and Letter from The Vanguard Group ("Vanguard") (Sept. 17, 2004). NASD also separately received a letter from T. Rowe Price Associates, Inc. ("T. Rowe Price") (Dec. 6, 2004) on the proposal.

(ii) Text Box Requirement and Web Sites

Commenters objected that the text box requirement is unduly restrictive and impedes the effectiveness of member communications. Commenters also stated that this requirement would make advertising the performance of multiple funds extremely difficult, if not impossible, because the requirement would preclude the use of a spreadsheet format due to the need to have a separate page dedicated to each fund's performance.² The SIA also argued that as a general matter, more disclosure would confuse, rather than enlighten, investors.

Commenters particularly objected to applying the text box requirement to web sites, arguing that the requirement fails to acknowledge how individuals typically read and navigate web sites and retrieve information (such as through the use of hyperlinks).³ Vanguard noted that the text box and other prominence requirements would result in web sites that are cluttered, use small font sizes, and are difficult to navigate, all of which run contrary to established principles for effective web site design.

Commenters also stated that the prohibition against including any non-required information in the text box could result in poorly designed and repetitive fund advertisements. For example, an advertisement that compares a fund's performance against a benchmark index could not include the index performance in the text box, and thus might have to show the fund's performance again outside the text box in order to make an effective comparison.⁴

² Fidelity, ICI.

³ ICI, Vanguard.

⁴ ICI, T. Rowe Price.

Fidelity and the ICI recommended as an alternative to the text box a requirement that a fund's expense ratio be disclosed in the same manner in which a fund's maximum sales charge is required to be disclosed under SEC Rule 482. Fidelity, the ICI and Vanguard also strongly urged NASD to modify the proposal to allow the use of hyperlinks to show standardized performance when also showing non-standardized performance.

NASD is sensitive to concerns that the text box requirement could impede the presentation of performance information through electronic media, such as web sites. NASD also wishes to avoid inefficient or repetitive marketing material and therefore agrees that comparative performance and fee data should be permitted in the text box.

Accordingly, NASD is amending the prominence requirements (proposed Rule 2210(d)(3)(B)) to apply the text box rule only to print advertisements and to permit the inclusion of other pertinent comparative data in the text box, as follows (new text is underlined and deletions are bracketed):

- (B) All of the information required by paragraph (A) must be set forth:
 - (i) clearly and prominently, and standardized performance information must be in a type size that is at least as large as that used to present any non-standardized performance;
 - (ii) with respect to any radio, television or video advertisement, with equal emphasis to that given to any non-standardized performance; and
 - (iii) in any print advertisement [other than a radio, television or video advertisement], in a prominent text box that contains only the

required information and, at the member's option, comparative performance and fee data.

Thus, web sites and other electronic advertisements would not have to present the required performance and fee information within a text box. And in those print advertisements where the text box still would be required, members would be allowed to present comparative performance and fee data (e.g., non-standardized fund performance, the performance of a relevant benchmark index, or a comparison of the fund's expense ratio to the average expense ratio for similar funds).

The text box still would be required to present required information clearly and prominently, all required disclosures would have to be given equal emphasis as any non-standardized performance, and standardized performance would have to be presented in a type size as least as large as that used to present non-standardized performance.

NASD believes that, with these changes, the proposed rule will be consistent with the prominence requirements of SEC Rule 482. For example, the "equal emphasis" standard for radio, television and video advertisements of proposed Rule 2210(d)(3)(B)(ii) is the same standard used in SEC Rule 482(b)(5) for radio and television advertisements.

NASD also has reconsidered the use of hyperlinks to show standardized performance information. Given that NASD no longer would require web sites to present required disclosures in a text box, we think it also would be appropriate to permit members under certain circumstances to present standardized performance and other required disclosures through the use of a hyperlink, provided that the required disclosures are clear, prominent and consistent with the standards of SEC Rule 482.

(iii) Calculation of Expense Ratio

The rule proposal would require performance sales material to show a fund's annual operating expenses as derived from the fund's most recent fund prospectus, which would mean that the expense ratio could not be shown net of fee waivers and reimbursements. Fidelity and the ICI commented that the proposal should be modified to allow member firms to disclose a fund's current expense ratio net of fee waivers and reimbursements in lieu of the expense ratio derived from the fund's most recent prospectus. The commenters argued that, since performance information may be presented with the effect of subsidization, as long as the fact of this subsidization is disclosed, a fund should be allowed to show its expense ratio net of fee waivers and reimbursements.⁵

Vanguard disagreed, arguing that expense ratios should be calculated in accordance with Item 3 of Form N-1A – that is, without taking into account fee waivers and reimbursements. Although Vanguard acknowledges that shareholder reports may show subsidized expense ratios, it notes that shareholder reports are directed to current shareholders, whereas prospectuses and advertisements are directed to prospective investors. Because prospective investors should base their decisions on the long-term costs of a fund rather than its current costs that may include subsidization, Vanguard believes that expense ratios that appear in fund sales material should reflect the fund's expenses without regard to fee waivers.

⁵ Although the proposal would permit member firms also to show the expense ratio net of fee waivers and reimbursements, this information would have to appear outside the required text box for print advertisements and would be in addition to the required expense ratio that is derived from the fund's prospectus.

NASD generally agrees that fund advertisements, like prospectuses, are directed to prospective investors, and thus any required expense ratio disclosure should not reflect fee waivers or reimbursements. Accordingly, NASD does not believe it appropriate to revise the proposal as recommended by Fidelity and the ICI. The proposal would not preclude performance sales material from also presenting a fund's expense ratio net of fee waivers and reimbursements, as long as the sales material also presents the unsubsidized expense ratio, and the member presents the subsidized expense ratio in a fair and balanced manner in accordance with the standards of Rule 2210.

(iv) Compliance Lead Time and the Use of Templates

The original rule filing indicated that NASD would publish a Notice to Members announcing Commission approval of the proposal within 60 days after such approval, and that the proposal would become effective 30 days after publication of the Notice. Fidelity, the ICI and Vanguard all urged NASD to allow for ample lead-time to comply with the proposal's new requirements should the SEC approve it. The ICI and Fidelity recommend that compliance with the proposal not be required until after the second full calendar quarter end following SEC approval of the final rule change. Vanguard recommended that firms be given at least 6 months, and preferably 9 to 12 months, following SEC approval to comply with the rule change.

Fidelity and the ICI also requested that NASD allow member firms to file templates to show how substantially similar performance sales material will be revised to comply with the new standards. These commenters note that allowing templates to be filed will reduce compliance and filing costs for member firms while allowing the NASD

staff to identify and address any regulatory concerns with the format and content of performance sales material.

NASD agrees that, should the SEC approve the proposed rule change, member firms will require sufficient lead-time to bring their performance sales material into compliance with the new standards. NASD further agrees that six months is a reasonable period of time to achieve that compliance and that timing this compliance date based on a calendar quarter end would be appropriate.

Accordingly, notwithstanding the effective date indicated in the original proposed rule change, NASD hereby amends the effective date as follows. Should the Commission approve the proposal, NASD will publish a Notice to Members announcing Commission approval within 60 days thereafter. The proposal will become effective six months following the calendar quarter ended after publication of the Notice.

NASD also agrees that the filing of templates may be appropriate under certain circumstances to show how similar performance sales material will be revised to comply with the new standards. NASD will permit the filing of templates on a case-by-case basis to show compliance with the new rule requirements.

(b) Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. NASD believes that the proposed rule change will enhance investor protection by making more

transparent the true costs of purchasing and owning a mutual fund and providing useful information on which to base investment decisions.

4. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change will not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Commission received four comment letters on the proposal. NASD's response to these comments is discussed in Item 3 above.

6. Extension of Time Period for Commission Action

NASD does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 4. Revised full text of the rule change marked to show additions to and deletions from rule text proposed in the immediately preceding rule filing.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- ; File No. SR-NASD-2004-043)
SELF-REGULATORY ORGANIZATIONS

Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Disclosure of Fees and Expenses in Mutual Fund Performance Sales Material

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on , the National Association of Securities Dealers, Inc. (“NASD”), filed with the Securities and Exchange Commission (“SEC” or “Commission”) Amendment No. 2 to the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to amend Rules 2210 and 2211 of NASD to require mutual fund communications with the public that provide performance data to disclose the fund’s fees, expenses and standardized performance. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

2210. Communications With the Public

(a) through (c) No change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

(d) Content Standards

(1) through (2) No change.

(3) Disclosure of Fees, Expenses and Standardized Performance

(A) Communications with the public, other than institutional sales material and public appearances, that present non-money market fund open-end management investment company performance data as permitted by Rule 482 under the Securities Act of 1933 and Rule 34b-1 under the Investment Company Act of 1940 must disclose:

(i) the standardized performance information mandated by Rule 482 and Rule 34b-1; and

(ii) to the extent applicable:

(a) the maximum sales charge imposed on purchases or the maximum deferred sales charge, as stated in the investment company's prospectus current as of the date of submission of an advertisement for publication, or as of the date of distribution of other communications with the public; and

(b) annual fund operating expenses, as stated in the investment company's prospectus described in subparagraph (a).

(B) All of the information required by paragraph (A) must be set forth:

(i) clearly and prominently, and standardized performance information must be in a type size that is at least as large as that used to present any nonstandardized performance;

(ii) with respect to any radio, television or video advertisement, with equal emphasis to that given to any nonstandardized performance; and

(iii) in any print advertisement, in a prominent text box that contains only the required information and, at the member's option, comparative performance and fee data.

(e) No change.

* * * * *

2211. Institutional Sales Material and Correspondence

(a) through (c) No change.

(d) Content Standards Applicable to Institutional Sales Material and Correspondence

(1) All institutional sales material and correspondence are subject to the content standards of Rule 2210(d)(1) and the applicable Interpretive Materials under Rule 2210, and all correspondence is subject to the content standards of paragraph (d)(3).

(2) through (3) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

(a) Background

The proposed rule change would amend NASD Rules 2210 and 2211 to require member communications with the public, other than institutional sales material and public appearances, that present mutual fund performance information (“performance sales material”) to disclose the fund’s fees, expenses and standardized performance. These new requirements would improve investor awareness of the costs of buying and owning a mutual fund, facilitate comparison of funds and make the presentation of standardized performance more prominent. The proposed rule change would require that:

- Performance sales material disclose:
 - the standardized performance information mandated by Rule 482 under the Securities Act of 1933 and Rule 34b-1 under the Investment Company Act of 1940;
 - to the extent applicable, the maximum front-end and deferred sales charges stated in the fund’s current prospectus; and

- the fund's annual operating expenses measured as a percentage of net assets and stated in the fund's current prospectus.
- All required performance information and fee disclosures be set forth:
 - Clearly and prominently, and standardized performance information be in a type size at least as large as that used for any non-standardized performance information;
 - With respect to any radio, television or video advertisement, with equal emphasis to that given to any non-standardized performance information; and
 - In any advertisement (other than radio, television or video advertisements) in a prominent text box that contains only the required information.

The Commission received four comment letters in response to the Federal Register publication of SR-NASD-2004-043.¹ Commenters' concerns with the proposal fell into three principal categories. First, commenters either opposed the text box requirement in its entirety, or believed strongly that, to be workable, NASD needed to modify the proposal to allow greater flexibility when text box performance is shown through electronic media, such as web sites. Second, some commenters argued that ongoing fees should be shown net of fee waivers and expense reimbursements. Finally, commenters urged NASD to provide members with ample time to comply with any new rules that may be approved, and to allow the use of templates when filing revised sales material. We discuss and respond to each of these comments below.

¹ Letter from Fidelity Investments ("Fidelity") (Oct. 12, 2004); Letter from the Investment Company Institute ("ICI") (Sept. 17, 2004); Letter from the Securities Industry Association ("SIA") (Sept. 17, 2004); and Letter from The Vanguard Group ("Vanguard") (Sept. 17, 2004). NASD also separately received a letter from T. Rowe Price Associates, Inc. ("T. Rowe Price") (Dec. 6, 2004) on the proposal.

(b) Text Box Requirement and Web Sites

Commenters objected that the text box requirement is unduly restrictive and impedes the effectiveness of member communications. Commenters also stated that this requirement would make advertising the performance of multiple funds extremely difficult, if not impossible, because the requirement would preclude the use of a spreadsheet format due to the need to have a separate page dedicated to each fund's performance.² The SIA also argued that as a general matter, more disclosure would confuse, rather than enlighten, investors.

Commenters particularly objected to applying the text box requirement to web sites, arguing that the requirement fails to acknowledge how individuals typically read and navigate web sites and retrieve information (such as through the use of hyperlinks).³ Vanguard noted that the text box and other prominence requirements would result in web sites that are cluttered, use small font sizes, and are difficult to navigate, all of which run contrary to established principles for effective web site design.

Commenters also stated that the prohibition against including any non-required information in the text box could result in poorly designed and repetitive fund advertisements. For example, an advertisement that compares a fund's performance against a benchmark index could not include the index performance in the text box, and thus might have to show the fund's performance again outside the text box in order to make an effective comparison.⁴

² Fidelity, ICI.

³ ICI, Vanguard.

⁴ ICI, T. Rowe Price.

Fidelity and the ICI recommended as an alternative to the text box a requirement that a fund's expense ratio be disclosed in the same manner in which a fund's maximum sales charge is required to be disclosed under SEC Rule 482. Fidelity, the ICI and Vanguard also strongly urged NASD to modify the proposal to allow the use of hyperlinks to show standardized performance when also showing non-standardized performance.

NASD is sensitive to concerns that the text box requirement could impede the presentation of performance information through electronic media, such as web sites. NASD also wishes to avoid inefficient or repetitive marketing material and therefore agrees that comparative performance and fee data should be permitted in the text box.

Accordingly, NASD is amending the prominence requirements (proposed Rule 2210(d)(3)(B)) to apply the text box rule only to print advertisements and to permit the inclusion of other pertinent comparative data in the text box, as follows (new text is underlined and deletions are bracketed):

- (B) All of the information required by paragraph (A) must be set forth:
 - (i) clearly and prominently, and standardized performance information must be in a type size that is at least as large as that used to present any non-standardized performance;
 - (ii) with respect to any radio, television or video advertisement, with equal emphasis to that given to any non-standardized performance;
and
 - (iii) in any print advertisement [other than a radio, television or video advertisement], in a prominent text box that contains only the required

information and, at the member's option, comparative performance and fee data.

Thus, web sites and other electronic advertisements would not have to present the required performance and fee information within a text box. And in those print advertisements where the text box still would be required, members would be allowed to present comparative performance and fee data (e.g., non-standardized fund performance, the performance of a relevant benchmark index, or a comparison of the fund's expense ratio to the average expense ratio for similar funds).

The text box still would be required to present required information clearly and prominently, all required disclosures would have to be given equal emphasis as any non-standardized performance, and standardized performance would have to be presented in a type size as least as large as that used to present non-standardized performance.

NASD believes that, with these changes, the proposed rule will be consistent with the prominence requirements of SEC Rule 482. For example, the "equal emphasis" standard for radio, television and video advertisements of proposed Rule 2210(d)(3)(B)(ii) is the same standard used in SEC Rule 482(b)(5) for radio and television advertisements.

NASD also has reconsidered the use of hyperlinks to show standardized performance information. Given that NASD no longer would require web sites to present required disclosures in a text box, we think it also would be appropriate to permit members under certain circumstances to present standardized performance and other required disclosures through the use of a hyperlink, provided that the required disclosures are clear, prominent and consistent with the standards of SEC Rule 482.

(c) Calculation of Expense Ratio

The rule proposal would require performance sales material to show a fund's annual operating expenses as derived from the fund's most recent fund prospectus, which would mean that the expense ratio could not be shown net of fee waivers and reimbursements. Fidelity and the ICI commented that the proposal should be modified to allow member firms to disclose a fund's current expense ratio net of fee waivers and reimbursements in lieu of the expense ratio derived from the fund's most recent prospectus. The commenters argued that, since performance information may be presented with the effect of subsidization, as long as the fact of this subsidization is disclosed, a fund should be allowed to show its expense ratio net of fee waivers and reimbursements.⁵

Vanguard disagreed, arguing that expense ratios should be calculated in accordance with Item 3 of Form N-1A – that is, without taking into account fee waivers and reimbursements. Although Vanguard acknowledges that shareholder reports may show subsidized expense ratios, it notes that shareholder reports are directed to current shareholders, whereas prospectuses and advertisements are directed to prospective investors. Because prospective investors should base their decisions on the long-term costs of a fund rather than its current costs that may include subsidization, Vanguard believes that expense ratios that appear in fund sales material should reflect the fund's expenses without regard to fee waivers.

⁵ Although the proposal would permit member firms also to show the expense ratio net of fee waivers and reimbursements, this information would have to appear outside the required text box for print advertisements and would be in addition to the required expense ratio that is derived from the fund's prospectus.

NASD generally agrees that fund advertisements, like prospectuses, are directed to prospective investors, and thus any required expense ratio disclosure should not reflect fee waivers or reimbursements. Accordingly, NASD does not believe it appropriate to revise the proposal as recommended by Fidelity and the ICI. The proposal would not preclude performance sales material from also presenting a fund's expense ratio net of fee waivers and reimbursements, as long as the sales material also presents the unsubsidized expense ratio, and the member presents the subsidized expense ratio in a fair and balanced manner in accordance with the standards of Rule 2210.

(d) Compliance Lead Time and the Use of Templates

The original rule filing indicated that NASD would publish a Notice to Members announcing Commission approval of the proposal within 60 days after such approval, and that the proposal would become effective 30 days after publication of the Notice. Fidelity, the ICI and Vanguard all urged NASD to allow for ample lead-time to comply with the proposal's new requirements should the SEC approve it. The ICI and Fidelity recommend that compliance with the proposal not be required until after the second full calendar quarter end following SEC approval of the final rule change. Vanguard recommended that firms be given at least 6 months, and preferably 9 to 12 months, following SEC approval to comply with the rule change.

Fidelity and the ICI also requested that NASD allow member firms to file templates to show how substantially similar performance sales material will be revised to comply with the new standards. These commenters note that allowing templates to be filed will reduce compliance and filing costs for member firms while allowing the NASD

staff to identify and address any regulatory concerns with the format and content of performance sales material.

NASD agrees that, should the SEC approve the proposed rule change, member firms will require sufficient lead-time to bring their performance sales material into compliance with the new standards. NASD further agrees that six months is a reasonable period of time to achieve that compliance and that timing this compliance date based on a calendar quarter end would be appropriate.

Accordingly, notwithstanding the effective date indicated in the original proposed rule change, NASD hereby amends the effective date as follows. Should the Commission approve the proposal, NASD will publish a Notice to Members announcing Commission approval within 60 days thereafter. The proposal will become effective six months following the calendar quarter ended after publication of the Notice.

NASD also agrees that the filing of templates may be appropriate under certain circumstances to show how similar performance sales material will be revised to comply with the new standards. NASD will permit the filing of templates on a case-by-case basis to show compliance with the new rule requirements.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. NASD believes that the proposed rule change will enhance investor protection by making more

transparent the true costs of purchasing and owning a mutual fund and providing useful information on which to base investment decisions.

B Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Commission received four comment letters. NASD's response to these comments is discussed in section II(A)1 above.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2004-043 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary,
Securities and Exchange Commission, 450 Fifth Street, NW, Washington,
DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-043. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NASD.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to the

File Number SR-NASD-2004-043 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁶

Secretary

⁶

17 CFR 200.30-3(a)(12).

EXHIBIT 4

Revised full text of the proposed rule change marked to show the additions to and deletions from rule text in the immediately preceding rule filing.

Proposed new language in the original filing is underlined

Proposed deletions in the original filing are [bracketed]

Proposed new language in Amendment No. 2 is double-underlined

Proposed deletions in Amendment No. 2 are ~~struck through~~

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2210. Communications With the Public

(a) through (c) No change.

(d) Content Standards

(1) through (2) No change.

(3) Disclosure of Fees, Expenses and Standardized Performance

(A) Communications with the public, other than institutional sales material and public appearances, that present non-money market fund open-end management investment company performance data as permitted by Rule 482 under the Securities Act of 1933 and Rule 34b-1 under the Investment Company Act of 1940 must disclose:

(i) the standardized performance information mandated by Rule 482 and Rule 34b-1; and

(ii) to the extent applicable:

(a) the maximum sales charge imposed on purchases or the maximum deferred sales charge, as stated in the investment company's prospectus current as of the date of submission of an advertisement for publication, or

as of the date of distribution of other communications with the public; and

(b) annual fund operating expenses, as stated in the investment company's prospectus described in subparagraph (a).

(B) All of the information required by paragraph (A) must be set forth:

(i) clearly and prominently, and standardized performance information must be in a type size that is at least as large as that used to present any non-standardized performance;

(ii) with respect to any radio, television or video advertisement, with equal emphasis to that given to any non-standardized performance; and

(iii) in any print advertisement ~~other than a radio, television or video advertisement~~, in a prominent text box that contains only the required information and, at the member's option, comparative performance and fee data.

(e) No change.

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2211. Institutional Sales Material and Correspondence

(a) through (c) No change.

(d) Content Standards Applicable to Institutional Sales Material and Correspondence

(1) All institutional sales material and correspondence are subject to the content standards of Rule 2210(d)(1) and the applicable Interpretive Materials

under Rule 2210, and all correspondence is subject to the content standards of paragraph (d)(3).

(2) through (3) No change.