

**MEMO# 14422**

February 1, 2002

# **ICI DRAFT COMMENT LETTER ON AMENDMENTS PROPOSED TO NASDR'S RULES RELATING TO COMMUNICATIONS WITH THE PUBLIC**

[14422] February 1, 2002 TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 5-02 CLOSED-END INVESTMENT COMPANY COMMITTEE No. 6-02 SEC RULES COMMITTEE No. 12-02 UNIT INVESTMENT TRUST COMMITTEE No. 5-02 RE: ICI DRAFT COMMENT LETTER ON AMENDMENTS PROPOSED TO NASDR'S RULES RELATING TO COMMUNICATIONS WITH THE PUBLIC As we previously informed you, in December 2001, the Securities and Exchange Commission published for comment NASD Regulation, Inc.'s proposed amendments to NASDR rules governing member communications with the public.\* The Institute has prepared the attached draft comment letter, which is summarized below. Comments are due to the SEC by February 14. Persons with comments on the Institute's draft letter should submit them to the undersigned no later than Friday, February 8th by e-mail (tamara@ici.org) or phone (202-326-5825).

I. OVERVIEW OF COMMENT LETTER The Institute's draft letter generally supports the proposed revisions. It particularly notes our support for revisions in the proposal that would, for the first time, distinguish communications directed to institutional investors from those directed to retail customers and provide different regulatory treatment for both classes of communications. After these general comments of support for the proposal, the draft letter discusses our recommended revisions to the proposal. While the letter commends NASDR for incorporating many of our previous comments into the current version of the rules, we recommend additional revisions be made. The letter divides our recommendations on the proposal into two groups - specific comments, which are directed towards individual provisions in proposed Rules 2210 and 2211, and which include comments in our previous comment letter that have not yet been incorporated into the rules; and general comments, which apply to the rules and Interpretive Material overall and NASDR's anticipated application of them. These comments are as follows. \* See Memorandum to Advertising Compliance Advisory Committee No. 1-02, Closed-End Investment Company Committee No. 1-02, SEC Rules Committee No. 1-02, and Unit Investment Trust Committee No. 1-02 (January 4, 2002).

2 II. SUMMARY OF SPECIFIC COMMENTS As noted in the letter, our specific comments follow the order in which the provisions appear in the proposal and not the order of importance of the issue to the Institute. With respect to our specific comments, the draft letter recommends:

- Revising the proposed definition of "independently prepared reprints" in Rule 2210(a)(6) to (1) clarify the "affiliate" test applicable to an article reprint that will be sued with respect to an investment company security; and (2) clarify the rule's application to excerpts;
- Eliminating the requirement in proposed Rule 2210(c)(3)(A) that members file backup

ranking and comparison material. Instead, the Institute recommends that such backup material be filed only when requested by NASDR staff because such information is not readily available; • Revising proposed Rule 2210(c)(4)(B), which authorizes NASDR to impose pre-use filing requirements on members subject to certain conditions, to (1) require NASDR to make all findings required by the current rule prior to imposing such pre-use filing requirements; and (2) limit the duration of the pre-use filing requirement to a period not to exceed one year; • Amending proposed Rule 2210(c)(7) to exempt generic fund advertisements from the rule's filing requirements; • Revising proposed Rule 2210(c)(7) to clarify that, with respect to management's discussion of fund performance (MDFP) as required by Form N-1A, only that portion of MDFP that is supplemental sales material, if any, is required to be filed with NASDR; • Revising the proposed specific content standards of Rule 2210(d)(1)(D) to: (1) provide a carve out for independently prepared reprints from the provisions relating to predictions and projections; and (2) clarify the treatment of hypothetical illustrations of mathematical principles under the rule; • Revising the definition of "institutional investor" proposed in Rule 2210(a)(3) to: (1) include qualified retirement plans beyond those covered by Section 401 of the Internal Revenue Code; (2) lower the proposed \$50 million asset threshold for a person to qualify under the rule as an "institutional investor"; and (3) clarify the new category added to the definition relating to persons acting solely on behalf of an institutional investor; and • Revising the definition of "existing retail customer" proposed in Rule 2211(a)(4) to include a reference to affiliates and to an actual or beneficial interest in an account. With respect to our general comments, the Institute recommends that: III. SUMMARY OF GENERAL COMMENTS With respect to our general comments, the draft letter recommends that: • A transition period be provided prior to enforcing compliance with the rules in order to give members ample time to revise their practices, policies, and procedures to conform to the rule; 3 • NASDR use the adoption of these revisions as an opportunity to emphasize to its staff the need for consistent interpretation of and comment on materials prepared under the rules; and • The Commission set a date certain by which NASDR must accommodate electronic filing of advertisements and sales literature. Each of these comments is discussed in detail in the draft letter. Tamara K. Reed Associate Counsel Attachment (in .pdf format)