

MEMO# 12858

November 16, 2000

SEC REQUESTS COMMENT ON NASDR'S PROPOSED RULE CHANGES CONCERNING RELATED PERFORMANCE INFORMATION

[12858] November 16, 2000 TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 31-00 SEC RULES COMMITTEE No. 127-00 RE: SEC REQUESTS COMMENT ON NASDR'S PROPOSED RULE CHANGES CONCERNING RELATED PERFORMANCE INFORMATION The Securities and Exchange Commission has published for comment NASD Regulation, Inc.'s proposed new Interpretive Material 2210-5 and conforming amendments to existing Rule 2210 and IM-2210-2 to permit certain types of related performance information ("RPI") in mutual fund and variable product sales material.¹ The proposed rule changes reflect many of the comments made in the Institute's September 29, 1997 letter in response to NASDR's request for comment on related performance issues.² In particular, the performance of another mutual fund previously managed by the advertised fund's portfolio manager would not be allowed in fund sales material under the proposal. A copy of the SEC's release is attached and is summarized below. Comments on the proposal must be filed with the SEC by December 26, 2000. If you have comments that you would like the Institute to consider including in its letter on the proposal, please provide them to the undersigned no later than Monday, December 4, 2000 (phone: 202/326-5819; fax: 202/326-5839; e-mail: dvanslyke@ici.org). Presentation of Mutual Fund Related Performance Information Proposed IM-2210-5 would generally permit, subject to certain conditions, three types of RPI to appear in fund sales material:

- "Clone" Performance - the total return of all registered investment companies that have the same investment policies, objectives and strategies, investment adviser and sub-adviser as the advertised fund; 1 SEC Release No. 34-43507, 65 Fed. Reg. 67025 (Nov. 8, 2000). 2 See Memorandum to SEC Rules Members No. 58-97, dated August 7, 1997 (transmitting NASDR's request for comment) and Memorandum to SEC Rules Committee No. 94-97 and Advertising Subcommittee No. 33-97, dated September 29, 1997 (transmitting Institute's comment letter to NASDR).
- "Predecessor" Performance - the total return of the advertised fund that includes the performance of an insurance company separate account, common trust fund or private investment company that had been converted into, and had the same investment adviser and sub-adviser as, the advertised fund; that had investment policies, objectives and strategies that "were in all material respects equivalent" to those of the advertised fund; and that was not created in order to establish a performance record; and
- "Comparison Portfolio" Performance - the total return of a composite of other portfolios, including other investment companies, managed by the investment adviser (or, as appropriate, the sub-adviser), with substantially similar investment policies, objectives, and strategies to the advertised fund.

General Standards Proposed IM-2210-5 includes general standards that provide that no material

difference may exist between the portfolio to which the RPI refers and the advertised fund, except that the portfolio may not have been registered under the Investment Company Act of 1940, and material differences may exist between the fees and expenses of a cloned fund and the advertised fund. Additionally, any NASD member filing sales material presenting RPI must maintain books and records that demonstrate the basis for the calculation of the RPI for three years, and no sales material for a money market fund may present RPI. The proposal would require that any RPI presented in fund sales material must be current to the most recent calendar quarter-end and must be accompanied by RPI for one, five, and ten-year periods (or since inception if RPI is available for less than one, five or ten years). In addition, the proposal would require that any fund sales material that presents RPI, among other things, must:

- Identify the length of and the last day in the period used to compute RPI;
- Present the total return of the advertised fund (excluding the performance of any predecessor portfolio) in a more prominent manner than the RPI, provided that the registration statement of the advertised fund has been effective for at least one year;
- When applicable, prominently disclose that the advertised fund has been in operation for less than one year;
- Disclose any material difference between the fees and expenses of an investment company reflected in clone performance and the advertised fund;
- Include certain other specified disclosures cautioning against over-reliance on RPI as a substitute for the advertised fund's performance;
- Not refer to the RPI in a headline or other prominent statement, or contain any ranking based on RPI; and

3• Accompany any graph or illustration concerning RPI with a more prominent graph or illustration concerning the total return of the advertised fund, provided that the advertised fund has been in existence for at least one year. Manager Performance Information The notice explains that of the 55 comment letters NASDR received on its proposal, "the highest level of opposition was raised to the presentation of manager performance information." The notice states that the NASD Board of Directors reaffirmed the NASD's longstanding policy of prohibiting the presentation of manager performance in mutual fund advertisements and sales literature. The NASD believes that the presentation of manager performance could mislead or confuse investors about the contributions of other personnel of the investment adviser to the mutual fund's performance. The notice further states that the SEC staff "disagrees with the NASD's decision to per se exclude manager performance information from the rule." 3 The SEC specifically asks for comment on this issue, in addition to comments on any other aspect of the proposal. Doretha VanSlyke Zornada Assistant Counsel Attachment Attachment (in .pdf format) 3 See Bramwell Growth Fund (pub. avail. August 7, 1996) (permitting the presentation of the performance of a mutual fund that was previously managed by of the offered fund's portfolio manager).

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