

MEMO# 18781

April 15, 2005

NASD PROPOSAL TO REQUIRE PRINCIPAL PRE-USE APPROVAL OF RETAIL CORRESPONDENCE; APRIL 19TH CONFERENCE CALL SCHEDULED

©2005 Investment Company Institute. All rights reserved. Information may be abridged and therefore incomplete. Communications from the Institute do not constitute, and should not be considered a substitute for, legal advice. [18781] April 15, 2005 TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 2-05 SEC RULES COMMITTEE No. 29-05 SMALL FUNDS COMMITTEE No. 14-05 UNIT INVESTMENT TRUST COMMITTEE No. 5-05 RE: NASD PROPOSAL TO REQUIRE PRINCIPAL PRE-USE APPROVAL OF RETAIL CORRESPONDENCE; APRIL 19TH CONFERENCE CALL SCHEDULED The NASD has issued Notice to Members 05-27 seeking comment on a proposal to amend NASD Rule 2211 to require a registered principal to pre-approve correspondence sent to 25 or more existing retail customers within a 30 calendar-day period.¹ The NASD's proposal is summarized below. Comments on the proposal must be filed with the NASD by Friday, May 27th. The Institute will hold a conference call on Tuesday, April 19th at 2:00 EST to discuss both this proposal and the NASD's recent proposal to require pre-use filing of sales material for new types of securities and television, video, and radio advertisements.² The dial-in number for the call is 888/381-5773 and the pass code is Advertising/Donohue. If you or another representative of your firm plan to participate on the call, please send an email to Monica Carter-Johnson at mcarter@ici.org. If you are unable to participate on the call, please provide your comments in advance of the call to Dorothy Donohue by phone (202.218-3563) or email (ddonohue@ici.org). The NASD currently does not require correspondence to existing customers to be pre-approved by a registered principal. Rather, it is subject to the supervision and review requirements of Rule 3010(d). Under the proposal, a registered principal would be required to pre-approve correspondence that is sent to 25 or more existing retail customers within a 30 1 See NASD Notice to Members 05-27 (April 2005) (the "Notice"), which is available on the NASD's website at http://www.nasd.com/web/groups/rules_regs/documents/notice_to_members/nasdw_013812.pdf. 2 See Memorandum to Advertising Compliance Advisory Committee No. 1-05, SEC Rules Committee No. 28-05, Small Funds Committee No. 13-05, and Unit Investment Trust Committee No. 4-05 [18770], dated April 13, 2005. 2 calendar-day period.³ The proposal thereby would subject correspondence to pre-approval without regard to whether the recipient is an existing or prospective retail customer. Correspondence to existing customers would not be required to be filed with the NASD and would not be subject to all of the content standards of the advertising rules. According to the NASD, some member

correspondence to multiple existing customers raises the same sorts of issues as advertisements and sales literature. For example, the NASD has reviewed form letters that encourage existing customers to invest in mutual funds, variable annuities or other securities. In some of these cases, the NASD required the correspondence to be substantially revised, and, in other cases, it took informal disciplinary action against the member that distributed the correspondence. The Notice states that registered principal pre-use approval would better ensure that this material complies with the applicable standards of the advertising rules. Because many firms already require registered principal pre-use approval of such correspondence, the NASD believes that the benefits of the proposed requirement outweigh any additional burdens. Dorothy M. Donohue Associate Counsel 3 Correspondence is defined to include any written letter or electronic mail message distributed by a member to one or more of its existing retail customers and fewer than 25 prospective retail customers within any 30 calendar-day period.

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