

MEMO# 15925

April 22, 2003

SEC RELEASE SEEKS COMMENT ON NASD PROPOSAL RELATING TO INVESTMENT ANALYSIS TOOLS; DRAFT INSTITUTE COMMENT LETTER

[15925] April 22, 2003 TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 2-03 INVESTMENT ADVISERS COMMITTEE No. 7-03 PENSION COMMITTEE No. 10-03 SEC RULES COMMITTEE No. 35-03 RE: SEC RELEASE SEEKS COMMENT ON NASD PROPOSAL RELATING TO INVESTMENT ANALYSIS TOOLS; DRAFT INSTITUTE COMMENT LETTER As we previously informed you, in August 2002, the NASD sought comment on proposed Interpretive Material to NASD Rule 2210 that would allow NASD members to make available to their customers "investment analysis tools" under certain circumstances.¹ The Institute filed a comment letter with the NASD on the proposal, recommending several revisions to the conditions – particularly to the disclosure requirements – that would be imposed on a member utilizing a tool.² Based upon the comments received, the NASD revised the proposed IM and filed it with the Securities and Exchange Commission, which recently published it for comment.³ The Commission's proposal and the Institute's draft comment letter, which is attached, are summarized below. Comments on the proposal are due to the Commission no later than Thursday, April 24th. Persons with comments on the Institute's draft letter should provide them to the undersigned no later than Wednesday, April 23rd by phone (202-326-5825) fax (202-326-5839), or e-mail (tamara@ici.org). I. Summary of the Proposed IM The proposed IM would provide a limited exception to Rule 2210(d)(2)(N), which prohibits NASD member firms from making predictions or projections of investment results to the public. This exception would allow NASD members to make available to their customers 1 See Memorandum No. 15056 (dated August 20, 2002). 2 See Memorandum No. 15226 (dated October 2, 2002). 3 See SEC Release No. 34-47590 (March 28, 2003), 68 Fed. Reg. 16325 (April 3, 2003). 2 "investment analysis tools"⁴ upon compliance with certain conditions. These conditions include: (1) the tool must use a mathematical process that can be audited and reviewed and it must comply with certain criteria regarding the presentation of its results; (2) the tool, any written reports indicating the results generated by the tool, and any related sales material must provide written, clear, and prominent disclosure of specified information, including a legend; and (3) at least 30 days prior to first use, the staff of the NASD must be provided access to the tool and the member must file with the NASD any template for written reports produced by or sales material concerning the tool. A member is prohibited from using the tool or any of these materials until such time as they have been approved by the NASD's staff. II. Summary of the Institute's Draft Comment Letter The Institute's letter is generally supportive of the proposed IM. Our letter notes that we are pleased that many of the recommendations we made to the NASD on the original

proposal are reflected in the current proposal. We recommend, however, that the NASD make the following additional revisions to the proposed IM:

- Eliminate the requirement to disclose that other investments not considered by the tool may have characteristics similar or superior to those being analyzed by the tool.
- In lieu of requiring that the tool and each piece of related sales material and each written report generated by the tool include the same disclosure, provide members the flexibility to determine how such disclosure is provided to investors, so long as the totality of the disclosure satisfies the requirements of the IM.
- Conform the proposed filing requirements in the IM to the NASD's existing filing requirements under Rule 2210. In addition, to providing these substantive comments on the proposal, the Institute's letter again expresses our concern with the lack of time the Commission has provided interested persons to comment on the proposal – i.e., the bare minimum 21-day period.

Tamara K. Salmon Senior Associate Counsel Attachment (in .pdf format)

4 The term “investment analysis tool” would be defined to mean “an interactive technological tool that produces simulations and statistical analyses that present a range of probabilities that various investment outcomes might occur, thereby serving as an additional resource to investors in the evaluation of the potential risks of and returns on particular investments.”

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