

MEMO# 16224

June 20, 2003

NASD CLARIFIES MEMBERS' RESPONSIBILITIES IN CONNECTION WITH USE OF INSTANT MESSAGING

[16224] June 20, 2003 TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 6-03 COMPLIANCE ADVISORY COMMITTEE No. 47-03 SEC RULES MEMBERS No. 79-03 TECHNOLOGY ADVISORY COMMITTEE No. 4-03 RE: NASD CLARIFIES MEMBERS' RESPONSIBILITIES IN CONNECTION WITH USE OF INSTANT MESSAGING NASD recently published Notice to Members 03-33 (July 2003)¹ to clarify its members' supervisory obligations and recordkeeping requirements in connection with the use of instant messaging. The Notice reminds members that the lack of formality of an instant messaging communication does not exempt it from the general standards applicable to all forms of communications with the public. As such, "members should evaluate instant messaging according to the 'content and audience' of the instant messaging communication." Consistent with a member's supervisory and recordkeeping obligations, members that permit instant messaging "must use a platform that enables the members to monitor, archive, and retrieve message traffic." (Emphasis added.) The Notice reminds members that they must supervise the use of instant messaging consistent with the required supervision of e-mail messaging. As discussed in a previous Notice to Members on e-mail messaging,² a member's supervisory policies and procedures must . . . prohibit registered representatives' and other employees' use of electronic correspondence to the public unless such communications are subject to supervisory and review procedures developed by the firm. For example, [NASD] would expect members to prohibit correspondence with customers from employees' home computers or through third party systems unless the firm is capable of monitoring such communications." ¹ A copy of the Notice is available on NASD's website at <http://www.nasdr.com/pdf-text/0333ntm.pdf>. ² See NASD Notice to Members 98-11, which discussed the essential elements of a supervisory program and which is available on NASD's website at <http://www.nasdr.com/pdf-text/9811ntm.pdf>. ² While NASD rules do not specifically require member firms to review or approve internal communications, members must have procedures adequate to supervise the activities of each registered representative and associated person, including their use of electronic communications. The Notice also reminds members of their duty to assure themselves that their use of electronic communications media enables them to make and keep records as required by SEC Rules 17a-3 and 17a-4 and NASD Rule 3110. It notes that both SEC Rule 17a-4(b)(4) and NASD Rule 3110 require members to preserve "originals of all communications received and copies of all communications sent by the firm or its employees relating to its business" and that this requirement expressly extends to "electronic communications." NASD urges its members to evaluate their use of instant messaging in light of these supervisory and recordkeeping obligations. Tamara K. Salmon

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