

MEMO# 18770

April 13, 2005

NASD PROPOSAL TO REQUIRE PRE-USE FILING OF SALES MATERIAL FOR NEW TYPES OF SECURITIES AND TELEVISION, VIDEO, AND RADIO ADVERTISEMENTS; 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. [18770] April 13, 2005 TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 1-05 SEC RULES COMMITTEE No. 28-05 SMALL FUNDS COMMITTEE No. 13-05 UNIT INVESTMENT TRUST COMMITTEE No. 4-05 RE: NASD PROPOSAL TO REQUIRE PRE-USE FILING OF SALES MATERIAL FOR NEW TYPES OF SECURITIES AND TELEVISION, VIDEO, AND RADIO ADVERTISEMENTS; APRIL 19TH CONFERENCE CALL SCHEDULED The NASD has issued Notice to Members 05-25 seeking comment on a proposal to amend NASD Rule 2210 to require pre-use filing of an initial advertisement or piece of sales literature concerning a type of security that a NASD member has not previously offered. The proposal also would require pre-use filing of all television, video, radio, or similar broadcasts of 15 seconds or longer.¹ The NASD's proposal is summarized below. Comments on the proposal must be filed with the NASD by Friday, May 20th. The Institute will hold a conference call on Tuesday, April 19th at 2:00 EST to discuss the proposal. 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). Sales Material Concerning New Types of Securities The NASD currently requires pre-use filing of, among other things, new member advertisements, advertisements or sales literature that contain fund-created rankings, and sales literature containing bond fund volatility ratings. The proposal would expand the pre-use filing requirement to include advertisements and sales literature for a "type of security that the member has not previously offered." The NASD would require this material to be filed at least 10 business days prior to use and for the 90 calendar days following the initial filing. It would be subject to NASD staff review and would be required to be withheld from publication until any changes specified by the NASD staff have been made. 1 See NASD Notice to Members 05-25 (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_013753.pdf. 2 The pre-use filing requirement would not apply to any sales material that is already required to be filed, such as mutual fund sales material. However, under the proposal, if a member previously only offered registered investment companies and planned on offering unregistered hedge funds to its client base, the proposal would require the member to file its initial sales materials for hedge funds. The Notice explains that the pre-use filing requirement should provide the NASD with more time to address any sales practice issues that the new type of security presents. The NASD requests comment on whether the term “type of security that the member has not previously offered” needs further clarification, and if so, how it should define this term. The NASD also requests comment on whether the pre-use filing requirement should apply to advertisements and sales literature for products that the member has previously offered, but now is offering to a new class of investors for the first time. In particular, the Notice asks if the pre-use filing requirement should apply if a member prepares sales literature that offers a fund of hedge funds to retail investors for the first time, if the member previously offered funds of hedge funds only to institutional investors. Television, Video, and Radio Advertisements The proposal would require members to file all television, video (including Web site video), radio, or similar broadcasts of 15 seconds or longer at least 10 business days prior to the date of the first use or broadcast. The Notice explains that members could meet this requirement for television and video by filing draft versions, “story boards,” or scripts of these advertisements, as long as the member also files the final filmed version of the advertisement within 10 business days of the first use. The proposal also would require the member to withhold use of the advertisement until changes specified by the NASD staff have been made. The Notice explains that the NASD is concerned that in the past some members used broadcast advertisements that raised regulatory issues. The proposed requirement would permit the NASD to resolve these concerns before these advertisements are broadcast to retail investors. The NASD is not proposing to require the filing of short sponsorship announcements, Internet banner advertisements, and other similar communications. In addition, the proposal would not apply to television or radio shows in which a representative makes an unscripted appearance. The pre-use filing requirement would apply, however, to any scripted portions of such a show. Dorothy M. Donohue Associate Counsel