

MEMO# 18234

November 22, 2004

NASD ISSUES NOTICE TO MEMBERS RELATING TO USE OF INVESTMENT ANALYSIS TOOLS; EFFECTIVE DATE IS FEBRUARY 14, 2005

[18234] November 22, 2004 TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 7-04 INVESTMENT ADVISERS COMMITTEE No. 19-04 PENSION COMMITTEE No. 57-04 SEC RULES COMMITTEE No. 91-04 RE: NASD ISSUES NOTICE TO MEMBERS RELATING TO USE OF INVESTMENT ANALYSIS TOOLS; EFFECTIVE DATE IS FEBRUARY 14, 2005 Last week, the NASD published its expected Notice to Members relating to the use of investment analysis tools in reliance upon the NASD's Interpretive Material, IM-2210-6,¹ which was approved by the SEC last month.² The NTM provides an effective date of February 14, 2005 for the use of such tools. The NTM reminds members that, in addition to providing users of the tool required disclosures, members must within 10 days of first use, (1) provide the NASD's Advertising Department access to the tool and (2) file with the Advertising Department any template for written reports produced by, and sales material concerning, the tool. According to staff of the NASD's Advertising Department, providing the Advertising Department access to the tool will constitute a filing with the Department, which will necessitate the payment of filing fees. According to the NTM, the Department's review of the tool "generally will focus on whether the member has made the proper disclosures." Members that are already using an investment analysis tool that falls within the scope of IM-2210-6 must file such tool, any written-report templates generated by the tool, and sales material for the tool, within 10 days of the effectiveness of IM-2210-6. This is true even if such information was previously filed with the NASD. The NTM clarifies that the filing requirement does not apply to hypothetical illustrations of mathematical principles that do not predict or project the performance of an investment or investment strategy – such as Web site calculators. Also, tools that are used exclusively with institutional investors (as defined in NASD Rule 2211(a)(3)) need not be filed. With respect to the disclosures required in connection with the use of tools, the NTM notes that each required disclosure is not required to be displayed on every separate Web page. 1 See NASD Notice to Members 04-86 (November 2004) ("NTM"). The NTM is available at: http://www.nasd.com/stellent/groups/rules_regs/documents/notice_to_members/nasdw_012413.pdf 2 See Institute Memorandum to Advertising Compliance Advisory Committee No. 6-04, Pension Committee No. 50-04, and SEC Rules Committee No. 82-04 [18130], dated October 22, 2004, which discusses the contents and the SEC's approval of IM-2210-6. 2 and/or pages of a written report generated by the tool. Such disclosures are, however, required to be "clear and prominent" in light of the content, context, and presentation of the tool and/or written report. Moreover, the disclosures must be clear and prominent on

both the tool and the written report. As such, the disclosures may not be on one but not the other. Finally, the NTM reminds members that, in connection with the use of investment analysis tools, members remain responsible for compliance with the federal securities laws and the rules of the NASD and SEC, including, but not limited to, as applicable, the following: • The NASD's suitability rule (Rule 2310); • The other provisions of the NASD's rules governing communications with the public, Rule 2210; and • SEC Rule 156, governing investment company sales literature. Tamara K. Salmon Senior Associate Counsel

Copyright © by the 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.