

# PACE INVESTOR RIGHTS PROJECT

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May 19, 2005

Barbara Z. Sweeney  
Office of Corporate Secretary  
NASD  
1735 K Street, NW  
Washington, DC 20006-1500

Re: Notice to Members 05-25, New Products Sales Material and Television,  
Video, and Radio Advertisements

Dear Ms. Sweeney:

The Pace Investor Rights Project (“PIRP”) at Pace University School of Law, in furtherance of its mission to advocate on behalf of the rights of individual investors, supports NASD’s efforts to improve member practices regarding communications with the public under NASD Rule 2210. We appreciate the opportunity to comment on this proposal and on advertising practices generally.

As a threshold matter, we endorse the proposed amendments to Rule 2210 as concrete steps in what should be a continuing effort by NASD to improve its members’ advertisements aimed at individual investors. More specifically, NASD seeks comment on whether the language of the first proposed amendment, which seeks to apply the pre-use filing requirement to a “type of security that the member firm has not previously offered,” needs further clarification. In our view, this term seems self-explanatory.

However, we believe that this new pre-use filing requirement should apply equally 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.” This is necessary, as the Notice states, to “alert NASD when the industry promotes a new type of security to retail investors.” The type of advertisements used to solicit funds from institutional investors is different than those used to solicit funds from retail investors. Furthermore, these two classes of investors have very different sophistication and experience levels. An advertisement provided to NASD for review that offered funds of hedge funds to institutional investors will look very different from one that seeks to offer these same funds to retail investors. As a result, NASD should apply – either through interpretive material, commentary accompanying the rule change, or with language in the rule change itself -- the “pre-use filing requirement” to a member firm that is promoting an existing type of security to a new class of investors. This will ensure that these advertisements

are in compliance with NASD's advertising rules, especially the disclosure requirements, and thus will enhance investor protection.

The 15-second threshold in the second proposed amendment requiring "members to file all television, video (including website video), radio, or similar broadcasts of 15 seconds or longer" appears to be an appropriate standard for the pre-use requirement, but we do share NASD's concerns that some firms could try to avoid this requirement by distributing shorter broadcasts, especially on the internet. We ask that NASD remain vigilant in this area and adjust the requirement downward if it finds that members are trying to exploit this threshold.

Since this proposal deals with the amendment of advertising rules, PIRP would like to again express our concerns about certain disturbing trends we noted in the advertising practices of some member firms. In 2004, PIRP conducted a study of various print advertisements of NASD member firms and identified possible violations of NASD's advertising rules by NASD members. Our study identified a lack of specific product identification in the promotion of annuities, an omission of material facts in a mutual fund advertisement, and possible violations of guidelines regarding the size and placement of legends in relation to the advertisement's text. That study also highlighted the need for additional disclosures by member firms when advertisements use symbol rankings, when they promote active or day-trading, when client-oriented advertisements promote a personal relationship, and when they endorse 401(k) rollovers or foreign securities.

PIRP conducted this study because we believe that member firms' advertisements and sales literature must be fair and balanced in their presentation of investment products and services. Furthermore, retail investors need to be fully informed so that they can evaluate different securities and ask relevant questions to their professional advisors prior to making investment decisions.

We hope that NASD will consider the concerns we have identified above in future proposed amendments to its advertising rules. Please contact us at the above-listed contact information if you have any questions about anything in this letter.

Sincerely,

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Lisa DeBock, J.D. Candidate, May 2005  
PIRP Student Intern

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