



May 20, 2005

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

Re: **Request for Comment New Products Sales Material and Television, Video, and Radio Advertisements (NASD Notice to Members 05-25)**

Dear Ms. Sweeney:

E*TRADE Securities LLC ("E*TRADE")¹ appreciates the opportunity to comment on the recent proposal by NASD to amend Rule 2210, governing member communications with the public ("the Proposal"). The Proposal is intended to require members to file certain additional categories of advertisements and sales literature with NASD. The Proposal, among other things, would require (1) the member to file the initial advertisement or item of sales literature concerning a type of security that the member has not previously offered at least 10 business days prior to first use or publication; and (2) the member 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 first use or broadcast.

E*TRADE supports initiatives that advance investor protection and facilitate an even playing field in the industry. However, we are concerned about the imposition of additional filing requirements when we believe that existing NASD filing requirements and other mechanisms, such as the Investigation Program, appear to serve an identical purpose.

We are pleased to offer the following general comments:

¹ E*TRADE Securities LLC pioneered online investing for the retail brokerage consumer when its proprietary technology was used to place the first online trade over 20 years ago. Today, as one of the E*TRADE FINANCIAL companies, E*TRADE Securities services over 3.6 million customer accounts worldwide.

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Member NASD/SIPC

1. Existing NASD Filing Requirements are Sufficient

NASD currently has mandatory filing requirements that provide an opportunity for both the member and NASD to address significant matters of compliance.

Among them are the following:

Pre-filing requirements:

Rule 2210(c)(3) – which requires that sales literature regarding bond mutual funds that include volatility ratings must be filed with the Advertising Regulation Department at least 10 business days prior to use and the communication must be withheld from circulation until any changes specified by the Department have been made, or if expressly disapproved, until the communication has been re-filed and received NASD approval.

Rule 2210(c)(4)(A) – which requires that advertisements and sales literature regarding mutual funds, variable contracts, continuously offered closed-end funds and unit investment trusts that include self-created rankings or comparisons must be filed with the Advertising Regulation Department at least 10 business days prior to use, and the communications must be withheld from circulation until any changes specified by the Department have been made.

Rule 2210(c)(4)(B) – which requires that advertisements regarding collateralized mortgage obligations must be filed with the Advertising Regulation Department at least 10 business days prior to use, and the communication must be withheld from circulation until any changes specified by the Department have been made.

Rule 2210(c)(4)(C) – which requires that advertisements regarding security futures must be filed with the Advertising Regulation Department at least 10 business days prior to use, and the communication must be withheld from circulation until any changes specified by the Department have been made.

Rule 2210(c)(5)(A) – which requires that each member that has not previously filed advertisements with the Advertising Regulation Department (or with a registered securities exchange having standards comparable to those contained in this Rule) must file its initial advertisement with the Department at least 10 business days prior to use and shall continue to file its advertisements at least 10 business days prior to use for a period of one year.

Rule 2220(c)(1) – which requires that each member must file advertisements and educational material regarding options with the Advertising Regulation

Department at least 10 days prior to use, and the communications must be withheld from circulation until any changes specified by the Department have been made, or if expressly disapproved, until the communications have been re-filed and received NASD approval.

Post-filing requirements:

Rule 2210(c)(2)(A) – which requires that advertisements and sales literature regarding mutual funds, variable contracts, continuously offered closed-end funds, and unit investment trusts be filed with the Advertising Regulation Department within 10 business days of first use or publication.

Rule 2210(c)(2)(B) – which requires that advertisements and sales literature regarding public direct participation programs be filed with the Advertising Regulation Department within 10 business days of first use or publication.

Rule 2210(c)(2)(C) – which requires that advertisements regarding government securities be filed with the Advertising Regulation Department within 10 business days of first use or publication.

Rule 2210(c)(6) – which requires that if a member has filed a draft version of a television or video advertisement with the Advertising Regulation Department, subject to a filing requirement, then the member must file the final filmed version within 10 business days of first use or broadcast.

Special situation filing requirements:

Rule 2210(c)(5)(B) - which upon review of a member's advertising and/or sales literature, and after determining that the member has departed from the standards of the Rule, NASD may require that such member file all advertising and/or sales literature, or the portion of such member's material that is related to any specific types or classes of securities or services, with the Advertising Regulation Department at least 10 business days prior to use.

Rule 2210(c)(7) – which indicates that in addition to the specified filing requirements, each member's written and electronic communications with the public may be subject to a spot-check procedure, where upon request of the Advertising Regulation Department, each member must submit the material specified by the Department.

Rule 2220(c)(2)(A) – which upon review of a member's options advertisements, educational material and/or sales literature, and after determining that the member has departed from the standards of the Rule, NASD may require that

such member file all options advertisements, educational material and/or sales literature with the Advertising Regulation Department at least 10 days prior to use.

Rule 2220(c)(3) – which indicates that in addition to the specified filing requirements, each member’s options advertising and sales literature shall be subject to a routine spot-check procedure, where upon request of the Advertising Regulation Department, each member must submit the material specified by the Department.

The aforementioned filing requirements cover a wide variety of securities offered by member firms and provide NASD with the ability to gain general insight into matters of compliance at member firms. Notwithstanding ongoing filing requirements for specified products, NASD maintains the ability under Rule 2210(c)(7) and Rule 2210(c)(3) to spot-check an individual firm’s advertising and sales literature, including television, radio and related broadcast material at any time. If it is determined that the member has departed from applicable standards, NASD can impose a pre-use filing requirement under Rule 2210(c)(5)(B) or Rule 2220(c)(2)(A) specific to the firm.

2. Requirement to Pre-file Television, Video and Radio Advertisements is Cost Prohibitive

According to data provided by Competitrack Advertising Tracking Service, total spending on television advertising during 2004 by financial services firms (to include broker-dealers and insurance companies) was \$622,035,000.

E*TRADE has conducted some informal research regarding the cost and time parameters around television, radio and video production and would like to share the following information with NASD:

Television Advertising

- Average time to produce a 30 second spot = 8 weeks
- Average cost to produce a 30 second spot = \$350,000
- Average cost to edit a final 30 second spot = \$12,500²

² Based on information obtained by E*TRADE during April 2005 for the average cost of a typical New York City production studio for eight hours editing time. This figure does not represent the result of exhaustive research and does not account for pricing differences that may be available in other regions of the country.

- Average time to negotiate television placements = 3–6 months
- Average media placement cost per 30 second advertisement =
 - Network Prime Time - \$100,000-\$750,000³
 - Cable News - \$5,000-\$10,000⁴

There is little-to-no flexibility in rescheduling television advertising placements once they are booked with either the networks or cable channels. Missing an agreed upon deadline because the spot was in the midst of an NASD review could be very costly to member firms. The Proposal fails to address a commitment by NASD to provide comments within any specified period of time, or on an expedited basis, which is a major concern.

Radio Advertising

- Average time to produce a 30 second advertisement = 4 weeks
- Average cost to produce a 30 second advertisement = \$30,000
- Average cost to edit a final 30 second radio spot = \$4,000⁵

There is little-to-no flexibility in rescheduling radio advertising placements once they are booked. Missing an agreed upon deadline because the spot was in the midst of an NASD review could be very costly to member firms. The Proposal fails to address a commitment by NASD to provide comments within any specified period of time, or on an expedited basis, which is a major concern.

³ Based on information obtained by E*TRADE during April 2005. The exact price is dependent on the television show during which the advertisement will run.

⁴ Based on information obtained by E*TRADE during April 2005. The exact price is dependent on the cable network which will air the advertisement.

⁵ Based on information obtained by E*TRADE during April 2005 for the average cost of a typical New York City production studio for eight hours editing time. This figure does not represent the result of exhaustive research and does not account for pricing differences that may be available in other regions of the country.

Video Production

- Average time to produce a 90 second video = 4 weeks
- Average cost to produce a 90 second video = \$30,000
- Average cost to edit a final 90 second video spot = \$5,500⁶

Although a member can better control the launch date of a video production, it could still be costly and problematic for the video to be hung up in the midst of an NASD review. The Proposal fails to address a commitment by NASD to provide comments within any specified period of time, or on an expedited basis, which is a major concern.

Regardless of the above, the very public nature of television, radio and similar broadcasts should provide NASD with the assurance that it currently has the ability to identify and address those advertisements and member firms that raise questions or present issues of regulatory concern. The Proposal refers to television advertisements used “several years ago” but does not imply that there is a current problem.

Similarly, given the active nature of the Investigations Program, which welcomes inquiries and complaints from members of the public, other NASD member firms and outside regulatory agencies, NASD currently has the necessary mechanisms in place to identify and address regulatory and compliance issues related to television, radio and related media on a case-by-case basis. The most public part of any NASD member’s business is its national television advertising.

3. Definition of Type of Security

In the Proposal, NASD has specifically asked whether the term “type of security that the member has not previously offered” needs further clarification, and if so, how NASD should define this term.

We note that the examples provided in the Proposal to define a “new type of security” are exotic, non-conventional investment products like new types of asset-backed securities, distressed debt, derivative products, hedge funds, etc.

⁶ Based on information obtained by E*TRADE during April 2005 for the average cost of a typical New York City production studio for eight hours editing time. This figure does not represent the result of exhaustive research and does not account for pricing differences that may be available in other regions of the country.

E*TRADE wishes to point out that a member firm can offer a type of security that it has not previously offered which is much more “vanilla” by nature. For example, a member may never have offered exchange-traded funds; however, the product is well known by both NASD and the investing public and certainly does not present the type of regulatory challenges contemplated by the Proposal. To require a member firm with an established history with the Advertising Regulation Department to pre-file advertisements on behalf of this type of product appears overly burdensome, especially considering that there are post-use filing requirements for so many types of securities in place now.

If NASD is concerned about members introducing a new type of security into the retail marketplace absent regulatory oversight, then “type of security” should be clearly and narrowly defined and the pre-filing requirement should be limited to members offering such products to the investing public.

4. **Existing Obligations on Member Firms**

E*TRADE believes that the following additional obligations on firms and registered principals are taken very seriously by member firms:

IM-2210-1 “Guidelines to Ensure that Communications with the Public Are Not Misleading” – requires that each member determine that every communication with the public complies with all applicable standards, including the requirement that the communication not be misleading.

A registered principal is required to attest that this requirement has been satisfied each and every time he or she provides his or her written signatory approval to advertising or sales literature. This is true whether the communication is being released for publication or will be pre-filed with NASD.

Rule 3010, regarding Supervision, requires that each member establish and maintain a system to supervise the activities of the firm in a manner that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with NASD rules. Consequently, the responsibility of ensuring that such issues as suitability and disclosure requirements are met already rests on the shoulders of NASD member firms. The “New Member” filing requirement imposed in Rule 2210(c)(5)(A) currently provides NASD with the ability to evaluate whether a firm has adequate policies and procedures in place with regard to the preparation, review, approval, filing and recordkeeping of advertisements and sales literature.

Finally, an NASD member currently has the ability to pre-file any communication it intends to use with customers or the public in advance of use in order to determine whether NASD has any regulatory concerns that should be addressed prior to distribution of the communication or launch of a new product, service or program. It has been my personal experience, while at NASD for nine years and while in the industry as a compliance professional for another nine years, that most NASD member firms not only rely on and fully utilize this “best practices” approach when communicating about a product, service or program that the member has not previously offered, but they also seek the legal opinion of outside counsel before launching such efforts.

In summary, NASD currently has sufficient filing requirements and oversight mechanisms in place to address potential issues of regulatory concern on a case-by-case basis with each member.⁷ E*TRADE strongly believes that additional and potentially burdensome filing requirements are not necessary at this time.

Again, we appreciate the opportunity to share our thoughts and concerns with you. Please feel free to contact the undersigned at (703) 236-8656 or James Ballowe, Associate General Counsel, at (703) 236-8650 should you desire any additional information or have any follow-up questions for us.

Sincerely,

/s/ June Jessup Batcheller

June Jessup Batcheller
Director
Compliance Officer, Advertising Review

cc: James Ballowe

⁷ Moreover, as you are aware, advertising practices already are the subject of extensive federal and state regulation. Since 1914, the Federal Trade Commission has been the primary federal agency charged with protecting consumers from false, misleading, or unsubstantiated advertising and unfair or deceptive marketing. In addition, virtually every state has laws and regulations governing advertising within its jurisdiction.

