

March 23, 2000

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, NW
Washington, D.C. 20549

Re: File No. SR-NASD-99-41 Amended NASD Rule; The Opening of
Day-Trading Accounts

The Discount Brokerage Committee and the Ad-hoc Committee on Technology & Regulation (the “Committees”) of the Securities Industry Association (“SIA”)¹ are pleased to offer their views on the amended NASDR rule filing referenced above. The proposed rules would establish account opening procedures and disclosure requirements for firms that promote day trading.

Although not advocates of day trading, many SIA member firms offer an online order entry capability to customers. Our previous comment letters to NASDR and SEC on this rule proposal reflected our concern that promotion of day trading had not been clearly defined.² While it is true that none of the account opening and disclosure requirements come into play *unless* a firm is “promoting” day trading, SIA believed the overbroad nature of that term made it very likely that many an unsuspecting firm could be deemed to be promoting and therefore, subject to the rule.

We have read the proposed revisions to the rule filing and believe they address many of our concerns. We wish to thank the NASDR and SEC for their willingness to thoroughly evaluate and respond to all of the opinions presented by commenters at each step of the process. We are especially pleased that NASDR has seen fit to include the safe harbor for activities that would not be deemed to be a promotion of day trading.

¹ The SIA brings together the shared interests of more than 740 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. The U.S. securities industry manages the accounts of more than 50-million investors directly and tens of millions of investors indirectly through corporate, thrift and pension plans. The industry generates more than \$300 billion of revenues yearly in the U.S. economy and employs more than 700,000 individuals.

² SIA’s response to the first version of the NASDR rule proposal (Notice to Members 99-32), can be found at http://www.sia.com/legal_regulatory/html/nasd99-5.html. SIA’s response to the version that was published for comment by the SEC (Release No. 34-41875), can be found at http://www.sia.com/legal_regulatory/html/sec99-22.html.

While the amended rule filing represents a marked improvement over the earlier versions, SIA believes that NASDR needs to clear up the apparent confusion over how promotion of day trading will be interpreted in the context of individual solicitations. Also, the SIA believes that the provision that assigns firms the responsibility for uncovering customer violations of the customer's "Other Use" agreement is overly burdensome and ill-advised as a matter of public policy.

INDIVIDUAL SOLICITATIONS

In the amended filing, the SEC properly characterizes SIA's concern, but does not adequately clarify how the rule will operate. SIA is concerned that individual solicitations by a broker or brokers of a particular strategy to a targeted group of customers could be deemed to be a promotion of day trading. In that case, the entire firm would be subject to the account opening rules and disclosure requirement with respect to all new accounts, not just those that were targeted. SIA suggested that the rule should reflect that such individual solicitations should only trigger obligations under the rule to those customers that are the target of the solicitation.

The release states that the NASDR does not believe that such individual solicitations alone would trigger application of the proposed rules. The release further states that the rules would only be triggered by firms' general promotional efforts or by firm-sponsored promotional efforts. These statements are helpful in order to clarify the application of the rule. However, there follows this puzzling statement: "if a principal or officer of the firm is aware that brokers in the firm are soliciting customers for day trading, then the firm will be deemed to be promoting day trading." This last statement appears to conflict with the prior two in that it suggests that individual solicitations in the absence of general promotional efforts could indeed trigger application of the rule if known to management. At a large brokerage firm, it is not uncommon to have a broker or group of brokers that specialize in particular trading strategies – some of which may involve aggressive trading that could be considered day trading – marketing that approach to customers who may be seeking such a strategy. Furthermore, the broker's firm, and especially his/her supervisors, would be expected to know the nature of the strategy in which the broker specializes. Knowing the strategies employed by a broker or brokers is good supervisory practice and should not trigger the application of the rule to the entire firm.

The concern that individual solicitations rather than general promotional efforts, could be used to circumvent the rule is unpersuasive. There is simply no way that individuals within a firm could avoid responsibility with respect to those customers that a firm has solicited for day trading. Even if it is determined that existing rules governing solicitations and suitability are not applicable in such cases, the account opening review and disclosure requirement would still apply with respect to targeted customers. This seems reasonable and in no way could be perceived as circumventing the rule.

In the alternative, NASDR should consider requiring a higher threshold for incidents of individual solicitation before tagging the entire firm with promoting day trading. Realistically, it would require many brokers individually soliciting customers to day trade to substitute for general promotional efforts, and we believe that the commentary accompanying the rule should so state.

OTHER USE AGREEMENT

The SIA believes that the rule unfairly assigns firms the responsibility for customer changes of heart with respect to the “other use” agreement. Clearly, the agreement in which a customer indicates he or she does not intend to use the account for day trading is the most accurate statement of whether the customer is indeed a day trader. This is inherently more reliable than having the firm guess how the customer is going to trade or interpret patterns of trading. It is for this reason that the SIA requested the removal of the provision that would require a firm to take responsibility when the firm suspects a customer is not being truthful on the other use agreement. SIA objected to a related provision that would make a firm responsible when a customer later decides to unilaterally repudiate the other use agreement and begin day trading.

SIA continues to believe that these two provisions represent an unfair and unrealistic allocation of responsibility. Why should a firm have to develop a means to detect patterns of trading when the best evidence of the customer’s own intention is the customer’s written statement? Surely, we cannot place so little faith in the average investors that we cannot trust them to correctly state whether they want to day trade.

The NASDR makes two comments in response. First, the Association points out that the standard to be used in assigning responsibility to a firm is “actual knowledge,” i.e., the rule requirements are triggered when a firm acquires actual knowledge that a customer has day traded in violation of a pledge to the contrary. SIA maintains that this standard is not clear and will be prone to retroactive subjective interpretation. Since a firm maintains all records pertaining to a customer’s account by virtue of the record keeping rules, it could always be argued that the firm has actual knowledge of customer day trading in that account.

Second, as the Commission points out, “it seems *unlikely* that other use agreements would be widely used at firms that promote day trading.” This suggests that the SEC has a keen understanding of the potential for the rule to be misapplied to non-day trading firms. We agree; why else would a firm that is not promoting day trading even need the agreement? Rather than require the firm to guess what the nature of the customer trading is, SIA strongly urges the SEC to adopt a rule that simply requires the customer, rather than the firm, to assume responsibility when the customer’s intentions have changed.

We believe these two recommendations will address all of SIA's concerns with the rule as proposed. These changes will ensure that entire firms are not made subject to the rule by virtue of the targeted promotional efforts of a few individuals at that firm. The changes will also promote responsible investing by requiring customers to be honest about their intended use of the account.

If we can provide any further information or clarification of the points made in this letter, please contact the undersigned or Scott Kursman, SIA Assistant General Counsel, at 212-618-0508.

Respectfully submitted,

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Discount Brokerage Committee

Michael L. Michael, Chairman
Ad Hoc Committee on Technology and
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cc: The Honorable Arthur Levitt, Chairman
The Honorable Norman S. Johnson, Commissioner
The Honorable Isaac C. Hunt, Jr., Commissioner
The Honorable Laura S. Unger, Commissioner
The Honorable Paul R. Carey, Commissioner
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