

Below, please find a copy of the e-mail I sent to Shirley Weiss, Esq. and Mary Schapiro of NASD concerning Amendment #1 filed on Form 19b-4 by NASD on February 7, 2006.

Please contact me if you should have any questions, and/or if there is someone else to whom I should send this. Thank you.

Sincerely,

Fred Ferrara

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From: Fred Ferrara
Sent: Monday, February 12, 2007 2:22 PM
To: 'shirley.weiss@nasd.com'
Cc: 'mary.schapiro@nasd.com'
Subject: Response to Amendment #1 filed with the SEC on 2/7/2007 re: File Number SR-NASD-2006-124

Shirley Weiss, Esq.
Associate General Counsel
NASD

Dear Ms. Weiss:

I am writing to ask NASD to provide further clarification and/or reconsider its 2/7/2007 filing of Amendment #1 re: proposed Rule 2342 (the "Amendment," a copy of which is attached for convenience).

In my December 20, 2006 e-mailed comment (a copy of which can be found below this e-mail), I indicated that, under SIPC Bylaws, if making reference to SIPC would reasonably be deemed misleading, then a SIPC member firm would be prohibited from making such reference (except where any applicable SRO rule would require a forthright disclaimer of SIPC protection).¹ The cited SIPC Bylaw section 4(g)(2) then explains when it might be misleading to make such reference to SIPC:

An advertisement including the official symbol, the official advertising statement, or the official explanatory statement might be misleading if the Act as amended would not under most circumstances provide protection with respect to the investment or service advertised or if it might appear that SIPC protects or insures the quality of such investment or service. Matters to which the prohibition of this paragraph apply include, but are not limited to, those relating primarily to the following:

- A. Commodities or related contracts or futures contracts or any warrant or right to subscribe to, purchase or sell any of the same.
- B. Direct investments in real estate and real estate or mortgage brokerage.
- C. Insurance.
- D. Investment services which are exclusively advisory in character. Interests which are not included in the definition of the term "security" in the Act.¹

The foregoing was the rationale behind my comment that we do not make reference to SIPC in communications with our clients, since our firm only markets private placements in real estate direct participation programs to accredited investors. Therefore, at least presently, I do not see how our firm can provide information regarding SIPC to our clients under proposed Rule 2342, without also violating SIPC Bylaws Articles 11, Section 4(g)(2) in the process, since our clients would be receiving SIPC information from us even though their investments with us would not be provided protection under SIPC.

Perhaps my main concern is that the Amendment did not address that issue. Rather, it focused on how "SIPA excludes certain categories of registered brokers and dealers from membership in SIPC," and that SIPA requires all other brokers and dealers under Section 15(b) to be members of SIPC.² That paragraph of the Amendment concludes that all SIPC members should be required to make the disclosures required by proposed NASD Rule 2342, "regardless of the products currently being sold."³

One can infer from that paragraph of the Amendment that perhaps NASD sees an exclusive connection between a firm being exempted from SIPC membership and a firm for whom it would be misleading to make reference to SIPC. However, the SIPC Bylaws section noted above clearly points to the opposite conclusion, since the Bylaws and that section apply to SIPC member firms. Therefore, SIPC via its Bylaws clearly envisioned that some firms which are not exempt from SIPC membership (and consequently required to be members of SIPC) could nonetheless encounter situations where it would be misleading for them to make reference to SIPC in communications with clients.

While NASD made note of products "currently" being sold as not a sufficient reason for a firm to be exempt from the proposed rule, I would also point out that our firm is limited by the terms of its NASD Membership Agreement to sell only those products which we

currently sell. If we ever were to consider expanding our product line, our understanding is that we would need to file an application for approval of change in business operations under NASD Rule 1017. Moreover our two sales people are only licensed to sell direct participation programs (Series 22)—in other words, changing a product line to include products which might be covered under SIPC is not something which could be accomplished overnight.

Lastly, I would like to raise one new point not mentioned in my 12/20/2006 comment e-mail—with respect to when to provide the SIPC information under proposed Rule 2342. Our firm does not have any active clients as defined under Regulation S-P, since we only refer clients to the issuer. Given that, we are exempt from providing annual privacy notices to clients. However, that being said, in order to make sure our clients are aware of our privacy policy, we include it with a copy of each investment proposal provided to a client before each potential transaction, in addition to including it with each New Account Form sent to the client in order to open the account. Since our clients generally engage in very few transactions relative to those customers who might have a stock account with a more traditional broker, we find this to be a very effective way of reminding our clients of our privacy policy. Would it be possible to amend the proposed Rule to include similar flexibility—grant firms the option as to whether to provide the SIPC information annually or with each investment proposal before each potential transaction?

Given the foregoing, I would ask NASD to consider the following alternatives and/or provide additional ones before finalizing the proposed Rule:

1. Amend proposed Rule 2342 to exempt those firms whose compliance with said rule would likely result in violation of SIPC Bylaws Article 11, Section 4(g)(2);
2. If NASD believes that firms such as ours would not violate the aforementioned SIPC Bylaws section, then provide additional guidance which would enable us to understand the rationale for that position;
3. Amend proposed Rule 2342 to allow/require firms such as ours to include a statement which clearly sets forth that our clients investments are not protected under SIPC, and that we are only providing them with SIPC information due to the requirement of NASD Rule 2342;
4. Amend proposed Rule 2342 to allow flexibility for firms as to the timing of when SIPC information must be provided to clients.

Footnotes:

¹ See attached copy of SIPC Bylaws Article 11, Section 4, especially Section 4(g)(2).

² See attached copy of the Amendment at pages 6-7.

³ See attached copy of the Amendment at top of page 7.

Thank you in advance for your consideration. But for the comments of Mary Schapiro and others that NASD would like to avoid “one size fits all” regulation, I don’t know that I would have thought to comment, let alone send this follow-up. Please do not hesitate to contact me if you have any questions and/or would like additional information about our square peg firm.

Sincerely,

Fred Ferrara

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From: Fred Ferrara
Sent: Wednesday, December 20, 2006 4:16 PM
To: 'rule-comments@sec.gov'
Subject: File Number SR-NASD-2006-124

To Whom It May Concern:

With respect to the proposed new NASD Rule 2342, I believe the requirement to provide the proposed SIPC notices to new clients should only apply to those member firms which provide investment products which are subject to SIPC protection. It would seem to serve no regulatory purpose for members which only provide investment products which would not be covered by SIPC to be required to provide the proposed notices to clients who would not be able to avail themselves of SIPC protection.

In fact SIPC Bylaws Article 11, Sections 4(d)(2) and 4(g)(2) would appear to prohibit SIPC members from displaying the SIPC symbol in situations in which it could mislead a client into believing that the investments offered by member firms are covered by SIPC when in fact they are not. By way of example, our firm only markets private placements in real estate direct participation programs, and therefore it seems doubtful that SIPC would ever provide protection to any of our clients. Accordingly, we notified SIPC that we would no longer make reference to SIPC in our correspondence, business cards, and would not display the SIPC symbol in our office. It would seem that our firm, as well as others like us, would be able to continue to act in a manner consistent with the aforementioned SIPC Bylaws only if the proposed Rule 2342 is amended to create an exemption for those firms which only provide investment products which would not be subject to SIPC coverage.

Please do not hesitate to contact me if you should require any additional information.

Sincerely,

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Article 11, Section 4, ADVERTISEMENT OF MEMBERSHIP.

Pursuant to Section 15(d) of the Act, as amended, this Section provides for the official symbol, the official advertising statement, and the official explanatory statement of SIPC. In addition, it sets forth certain requirements, prohibitions, and other guidelines for the use of these official devices by members.

a. Definitions.

1. Advertising -The term "advertising" as used in this Section shall mean promotional material used in or on any newspaper, magazine, or other periodical, radio, television, telephone or tape recording, videotape display, motion picture, slide presentation, telephone directory, sign or billboard, electronic or other public media.
2. Branch Office - The term "branch office" as used in this Section shall mean any office of a member which is registered with or designated as a branch office with any self-regulatory organization.
3. Official Brochure - The term "official brochure" as used in this Section shall mean any publication so designated by the Corporation which explains the purposes of the Corporation and the protections it affords and which is authorized for public distribution.
4. Official Advertising Statement - The term "official advertising statement" as used in this Section shall be "Member of the Securities Investor Protection Corporation." The word "the" or the words "of the" may be omitted. The words "This firm is a" may be added before the word "member." The short title "Member of SIPC" or "Member SIPC" may be used by members at their option as the official advertising statement. When the official advertising statement is used on the Internet, the words "[Securities Investor Protection Corporation](#)" and "[SIPC](#)" shall contain a hyperlink to SIPC's website.
5. Official Explanatory Statement - The term "official explanatory statement" as used in this Section shall be either: (1) "Member of SIPC, which protects securities customers of its members up to \$500,000 (including \$100,000 for claims for cash). Explanatory brochure available upon request or at [www.sipc.org](#)." or (2) "Member of SIPC. Securities in your account protected up to \$500,000. For details, please see [www.sipc.org](#)." The words "Member of SIPC" may be omitted if the official explanatory statement is used in conjunction with the official symbol. When the official explanatory statement is used on the Internet, "SIPC" and "[www.sipc.org](#)" shall contain a hyperlink to SIPC's website.
6. Official Symbol - The term "official symbol," which may be displayed in a variety of sizes, colors or materials, shall be of the following design:



When the symbol is so reduced in size that the words "member" and "Securities Investor Protection Corporation" are illegible, these words may be omitted. When the official symbol is used on the Internet, "SIPC" shall contain a hyperlink to SIPC's website.

b. Mandatory Display by Members.

Except as provided in (d) below, effective January 1, 1979, each member of SIPC shall continuously display in a prominent place the official symbol (as prescribed in (a)(6) above) at its principal place of business and at each branch office.

c. Mandatory Inclusion of Member Advertising.

Except as provided in (d), (e), and (g)(2) below, effective January 1, 1979, members of SIPC shall include in all advertising (as defined in (a)(1) above) a reproduction of the official symbol or the official advertising statement or the official explanatory statement (as defined in (a)(6), (a)(4), (a)(5), respectively).

d. Exemptions.

1. No member shall be required to display the official symbol until thirty (30) days after its first day of operation as a member.
 2. No member shall be required to display the official symbol at any office where such display would be misleading to the public in that none of the business transacted in such office appears likely to give rise to claims of public customers which might be protected with SIPC funds in the event the member should be liquidated under the provisions of the Act as amended.
 3. A member may exhaust supplies of advertising materials which do not include the official symbol, advertising statement or explanatory statement so long as such materials were on hand or on order on the date this Section 4 was adopted. Radio, telephone or television advertisement which were produced, recorded or contracted for on the date this Section 4 was adopted may be used even if they do not contain the official symbol, advertising statement or explanatory statement.
 4. Upon written application by a member, the Corporation may grant an exemption from the requirements of (b) or (c) above, if it finds that (1) compliance with the requirement may be misleading to the public or result in undue hardship to the member and (2) an exemption from the requirement is consistent with the purposes of this Section 4.
- e. Optional Inclusion in Member Advertising.

The following is an enumeration of the types of advertising which may, but need not, include the official symbol, advertising statement or explanatory statement:

1. Signs or plates in the offices or attached to the building or buildings in which the member's officers are located;
 2. Listings in directories;
 3. Classified or display advertisements relating to the recruitment of personnel;
 4. Advertisements not setting forth the name of the member;
 5. Printed advertisements which do not exceed 10 square inches in space;
 6. Advertisements by radio or telephone recording which do not exceed 30 seconds in time;
 7. Advertisements by television which do not exceed 15 seconds in time;
 8. Advertisements relating to underwriting offerings, investment banking activities, mergers and acquisitions, and personnel announcements; and
 9. Internal news wires.
- f. Other Optional Inclusion by Members.

The official symbol, advertising statement, or explanatory statement may also, but need not, be included in communications media other than those defined as advertising in paragraph (a)(1) above, including, but not limited to, the following:

1. Supplies, such as trade confirmations, stationery, envelopes, checks, statements;
 2. Customers' statements;
 3. Promotional items, such as calendars, matchbooks, pens, paperweights;
 4. Telephone market reports;
 5. Research reports;
 6. Annual reports; and
 7. Direct mail brochures, market letters, and similar communications.
- g. Prohibitions on Member Advertising.
1. No member shall display any sign or symbol, or include any symbol, statement, or explanation relating to SIPC or membership therein in any advertising, promotional or other material other than the official brochure, symbol and statements as specified in (a) of this Section.
 2. Notwithstanding the provisions of (b), (c), (e) and (f) above, advertisements or other material relating primarily to services or types of investments which might, if the official symbol, the official advertising statement, or the official explanatory statement were included therein, reasonably be deemed misleading to public customers, may not include any reference to SIPC except, where applicable rules or regulations of any self-regulatory organization require, a forthright disclaimer of SIPC protection.

An advertisement including the official symbol, the official advertising statement, or the official explanatory statement might be misleading if the Act as amended would not under most circumstances provide protection with respect to the investment or service advertised or if it might appear that SIPC protects or insures the quality of such

investment or service. Matters to which the prohibition of this paragraph apply include, but are not limited to, those relating primarily to the following:

- A. Commodities or related contracts or futures contracts or any warrant or right to subscribe to, purchase or sell any of the same.
- B. Direct investments in real estate and real estate or mortgage brokerage.
- C. Insurance.
- D. Investment services which are exclusively advisory in character.
- E. Interests which are not included in the definition of the term "security" in the Act.