approved internally prior to filing with the NASD should be revised to state that the material is submitted on a voluntary basis. The ICI is concerned that the use of the term "accountable" in the Commission's release could be construed as an attempt to impose liability on members based on filing materials with the NASD.

Lastly, the ICI is concerned that the application of the rules to electronic communications would be inconsistent with the application of the rules with respect to other forms of communications. For example, the ICI claims that if a member sponsors an electronic bulletin board, the NASD proposal would not distinguish between member advertising and other material posted by the public. The ICI recommends that the definition of "advertisement" be revised to clarify that messages posted by the public on member sponsored bulletin boards are not included in the definition. Further, the ICI believes that the definition of ''sales literature'' is overbroad. The ICI is concerned that the definition would include a personalized message to a particular individual and, instead, recommends limiting the definition to form letters sent to individuals or targeted groups.

The second commenter strongly endorsed the comments made by the ICI.7 In particular, this commenter was concerned about the proposed requirement relating to registered principal approval of advertising and sales literature and the proposed inclusion of the word "electronic" in the definitions of "advertisement" and "sales literature." 8

The NASD responded to these comments in a letter dated July 24, 1995.9 In response to the requirement that only registered principals will be able to approve advertising and sales literature, the NASD notes that while some unregistered legal or compliance officers perform the review function very well, the expertise and skill among the reviewers are inconsistent on an industry-wide basis and can result in inferior submissions to the NASD. The NASD believes that any burden imposed by the rule will be minimal. The NASD states that a significant number of firms have legal and compliance personnel that are already registered principals. Additionally, the NASD states that

under the rule as proposed, such personnel do not need to be registered to continue to review materials, as long as a registered principal approved the material prior to submission. Moreover, the NASD argues that the steps necessary to register such personnel, which includes a one-time examination, are not overly burdensome. The NASD believes the requirement that a registered principal assume final approval responsibility will help ensure a satisfactory level of review is conducted by all reviewers. The NASD concludes that the improvement of the efficiency and quality of the review process, and the resulting benefits to the investing public, far outweigh the burdens discussed by the commenters.

The NASD also responded to the commenters' concern that the requirement regarding internal approval by members prior to filing submissions with the NASD could be interpreted as an attempt to establish a standard of culpability. In its letter, the NASD states that the rule is not intended to attach liability to, or establish a standard of culpability for, prefiled material. Instead, the rule will ensure that member firms' communications are in reasonable compliance with relevant SEC and NASD rules prior to submission to the NASD for review. The NASD states that this requirement is consistent with SEC recommendations made pursuant to the Commission's inspection of the NASD's program for reviewing member communications with the public. Under the rule, deficient filings will be returned and, if a pattern of deficiency is discovered, an internal review of member procedures may be appropriate.

Finally, the NASD responded to the commenters concerns regarding the inclusion of the term "electronic" in the definitions of "advertisement" and 'sales literature." The NASD states that the definition of advertisement in the proposed rule is not intended to apply to communications posted by members of the public on electronic bulletin boards sponsored by NASD members. The NASD claims that the definition of advertisement has never applied to communications by members of the general public. The NASD argues, therefore, that there is no need to amend the definition to clarify that it does not apply communications by the general public.

The NASD also claims that the definition of sales literature in the proposed rule is not intended to apply to a personalized message sent to a particular individual via electronic mail. The NASD states that such messages are not treated as sales

literature but generally are treated as correspondence under Article III, Section 27(d) of the Rules of Fair Practice. The NASD stresses, however, that the definition of sales literature does apply to messages sent directly to targeted individuals or groups.

## IV. Discussion

The Commission has determined to approve the NASD's proposal. The Commission finds that the rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the NASD, including the requirements of Section 15A(b)(6) of the Act. 10 Section 15A(b)(6) requires, in part, that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; and to protect the public and the public interest.

The proposed rule change applies to member communication with the public. It will act to clarify issues regarding advertising and sales literature, as well as to codify existing rule interpretations regarding the scope of rules applicable to member recommendations.

The changes to the definitions of "advertisement" and "sales literature" will update those terms in an effort to alert members of their responsibilities when contacting the public via electronic means or by way of telemarketing scripts. The result should be reduced confusion among members and a more consistent application of NASD rules.

The proposed changes to the internal approval procedures will ensure an adequate degree of expertise and uniformity in the execution of such procedures. Further, the requirement that material be approved internally prior to filing with the NASD will ensure that members satisfy their existing compliance duties. The proposed amendment also will require members to include the actual or anticipated date that a particular communication will be published which will enable the NASD to enforce the existing rules regarding time tables for filing certain communications more effectively.

Lastly, the proposal will reduce member confusion by clarifying an existing interpretation with respect to recommendations made by members. The rules will be consistent with the existing practice of requiring the price at the time a recommendation is made to

<sup>&</sup>lt;sup>7</sup>Letter from Laura Chasney, T. Rowe Price Associates, Inc., to Jonathan G. Katz, Secretary, SEC (July 5, 1995).

<sup>&</sup>lt;sup>8</sup> *Id.* These concerns already have been summarized in the context of the ICI letter above.

<sup>&</sup>lt;sup>9</sup>Letter from Suzanne E. Rothwell, Associate General Counsel, NASD, to Mark P. Barracca, Branch Chief, SEC (July 24, 1995).

<sup>&</sup>lt;sup>10</sup> 15 U.S.C. § 78*o*–3(b)(6).