

[Release No. 34-37875; File No. SR-NASD-96-37]

**Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Policy and Practice Concerning the Application of the Eligibility Provision in Rule 10304 of the NASD Code of Arbitration Procedure**

October 28, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on October 15, 1996, NASD Regulation, Inc. ("NASD Regulation") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD Regulation. NASD Regulation has designated this proposal as one constituting a stated policy, practice, or interpretation under § 19(b)(3)(A)(i) of the Act, which renders the rule effective upon the Commission's receipt of this filing. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

NASD Regulation is proposing to amend its policy and practice concerning the application of the eligibility provision in Rule 10304 of the Code of Arbitration Procedure ("Code") of the National Association of Securities Dealers, Inc. ("NASD" or "Association") to the effect that arbitrators, not the NASD Regulation staff, shall determine whether a dispute is eligible for arbitration. Below is the text of the proposed policy and practice change.

Pursuant to Rule 10304 of the Code, "[n]o dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy." Effective August 1, 1996, the NASD Regulation staff will no longer make preliminary determinations concerning the eligibility of a claim for arbitration. The NASD Regulation staff instead will address questions concerning the eligibility of a claim according to the following procedures:

1. Upon the filing or receipt of a claim, the staff reviews the claim to determine if the claimant has identified when the transaction at issue occurred or when the claim arose. If not

identified, the Statement of Claim is retained by the claimant is asked for additional information about the age of the claim.

2. If a claim identifies when the transaction at issue occurred or when the claim arose, it is served on the respondents. It is then the respondent's determination whether to challenge the eligibility of the claim.

3. Any motions to dismiss the claim on eligibility grounds and any responses thereto are forwarded to the arbitrators for a decision.

4. For those cases filed prior to August 1, 1996 where the staff has made a preliminary eligibility ruling in response to a respondent's motion, the moving papers will be forwarded to the arbitrators with a reminder that the arbitrators must review the issue *de novo* and must not accord the staff's preliminary ruling any weight.

**II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, NASD Regulation included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD Regulation has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

**A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

**1. Purpose**

NASD Regulation is proposing to amend its policy and practice concerning the application of the eligibility provision in Rule 10304 of the Code to the effect that arbitrators, not the NASD Regulation staff, shall determine whether a dispute is eligible for arbitration under Rule 10304.<sup>1</sup>

Until recently, the NASD Regulation staff made preliminary eligibility determinations, both before and after a

claim had been served, in cases where a bright line test could be applied. Before a claim was served the staff would, upon examination of the allegations in the Statement of Claim, determine if the occurrence or event giving rise to the act or dispute, claim or controversy took place more than six (6) years prior to the filing of the Statement of Claim. If the staff determined that this was the case, it would advise the claimant that the claim was ineligible for arbitration. Once a claim had been served and the staff had previously made a preliminary eligibility determination upon the motion of a party, upon the request of a party the arbitrators could review the preliminary staff determination and accept or reject it. The other self-regulatory organization ("SRO") arbitration forums have also followed this practice.

NASD Regulation has determined that because the practice of having the staff make preliminary eligibility determinations is not expressly provided for in the Code, questions may arise concerning the legal effect of these determinations. Accordingly, NASD Regulation is proposing to amend the existing policy and practice to eliminate staff eligibility determinations.

The amended policy, which is consistent with the Code and plain language of Rule 10304, will require the staff, upon the filing or receipt of a claim, to review the claim to determine if the claimant has identified when the transaction at issue occurred or when the claim arose. If not identified, the Statement of Claim is retained but the claimant is asked for additional information about the age of the claim. By requiring that claims identify when the transaction at issue occurred or arose, NASD Regulation is facilitating the ability of the arbitrators to determine if the claim is eligible.

If a claim identifies when the transaction at issue occurred or when the claim arose, or is amended to provide such information, it is served on the respondents. Once the claim is served, the respondents can decide whether or not to challenge the eligibility of the claim. If a respondent submits a motion to dismiss on eligibility grounds, the claimants will have an opportunity to respond, and the motion and the responses will be forwarded to the arbitrators for a decision.

NASD Regulation has also determined that where a case was filed prior to August 1, 1996, and the staff has made a preliminary eligibility ruling in response to a respondent's motion, the moving papers will be forwarded to the

<sup>1</sup> This policy is intended to be temporary. NASD Regulation intends the policy to remain in effect until an amendment to Rule 10304 can be developed and approved. The NASD's Arbitration Policy Task Force Report on Securities Arbitration Reform recommended suspending the eligibility rule. NASD Regulation, in consultation with the Securities Industry Conference on Arbitration (SICA) and others, is considering other alternatives to suspending the eligibility rule. The policy will not be included in the NASD Manual because NASD Regulation intends to propose a new arbitration eligibility rule within a few months.

arbitrators with a reminder that the arbitrators must review the issue *de novo* and must not accord the staff's preliminary ruling any weight.

NASD Regulation notes, as described above, that eligibility determinations have always involved an element of staff discretion. Thus, adoption of the policy set forth above is not a substantive change in Rule 10304 or its interpretation; it is a change in the manner in which the staff exercises its discretion to administer the arbitration process under the Rule.

## 2. Statutory Basis

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act<sup>2</sup> in that amending the policy for applying the eligibility provision of the Code serves the public interest by enhancing the perception of fairness of such proceedings by the parties to such proceedings. Unless otherwise expressly provided for in the Code, dispositive motions should be decided by the arbitrators because the arbitrators are the designated adjudicators of all issues of fact, law and procedure in an arbitration. To the extent the parties to such proceedings express increased satisfaction with the resolution of eligibility issues, the goal of providing the investing public with a fair, efficient and cost-effective forum for the resolution of disputes will have been advanced.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

NASD Regulation does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments were neither solicited nor received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)(i) of the Act<sup>3</sup> and subparagraph (e) of Rule 19b-4<sup>4</sup> thereunder in that it constitutes a stated policy, practice or interpretation with

respect to the meaning, administration, or enforcement of an existing rule.

At any time within 30 days of the filing of a rule change pursuant to Section 19(b)(3)(A) of the Act, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-96-37 and should be submitted by November 22, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,  
Deputy Secretary.

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[Release No. 34-37877; File No. SR-NSCC-96-18]

### **Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of a Proposed Rule Change To Modify Procedures Relating to the Reconfirmation and Pricing Service**

October 28, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on September 30, 1996, the National Securities Clearing Corporation ("NSCC") filed with the Securities and

Exchange Commission ("Commission") the proposed rule change (File No. SR-NSCC-96-18) as described in Items I, II, and III below, which Items have been prepared primarily by NSCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The purpose of the proposed rule change is to modify NSCC's procedures relating to supplemental input into the Reconfirmation and Pricing Service ("RECAPS").

### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments that it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.<sup>2</sup>

#### *(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

The purpose of the proposed rule change is to modify NSCC's procedures relating to RECAPS.<sup>3</sup> The proposed rule change will implement a request by the RECAPS Subcommittee of the Securities Operations Division of the Securities Industry Association to have members respond more effectively to transactions processed through RECAPS.

NSCC's Procedure II(G) currently provides that members with transactions that have not been reconfirmed after the processing of initial RECAPS input have an opportunity to submit supplemental input during the same RECAPS cycle. Supplemental input includes advisories, deletes, and as-of trades. An advisory allows a member to acknowledge a contraside submission that has not been reconfirmed after processing of initial RECAPS input. A delete permits a member to delete its own submission

<sup>2</sup> The Commission has modified the text of the summaries submitted by NSCC.

<sup>3</sup> RECAPS is NSCC's automated fail clearance system for eligible securities. RECAPS provides members an opportunity on a quarterly basis to reconfirm and reprice transactions that already have been compared.

<sup>2</sup> 15 U.S.C. 78o-3(b)(6).

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(i).

<sup>4</sup> 17 CFR 240.19b-4(e).

<sup>1</sup> 15 U.S.C. 78s(b)(1)(1988).