

V. Conclusion

It is Therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁶ that the proposed rule change (SR-MSRB-96-06), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁷

Margaret H. McFarland,

Deputy Secretary.

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[Release No. 34-38060; File NO. SR-NASD-96-47]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NASD Regulation, Inc. Relating to the Policy and Practice Concerning the Application of the Eligibility Provision in Rule 10304 of the NASD Code of Arbitration Procedure

December 18, 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 December 17, 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. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.¹

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

NASD Regulation amended 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 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) year as have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy." Effective August

1, 1996,² 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 but 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 remainder 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 soliciting comment on its amended 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 10304.³

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 amended 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.

³ 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.

¹⁶ 15 U.S.C. § 78s(b)(2).

¹⁷ 17 CFR 200.30-3(a)(12)(1994).

¹ NASD Regulation originally submitted this proposed rule change in SR-NASD-96-37 on October 15, 1996. That rule filing was submitted for immediate effectiveness under Section 19(b)(3)(A) of the Act. SR-NASD-96-37 was withdrawn simultaneously with the filing of this rule change.

² NASD Regulation has been enforcing the amended policy and practice described in SR-NASD-96-37, and in this filing, since August 1, 1996, up to and during the filing of notice in SR-NASD-96-37, and is continuing to enforce the policy at this time.

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 the 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 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 Act⁴ 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

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

NASD Regulation proposed rule change SR-NASD-96-37 was filed for immediate effectiveness pursuant to Section 19(b)(3)(A) of the Act on October 15, 1996. The Commission published notice of the filing of SR-NASD-96-37 in the Federal Register⁵ and received thirteen comment letters in response.⁶ Filing SR-NASD-96-37 is being withdrawn simultaneously with the submission of this rule filing, which is substantively the same as SR-NASD-96-37.

Because there is insufficient time to adequately address the comment letters received in response to SR-NASD-96-37 at this time, NASD Regulation will respond to them when addressing the comment letters received in response to this filing.

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

Within 35 days of the publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

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-96-47 and should be submitted by January 16, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷

Margaret H. McFarland,
Deputy Secretary.

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[Release No. 34-38058; File No. SR-NYSE-96-36]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Transmission of Proxy and Other Shareholder Communication Material.

December 18, 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 December 6, 1996, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") 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 the self-regulatory organization. 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 Exchange is proposing changes to Rules 451 and 465 (the "Rules") on a three-year pilot basis. The Rules establish guidelines for the reimbursement of expenses by issuers to NYSE member organizations for the processing of proxy materials and other issuer communications with respect to security holders whose securities are held in street name. The text of the proposed rule change is available at the Exchange or the Commission.

⁵ Securities Exchange Act Release No. 37875 (October 28, 1996), 61 FR 56594 (November 1, 1996).

⁶ Comment letters were received from A.G. Edwards & Sons, Inc.; Scot D. Bernstein, Esq.; Gail E. Boliver, Esq.; Michael R. Casey, Esq.; Dean Witter, Discover & Co.; Philip J. Hoblin, Jr., Esq.; Investor Advocates; C. Thomas Mason, III; Merrill Lynch; Public Investors Arbitration Bar Association; Harold W. Sellner; Smith Barney; and the Securities Industry Association.

⁷ 17 CFR 200.30-3(a)(12).

⁴ 15 U.S.C. 780-3(b)(6).