

Finally, the Commission finds good cause to accelerate approval of Amendment No. 2 to the proposed rule change prior to the thirtieth day after the date of publication in the **Federal Register**. The Commission notes that Amendment No. 2 merely clarifies the rule language and deletes inapplicable language. The amendment, therefore, does not substantively change the meaning or intent of the proposed rule change. For these reasons, the Commission believes that good cause exists, consistent with Sections 6(b)(5)<sup>19</sup> and 19(b)<sup>20</sup> of the Act, to approve Amendment No. 2 to the proposed rule change on an accelerated basis.

#### V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether Amendment No. 2 is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. 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 at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR-BSE-2001-01 and should be submitted by November 15, 2001.

#### VI. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>21</sup> that the proposed rule change (SR-BSE-2001-01), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>22</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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National Association of Securities Dealers, Inc., the Pacific Exchange, Inc. and the Philadelphia Stock Exchange, Inc.

<sup>19</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> 15 U.S.C. 78s.

<sup>21</sup> 15 U.S.C. 78s(b)(2).

<sup>22</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-44950; File No. SR-NASD-00-02]

### Self-Regulatory Organizations; Notice of Filing of Amendments to Proposed Rule Change by National Association of Securities Dealers, Inc. Amending NASD Code of Arbitration Rules 10335 and 10205(h) Relating to Injunctive Relief

October 18, 2001.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 18, 2000, May 17, 2001 and August 10, 2001, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. ("NASD Dispute Resolution") filed with the Securities and Exchange Commission ("Commission") Amendment No. 3, Amendment No. 4 and Amendment No. 5 to the proposed rule change respectively, as described in Items I, II, and III below, which items have been prepared by NASD Dispute Resolution.<sup>3</sup> On April 7, 2000, the proposed rule change, which incorporated Amendment No. 1 and Amendment No. 2,<sup>4</sup> was published for comment in the **Federal Register**.<sup>5</sup> The Commission is publishing this notice to solicit comments on Amendment Nos. 3, 4, and 5 from interested persons.

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

NASD Dispute Resolution is proposing to amend Rules 10335 and 10205(h) of the Code of Arbitration Procedure of the NASD ("Code"), to

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See letter from Laura Leedy Gansler, Counsel, NASD Dispute Resolution to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated December 18, 2000 ("Amendment No. 3"); letter from Laura Leedy Gansler, Counsel, NASD Dispute Resolution to Florence Harmon, Senior Special Counsel, Division, Commission, dated May 17, 2001 ("Amendment No. 4"); and letter from Laura Leedy Gansler, Counsel, NASD Dispute Resolution to Florence Harmon, Senior Special Counsel, Division, Commission, dated August 10, 2001 ("Amendment No. 5").

<sup>4</sup> See letters from Patrice Cliniecki, Vice President and Deputy General Counsel, NASD Dispute Resolution, to Katherine A. England, Assistant Director, Division, Commission, dated March 7, 2000 ("Amendment No. 1") and March 24, 2000 ("Amendment No. 2").

<sup>5</sup> See Securities Exchange Act Release No. 42606 (April 3, 2000), 65 FR 18405 (April 7, 2000) ("Original Proposal").

simplify and clarify the procedures for obtaining injunctive relief in certain disputes subject to arbitration. Below is the text of the proposed rule change. Changes to the proposed rule text added since the proposed rule change was published in the **Federal Register** on April 7, 2000 are in italics; deletions from the previously published rule change are in brackets.<sup>6</sup>

#### Rules of the Association

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10000. Code of Arbitration Procedure

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10300. Uniform Code of Arbitration

#### Rule 10335. Temporary Injunctive Orders; Requests for Permanent Injunctive Relief

(a) Temporary Injunctive Orders.

(1) In industry or clearing disputes required to be submitted to arbitration pursuant to Rule 10201, parties may seek a temporary injunctive order, as defined in paragraph (a)(2) of this Rule, from a court of competent jurisdiction. Parties to a pending arbitration may seek a temporary injunctive order from a court of competent jurisdiction even if another party has already filed a claim arising from the same dispute in arbitration pursuant to this paragraph, provided that an arbitration hearing on a request for permanent injunctive relief *pursuant to paragraph (b) of this Rule* has not yet *begun* [commenced].

(2) For purposes of this Rule, temporary injunctive order means a temporary restraining order, preliminary injunction or other form of initial, temporary injunctive relief.

(3) A party seeking a temporary injunctive order from a court with respect to an industry or clearing dispute required to be submitted to arbitration pursuant to Rule 10201 shall simultaneously file with the Director a Statement of Claim requesting permanent *injunctive and all other* relief with respect to the same dispute in the manner specified under this Code[, and shall simultaneously]. *The party seeking temporary injunctive relief shall also serve the Statement of Claim requesting permanent injunctive and all other relief on all other parties in the same manner and at the same time as the Statement of Claim is filed with the Director.* Filings and service under this Rule *shall* [may] be made by facsimile, overnight delivery service or messenger. *Service shall be made on all parties at the same time and in the same manner, unless*

<sup>6</sup> NASD Disputes Resolution represents that the proposal, and all amendments thereto are available at its web site, [www.nasdr.com](http://www.nasdr.com).

*the parties agree otherwise.* A party obtaining a court-issued temporary injunctive order shall notify the Director and the other parties of the issuance of the order within one business day.

(4) Unless otherwise stated, for purposes of computation of time under any paragraph of this Rule, any reference to days means calendar days, including Saturdays, Sundays or any NASD holiday. However, if a party must provide notice or a response to the Director and the day on which that notice or response to the Director must be given falls on a Saturday, Sunday or any NASD holiday, then the time period is extended until the next business day.

(b) Hearing on Request for Permanent Injunctive Relief.

(1) Scheduling of Hearing.

If a court issues a temporary injunctive order, an arbitration hearing on the request for permanent injunctive relief shall *begin* [commence] within 15 days of the date the court issues the temporary injunctive order. If the 15th day falls on a Saturday, Sunday, or NASD holiday, the 15-day period shall expire on the next business day. *Unless the parties agree otherwise, a hearing lasting more than one day shall be held on consecutive days when reasonably possible.* The Director shall provide to all parties notice of the date, time and place of the hearing at least three days prior to the *beginning* [commencement] of the hearing.

(2) Composition of Arbitration Panel.

The hearing on the request for permanent injunctive relief shall be heard by a panel of three arbitrators, who shall either be all non-public arbitrators as defined in Rule 10308(a)(4), or, if the underlying dispute would be heard by a public arbitrator or panel consisting of a majority of public arbitrators under Rule 10202, a majority of public arbitrators as defined in Rule 10308(a)(5).

(3) Selection of Arbitrators and Chairperson.

(A) (i) In cases in which all of the members of the arbitration panel are non-public under paragraph (b)(2) of this Rule, the Director shall generate and provide to the parties a list of seven arbitrators from a national roster of arbitrators. *The Director shall send to the parties the employment history for the past 10 years for each listed arbitrator and other background information.* At least [a majority] *three* of the arbitrators listed shall be lawyers [specializing in] *with experience litigating cases involving* injunctive relief.

(ii) Each party may exercise one strike to the arbitrators on the list. Within three days of receiving the list, each

party shall inform the Director which arbitrator, if any, it wishes to strike, and shall rank the remaining arbitrators in order of preference. *The Director shall consolidate the parties' rankings, and shall appoint arbitrators based on the order of rankings on the consolidated list, subject to the arbitrators' availability and disqualification.*

(B) (i) In cases in which the panel of arbitrators consists of a majority of public arbitrators under paragraph (b)(2) of this Rule, the Director shall generate and provide to the parties a list of nine arbitrators from a national roster of arbitrators. *The Director shall send to the parties employment history for the past 10 years for each listed arbitrator and other background information.* At least a majority of the arbitrators listed shall be [(1)] public arbitrators [and (2)], *and at least four of the arbitrators listed shall be lawyers [specializing in] with experience litigating cases involving* injunctive relief.

(ii) Each party may exercise two strikes to the arbitrators on the list. Within three days of receiving the list, each party shall inform the Director which arbitrators, if any, it wishes to strike, and shall rank the remaining arbitrators in order of preference. *The Director shall consolidate the parties' rankings, and shall appoint arbitrators based on the order of rankings on the consolidated list, subject to the arbitrators' availability and disqualification.*

(C) (i) Each party shall inform the Director of its preference of chairperson of the arbitration panel by the close of business on the next business day after receiving notice of the panel members.

(ii) If the parties do not agree on a chairperson within that time, the Director shall select the chairperson. In cases in which the panel consists of a majority of public arbitrators, *the Director shall select a public arbitrator as chairperson.* [shall be one of the public arbitrators who is a lawyer specializing in] *with experience litigating cases involving* injunctive relief. [In cases in which the panel consists of non-public arbitrators, the chairperson shall be a lawyer specializing in injunctive relief.] Whenever possible, the Director shall select as chairperson the lawyer [specializing in] *with experience litigating cases involving* injunctive relief whom the parties have ranked the highest.

(D) The Director may exercise discretionary authority and make any decision that is consistent with the purposes of this Rule and Rule 10308 to facilitate the appointment of arbitration panels and the selection of chairperson.

(4) Applicable Legal Standard.

The legal standard for granting or denying a request for permanent injunctive relief is that of the state where the events upon which the request is based occurred, or as specified in an enforceable choice of law agreement between the parties.

(5) Effect of Pending Temporary Injunctive Order.

Upon a full and fair presentation of the evidence from all relevant parties on the request for permanent injunctive relief, the panel may prohibit the parties from seeking an extension of any court-issued temporary injunctive order remaining in effect, or, if appropriate, order the parties jointly to move to modify or dissolve any such order. In the event that a panel's order conflicts with a pending court order, the panel's order will become effective upon expiration of the pending court order.

(2) Fees, Costs and Expenses, and Arbitrator Honorarium.

(A) The parties shall jointly bear [the] *reasonable* travel-related costs and expenses *incurred by arbitrators who are required to travel to a hearing location other than their primary hearing location(s) in order to participate in* [of the arbitrators appointed to hear] *the hearing on the request for permanent injunctive relief.* [The arbitrators shall not reallocate such costs and expenses among the parties.] *The arbitrators may reallocate such costs and expenses among the parties in the award.*

(B) The party seeking injunctive relief shall pay the expedited hearing fees pursuant to Rule 10205(h), or, where both sides seek such relief, both parties shall pay such fees. In either event, however, the arbitrator(s) [shall have the authority to] *may* reallocate such fees among the parties *in the award.*

(C) Notwithstanding any other provision in the Code, the chairperson of the panel hearing a request for permanent injunctive relief pursuant to this Rule shall receive an honorarium of \$375 for each single session, and \$700 for each double session, of the hearing. Each other member of the panel shall receive an honorarium of \$300 for each single session, and \$600 for each double session, of the hearing. The parties shall equally pay the difference between these amounts and the amounts panel members and the chairperson receive under the Code pursuant to IM-10104. The arbitrators [shall not] *may* reallocate such amount among the parties *in the award.*

(c) Hearing on Damages or other Relief.

(1) Upon completion of the hearing on the request for permanent relief, the

panel, may, if necessary, set a date for any subsequent hearing on damages or other relief, which shall be held before the same panel or arbitrators and which shall include, but not be limited to, the same record.

(2) The parties shall jointly bear [the] *reasonable* travel-related costs and expenses [of the arbitrators resulting from] *incurred by arbitrators who are required to travel to a hearing location other than their primary hearing location(s) in order to participate in* any subsequent hearings on damages or other relief. The arbitrators [shall not] *may* reallocate such costs and expenses among the parties *in the award*.

(d) Unchanged.

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#### 10200. INDUSTRY AND CLEARING CONTROVERSIES

10205. Schedule of Fees for Industry and Clearing Controversies

(a)–(k) Unchanged.

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

NASD Dispute Resolution has filed three amendments to the proposed rule change since it was published for comment by the Commission on April 7, 2000.<sup>7</sup> In the amendments filed with the Commission, NASD Dispute Resolution included statements concerning the purpose of and basis for the amendments to 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 Dispute Resolution 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

Rule 10335 of the Code is a pilot rule providing procedures for obtaining interim and permanent injunctive relief in arbitration. The pilot rule is currently due to expire on January 4, 2002. The purpose of the proposed rule change is to streamline the process for obtaining injunctive relief, and to expedite the disposition of the merits of cases in which injunctive relief is ordered.

The Commission published the proposed rule change for comment on

April 7, 2000.<sup>8</sup> On December 19, 2000, NASD Dispute Resolution filed Amendment No. 3 and a Response to Comments responding to a majority of the comment letters.<sup>9</sup> On December 21, 2000, NASD Dispute Resolution filed a second Response to Comments responding to the remaining comment letters subsequently received by NASD Dispute Resolution.<sup>10</sup> Since then, NASD Dispute Resolution has amended the proposed rule change twice more in response to comments from the Commission staff.<sup>11</sup> The amendments to the proposed rule change made since the proposed rule change was published for comment are summarized below.

#### Panel Composition

The proposed rule change originally required that a majority of arbitrators hearing requests for permanent injunctive relief be lawyers specializing in injunctive relief. A number of commenters expressed the view that this requirement was overly vague, would result in more arbitrators with a bias in favor of member firms and would give the staff too much discretion in determining who met the criteria. In response, NASD Dispute Resolution amended the proposed rule change to provide that a majority of arbitrators hearing a request for permanent injunctive relief be lawyers "with experience litigating cases involving injunctive relief, rather than lawyers 'specializing in' injunctive relief. In response to additional comments from the Commission staff based on commenters' concerns about panel composition, the proposed rule change was further amended to provide that less than a majority of the arbitrators listed would be required to be lawyers with experience litigating cases involving injunctive relief. Therefore, the proposed rule now provides that at least three of seven, or four of nine, rather than a majority, of the listed arbitrators in non-public and public cases, respectively, shall be lawyers with experience litigating cases involving injunctive relief.<sup>12</sup>

<sup>8</sup> See note 5.

<sup>9</sup> See Amendment No. 3 for a detailed summary of the comments and NASD Dispute Resolutions' response, *supra* note 3.

<sup>10</sup> See *supra* note 5.

<sup>11</sup> See Amendment No. 4 and Amendment No. 5, *supra* note 3.

<sup>12</sup> See letter from John W. Shaw and Jeffrey A. Ziesman, Berkowitz, Feldmiller, Stanton, Brandt, Williams & Stueve, LLP, counsel to Sutro & Co. Incorporated, to Secretary, Commission, dated April 28, 2000 ("Sutro Comment Letter"), and letter from Dan Jamieson, Public Investor, to Jonathan Katz, Secretary, Commission, dated May 1, 2000.

#### Allocation of Fees and Costs

In order to fill a panel to hear requests for permanent relief within the shortened time frame provided by the proposed rule, arbitrators will occasionally be required to travel to hearing locations other than their primary hearing location. The proposed rule change originally provided that the parties would jointly bear the travel-related costs and expenses of the arbitrators hearing the request for permanent relief or any subsequent hearing on other relief, as well as the additional honoraria required by the rule, and prohibited arbitrators from reallocating costs and expenses among the parties.

In response to comments, NASD Dispute Resolution amended the text of the proposed rule change to delete all prohibitions on reallocation of the costs, expenses, fees, and honoraria. In addition, the proposed rule change was amended to expressly provide that the arbitrators may reallocate these costs, expenses, and honoraria in the award. NASD Dispute Resolution also amended the provisions relating to travel costs and expenses to clarify that the parties are only responsible for reasonable travel-related costs and expenses incurred by arbitrators who are required to travel to a hearing location other than their primary hearing location(s) in order to participate in the hearing on the request for permanent injunctive relief or subsequent hearings on other forms of relief.

#### Appointment of Arbitrators

At the suggestion of the Commission staff, NASD Dispute Resolution amended the proposed rule change to make clear that certain procedures in Rule 10308 under the Code for providing parties with background information regarding the listed arbitrators, and for appointing arbitrators based on the consolidated list of the parties' rankings, apply in the context of the proposed rule. Specifically, the proposed rule change now provides that the Director shall send to the parties the employment history for each listed arbitrator for the past 10 years and other background information. This language mirrors language in Rule 10308(b)(6) under the Code. The proposed rule change also now provides that once the lists are ranked and returned by the parties, the Director shall consolidate the parties' rankings and shall appoint arbitrators based on the order of rankings on the consolidated list, subject to availability and disqualification. This language

<sup>7</sup> See Amendment No. 3, Amendment No. 4 and Amendment No. 5, *supra* note 3.

mirrors language in Rule 10308(c)(3) and (c)(4) under the Code.

#### *Filing and Service of Statement of Claim*

NASD Dispute Resolution amended the proposed rule change to clarify that when parties file a Statement of Claim in arbitration pursuant to paragraph (a)(3) of the proposed rule, the Statement of Claim must include requests for all permanent relief, whether injunctive or otherwise. The same provision was also amended to clarify that service under the rule must be made on all parties at the same time and in the same manner, unless the parties agree otherwise, and that the Statement of Claim must be filed with the Director in the same manner as it is served on the other parties. The provision was also amended to clarify, because of the short time frames provided by the rule, that service and filings under the rule must be either by facsimile, overnight delivery service or messenger. These changes reflect the intent of the original rule filing and are merely intended to remove any ambiguity from the original filing.

#### *Consecutive Hearing Days*

To further ensure prompt presentation of evidence in such cases, the proposed rule was amended to provide that, to the extent possible, hearings on requests for permanent injunctive relief lasting more than one day would be held on consecutive days, unless the parties agree otherwise.

(b) *Timing of Requests for Temporary Injunctive Orders in Court:* The proposed rule provides that parties to a pending arbitration may seek temporary injunctive relief in court even if another party has already filed a claim arising from the same dispute in arbitration, provided that an arbitration hearing on the request for permanent injunctive relief has not yet begun. NASD Dispute Resolution amended this provision to clarify that this provision refers to the arbitration hearing on the merits of the request for permanent injunctive relief, and not to any pre-hearing conferences related to the hearing on the request for permanent injunctive relief.

(c) *Commence v. Begin:* At the request of the Commission staff, NASD Dispute Resolution replaced the word "commence" with the word "begin," or the appropriate form thereof, throughout the proposed rule to respond to a commenter's request to clarify that the relevant provisions refer to the arbitration hearing on the merits.<sup>13</sup>

#### 2. Statutory Basis

NASD Dispute Resolution believes that the proposed rule change as amended is consistent with the provisions of Section 15A(b) of the Exchange Act,<sup>14</sup> in general, and furthers the objectives of Section 15A(b)(6),<sup>15</sup> in particular, which requires, among other things, that the Association's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The NASD believes that it is in the best interest of investors and the parties involved in intra-industry disputes to provide for fast and efficient resolution of requests for temporary injunctive relief, and to provide clear and simple rules governing the integration of court-ordered relief with the arbitration of the underlying disputes.

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

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

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

The NASD submitted Amendment No. 3, Amendment No. 4 and Amendment No. 5 to the proposed rule change ("Current Amendments") in response to written comments it received on the Original Proposal. Written comments regarding the Current Amendments were neither solicited nor received.

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

Within 35 days of the date of 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 such 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 Amendment Nos. 3, 4, and 5, including whether Amendment Nos. 3, 4, and 5 are consistent with the Act. The Commission notes in particular that, under the proposal, the parties shall jointly bear the reasonable travel-related costs and expenses resulting from any subsequent hearings on damages or other relief. In addition, the parties shall equally pay the difference between the honorarium under proposed paragraph (b)(6)(C) of Rule 10335 and the amounts the arbitrators are otherwise entitled to receive under the Code. The arbitrators may reallocate these costs and expenses among the parties. The Commission seeks comments on this fee structure, including whether the proposal is consistent with the Act which, among other things, prohibits the imposition of inappropriate and unnecessary burdens on competition<sup>16</sup> and requires that fees and charges be reasonable and equitably allocated.<sup>17</sup>

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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-00-02 and should be submitted by November 15, 2001.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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<sup>13</sup> See Sutro Comment Letter, *supra* note 12.

<sup>14</sup> 15 U.S.C. 78o-3(b).

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

<sup>16</sup> See 15 U.S.C. 78o-3(b)(9).

<sup>17</sup> See 15 U.S.C. 78o-3(b)(5).

<sup>18</sup> 17 CFR 200.30-3(a)(12).