

NASD Regulation has found that parties are deterred from using these procedures by the extra compensation paid to arbitrators and the additional administrative fees required under Rule 10334. At the same time, NASD Regulation found that one of the most attractive aspects of Rule 10334 is the availability of a list selection procedure for the appointment of arbitrators, which is not yet generally available for other types of arbitration cases.

In addition, the attractiveness of the procedures may be affected by the required administrative conference with the staff. This conference may be beneficial in assisting the parties to develop a road map for a proceeding, even if the parties do not agree to use other procedures under Rule 10334. However, the requirement that the administrative conference be conducted in all cases over \$1 million, regardless of whether the parties plan to proceed under Rule 10334, creates a cost burden to the parties and to the Office.

Accordingly, NASD Regulation is proposing to amend Rule 10334 to provide for an administrative conference with the staff only if all parties request such a conference in writing. The procedures will be available if the parties voluntarily agree to proceed with an administrative conference and to develop a written agreement to proceed under Rule 10334. An administrative conference will, however, continue to be a prerequisite to the use of the special procedures provided by Rule 10334. In addition, NASD Regulation is proposing to amend Rule 10334 to extend the Rule for five more years to August 1, 2002.

III. Discussion

The Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act⁵ in that extending the effectiveness of the procedures for large and complex cases and making their use entirely voluntary will serve the public interest, by enhancing the satisfaction and perceived fairness of such proceedings by the parties to the proceedings.⁶ The Commission notes that providing for a five-year extension of the pilot program will permit arbitration participants to continue to utilize the procedures. In addition, an extension of the pilot program will allow the NASD to gather additional data on the program and to continue to monitor the usefulness of the large and

complex rule to arbitration parties, in order to see if the pilot program should be approved on a permanent basis.

The Commission also believes that amending Rule 10334 to provide for an administrative conference with the staff only if all parties request such a conference in writing⁷ is reasonable under the Act because the elimination of the requirement for an administrative conference in all cases should result in reduced costs to the parties and to NASD Regulation. The Commission also notes that an administrative conference will continue to be a prerequisite to the use of the special procedures provided by Rule 10334.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁸ that the proposed rule change (SR-NASD-97-52) is approved, through August 1, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁹

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39021; File No. SR-NASD-97-45]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Modifications to the Definition of Qualified Independent Underwriter

September 4, 1997.

I. Introduction

On June 26, 1997, the National Association of Securities Dealers, Inc., ("NASD" or "Association") filed with the Securities and Exchange Commission ("Commission" or "SEC") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change relating to modifications to the definition of "qualified independent underwriter." The proposed rule change was published for comment in Securities

Exchange Act Release No. 38833 (July 11, 1997), 62 FR 38333 (July 17, 1997). The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

NASD is proposing to amend Rule 2720, Distribution of Securities of Members and Affiliates—Conflicts of Interest, that regulates the conduct of offerings by members of their own securities, those of the member's parent, or an affiliate, and other offerings in which a member has a conflict of interest.

When a member proposes to participate in the distribution of a public offering of its own or an affiliate's securities, or of securities of a company with which it otherwise has a conflict of interest, NASD Rule 2720 requires that the price at which an equity issue or the yield at which a debt issue is to be distributed to the public be established at a price no higher or a yield no lower than that recommended by a member acting as a "qualified independent underwriter." The qualified independent underwriter must also participate in the preparation of the offering document and is expected to exercise the usual standards of due diligence in respect thereto. The participation of a qualified independent underwriter is intended to assure the public of the independence of the pricing and due diligence functions in a situation where a member is participating in an offering where the member has a conflict of interest.

The NASD is proposing to delete the requirement that a qualified independent underwriter has had net income from operations of the broker/dealer entity or from the pro forma combined operations of predecessor broker/dealer entities, exclusive of extraordinary items, as computed in accordance with generally accepted accounting principles, in at least three of the five years immediately preceding the filing of the registration statement.

III. Discussion

The Commission believes the NASD's proposed rule change is consistent with the Act, and specifically with Section 15A(b)(6) thereunder.³ Section 15A(b)(6) requires that the rules of a national securities association be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in

⁵ 15 U.S.C. 78o-3.

⁶ In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁷ The procedures will be available if the parties voluntarily agree to proceed with an administrative conference and to develop a written agreement to proceed under Rule 10334.

⁸ 15 U.S.C. 78s(b)(2).

⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78o-3.

securities, and to remove impediments to and perfect the mechanism of a free and open market.⁴

The NASD is proposing to delete the eligibility criteria contained in the definition of "qualified independent underwriter" in NASD Rule 2720, which requires a qualified independent underwriter to have recorded net income in three of the five years immediately preceding the offering. Due to the important investor protections provided by qualified independent underwriters, the Commission agrees with the NASD's assessment that qualified independent underwriters should meet certain standards as prescribed by the NASD in Rule 2720, however, the Commission believes the requirement that a qualified independent underwriter have had net income in three of the previous five years immediately preceding an offering does not specifically indicate a member's ability to act as a qualified independent underwriter. The Commission believes that other factors, including a member's actual experience in underwriting, may be more significant in determining eligibility as a qualified independent underwriter. In its proposed rule change, the NASD noted that the Hearing Subcommittees of the NASD's Corporate Financing Committee have granted the majority of requests received seeking an exemption from the proposed qualified independent underwriter net income requirement, relying instead, on members' extensive underwriting experience managing or co-managing public offerings to compensate for any lack of ongoing profitability.

The Commission recognizes that the net income requirement, in some instances, may serve as an effective measure for qualified independent underwriters. However, the Commission also notes that a deficiency in net income may be the result of various situations, many of which are not directly connected to the profitability of a member's underwriting activities. Indeed, in its filing, the NASD noted that one national broker-dealer failed the net income requirement due to its settlement of sales practice abuses in connection with the distribution of noncorporate securities, an activity unrelated to its ability to serve as a qualified independent underwriter.

The Commission believes that the participation of a qualified independent underwriter assures the public of the

independence of the pricing and due diligence functions in a situation where a member is participating in an offering where such member has a conflict of interest. Because of the important investor protections provided by qualified independent underwriters in such an instance, the Commission believes certain criteria must be met to assure the credibility of those acting as qualified independent underwriters. The Commission believes the elimination of the net income requirement is appropriate, as such requirement does not appropriately reflect a member's ability to act as a qualified independent underwriter. The Commission further believes the remaining standards provided in NASD Rule 2720 are more relevant in assessing a member's qualifications in the capacity as a qualified independent underwriter.

IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the NASD, and in particular Section 15A(b)(6).

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁵ that the proposed rule change (File No. SR-NASD-97-45) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39025; File No. SR-NASD-97-57]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Electronic Delivery of Information Between Members and Their Customers

September 5, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on July 30, 1997,² the National Association

⁵ 15 U.S.C. 78s(b)(2).

⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² On August 27, 1997, the NASD Regulation amended its NTM attached as Exhibit A to this notice. See letter from Mary N. Revell, Associate

of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD Regulation, Inc. ("NASD Regulation" or "NASDR").³ 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

NASDR has filed a Notice to Members ("NTM") setting forth the policy of NASDR applicable to the electronic delivery of information between members and their customers.

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

In its filing with the Commission, NASDR 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. NASDR 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

The Commission, in Release Nos. 34-37182⁴ and 33-723,⁵ set forth guidelines establishing a framework under which broker-dealers and others may use electronic media as an

General Counsel, NASD Regulation, Inc., to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, dated August 26, 1997.

³ The Board of Governors reviewed the proposed rule change at its meeting on August 7, 1997. See letter from Mary N. Revell, Assistant General Counsel, NASD Regulation, Inc., to Katherine A. England, Assistant Director, Division of Market Regulation, SEC, dated August 11, 1997.

⁴ See Securities Exchange Act Release No. 37182, May 9, 1996; 61 FR 24644, May 15, 1996, (Commission's interpretation concerning the delivery of the information through electronic media in satisfaction of broker-dealer and transfer agent requirements to deliver information under the Act and the rules thereunder) ("May 1996 Release").

⁵ See Securities Act Release No. 7233, Oct. 6, 1995; 60 FR 53458, Oct. 13, 1995, (Commission's interpretation concerning the use of electronic media as a means of delivering information required to be disseminated pursuant to the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940).

⁴ In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).