

regulations of the Corporate Financing Rule and to, instead, subject them to NASD Conduct Rule 2830, which regulates the distribution and sales charges of open-end funds.<sup>19</sup> The proposed amendment to the Corporate Financing Rule would amend subparagraph (b)(8)(C) to provide that closed-end fund offerings are exempt if the fund makes periodic repurchase offers pursuant to Rule 23c-3(b)<sup>20</sup> and it offers its shares on a continuous basis pursuant to Rule 415<sup>21</sup> under the Securities Act of 1933.<sup>22</sup> Closed-end funds that do not meet these requirements will continue to be subject to the Corporate Financing Rule. The proposed amendment to NASD Conduct Rule 2830 would amend paragraphs (d) and (j) to provide that interval funds are subject to the provisions regulating sales charges and the repurchases of fund securities.<sup>23</sup>

## 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>24</sup> 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. NASD Regulation believes that the calculation of members' compensation for the distribution of interval fund shares is more properly regulated by the Sales

<sup>19</sup> Interval funds are distinguished from other hybrid closed-end funds that make periodic self-tenders in compliance with Rule 13e-4 and Schedule 13E-4 under the Act ("tender offer funds"). See 17 CFR 240.13e-4 and 17 CFR 240.13e-101 *et seq.* Such tender offer funds are not required to establish as a fundamental policy that they will make periodic repurchases, as required by Rule 23c-3(b) under the 1940 Act. 17 CFR 270.23c-3(b), 15 U.S.C. 80a. The rule change proposed herein would not exempt tender offer funds from the Corporate Financing Rule. However, NASD Regulation will consider individual requests for exemption under the NASD Rule 9600 series from the requirements of the Corporate Financing Rule for such tender offer funds. See, Exemption granted October 29, 1999 under "Corporate Financing Rule—Rule 2710" at [www.nasd.com](http://www.nasd.com).

<sup>20</sup> 17 CFR 270.23c-3(b).

<sup>21</sup> 17 CFR 230.415.

<sup>22</sup> 15 U.S.C. 77a *et seq.*

<sup>23</sup> An interval fund that has received a "no objections" opinion from the Corporate Financing Department based upon representations that underwriting compensation will not exceed a certain amount will become subject to the Sales Charge Rule upon effectiveness of the proposed amendments, provided that the compensation limit has not already been met or exceeded. Any interval fund that has reached the applicable compensation limit under the Corporate Financing Rule shall remain subject to the requirements of the Rule until the fund files a post-effective amendment with the Commission registering additional securities.

<sup>24</sup> 15 U.S.C. 78o-3(b)(6).

Charge Rule, rather than by the limitations on underwriting compensation in the Corporate Financing Rule.

### 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, as amended.

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

NASD Notice to Members 98-81 (October, 1998) requested comment on whether any NASD rules are obsolete. A copy of the comment letter received from the Investment Company Institute in response to the Notice that requested the amendments proposed herein was filed with the proposed rule change. A copy of a petition for rulemaking requesting the amendments proposed herein submitted by the law firm of Stradley Ronon Stevens & Young on behalf of Franklin/Templeton Distributors, Inc. was also attached to the proposed rule change.

## 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 NASD consents, the Commission will:

- By order approve such proposed rule change, or
- 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, including whether the proposed rule change 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 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 number SR-NASD-99-74 and should be submitted by April 28, 2000.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>25</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 00-8490 Filed 4-6-00; 8:45 am]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42606; File No. SR-NASD-00-02]

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

April 3, 2000.

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 January 13, 2000,<sup>3</sup> the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly-owned subsidiary NASD Regulation, Inc. ("NASD Regulation") filed with the Securities and Exchange Commission ("SEC" or "Commission") a 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.

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

NASD Regulation is proposing to amend Rules 10335 and 10205(h) of the

<sup>25</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> On March 9, 2000 and March 15, 2000 the NASD submitted Amendments No. 1 and 2 to the proposed rule change, respectively, the substance of which is incorporated into the notice. See letters to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, from Patrice Gliniecki, Vice President and Deputy General Counsel, NASD Regulation, dated March 7, 2000 ("Amendment No. 1") and March 24, 2000 (Amendment No. "2").

Code of Arbitration Procedure of the NASD, to simplify and clarify the procedures for obtaining injunctive relief in certain disputes subject to arbitration. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

\* \* \* \* \*

#### RULES OF THE ASSOCIATION

\* \* \* \* \*

#### 10000. CODE OF ARBITRATION PROCEDURE

\* \* \* \* \*

#### 10300. UNIFORM CODE OF ARBITRATION

##### Rule 10335. [Injunctions] *Temporary Injunctive Orders; Requests for Permanent Injunctive Relief*

[The current text of Rule 10335 is deleted in its entirety.]

###### (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 subparagraph (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 has not yet 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 relief with respect to the same dispute in the manner specified under this Code, and shall simultaneously serve the Statement of Claim requesting permanent relief on all parties. Filings and service under this Rule may be made by facsimile, overnight delivery service or messenger. 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 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. The Director shall provide to all parties notice of the date, time and place of the hearing at least three days prior to the 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) *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. At least a majority of the arbitrators listed shall be lawyers specializing in injunctive relief. 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.*

(B) *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. At least a majority of the arbitrators listed shall be (1) public arbitrators and (2) lawyers specializing in injunctive relief. 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.*

(C) *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. 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 chairperson shall be one of the public arbitrators who is a lawyer specializing in 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 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 air 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.*

###### (6) *Fees, Costs and Expenses, and Arbitrator Honorarium*

(A) *The parties shall jointly bear the travel-related costs and expenses of the arbitrators appointed to hear the request for permanent injunctive relief. The arbitrators shall not reallocate such costs and expenses among the parties.*

(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 allocate such fees among the parties.*

(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 \$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 reallocate such amount among the parties.*

(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 of arbitrators and which shall include, but not be limited to, the same record.*

(2) *The parties shall jointly bear the travel-related costs and expenses of the arbitrators resulting from any subsequent hearings on damages or other relief. The arbitrators shall not reallocate such costs and expenses among the parties.*

(d) *Effective Date*

*This Rule shall apply to arbitration claims filed on or after [60 days from effective date.] Except as otherwise provided in this Rule, the remaining provisions of the Code shall apply to proceeding instituted under this Rule.*

\* \* \* \* \*

## 10200. INDUSTRY AND CLEARING CONTROVERSIES

### 10205. Schedule of Fees for Industry and Clearing Controversies

(h) [In each industry dispute of clearing controversy which is required to be submitted to arbitration before the Association as set forth in Rule 10201, above, where interim injunctive relief is requested or where a court has issued a temporary injunction and a party requests expedited proceedings, a total non-refundable surcharge of \$2,500 shall be paid by the party or parties requesting the expedited proceedings as provided by Rule 10335. For purposes of this Rule, where expedited proceedings are mandated by Rule 10335(g), the party that sought and was granted injunctive relief by a court shall be deemed a party requesting expedited proceedings. These surcharges shall be in addition to all other non-refundable filing fees, hearing deposits, or costs which may be required. The arbitrator

may determine that a party shall reimburse another party for any non-refundable surcharge it has paid.] *A party seeking a temporary injunctive order in court pursuant to Rule 10335 shall pay a total non-refundable surcharge of \$2,500 at the time the party files its Statement of Claim and Request for Permanent Relief as required by Rule 10335. Where more than one party seeks such relief, all such parties shall pay the surcharge. The arbitrator may determine that a party shall reimburse another party for part or all of any non-refundable surcharge it has paid. These surcharge fees shall be in addition to all other non-refundable filing fees, hearing deposits, or costs which may be required.*

\* \* \* \* \*

## 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

Rule 10335, the NASD's pilot injunctive relief rule, allows interim injunctive relief to be obtained in controversies involving member firms and associated persons in arbitration. The rule has primarily been used in "raiding cases," or cases involving the transfer of an employee to another firm. Rule 10335 took effect on January 3, 1996 for a one-year pilot period. The Commission has periodically extended the initial pilot period in order to permit NASD Regulation's Office of Dispute Resolution to assess the effectiveness of the rule. The pilot rule is currently due to expire on January 5, 2001.<sup>4</sup>

In November 1997, the NASD published Notice to Members 97-59, which sought comment on how the injunctive relief and expedited proceedings work and how they could be improved, and identified more than

twenty specific questions based on previous comments received from users of the rule. Based on comments received in response to Notice to Members 97-59, the NASD filed a rule to amend Rule 10335 and to make it a permanent part of the Code (SR-NASD-98-49) in July 1998. The NASD filed amendments and responses to comments received by the Commission regarding the rule filing in December 1998.

In response to additional formal and informal comments received after the amendments and responses to comments were filed, the Injunctive Relief Rule Subcommittee of NASD Regulation's Inc's National Arbitration and Mediation Committee ("NAMC") undertook to reconsider every aspect of the proposed rule change. In addition to its NAMC members, the Subcommittee included representatives from member firms that has expressed an interest in the rule, including all of the retail firms that commented negatively on the prior rule filing.

After lengthy deliberation and careful compromise, the Subcommittee recommended withdrawing the previous rule filing and replacing it with the proposed amendments summarized below. The NAMC approved the proposed amendments at its September 1999 meeting. The proposed amendments were then approved by the Small Firm Advisory Board and the Board of Directors of NASD Regulations in December 1999.

#### Summary of the Current Rule

Rule 10335 currently provides, among other things, that:

- Parties may seek temporary injunctive relief either in court or in arbitration.
- Parties who seek temporary injunctive relief in court must simultaneously submit the claim to arbitration for permanent relief.
- Parties may obtain interim injunctive relief in arbitration rather than in court in the form of either an Immediate Injunctive Order or a Regular Injunctive Order.
- Permanent injunctive relief may be obtained in arbitration as part of the final relief sought by a party in connection with a claim.
- Applications for interim injunctive relief are expedited.
- Where a court grants interim injunctive relief to one of the parties, arbitration proceedings on the dispute must be expedited.

#### Summary of Proposed Rule Change

The NASD continues to believe that it is important that parties be able to obtain immediate temporary injunctive

<sup>4</sup> See Securities Exchange Act Release No. 42280 (December 28, 1999), 65 FR 1211 (January 7, 2000).

relief in cases that warrant such relief. However, users of the rule have complained that the bifurcated procedures and multiple layers of review provided by the current pilot rule are unnecessarily complex and confusing. The principal objectives of the proposed amendments are to simplify and expedite the procedures for seeking immediate injunctive relief in intra-industry disputes and to fairly and effectively integrate court-ordered initial injunctive relief with the arbitration of the underlying claims in the same disputes.

#### *Availability of Injunctive Relief in Arbitration*

The most significant aspect of the proposed rule change is that it would eliminate the option of seeking temporary injunctive relief in arbitration. Under the current rule, parties may seek either an Immediate Injunctive Order or a Regular Injunctive Order in arbitration, which are roughly parallel to temporary restraining orders and preliminary injunctions available in court. The rule does not currently impose any time limits on the orders issued, and does not specify what standard should be applied in deciding applications for injunctive relief. Users of the pilot rule have complained that the terminology is confusing, that the lack of standards has created uncertainty, and that the lack of time limits permits parties who obtain relief to pressure the enjoined party to settle by delaying the hearing on the merits. In addition, experience with the rule has shown that, although temporary injunctive relief is available in arbitration on an expedited basis, it is still not possible to obtain such injunctive relief in arbitration as quickly as in court, due largely to the need to appoint and convene arbitrators specifically for each case.

Under the proposed amendments, parties would still be able to seek temporary injunctive relief in a court of competitive jurisdiction. The rule would continue to require parties seeking such relief to simultaneously file a Statement of Claim in arbitration requesting permanent relief regarding the same dispute. This requirement reflects the intent of the rule to provide parties with an ability to seek immediate relief, but to ensure that the underlying disputes remain subject to arbitration.

One question that has arisen in the application of the pilot rule is whether parties can seek temporary injunctive relief in court even if a Statement of Claim has already been filed in arbitration regarding the underlying

dispute. Under the proposed amendments, parties to a pending arbitration would be able to seek a temporary injunctive order in court even if another party has already filed a claim arising from the same dispute in arbitration, provided that an arbitration hearing on a request for permanent injunctive relief had not yet commenced.

#### *Hearing on Request for Permanent Relief; Selection of Arbitrators; Appointment of Chairperson*

Under the proposed amendments, if a court issues a temporary injunctive order, the hearing on the request for permanent relief must commence within 15 days of the date the court issued its order. The hearing on the request for permanent injunctive relief would be heard by a panel of three arbitrators. In cases in which the underlying dispute would be heard by a panel of non-public arbitrators as defined in Rule 10308(a)(4), the three arbitrators would be non-public. In cases in which the underlying dispute would be heard by a public arbitrator or panel consisting of a majority of public arbitrators under Rule 10202, the panel hearing the request for permanent relief would consist of a majority of public arbitrators as defined in Rule 10308(a)(5).

In cases in which all of the members of the arbitration panel are non-public, the Director of Arbitration would generate and provide to the parties a list of seven arbitrators from a national roster of arbitrators, at least a majority of whom would be lawyers specializing in injunctive relief. Each party would be able to exercise one strike to the arbitrators on the list.

In cases in which the panel of arbitrators consists of a majority of public arbitrators, the Director of Arbitration would generate and provide to the parties a list of nine arbitrators from a national roster of arbitrators. At least a majority of the arbitrators in those cases would be (1) public arbitrators and (2) lawyers specializing in injunctive relief. In those cases, the parties would be able to exercise two strikes to the arbitrators on the list. Regardless of the number of strikes given to the parties, the rule would incorporate by reference other Code of Arbitration rules providing unlimited strikes for cause, so that parties would always be able to strike arbitrators who were unqualified due to conflicts of interest or for other reasons.

Under the proposed amendments, the parties would be required to inform the Director of their preference of chairperson of the arbitration panel by

the close of business on the next business day after receiving notice of the panel members. If the parties did not agree on a chairperson within that time, the Director would select the chairperson. In cases in which the panel consists of a majority of public arbitrators, the chairperson would be one of the public arbitrators who is a lawyer specializing in injunctive relief. In cases in which the panel consists of non-public arbitrators, the chairperson would be a lawyer specializing in injunctive relief. Whenever possible, the Director would select as chairperson the lawyer specializing in injunctive relief whom the parties have ranked the highest. The rule would also provide that the Director of Arbitration may exercise discretionary authority and make any decision that is consistent with the purposes of the rule and the arbitrator selection rule (Rule 10308) to facilitate the appointment of arbitration panels and the selection of the chairperson.

The timing of the hearing, the composition of the panel and the selection of the chairperson are the result of a carefully crafted compromise that is intended to balance the need to ensure fairness for all parties with the need to commence the arbitration process as quickly as possible.

#### *Applicable Legal Standard*

The proposed rule would provide that the decision to grant or deny a request for permanent injunctive relief would be governed by an enforceable choice of law agreement between the parties, or, if there were no such agreement, then by the law of the state where the events upon which the request is based occurred.

#### *Temporary Injunctive Order in Effect During Hearing*

One of the most difficult aspects of integrating court-ordered injunctive relief with arbitration of the underlying claims in the same dispute is the treatment of a pending court order in effect at the commencement of the hearing on the request for permanent relief. This becomes a potentially important issue in the event that the pending court order conflicts with the decision of the panel, because conflicting orders from a court and the arbitration panel could place parties in the position of either having to be in contempt of a pending court order or violation of an arbitration order.

NASD Regulation does not believe that arbitration panels have the authority to dissolve, modify or supersede a court order. However, arbitrators do have the authority to

order parties not to seek extensions of pending orders, or to jointly ask the court to modify or dissolve a pending order, if necessary. To address this issue, the proposed rule change would provide that, in the event that a court-issued temporary injunctive order is still in effect, after a full and fair presentation of evidence from all relevant parties, an arbitration panel may prohibit the parties from seeking an extension of the pending court order, and, if appropriate, may order the parties to jointly move the court to modify or dissolve the pending court 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.

#### *Fees*

Expediting the hearing on the request for permanent relief and providing arbitrators who meet the special requirements of Rule 10335 may involve additional costs and expenses. For example, in order to appoint the required number of qualified arbitrators in the short time frame provided by the rule, it may be necessary to use arbitrators from cities other than the site of the hearing. Because expedition of the hearing on the request for permanent relief is in the interest of all parties, particularly the party against whom a court-ordered temporary restraining order has been entered, the proposed amendments provide that the parties would jointly bear the travel-related costs and expenses of the arbitrators appointed to hear the request for permanent injunctive relief. To ensure that these additional expenses are borne equally by the parties, the rule would prohibit the arbitrators from reallocating arbitrator travel costs and expenses among the parties.

Similarly, the rule provides that, 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 NASD believes that these additional amounts are necessary to ensure that a sufficient number of qualified arbitrators are available to participate in such hearings in the short time frame provided by the rule. Again, because both parties benefit from the expedition of the hearing on the request for permanent relief, the NASD believes that it is equitable that

the parties share the difference between these amounts and the amounts panel members and the chairperson would otherwise receive under the Code. As in the case of additional travel costs and expenses, the rule ensure this balance by prohibiting arbitrators from reallocating these amounts among the parties.<sup>5</sup>

Finally, the rule also provides that 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, the rule specifically provides that the arbitrators shall have the authority to allocate such fees among the parties. The rule has no effect on the obligations of parties to pay, or on the authority of arbitrators to allocate, any other hearing fees required under the Code.

#### *Subsequent Hearings on Damages or Other Relief*

The hearing on the request for permanent relief is intended to address only the question of injunctive relief. It is not intended to address other forms of relief, such as damages, which do not need to be heard on an expedited basis. The rule provides that if, upon completion of the hearing on the request for permanent relief, a subsequent hearing on other forms of relief is necessary, the panel shall set the date for the subsequent hearing. This would provide parties the opportunity to develop a more complete record than might be possible within the constraints of the expedited injunctive relief hearing. Any subsequent hearing would be before the same panel that heard the request for permanent injunctive relief, and would include, but would not be limited to, the record developed at the earlier hearing. The rule would also provide that the parties would jointly bear the travel-related costs and expenses of the arbitrators resulting from any subsequent hearings on damages or other relief, and prohibits the arbitrators from reallocating those costs and expenses among the parties.

#### *Rule 10205(n)*

Rule 10205(h), Schedule of Fees in Industry and Clearing Controversies, currently provides that when temporary injunctive relief is sought in arbitrators or in court, a non-refundable surcharge of \$2,500 shall be paid by the party or parties requesting the expedited proceedings as provided in Rule 10335. To harmonize Rule 10205(h) with the

proposed amendments to Rule 10335, the proposed rule change would also amend Rule 10205(h) to eliminate reference to the availability of temporary injunctive relief in arbitration, and to clarify the application of the provision of temporary injunctive orders sought in court.

#### 2. Statutory Basis

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, 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 arbitrator of the underlying disputes.

#### *B. Self-Regulation 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, as amended.

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

No written comments were solicited or received with respect to the proposed rule change.

#### **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

<sup>5</sup> The payment of ordinary honoraria, as provided in IM-10104 of the Code, shall not be affected by this provision.

arguments concerning the foregoing. The Commission notes in particular that, under the proposal, the parties shall jointly bear the travel-related costs and expenses of the arbitrators appointed to hear the request for permanent injunctive relief. Further, the parties shall jointly bear the 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 not 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>6</sup> and requires that fees and charges be reasonable and equitably allocated.<sup>7</sup> In previous orders, the Commission has relied substantially on arbitrators' discretion in finding that fees and charges met this standard.<sup>8</sup>

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549-0609. 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 April 28, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 00-8649 Filed 4-6-00; 8:45 am]

**BILLING CODE 8010-01-M**

<sup>6</sup> See 15 U.S.C. 78o-3(b)(9).

<sup>7</sup> See 15 U.S.C. 78o-3(b)(5).

<sup>8</sup> See, e.g., Securities Exchange Act Release No. 41056 (February 16, 1999), 64 FR 10041 (March 1, 1999).

<sup>9</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42579; File No. SR-NYSE-99-50]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 thereto by the New York Stock Exchange, Inc. Relating to Continued Listing Standards

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 21, 1999, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") 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 the Exchange. On March 27, 2000, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>3</sup> On March 27, 2000, the Exchange submitted Amendment No. 2 to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange proposes to amend Section 802 of its *Listed Company Manual* (the "Manual") regarding its criteria governing the continued listing of securities (and corresponding changes to NYSE Rule 499). Specifically, the Exchange proposes: (1) to define "market capitalization" for the purpose of its continued listing standards; (2) to clarify the appropriate measures for partnerships; and, (3) to

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

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

<sup>3</sup> In Amendment No. 1, the NYSE made several clarifications to the intent and proposed interpretation of the proposed rule change. The Exchange expanded its discussion regarding the use of convertible securities in calculating the market capitalization of an issuer, and provided several examples of the proposed rule's application. The Exchange also explained the IRS-related basis for the proposed changes to the calculation of market capitalization for partnerships. Finally, the Exchange clarified that the proposed change to the bankruptcy provision would not restart the eighteen-month clock for an Exchange-approved plan. See Letter to Belinda Blaine, Associate Directors, Division of Market Regulation ("Division"), SEC, from James E. Buck, Senior Vice President and Secretary, NYSE, dated March 21, 2000 ("Amendment No. 1").

<sup>4</sup> In Amendment No. 2, the Exchange made several technical changes to the rule text which are reflected in this notice. See Letter to Belinda Blaine, Associate Director, Division, SEC, from James E. Buck, Senior Vice President and Secretary, NYSE, dated March 24, 2000 ("Amendment No. 2").

codify the Exchange's discretion to accept a financial plan for certain companies that have filed or that have announced an intent to file for bankruptcy, and that are below financial continued listing standards, but that are otherwise financially sound. The text of the proposed rule change is as follows: Proposed additions are italicized and proposed deletions are in brackets.

#### NYSE Listed Company Manual

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#### Section 8

#### Suspension and Delisting

#### 801.00 Policy

\* \* \* \* \*

#### 802.00 Continued Listing

#### 802.01 Continued Listing Criteria

\* \* \* \* \*

The Exchange would normally give consideration to delisting a security of either a domestic or non-U.S. issuer when:

\* \* \* \* \*

#### 802.01B Numerical Criteria for Capital or Common Stock—

If a company falls below any of the following criteria, it is subject to the procedures outlined in Paras. 802.02 and 802.03:

- Total global market capitalization is less than \$50,000,000 and total stockholders' equity *or, for partnerships, both the general and limited partners' capital as applicable*, is less than \$50,000,000 (C); or

- Average global market capitalization over a consecutive 30 trading-day period is less than \$15,000,000; or

- For companies that qualify under the "global market capitalization" standard:

- Total global market capitalization is less than \$500,000,000 and total revenues are less than \$50,000,000 over the last 12 months (unless the resultant entity qualifies as an original listing under one of the other standards) (C)

OR

- Average global market capitalization over a consecutive 30 trading-day period is less than \$100,000,000.

*When applying the market capitalization test in any of the above three standards, the Exchange will generally look to the total common stock outstanding (excluding treasury shares) as well as any common stock that would be issued upon conversion of another outstanding equity security. The Exchange deems these securities to be reflected in market value to such an extent that the security is a "substantial equivalent" of common stock. In this regard, the Exchange will only consider*