thereunder, in that it constitutes a stated policy, practice, or interpretation with respect to the meeting, administration, or enforcement of an existing rule.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal 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–2002–03 and should be submitted by February 6, 2002.[9]

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

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 02–1103 Filed 1–15–02; 8:45 am]

**BILLING CODE 8010–01–M**

[9] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–45261; File No. SR–NASD–00–02]**

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

January 9, 2002.

## I. Introduction

On January 13, 2000, the National Association of Securities Dealers, Inc. (''NASD''), through its wholly-owned subsidiary NASD Regulation Inc. (''NASD Regulation'') filed with the Securities and Exchange Commission (''Commission''), pursuant to section 19(b)(1) of the Securities Exchange Act (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change amending the NASD Code of Arbitration Procedure (''Code'') Rules 10335 and 10205(h) relating to injunctive relief.

NASD Regulation submitted to the Commission Amendment No. 1 to its proposed rule change on March 9, 2000 [3] and Amendment No. 2 on March 25, 2000.[4] On April 27, 2000, the proposed rule change, as amended, was published for comment in the **Federal Register**.[5] The Commission received 13 comment letters on the proposed rule change, as amended by Amendments No. 1 and 2.[6] On December 19, 2000, NASD, through NASD Dispute Resolution Inc. (''NASD Dispute Resolution''), filed Amendment No. 3 and a response to comments [7] and on December 21, 2000, filed a supplemental response to comments.[8] In response to Amendment No. 3 and NASD Supplemental Response, the Commission received two additional comment letters on the proposal.[9] NASD, through NASD Dispute Resolution, filed Amendment No. 4 and Amendment No. 5 on May 17, 2001 and August 10, 2001, respectively.[10] On October 25, 2001, the proposed rule change, as amended by Amendment Nos. 3, 4, and 5, was published for comment in the **Federal Register**.[11] The Commission received one additional comment letter on the amended proposal.[12] As discussed below, this

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Patrice Gliniecki, Vice President and Deputy General Counsel, NASD Regulation, to Katherine A. England, Assistant Director, Division of Market Regulation (''Division''), Commission, dated March 7, 2000 (''Amendment No. 1'').

[4] *See* letter from Patrice Gliniecki, Vice President and Deputy General Counsel, NASD Regulation, to Katherine A. England, Assistant Director, Division, Commission, dated March 24, 2000 (''Amendment No. 2'').

[5] *See* Securities Exchange Act Release No. 42606 (April 3, 2000), 65 FR 18405 (April 7, 2000).

[6] Letter from Alan Foxman, Esq. Chairman, National Association of Investment Professionals, Government and Regulatory Committee, and T. Sheridan O'Keefe, President, National Association of Investment Professionals, to Jonathan G. Katz, Secretary, Commission, dated April 26, 2000 (''Foxman Letter''); letter from Thomas M. Campbell, Smith Campbell & Paduano, to Katherine A. England, Assistant Director, Division, Commission, dated April 27, 2000 (''Campbell Letter''); 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 Letter''); letter from Dana N. Pescosolido, Law Offices of Saul, Ewing, Weinberg & Green, counsel to Ferris, Baker Watts, Incorporated, Janney Montgomery Scott LLC, Legg Mason Wood Walker, Incorporated, Morgan Keegan & Company, Inc. and Raymond James & Associates, Inc. to Jonathan G. Katz, Secretary, Commission, dated April 28, 2000 (''Pescosolido Letter''); letter from Dan Jamieson, Public Investor, to Jonathan Katz, Secretary, Commission, dated May 1, 2000 (''Jamieson Letter''); e-mail from Joseph G. Kathrein Jr. to Commission, dated May 23, 2000 (''Kathrein E-mail''); letter from Gary R. Irwin, Vice President and Group Counsel, American Express Financial Corporation, American Express Financial Advisors, to Jonathan G. Katz, Secretary, Commission, dated May 25, 2000 (''Irwin Letter''); e-mail from Kosta, to Commission, dated July 10, 2000 (''Kosta E-mail''); e-mail from Michael A. Yoakum, to Commission, dated July 10, 2000 (''Yoakum E-mail''); e-mail from Frank Louis Blair Koucky III to Commission, dated July 11, 2000 (''Koucky E-mail''); e-mail from Gilbert A. Armour, Financial Consultant, Kirlin Securities, to Commission, dated July 11, 2000 (''Armour E-mail''); letter from Bob Chernow, to J. Katz, Secretary, Commission, dated July 10, 2000 (''Chernow Letter''); and letter from Dan Jamieson, to Jonathan Katz, Secretary, Commission, dated January 3, 2001 (''Jamieson Letter 2'').

[7] *See* letter from Laura Leedy Gansler, Counsel, NASD Dispute Resolution, to Katherine A. England, Assistant Director, Division, Commission, dated December 18, 2000 (''Amendment No. 3'').

[8] *See* letter from Laura Leedy Gansler, Counsel, NASD Dispute Resolution, to Katherine A. England, Assistant Director, Division, Commission, dated December 21, 2000 (''NASD Supplemental Response'')

[9] Letter from Dan Jamieson, to Jonathan Katz, Secretary, Commission, dated January 4, 2001 (''Jamieson Letter 3''); and letter from Dana N. Pescosolido, Saul Ewing LLP, to Katherine A. England, Assistant Director, Division, Commission, dated January 20, 2001 (''Pescosolido Letter 2,'' and together with Pescosolido Letter, ''Pescosolido Letters'').

[10] *See* 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'').

[11] *See* Securities Exchange Act Release No. 44950 (October 18, 2001), 66 FR 54041 (October 25, 2001) (''Second Release'').

[12] *See* letter from Dan Jamieson, to Jonathan Katz, Secretary, Commission, dated November 1, 2001 (''Jamieson Letter 4,'' and together with Jamieson Letter, Jamieson Letter 2 and Jamieson Letter 3, ''Jamieson Letters'').

order approves the proposed rule change, as amended.

## II. Description

*Background*

NASD proposes to amend Rules 10335 and 10205(h) of the Code to simplify and clarify the procedures for obtaining injunctive relief in certain disputes subject to arbitration. Rule 10335, the NASD's pilot injunctive relief rule, provides procedures for obtaining interim injunctive relief in controversies involving member firms and associated persons in arbitration. NASD Rule 10335 currently provides that parties to arbitration may seek temporary injunctive relief within the arbitration process or from a court of competent jurisdiction. NASD represents that this rule has primarily been used in ''raiding cases,'' or cases involving the transfer of an employee to another firm. NASD 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 Dispute Resolution to assess the effectiveness of the rule. The pilot rule is currently due to expire on July 1, 2002.[13]

NASD represents that the principal objectives of the amended proposal 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.[14] The amended proposal would (i) eliminate the option of seeking temporary injunctive relief within the arbitration process by requiring parties to seek temporary injunctive relief in a court of competent jurisdiction; (ii) require simultaneous filing of an arbitration claim for permanent injunctive and all other relief; (iii) require arbitration to be expedited once interim relief has been granted; (iv) set forth the procedures for establishing the composition of the arbitration panel; (v) specify the applicable legal standard for granting or denying a request for permanent injunctive relief; (vi) address the effect of court-ordered temporary injunctive relief during and after arbitration; and (vii) address the allocation of arbitration fees, costs and expenses, and arbitrator honoraria.

*Temporary Injunctive Relief*

The proposed rule change would eliminate arbitration as a forum for seeking temporary injunctive relief. Parties would still be able to seek temporary injunctive relief, but only in a court of competent jurisdiction. Under the proposal, a party may seek temporary injunctive relief in court 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 has not yet begun. NASD Dispute Resolution clarified that an arbitration hearing on permanent injunctive relief would not include preparations for the arbitration hearing, such as pre-hearing conferences or assembling an arbitration panel or resolving discovery or other pre-hearing matters.[15] The proposal would require any party seeking a temporary injunctive order from a court to simultaneously file a Statement of Claim in arbitration requesting permanent injunctive and all other relief.

Several commenters criticized the elimination of arbitration as a forum for the issue of temporary injunctive relief.[16] Two commenters argued that NASD did not offer any statistical data or evidence justifying the elimination of this option.[17] Three commenters believe that requiring parties to seek interim relief from courts and having the ultimate conflict resolved by arbitrators is inefficient and will increase the expense to the parties.[18] Another commenter argued that the experience and training of NASD arbitrators made them more qualified that judges to make decisions relating to temporary injunctive relief.[19] In response, NASD explained that its experience has shown that it is not possible to obtain temporary injunctive relief in arbitration as quickly as in court, due largely to the need to appoint and convene arbitrators specifically for each case.[20] One commenter responded by arguing that arbitration is the preferred option for some parties in spite of time delays.[21]

Commenters concerned about the interests of associated persons stated that eliminating arbitration as a forum for temporary injunctive relief favors the party requesting injunctive relief because these commenters believe that courts are more likely to grant injunctive relief than arbitrators.[22] NASD believes that this premise is flawed because the proposed NASD Rule 10335 does not govern when such relief is appropriate, either in court or in arbitration. NASD notes that the same substantive legal standards for granting injunctive relief apply in both forums. NASD contends that the elimination of the option of seeking temporary injunctive relief in arbitration would only discriminate against associated persons and investors if courts applied the applicable legal standards in a discriminatory manner. NASD believes that because there is no evidence that courts apply the applicable legal standard in a discriminatory manner, the elimination of the option of seeking temporary injunctive relief in arbitration is a procedural change designed to expedite this process and should not affect the likelihood of whether such relief is granted or denied.[23] One commenter responded by arguing that Rule 10335 is more than a procedural rule.[24]

The same commenters argued that injunctions are anticompetitive, as highly profitable for firms, are prejudicial to the investing public, and conflict with other NASD rules that protect customers' rights.[25] In response, NASD stated that while these questions may warrant attention, NASD Rule 10335 is not the appropriate vehicle for addressing them because it is a procedural rule.[26] In addition, NASD notes that temporary restraining orders were always an option under the pilot rule, which the Commission approved as consistent with the Exchange Act.[27]

[13] *See* Securities Exchange Act Release Act No. 45162 (December 18, 2001), 66 FR 66489 (December 26, 2001). The rules approved pursuant to this order supersede and replace the pilot program.

[14] *See* Second Release, *supra* note 11.

[15] Telephone call between Florence Harmon, Senior Special Counsel, Division, Commission, and Laura Leedy Gansler, Counsel, NASD Dispute Resolution, on January 3, 2002.

[16] *See* Foxman Letter, Jamieson Letter and Sutro Letter, *supra* note 6.

[17] *See* Foxman Letter and Jamieson Letters, *supra* notes 6, 9 and 12.

[18] *See* Foxman Letter, Sutro Letter, and Jamieson Letter, *supra* note 6.

[19] *See* Sutro Letter, *supra* note 6.

[20] *See* Amendment No. 3, *supra* note 7.

[21] *See* Pescosolido Letter 2, *supra* note 9.

[22] *See* Foxman Letter, Pescosolido Letter, Jamieson Letter, Kosta E-mail, Yoakum E-mail, Koucky E-mail, Armour E-mail, and Chernow Letter, *supra* note 6.

[23] *See* Amendment No. 3, *supra* note 7.

[24] *See* Pescosolido Letter 2, *supra* note 9.

[25] *See* Foxman Letter, Pescosolido Letter, Jamieson Letter, Kosta E-mail, Yoakum E-mail, Koucky E-mail, Armour E-mail, and Chernow Letter, *supra* note 6.

[26] *See* Amendment No. 3, *supra* note 7. We note that on December 21, 2001, NASD Dispute Resolution submitted a proposed rule change, which was effective upon filing, that expressly interprets NASD Rule 2110 to prohibit members from interfering with a customer's request to transfer his or her account in connection with the change in employment of the customer's registered representative, provided that the account is not subject to any lien for monies owed by the customer or other bona fide claim. *See* Securities Exchange Act Release No. 45239 (January 4, 2001) (pertaining to NASD IM–2110–7 Interfering With the Transfer of Customer Accounts in the Context of Employment Disputes).

[27] *See* Amendment No. 3, *supra* note 7.

Two comments made suggestions for improving the provision requiring simultaneous filing of the court and arbitration claims.[28] In response, NASD amended the proposal to require the party seeking temporary injunctive relief to simultaneously file with the Director of Arbitration a Statement of Claim requesting permanent injunctive and all other relief and to serve such Statement of Claim on all other parties in the same manner and at the same time as it is filed with the Director.[29] The proposal provides that the filing and service of both the court filed complaint seeking temporary injunctive relief and the simultaneous arbitration filed complaint seeking permanent injunctive and all other relief shall be made by facsimile, overnight delivery or messenger.[30]

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

The proposal initially provided that if a court issues a temporary injunctive order, the hearing on the request for permanent relief must begin within 15 calendar days of the date the court issued its temporary injunctive order. One commenter stated that parties' lawyers would be able to stall the arbitration hearing by claiming to be unavailable within 15 days.[31] Another commenter found the language unclear as to whether the hearing itself was required to begin or whether preparations for the hearing, such as assembling an arbitration panel, were required to have begun within 15 days.[32] In response, NASD amended the proposal by adding language to paragraph (a)(1) of proposed Rule 10335 to clarify that the hearing itself would be required to begin within 15 days of the date a court issues a temporary injunctive order.[33] NASD Dispute Resolution clarified that the arbitration hearing on the merits must begin within 15 calendar days of the date that the court issues the order, and that this does not include preparations for the arbitration hearing, such as pre-hearing conferences or assembling a panel or resolving discovery disputes or other pre-hearing matters.[34]

Under the proposed rule change, 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 NASD 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 NASD Rule 10202, the three arbitrator panel hearing the request for permanent relief would consist of a majority of public arbitrators as defined in NASD 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. NASD originally proposed that at least a majority of the arbitrators on the list 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. NASD originally proposed that 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 NASD 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 constituting cause.

Under the proposed rule change, 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. The proposal initially provided that, 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; and in cases in which the panel consists of non-public arbitrators, the chairperson would be a lawyer specializing in injunctive relief. The proposal initially provided that, whenever possible, the Director would select as chairperson the lawyer specializing in injunctive relief whom the parties have ranked the highest. The proposed rule change also provides 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 (NASD Rule 10308) to facilitate the appointment of arbitration panels and the selection of the chairperson.

Several commenters concerned with the interests of associated persons expressed dissatisfaction with a list of potential arbitrators (and a chairman) composed of a majority of ''lawyers specializing in injunctive relief.'' [35] They found this requirement unclear, too limiting and fraught with the potential for bias.[36] In response, NASD amended the proposal to provide that one less than a majority of the list of arbitrators be lawyers ''with experience litigating cases involving injunctive relief'' and that the chairman of the panel, if possible, also be a lawyer with ''experinece litigating cases involving injunctive relief.'' [37]

NASD also made the following changes to the procedure for selecting an arbitration panel: the Director shall send to the parties the employment history for the past 10 years and other background information for each listed arbitrator; 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; and, in cases in which the panel consists of a majority of public arbitrators, the Director shall select a public arbitrator as chairperson.[38]

*Applicable Legal Standard*

The proposed rule change provides 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. Some commenters argued that permitting an enforceable choice of law agreement between the parties to establish the

[28] *See* Sutro Letter and Campbell Letter, *supra* note 6.

[29] *See* Amendment No. 5, *supra* note 10.

[30] *See* Amendment No. 4, *supra* note 10.

[31] *See* Pescosolido Letter 2, *supra* note 9.

[32] *See* Sutro Letter, *supra* note 9.

[33] *See* Amendment No. 4, *supra* note 10.

[34] Telephone call between Florence Harmon, Senior Special Counsel, Division, Commission, and Laura Leedy Gansler, Counsel, NASD Dispute Resolution, on January 3, 2002. *See supra* note 15.

[35] *See* Sutro Letter, Campbell Letter, Pescosolido Letters, Jamieson Letter 3 and Jamieson Letter 4, *supra* notes 6, 9 and 12.

[36] *Id.*

[37] *See* Amendment No. 3, *supra* note 7 and Amendment No. 5, *supra* note 10.

[38] *See* Amendment No. 4 and Amendment No. 5, *supra* note 10.

governing law would be unfair to associated persons since firms draft these agreements in their own favor and force associated persons to sign them.[39] One commenter was also concerned that the absence of a uniform legal standard would yield wildly inconsistent results.[40] In response, NASD stated that this provision codifies the status quo, which is that enforceable choice of law agreements are applicable to requests for injunctive relief in arbitration and that this provision would not render any otherwise unenforceable choice-of-law provision or employment contract enforceable.[41]

*Temporary Injunctive Order in Effect During Hearing*

The proposed rule change provides 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 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.

Some commenters expressed concern that this process would keep the injunctive order in place longer than was fair and appropriate because arbitrators could not make decisions on injunctive issues until a full and fair hearing had occurred. Commenters argued that this could be an extended period of time because of the potential for a fifteen day delay before an arbitration hearing would be required to begin; the hearing would not be required to be expedited; the hearing would not be required to be held on consecutive days; and the temporary injunctive order could not be terminated until the parties petitioned the court after arbitration was complete.[42]

NASD responded that it does not believe that arbitration panels have the authority to dissolve, modify or supersede a court order; rather, arbitrators 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. NASD does not believe arbitrators should exercise this authority until they have heard a full and fair presentation of the evidence regarding a request for permanent relief to ensure that arbitrators will be in a position to make an informed decision. In response to commenters' concerns about how long it would take arbitrators to reach a decision after a full and fair hearing, NASD stated that statistics on the average length of evidentiary hearings on requests for permanent injunctive relief suggest that, in most cases, arbitrators will be in a position to make that decision in a short period of time because the average duration of such hearings is 1.36 days, and almost 80% of all cases that go to a hearing are resolved after one day of hearings.[43] NASD also revised the proposal to expedite a hearing on permanent injunctive relief. Under the amended proposal, unless the parties agreement otherwise, a hearing lasting more than one day would be held on consecutive days when reasonably possible.[44] NASD also added language to make clear that arbitrators may make decisions on the issue of permanent injunctive relief and hold subsequent hearing sessions to decide other issues between the parties, including damages or other relief, to allow the parties time to gather or present additional evidence without delaying the termination of a temporary injunctive order.[45]

In response to a comment that judges often include language in their orders that transfer authority to arbitrators,[46] NASD further stated that the provision requiring arbitrators to have a full and fair hearing before ordering parties to petition the court for dismissal of a temporary injunctive order does not apply to court orders that expire by their own terms or otherwise contain provisions that confer authority on arbitrators to modify, amend, or dissolve the order.[47]

*Fees*

NASD originally proposed that the parties would jointly bear the travel-related costs and expenses of the arbitrators appointed to hear the request for permanent injunctive relief and prohibited arbitrators from reallocating arbitrator travel costs and expenses among the parties. Under the proposed rule change, notwithstanding any other provision of 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 proposal initially provided for the parties to share the difference between these amounts and the amounts panel members and the chairperson would otherwise receive under the Code and prohibited arbitrators from reallocating these amounts among the parties.[48]

The proposed rule change 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 proposed rule specifically provides that the arbitrators shall have the authority to allocate such fees among the parties. The proposed rule would have 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.

Several commenters argued that the provision prohibiting arbitrators from reallocating the travel-related costs and expenses of the arbitrators among the parties was unfair to associated persons.[49] In response, NASD amended the text of the proposed rule change to expressly permit arbitrators to reallocate the travel-related costs and expenses of arbitrators and the arbitrators' fees among the parties.[50] NASD also clarified that the parties were responsible for 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 or locations.[51]

*Development of Proposal*

Several commenters stated that the subcommittee that worked on the proposal consisted only of representatives from retail firms, and did not include representatives from associated persons and the investing

[39] *See* Foxman Letter, Sutro Letter, Jamieson Letter 2 and Jamieson Letter 3, *supra* notes 6, 9 and 12.

[40] *See* Sutro Letter, *supra* note 6.

[41] *See* Amendment No. 3, *supra* note 7.

[42] *See* Foxman Letter, Sutro Letter, Pescosolido Letters, Jamieson Letters, and Campbell Letter, *supra* notes 6, 9 and 12.

[43] *See* Amendment No. 3, *supra* note 7. One commenter responded that these statistics were inaccurate. This commenter, however, conceded that if hearings took place within 15 days following an injunction on consecutive days his concerns would not be as critical. *See* Pescosolido Letter 2, *supra* note 9.

[44] *See* Amendment No. 4 *supra* note 10.

[45] *See* Amendment No. 4, *supra* note 10.

[46] *See* Pescosolido Letter 2, *supra* note 9.

[47] *See* Amendment No. 4, *supra* note 10.

[48] NASD proposes that the payment of ordinary honoraria, as provided in NASD IM–10104 of the Code, shall not be affected by this provision.

[49] *See* James Letters, Sutro Letter, Pescosolido Letter, and Campbell Letter, *supra* notes 6, 9 and 12.

[50] *See* Amendment No. 3 and Amendment No. 4, *supra* note 7 and note 10.

[51] *See* Amendment No. 4, *supra* note 10.

public.[52] In response, NASD stated that it believed that interests of all relevant parties, including member firms, associated persons and the investing public were represented during the process. The committee included member firms with interests on both sides of raiding cases. NASD believes that views of associated persons and the investing public were represented by these firms. In addition, the proposal was reviewed and approved by the full National Arbitration and Mediation Committee, which consists of a majority of public members, as well as the Board of Directors of NASD Dispute Resolution. NASD believes that ''advocates of the interests of associated persons, as well as investors, have had ample opportunity to express opinions about the proposed rule change at all levels of review, and changes have been made throughout the process to address the interests of both constituencies''.[53]

## III. Discussion

After careful review, the Commission finds, for the reasons discussed below, that the proposed rule change, as amended, is consistent with the Exchange Act and the rules and regulations thereunder applicable to the NASD. Specifically, the Commission finds the proposed rule change, as amended, is consistent with sections 15A(b)(5), 15A(b)(6) and 15A(b)(9) of the Exchange Act.[54]

NASD Rule 10335 was initially adopted as a pilot program in order to give NASD the opportunity to assess the rule's effectiveness.[55] NASD represents, based on its experience with Rule 10335, that the current rule is confusing and unnecessarily complex. NASD represents that the proposed rule change is the result of lengthy deliberation and careful compromise by the Injunctive Relief Rule Subcommittee of the National Arbitration and Mediation Committee (''NAMC''). Before the proposal was filed with the Commission, it was approved by the National Arbitration and Mediation Committee, which consisted of a majority of public members, as well as the board of NASD Regulation. The proposal was published for comment on two separate occasions, after Amendment No. 2 and Amendment No. 5 were filed, respectively. The Commission received 16 comment letters. The NASD incorporated many of the commenters' suggestions in the proposal, as amended.

In approving this proposal, the Commission does not address the merit of injunctive relief in the context of NASD Rule 10335. In large part, NASD Rule 10335 is a procedural rule that establishes the process for seeking temporary injunctive relief. The Commission notes that NASD Dispute Resolution has recently provided interpretive guidance to NASD Rule 2110 designed to protect investors by prohibiting members from interfering with a customer's request to transfer his or her account in connection with the change in employment of the customer's registered representative.[56]

Further, the Commission notes that the proposal, as amended, contains provisions that address the commenters' concerns pertaining to associated persons and public investors. A party seeking temporary injunctive relief is required to file its permanent claim at the same time it files its temporary claim and must simultaneously serve such claim on all parties by facsimile, overnight delivery or messenger. To keep the arbitration process as short as possible, once temporary injunctive relief has been granted, an arbitration hearing on permanent injunctive and all other relief must begin within 15 calendar days, must be held on consecutive days when reasonably possible, and arbitrators may hold separate subsequent hearings to decide other issues in order to expedite the ''full and fair'' hearing on permanent injunctive relief.

To address commenters' concerns regarding the composition of the arbitration panel, NASD made a number of changes to the proposal. In particular, a portion, but not a majority, of the list of potential arbitrators will be required to be lawyers with experience litigating cases involving injunctive relief. Further, the parties will be provided with a 10-year employment history for each potential arbitrator and the arbitrators will be selected based on the consolidated rankings of the parties. In addition, NASD modified the proposal to address certain commenters' concerns about fees. Specifically, the arbitrators now have the discretion to reallocate the reasonable travel-related costs and expenses incurred by the arbitrators and the arbitrators' fees among the parties.[57]

## IV. Commission Findings and Order Granting Approval of the Proposed Rule Change

After careful consideration, the Commission finds that the proposed rule change, as amended, is consistent with the provisions of section 15A of the Exchange Act and the rules and regulations thereunder that govern NASD.[58] In particular, the Commission finds that the proposal is consistent with section 15A(b)(6) of the Exchange Act[59] because the proposal establishes procedures that allow for the quick resolution of disputes involving injunctive relief, provides a process for selecting a balanced arbitration panel, and improves procedural notice and service of injunctive relief claims. The Commission also finds that the proposed rule change, as amended, is consistent with the provisions of sections 15A(b)(5) of the Exchange Act[60] because the rule change provides that the parties are responsible for the ''reasonable'' travel-related costs and expenses of the arbitrators, and permits the arbitrators to use their discretion to reallocate costs and fees among the parties.

In reviewing this proposal, the Commission is required to consider whether the proposal will promote competition, efficiency and capital formation.[61] In this regard, the proposal provides a process that should help expedite and streamline the process for obtaining injunctive relief and deciding cases on the merits where injunctive relief is ordered. Further, the Commission does not believe that this procedural process, which does not address employment contracts, should

[52] *See* Foxman Letter, Campbell Letter, Pescosolido Letter, and Jamieson Letters, *supra* note 6.

[53] *See* Amendment No. 3, *supra* note 7.

[54] 15 U.S.C. 78*o*–3(b)(5), 15 U.S.C. 78*o*–3(b)(6) and 15 U.S.C. 78*o*–3(b)(9).

[55] *See* Securities Exchange Act Release No. 36145 (August 23, 1995), 60 FR 45200 (August 30, 1995); Securities Exchange Act Release No. 38069 (December 20, 1996), 61 FR 68806 (December 30 1996); Securities Exchange Act Release No. 39458 (December 17, 1997), 62 FR 67423 (December 24, 1997), Securities Exchange Act Release No. 40124 (June 24, 1998), 63 FR 36282 (July 2, 1998); Securities Exchange Act Release No. 40846 (December 28, 1998), 64 FR 548 (January 5, 1999); Securities Exchange Act Release No. 41532 (June 16, 1999), 64 FR 33335 (June 22, 1999); Securities Exchange Act Release No. 42280 (December 28, 1999), 65 FR 1211 (January 7, 2000) and Securities Exchange Act Release No. 43813 (January 5, 2001), 66 FR 2629 (January 16, 2001).

[56] *See* note 26, *supra.*

[57] Jamieson Letter 4 argued that in the context of arbitration, cost-splitting is illegal even if the arbitrators are permitted to reallocate costs based on a recent California Supreme court decision. *Armendariz* v. *Foundation Health Psychcare Services, Inc.,* 6 P.3d 669 (2000). This court decision is not relevant to NASD 00–02 because the court's decision was directed to the validity of a predispute arbitration agreement involving certain employment matters, not the validity of the arbitration forum's fees (or the arbitration forum's procedural rules). In California, NASD–DR has limited the arbitration fees for employees in applicable cases involving employment disputes pursuant to this court decision, including those filed under the procedural injunctive relief rule. *See* note 12, *supra.*

[58] 15 U.S.C. 78*o*–3.

[59] 15 U.S.C. 78*o*–3(b)(6).

[60] 15 U.S.C. 78*o*–3(b)(5).

[61] 15 U.S.C. 78c(f).

result in any burden on competition not necessary or appropriate in furtherance of the Exchange Act. Therefore, the Commission finds that the proposal is consistent with section 15A(b)(9) of the Exchange Act.[62]

*It Is Therefore Ordered,* pursuant to section 19(b)(2) of the Act[63] that the proposed rule change (SR–NASD–00–02), as amended, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[64]

**Margaret H. McFarland,**

*Deputy Secretary.*

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[62] 15 U.S.C. 78*o*–3(b)(9).

[63] 15 U.S.C. 78s(b)(2).

[64] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–45258; File No. SR–NYSE–2002–02]**

## Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Regarding Fees for Mandatory Participation in the Floor Member Continuing Education Program

January 9, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 4, 2002, 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 Exchange. 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 proposes to establish fees as of January 14, 2002 to be charged to members that are active on the floor of the Exchange who are required under NYSE Rule 103A (Specialist Stock Reallocation and Member Education and Performance) to participate in the Exchange's Floor Member Continuing Education Program on a semi-annual basis. The text of the proposed rule change is available at the NYSE and at the Commission.

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

In its filing with the Commission, the NYSE included statements concerning the purpose of and basis for its proposal and discussed any comments it received regarding the proposal. The text of these statements may be examined at the places specified in Item IV below. The Exchange 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

NYSE Rule 103A requires members active on the floor of the Exchange to participate in the Exchange's Floor Member Continuing Education Program on a semi-annual basis and at such other times as may be necessary in connection with any particular matter or matters. Any floor member who fails to complete an educational program as scheduled must attend a make-up program no later than 120 days from the date of the originally scheduled program. Failure to do so will result in the member being precluded from entering on the floor until such time as the member satisfies the requirement to participate in the program.

A new interactive computer-based education program has been developed that will be implemented during January 2002. Participants will be required to be trained on market activities such as Opening, Intra-Day and the Closing. Specific categories include, but are not limited to: foreign stocks and parity, the opening of a volatile stock, NYSE Rule 127 (Block Positioning) and NYSE Rule 726 (Delivery of Options Disclosure Document and Prospectus) trades, CAP orders, error accounts, crossing sessions, MOC/LOC orders and informational imbalances. An industry committee has also been formed to guide the development of the content. Participation will continue to be required on a semi-annual basis, and a $100 registration fee will be charged for each session.

If a registrant fails to keep the scheduled appointment or does not complete the session, the registrant will be charged an additional $100 to re-register for another session.

The proposed fees are intended to help offset the costs of developing the program and infrastructure, administration, and ongoing development and maintenance.

2. Statutory Basis

The Exchange believes that the proposed rule is consistent with the provisions of section 6(b)(4) of the Act,[3] in that it provides for the equitable allocation of reasonable dues, fees and other charges among members, issuers and other persons using its services.

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

The Exchange does not believe that the proposed rule change will impose 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*

Comments were neither solicited nor received.

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

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[4] and subparagraph (f)(2) of Rule 19b–4 thereunder,[5] because it involves a due, fee, or other charge. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### VI. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78f(b)(4).

[4] 15 U.S.C. 78s(b)(3)(A)(ii).

[5] 17 CFR 240.19b–4(f)(2).