

# CODE OF PROCEDURE

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## **9000. CODE OF PROCEDURE**

### **9001. Nasdaq Regulatory Contract with NASD Regulation**

Nasdaq and NASD Regulation, an affiliate of NASD, are parties to the Regulatory Contract, pursuant to which NASD Regulation has agreed to perform certain functions described in the Rule 9000 Series on behalf of Nasdaq. Nasdaq Rules that refer to the Nasdaq Regulation, Nasdaq Regulation staff, Nasdaq staff, and Nasdaq departments should be understood as also referring to NASD staff, NASD Regulation staff and NASD departments acting on behalf of Nasdaq pursuant to the Regulatory Contract.

Notwithstanding the fact that Nasdaq has entered into the Regulatory Contract with NASD Regulation to perform some of Nasdaq's functions, Nasdaq shall retain ultimate legal responsibility for, and control of, such functions.

## **9100. APPLICATION AND PURPOSE**

### **9110. Application**

#### **(a) Proceedings**

The Rule 9000 Series is the Code of Procedure and includes proceedings for disciplining a member or person associated with a member; proceedings for regulating the activities of a member experiencing financial or operational difficulties; proceedings for summary or non-summary suspensions, cancellations, bars, prohibitions, or limitations; and proceedings for obtaining relief from the eligibility requirements of the Nasdaq By-Laws and the Rules of Nasdaq. The Rule 9100 Series is of general applicability to all proceedings set forth in Rule 9000 Series, unless a Rule specifically provides otherwise.

#### **(b) Rights, Duties, and Obligations of Members and Associated Persons**

Unless otherwise specified, a person associated with a member shall have the same rights as a member and shall be subject to the same duties and obligations under the Code of Procedure.

Except as otherwise permitted under the By-Laws or the Act and as set forth in more detail in the Rule 9000 Series, in any disciplinary proceeding under the Rules, any Nasdaq member or person associated with a Nasdaq member shall be given the opportunity to have a hearing at which such Nasdaq member or person associated with a Nasdaq member shall be entitled to be heard in person or by counsel or by a representative as provided in the Rules. Such persons may present any relevant material in accordance with the Rules. In any such proceeding against a Nasdaq member or against a person associated with a Nasdaq member to determine whether the Nasdaq member or the person associated with a Nasdaq member shall be disciplined:

(1) specific charges shall be brought;

(2) such Nasdaq member or person associated with a Nasdaq member shall be notified of and be given an opportunity to defend against such charges;

(3) a record shall be kept; and

(4) any determination shall include a statement setting forth:

(i) any act or practice, in which such Nasdaq member or person associated with a Nasdaq member may be found to have engaged, or which such Nasdaq member or person associated with a Nasdaq member may be found to have omitted;

(ii) the rule, regulation, or statutory provision of which any such act or practice, or omission to act, is deemed to be in violation;

(iii) the basis upon which any findings are made; and

(iv) the sanction imposed.

**(c) Incorporation of Defined Terms and Cross References**

Unless otherwise provided, terms used in the Rule 9000 Series shall have the meaning as defined in Rule 0120 and Rule 9120.

**9120. Definitions**

**(a) “Adjudicator”**

The term “Adjudicator” means:

(1) a body, board, committee, group, or natural person that presides over a proceeding and renders a decision;

(2) a body, board, committee, group, or natural person that presides over a proceeding and renders a recommended or proposed decision which is acted upon by an Adjudicator described in (1); or

(3) a natural person who serves on a body, board, committee, or group described in (1) or (2).

The term includes a Review Subcommittee as defined in paragraph (cc), a Subcommittee as defined in paragraph (ee), an Extended Proceeding Committee as defined in paragraph (n), and a Statutory Disqualification Committee as defined in paragraph (dd).

**(b) “Chief Hearing Officer”**

The term “Chief Hearing Officer” means the Hearing Officer that manages the Office of Hearing Officers, or his or her delegatee.

**(c) “Chief Regulatory Officer”**

The term “Chief Regulatory Officer” means the Chief Regulatory Officer of Nasdaq, or his or her delegatee, who shall be a person who reports to the Chief Regulatory Officer of Nasdaq.

**(d) “Code”**

The term “Code” refers to the Code of Procedure.

**(e) “Counsel to the Nasdaq Review Council”**

The term “Counsel to the Nasdaq Review Council” means an attorney that reports to the Chief Regulatory Officer of Nasdaq who is responsible for advising the Nasdaq Review Council, the Review Subcommittee, a Subcommittee, or an Extended Proceeding Committee regarding a disciplinary proceeding on appeal or review before the Nasdaq Review Council.

**(f) “Department of Enforcement”**

The term “Department of Enforcement” means the Department of Enforcement of NASD Regulation, acting on behalf of Nasdaq pursuant to the Regulatory Contract.

**(g) “Department of Market Regulation”**

The term “Department of Market Regulation” means the Department of Regulation of NASD Regulation, acting on behalf of Nasdaq pursuant to the Regulatory Contract.

**(h) “Department of Member Regulation”**

The term “Department of Member Regulation” means the Department of Member Regulation of NASD Regulation, acting on behalf of Nasdaq pursuant to the Regulatory Contract.

**(i) “Director”**

The term “Director” means a member of the Board of Directors of Nasdaq.

**(j) “Document”**

The term “Document” means writing, drawing, graph, chart, photograph, recording, or any other data compilation, including data stored by computer, from which information can be obtained.

**(k) “Extended Hearing”**

The term “Extended Hearing” means a disciplinary proceeding described in Rule 9231(c).

**(l) “Extended Hearing Panel”**

The term “Extended Hearing Panel” means an Adjudicator that is constituted under Rule 9231(c) to conduct a disciplinary proceeding that is classified as an “Extended Hearing” and is governed by the Rule 9200 Series.

**(m) “Extended Proceeding”**

The term “Extended Proceeding” means a disciplinary proceeding described in Rule 9331(a)(2).

**(n) “Extended Proceeding Committee”**

The term “Extended Proceeding Committee” means an appellate Adjudicator that is constituted under Rule 9331 to participate in the Nasdaq Review Council’s consideration of a disciplinary proceeding that is classified as an “Extended Proceeding” and governed by the Rule 9300 Series.

**(o) “Head of Enforcement”**

The term “Head of Enforcement” means the individual that manages the Department of Enforcement of NASD Regulation, or his or her delegatee in the Department of Enforcement.

**(p) “Head of Market Regulation”**

The term “Head of Enforcement” means the individual that manages the Department of Market Regulation of NASD Regulation, or his or her delegatee in the Department of Market Regulation.

**(q) “Head of Member Regulation”**

The term “Head of Enforcement” means the individual that manages the Department of Member Regulation of NASD Regulation, or his or her delegatee in the Department of Member Regulation.

**(r) “Hearing Officer”**

The term “Hearing Officer” means an attorney and who is appointed by the Chief Hearing Officer to act in an adjudicative role and fulfill various adjudicative responsibilities and duties described in the Rule 9200 Series regarding disciplinary proceedings, the Rule 9550 Series regarding expedited proceedings, and the Rule 9800 Series regarding temporary cease and desist proceedings brought against members and

associated persons.

**(s) “Hearing Panel”**

The term “Hearing Panel” means an Adjudicator that is constituted under Rule 9231 to conduct a disciplinary proceeding governed by the Rule 9200 Series or that is constituted under the Rule 9520 Series or the Rule 9550 Series to conduct a proceeding.

**(t) “Interested Staff”**

The term “Interested Staff” means, in the context of:

(1) a disciplinary proceeding under the Rule 9200 Series and the Rule 9300 Series:

(A) the Head of Enforcement;

(B) a Nasdaq Regulation or NASD employee of the Department of Enforcement who reports, directly or indirectly, to the Head of Enforcement;

(C) a Nasdaq Regulation or NASD employee who directly participated in the authorization of the complaint;

(D) a Nasdaq Regulation or NASD employee who directly participated in an examination, investigation, prosecution, or litigation related to a specific disciplinary proceeding, and a district director or department head to whom such employee reports;

(E) the Head of the Department of Market Regulation; or

(F) an employee of the Department of Market Regulation who reports, directly or indirectly, to the Head of the Department of Market Regulation;

(2) a proceeding under the Rule 9520 Series or Rule 9550 Series:

(A) the head of the department or office that issues the notice or is designated as a Party;

(B) a Nasdaq Regulation or NASD employee who reports, directly or indirectly, to such person;

(C) a Nasdaq Regulation or NASD employee who directly participated in the authorization or initiation of the proceeding; or

(D) a Nasdaq Regulation or NASD employee who directly

participated in an examination, investigation, prosecution, or litigation related to a specific proceeding, and a district director or department head to whom such employee reports; or

(3) a proceeding under the Rule 9600 Series:

(A) the head of the department or office that issues the decision granting or denying an exemption or is designated as a Party;

(B) a Nasdaq Regulation or NASD employee who reports, directly or indirectly, to such person;

(C) a Nasdaq Regulation or NASD employee who directly participated in the exemption proceeding; or

(D) a Nasdaq Regulation or NASD employee who directly participated in an examination, investigation, prosecution, or litigation related to a specific exemption proceeding, and a district director or department head to whom such employee reports.

**(u) “Market Regulation Committee”**

The term “Market Regulation Committee” means the committee designated under Nasdaq’s By-laws to consider the federal securities laws and the rules and regulations adopted thereunder and various Nasdaq Rules and policies relating to:

(1) the quotations of securities;

(2) the execution of transactions;

(3) the reporting of transactions; and

(4) trading practices, including rules prohibiting manipulation and insider trading, and those Rules designated as Trading Rules (Rule 3300 Series), the Nasdaq Stock Market Rules (Rule 4000 Series), other Nasdaq and Nasdaq Market Rules (Rule 5000 Series), Nasdaq Systems and Programs Rules (Rule 6000 Series), and Charges for Services and Equipment Rules (Rule 7000 Series).

**(v) “Nasdaq Board”**

The term “Nasdaq Board” means the Board of Directors of the Nasdaq.

**(w) “Nasdaq Regulation”**

The term “Nasdaq Regulation” means the Department of Nasdaq that Administers the Code.

**(x) “Office of Disciplinary Affairs”**

The term “Office of Disciplinary Affairs” means the Office of Disciplinary Affairs for NASD Regulation, acting on behalf of Nasdaq pursuant to the Regulatory Contract.

**(y) “Office of Hearing Officers”**

The term “Office of Hearing Officers” means the Office of Hearing Officers of NASD Regulation, acting on behalf of Nasdaq pursuant to the Regulatory Contract.

**(z) “Panelist”**

The term “Panelist,” as used in the Rule 9200 Series, means a member of a Hearing Panel or Extended Hearing Panel who is not a Hearing Officer. As used in the Rule 9300 Series, the term means a current or former member of the Nasdaq Review Council or a former Director who is appointed to serve on a Subcommittee or an Extended Proceeding Committee.

**(aa) “Party”**

With respect to a particular proceeding, the term “Party” means:

(1) in the Rule 9200 Series, the Rule 9300 Series, and the Rule 9800 Series, the Department of Enforcement or the Department of Market Regulation or a Respondent;

(2) in the Rule 9520 Series, the Department of Member Regulation or a member that is the subject of a notice or files an application under Rule 9522;

(3) in the Rule 9550 Series, the Nasdaq department or office that issued the notice or, if another Nasdaq department or office is named as the party handling the matter on behalf of the issuing department or office, the Nasdaq department or office that is so designated or a member or person that is the subject of a notice under the Rule 9550 Series; or

(4) in the Rule 9600 Series, the department or office designated under Rule 9620 to issue the decision granting or denying an exemption or a member that seeks the exemption under Rule 9610.

**(bb) “Respondent”**

The term “Respondent” means, in a disciplinary proceeding governed by the Rule 9200 Series and in an appeal or review governed by the Rule 9300 Series, a Nasdaq member or associated person against whom a complaint is issued.

**(cc) “Review Subcommittee”**

The term “Review Subcommittee” means a body appointed by the Nasdaq Review Council pursuant to the Nasdaq By-Laws.

**(dd) “Statutory Disqualification Committee”**

The term “Statutory Disqualification Committee” means a Subcommittee of the Nasdaq Review Council that makes a recommended decision to grant or deny an application for relief from the eligibility requirements of Nasdaq to the Nasdaq Review Council pursuant to the Rule 9520 Series.

**(ee) “Subcommittee”**

The term “Subcommittee” means an Adjudicator that is:

(1) constituted under Rule 9331(a) to participate in the Nasdaq Review Council’s consideration of an appeal or a review of a disciplinary proceeding pursuant to the Rule 9300 Series;

(2) constituted under Rule 9559(q) or Rule 9630 to conduct a review proceeding.

**9130. Service; Filing of Papers**

**9131. Service of Complaint and Document Initiating a Proceeding**

**(a) Service on Each Party**

A complaint shall be served on each Party by the Department of Enforcement or the Department of Market Regulation. A document initiating a proceeding shall be served on each Party by the Party or person initiating such proceeding or his or her counsel or representative.

**(b) How Served**

A complaint or document initiating a proceeding shall be served pursuant to Rule 9134.

**(c) Filing Requirement**

A complaint that is served upon a Respondent and each document initiating a proceeding that is served upon a Party, along with the certificate of service executed in connection with the service upon such Respondent or Party, shall be filed with Nasdaq Regulation pursuant to Rule 9135.

## **9132. Service of Orders, Notices, and Decisions by Adjudicator**

### **(a) Service on Each Party**

An order, notice, or decision issued by a Hearing Officer, Hearing Panel or Extended Hearing Panel under the Rule 9200 Series shall be served on each Party, or each Party's counsel, or other person the Party designates to represent him or her in a proceeding by the Office of Hearing Officers. An order, notice, or decision issued by any other Adjudicator shall be served by that Adjudicator.

### **(b) How Served**

An order, notice, or decision shall be served pursuant to Rule 9134.

### **(c) Service Upon Counsel or Other Person Acting In Representative Capacity**

Whenever service is required to be made upon a person represented by counsel or a representative who has filed a notice of appearance pursuant to Rule 9141, service shall be made upon counsel or the representative. The Adjudicator, at its discretion, may also order that service be made upon the person.

## **9133. Service of Papers Other Than Complaints, Orders, Notices, or Decisions**

### **(a) Service on Each Party**

Other than a complaint, order, notice, or decision, any paper, including an answer and a motion, shall be served on each Party by the Party on whose behalf such paper was prepared or by his or her counsel or representative.

### **(b) How Served**

The paper shall be served pursuant to Rule 9134.

### **(c) Filing Requirement**

The paper that is served upon a Party, along with the certificate of service executed in connection with the service upon such Party, shall be filed with the NASD pursuant to Rule 9135.

### **(d) Service upon Counsel or Other Person Acting in Representative Capacity**

Whenever service is required to be made upon a person represented by counsel or a representative who has filed a notice of appearance pursuant to Rule 9141, service shall be made upon counsel or the representative. The Adjudicator, at its discretion, may also order that service be made upon the person.

## **9134. Methods of, Procedures for Service**

### **(a) Methods**

The following methods of service are permitted:

#### **(1) Personal Service**

Personal service may be accomplished by handing a copy of the papers to the person required to be served; leaving a copy at the person's office with an employee or other person in charge thereof; or leaving a copy at the person's dwelling or usual place of abode with a person of suitable age and discretion then residing therein;

#### **(2) Service by Mail by U.S. Postal Service**

Service by mail may be accomplished by mailing the papers through the U.S. Postal Service by using first class mail, first class certified mail, first class registered mail, or Express Mail, except that a complaint shall be served upon a Respondent by U.S. Postal Service first class certified mail or Express Mail; or

#### **(3) Service by Courier**

Service by courier may be accomplished by sending the papers through a courier service that generates a written confirmation of receipt or of attempts at delivery.

### **(b) Procedures**

#### **(1) Service on Natural Persons**

Papers served on a natural person may be served at the natural person's residential address, as reflected in the Central Registration Depository, if applicable. When a Party or other person responsible for serving such person has actual knowledge that the natural person's Central Registration Depository address is out of date, duplicate copies shall be served on the natural person at the natural person's last known residential address and the business address in the Central Registration Depository of the entity with which the natural person is employed or affiliated. Papers may also be served at the business address of the entity with which the natural person is employed or affiliated, as reflected in the Central Registration Depository, or at a business address, such as a branch office, at which the natural person is employed, or at which the natural person is physically present during a normal business day. The Hearing Officer may waive the requirement of serving documents (other than complaints) at the addresses listed in the Central Registration Depository if there is evidence that these addresses are no longer valid, and there is a more current address available. If a natural person is represented by counsel or a representative, papers served on the

natural person, excluding a complaint or a document initiating a proceeding, shall be served on the counsel or representative.

(2) Service on Entities

Papers served on an entity shall be made by service on an officer, partner of a partnership, managing or general agent, a contact employee as set forth on Form BD, or any other agent authorized by appointment or by law to accept service. Such papers shall be served at the entity's business address as reflected in the Central Registration Depository, if applicable; provided, however, that when the Party or other person responsible for serving such entity has actual knowledge that an entity's Central Registration Depository address is out of date, duplicate copies shall be served at the entity's last known address. If an entity is represented by counsel or a representative, papers served on such entity, excluding a complaint or document initiating a proceeding, shall be served on such counsel or representative.

(3) When Service Is Complete

Personal service and service by courier or express delivery are complete upon delivery. Service by mail is complete upon mailing.

**9135. Filing of Papers with Adjudicator: Procedure**

**(a) When to File**

Papers that are required to be filed with an Adjudicator within a time limit specified by the Adjudicator or within a time limit set forth in the Rules shall be deemed timely if received within the time limit, unless otherwise ordered by an Adjudicator, except complaints, which shall be deemed timely filed upon mailing or delivery to the Office of Hearing Officers. Other papers that are required to be filed shall be deemed timely if, on the same day such papers are served, they are also hand-delivered, mailed via U.S. Postal service first class mail, or sent by courier to the Office of Hearing Officers.

**(b) Where to File**

All papers required to be filed pursuant to the Rule 9200 Series and any notice of appeal or review required to be filed pursuant to the Rule 9300 Series shall be filed with the Office of Hearing Officers. All other papers required to be filed pursuant to the Rule 9000 Series shall be filed where specified in the Rule, or if not specified in the Rule, with the Adjudicator, unless the Adjudicator orders otherwise.

**(c) Certificate of Service**

Papers filed with an Adjudicator or the Office of Hearing Officers shall be

accompanied by a certificate of service stating the name of the person or persons served, the date on which service is made, the method of service and, if service is not made in person, the address to which service is made. Such certificate shall be executed by the person who made the service. If the method of service on a Party is different from the method of service on any other Party, the certificate shall state why such different method was used.

## **9136. Filing of Papers: Form**

### **(a) Specifications**

Papers filed in connection with any proceeding under the Rule 9200 Series and the Rule 9300 Series shall:

- (1) be on unglazed white paper measuring 8 ½ x 11 inches, but to the extent that the reduction of a larger document would render it illegible, such document may be filed on larger paper;
- (2) be typewritten or printed in either 10 or 12 point typeface or otherwise reproduced by a process that produces a permanent and plainly legible copy;
- (3) include at the head of the paper, or on a title page, the title of the proceeding, the names of the Parties, the subject of the particular paper or pleading, and the number assigned to the proceeding;
- (4) be paginated at the bottom of the page and with all margins at least one inch wide;
- (5) be double-spaced, with double-spaced footnotes and single-spaced indented quotations; and
- (6) be stapled, clipped, or otherwise fastened in the upper left corner, but not bound.

### **(b) Signature Required**

All papers shall be signed and dated pursuant to Rule 9137.

### **(c) Number of Copies**

A signed original and three copies of all papers shall be filed with the Adjudicator.

### **(d) Form of Briefs**

A brief containing more than ten pages shall include a table of contents, and an alphabetized table of cases, statutes, and other authorities cited, with references to the

pages of the brief wherein they are cited.

**(e) Scandalous or Impertinent Matter**

Any scandalous or impertinent matter contained in any brief, pleading, or other filing, or in connection with any oral presentation in a proceeding may be stricken on order of an Adjudicator. Any matter stricken by an Adjudicator by this Rule shall be marked “Stricken” and preserved. Matters stricken in a proceeding governed by the Rule 9200 Series shall be preserved under Rule 9267(b).

**9137. Filing of Papers: Signature Requirement and Effect**

**(a) General Requirements**

Following the issuance of a complaint in a disciplinary proceeding, or the initiation of another proceeding, every filing of a Party represented by counsel or a representative shall be signed by at least one counsel or representative of record in his or her name and shall state the business address and telephone number of such counsel or representative. A Party who appears on his or her own behalf shall sign his or her individual name and state his or her address and telephone number on every filing.

**(b) Effect of Signature**

(1) The signature of a counsel, representative, or Party shall constitute a certification that:

(A) the person signing the filing has read the filing;

(B) to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(C) the filing is not made for any improper purpose, such as to harass, cause unnecessary delay, or needlessly to increase the cost of adjudication.

(2) If a filing is not signed, an Adjudicator may strike the filing, unless it is signed promptly after the omission is called to the attention of the person making the filing.

**9138. Computation of Time**

**(a) Calendar Day**

In the Rule 9000 Series, “day” means calendar day.

**(b) Formula**

In computing any period of time, the day of the act, event, or default from which the period of time designated in the Code begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays shall be excluded from the computation when the period prescribed is ten days or less, not including any additional time for service by mail allowed by paragraph (c).

**(c) Additional Time For Service by Mail**

If service is made by U.S. Postal Service first class, certified, or registered mail, three days shall be added to the prescribed period for response.

**9140. Proceedings**

**9141. Appearance and Practice; Notice of Appearance**

**(a) Representing Oneself**

In any proceeding, a person may appear on his or her own behalf. When a person first makes any filing or otherwise appears on his or her own behalf before an Adjudicator in a proceeding, he or she shall file with the Adjudicator, or otherwise state on the record, and keep current, an address at which any notice or other written communication required to be served upon or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours.

**(b) Representing Others**

A person shall not be represented before an Adjudicator, except as provided in this paragraph. Subject to the prohibitions of Rules 9150 and 9280, a person may be represented in any proceeding by an attorney at law admitted to practice before the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association. When a person first makes any filing or otherwise appears in a representative capacity before an Adjudicator in a proceeding, that person shall file with the Adjudicator, and keep current a Notice of Appearance. The Notice of Appearance is a written notice stating the name of the proceeding; the representative's name, business address, and telephone number; and the name and address of the person or persons represented. Any individual appearing or practicing in a representative capacity before an Adjudicator may be required to file a power of attorney with the Adjudicator showing his or her authority to act in such capacity.

**9142. Withdrawal by Attorney or Representative**

An attorney for a Party or other person authorized to represent others by Rule

9141 may withdraw by giving notice to the Adjudicator. The notice shall be in writing, set forth the good cause for withdrawal, and, unless circumstances do not permit, be given at least 30 days prior to withdrawal.

### **9143. Ex Parte Communications**

#### **(a) Prohibited Communications**

Unless on notice and opportunity for all Parties to participate, or to the extent required for the disposition of ex parte matters as authorized by the Rule 9000 Series:

(1) No Party, or counsel to or representative of a Party, or Interested Staff shall make or knowingly cause to be made an ex parte communication relevant to the merits of a proceeding to an Adjudicator who is participating in a decision with respect to that proceeding, or to Nasdaq Staff who is participating or advising in the decision of an Adjudicator with respect to that proceeding; and

(2) No Adjudicator who is participating in a decision with respect to a proceeding, or no Nasdaq Staff who is participating or advising in the decision of an Adjudicator with respect to a proceeding shall make or knowingly cause to be made to a Party, a counsel or representative to a Party, or Nasdaq Staff an ex parte communication relevant to the merits of that proceeding.

#### **(b) Disclosure of Prohibited Communication**

An Adjudicator who is participating in a decision with respect to a proceeding, or Nasdaq Staff who is participating or advising in the decision of an Adjudicator, who receives, makes, or knowingly causes to be made a communication prohibited by this Rule shall place in the record of the proceeding:

- (1) all such written communications;
- (2) memoranda stating the substance of all such oral communications; and
- (3) all written responses and memoranda stating the substance of all oral responses to all such communications.

#### **(c) Remedies**

Upon receipt of a communication made or knowingly caused to be made by any Party, any counsel or representative to a Party, or any Interested Staff in violation of subparagraph (a)(1), Nasdaq Regulation or an Adjudicator may, to the extent consistent with the interests of justice, the policies underlying the Act, and Nasdaq's Rules, order the Party responsible for the communication, or the Party who may benefit from the ex parte communication made, to show cause why the Party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by reason of such ex parte communication. All participants to a proceeding may respond to any allegations or contentions contained in a prohibited ex parte communication placed

in the record. Such responses shall be placed in the record.

**(d) Timing**

In a disciplinary proceeding governed by the Rule 9200 Series and the Rule 9300 Series, the prohibitions of this Rule shall apply beginning with the authorization of a complaint as provided in Rule 9211, unless the person responsible for the communication has knowledge that the complaint shall be authorized, in which case the prohibitions shall apply beginning at the time of his or her acquisition of such knowledge.

**(e) Waiver of Ex Parte Prohibition**

**(1) Offer of Settlement**

If a Respondent submits an offer of settlement under Rule 9270, the submission constitutes a waiver by such Respondent of any claim that the prohibitions against ex parte communications were violated by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of acceptance, including acceptance or rejection of such offer of settlement and order of acceptance.

**(2) Letter of Acceptance, Waiver, and Consent**

If a member or a person associated with a member submits an executed letter of acceptance, waiver, and consent under Rule 9216(a), the submission constitutes a waiver by such member or person associated with a member of any claim that the prohibitions against ex parte communications were violated by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent.

**(3) Minor Rule Violation Plan Letter**

If a member or a person associated with a member submits an executed minor rule violation plan letter under Rule 9216(b), the submission constitutes a waiver by such member or person associated with a member of any claim that the prohibitions against ex parte communications by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter, or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule plan violation letter.

## **9144. Separation of Functions**

### **(a) Interested Staff**

Except as counsel or a witness in a proceeding or as provided in the Rule 9550 Series, Interested Staff is prohibited from advising an Adjudicator regarding a decision or otherwise participating in a decision of an Adjudicator. An Adjudicator is prohibited from advising Interested Staff regarding a decision or otherwise participating in a decision of Interested Staff, including the decision to issue a complaint and a decision whether to appeal or cross-appeal a disciplinary proceeding to the Nasdaq Review Council.

### **(b) Separation of Adjudicators**

A Hearing Officer, including the Chief Hearing Officer, or a Panelist of a Hearing Panel or an Extended Hearing Panel, is prohibited from participating in: a decision whether to issue a complaint pursuant to Rule 9211; a decision whether to appeal or cross-appeal a disciplinary proceeding to the Nasdaq Review Council pursuant to Rule 9311; and a discussion or decision relating to a call for review, a review, or an appeal pursuant to the Rule 9300 Series. A Director is prohibited from participating in a discussion or a decision relating to the above referenced acts with the Review Subcommittee or the Adjudicators referenced above.

### **(c) Waiver of Prohibitions of Separation of Functions**

#### **(1) Offer of Settlement**

If a Respondent submits an offer of settlement under Rule 9270, the submission constitutes a waiver by such Respondent of any claim of violation of paragraph (a) or (b) by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of acceptance, including acceptance or rejection of such offer of settlement and order of acceptance.

#### **(2) Letter of Acceptance, Waiver, and Consent**

If a member or a person associated with a member submits an executed letter of acceptance, waiver, and consent under Rule 9216(a), the submission constitutes a waiver by such member or person associated with a member of any claim of violation of paragraph (a) or (b) by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the proposed letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent.

(3) **Minor Rule Violation Plan Letter**

If a member or a person associated with a member submits an executed minor rule violation plan letter under Rule 9216(b), the submission constitutes a waiver by such member or person associated with a member of any claim of violation of paragraph (a) or (b) by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule violation plan letter.

**9145. Rules of Evidence; Official Notice**

**(a) Rules of Evidence**

The formal rules of evidence shall not apply in a proceeding brought under the Rule 9000 Series.

**(b) Official Notice**

In a proceeding governed by the Rule 9000 Series, an Adjudicator may take official notice of such matters as might be judicially noticed by a court, or of other matters within the specialized knowledge of Nasdaq as an expert body. Before an Adjudicator proposes to take official notice of a matter, it shall permit a Party the opportunity to oppose or otherwise comment upon the proposal to take official notice.

**9146. Motions**

**(a) General Requirement for Motions**

A Party may make a written or oral motion, subject to limitations set forth below. A Party or other person may make a motion under Rule 9146(k), subject to limitations set forth below.

**(b) Adjudicator May Require a Written Motion**

If a Party makes an oral motion, an Adjudicator may order that such motion be set forth in writing, after considering the facts and circumstances, including whether:

(1) the hearing or conference in which the Party makes such motion is being recorded; and

(2) the opposing Parties shall be fully informed and shall have adequate notice and opportunity to respond to such motion.

**(c) Specificity**

All motions shall state the specific relief requested and the basis therefor.

**(d) Time For Filing Opposition or Other Response to Motion**

Unless otherwise ordered by an Adjudicator, any Party may file an opposition or other response to a written motion and the opposition or response shall be filed within 14 days after service of the motion. If no response is filed within the response period, the Party failing to respond shall be deemed to have waived any objection to the granting of the motion. A Party shall be afforded an opportunity to respond to an oral motion at the time the oral motion is made, unless the Adjudicator orders that the Party shall be granted additional time to respond.

**(e) Oral Argument**

An Adjudicator may allow oral argument on motions. Oral argument may take place in person or by telephone.

**(f) Frivolous Motions**

An Adjudicator may deny dilatory, repetitive, or frivolous motions without awaiting a response.

**(g) No Stay**

Unless otherwise ordered by an Adjudicator, the filing of a motion does not stay a proceeding.

**(h) Reply**

The moving Party shall have no right to reply to the opposition or other response of the other Parties unless an Adjudicator permits a reply to be filed. Unless otherwise ordered by an Adjudicator, a movant's reply submission shall be filed within five days after the Adjudicator serves the order granting the motion to file a reply or a Party serves the opposition or other response to which the Adjudicator previously ordered that a reply could be filed.

**(i) Page Limit, Format Requirements**

Unless otherwise ordered by an Adjudicator, submissions in support of or in opposition to motions shall not exceed ten double-spaced pages, including double-spaced footnotes, exclusive of pages containing any table of contents, table of authorities, or addenda.

**(j) Disposition of Procedural Motions; Disposition of Motions for Summary Disposition**

(1) In the Rule 9200 Series, a motion on a procedural matter may be decided by a Hearing Officer. A motion for summary disposition of a cause of action set forth in a complaint shall be decided by a majority vote of the Hearing Panel or, if applicable, the Extended Hearing Panel.

(2) In the Rule 9300 Series, a motion on a procedural matter may be decided by Counsel to the Nasdaq Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or the Nasdaq Review Council. A motion for disposition of a cause of action shall be decided by the Nasdaq Review Council, except that a motion to dismiss a case for abandonment made under Rule 9344 may be decided by the Review Subcommittee.

(3) In the Rule 9500 Series, a motion shall be decided by an Adjudicator.

**(k) Motion For Protective Order**

(1) A Party, a person who is the owner, subject, or creator of a Document subject to production under Rule 8210 or any other Rule which may be introduced as evidence in a disciplinary proceeding, or a witness who testifies at a hearing in a disciplinary proceeding may file a motion requesting a protective order to limit disclosure or prohibit from disclosure to other Parties, witnesses or other persons, except the Department of Enforcement and the Department of Market Regulation and Nasdaq Regulation staff, Documents or testimony that contain confidential information. The motion shall include a general summary or extract of the Documents or testimony without revealing confidential details. If the movant seeks a protective order against disclosure to other Parties, copies of the Documents shall not be served on the other Parties. Unless the Documents are unavailable, the movant shall file for in camera inspection a sealed copy of the Documents for which the order is sought. If the movant is not a Party, the motion shall be served on each Party by the movant using a method in Rule 9134(a) and filed with the Adjudicator. A motion for a protective order shall be granted only upon a finding that disclosure of the Document or testimony would have a demonstrated adverse business effect on the movant or would involve an unreasonable breach of the movant's personal privacy.

(2) If a protective order is granted, the order shall set forth the restrictions on use and disclosure of such Document or testimony. An Adjudicator does not have the authority to issue a protective order that would limit in any manner the use by the staff of Nasdaq Regulation of such Documents or testimony in Nasdaq Regulation staff's performance of their regulatory and self-regulatory responsibilities and functions, including the transmittal, without restriction to the recipient, of such Documents or testimony to state, federal, or foreign regulatory authorities or other self-regulatory organizations. An Adjudicator does not have the authority to issue a protective order that purports to protect from production such Documents or testimony in the event that Nasdaq is subject to a subpoena requiring that the Documents or testimony be produced.

**(l) General**

All motions, oppositions or responses, replies, and any other filings made in a proceeding shall comply with Rules 9133, 9134, 9135, 9136 and 9137.

### **9147. Rulings On Procedural Matters**

The Nasdaq Board, the Nasdaq Review Council, a Hearing Officer, or any other Adjudicator shall have full authority, except as otherwise provided by the Code, to rule on a procedural motion and any other procedural or administrative matter arising during the course of a proceeding conducted pursuant to the Code, subject to the rights of review or appeal provided by the Code.

### **9148. Interlocutory Review**

Except as provided in Rule 9280, there shall be no interlocutory review of a ruling or order issued by any Adjudicator in a proceeding governed by the Code. If an Adjudicator grants interlocutory review of a ruling or order, such review shall not stay a proceeding, except under Rule 9280 or as otherwise ordered by the Adjudicator.

### **9150. Exclusion From Rule 9000 Series Proceeding**

#### **(a) Exclusion**

An Adjudicator may exclude an attorney for a Party or other person authorized to represent others by Rule 9141 from acting as counsel, acting in any representative capacity, or otherwise appearing in a particular Rule 9000 Series proceeding for contemptuous conduct under Rule 9280 or unethical or improper professional conduct in that proceeding. If an attorney for a Party, or other person authorized to represent others by Rule 9141, is excluded from a disciplinary hearing or conference, or any portion thereof, such attorney or person may seek review by the Nasdaq Review Council of such exclusion under Rule 9280(c).

#### **(b) Other Proceedings Not Precluded**

Prohibiting an attorney or other person authorized to represent others by Rule 9141 from practicing or appearing in a Nasdaq proceeding shall not preclude Nasdaq from initiating other proceedings against such person.

### **9160. Recusal or Disqualification**

No person shall participate as an Adjudicator in a matter governed by the Code as to which he or she has a conflict of interest or bias, or circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case the person shall recuse himself or herself, or shall be disqualified as follows:

#### **(a) Nasdaq Board**

The Chair of the Nasdaq Board shall have authority to order the disqualification of a Director, and a majority of the Nasdaq Board excluding the Chair of the Nasdaq

Board, shall have authority to order the disqualification of the Chair;

**(b) Nasdaq Review Council, Review Subcommittee, or Certain Subcommittees**

The Chair of the Nasdaq Review Council shall have authority to order the disqualification of a member of the Nasdaq Review Council or the Review Subcommittee, a member of a Subcommittee appointed pursuant to Rule 9559(q) or the Rule 9600 Series, a Hearing Panel appointed pursuant to the Rule 9520 Series, and the Statutory Disqualification Committee; and a majority of the Nasdaq Review Council excluding the Chair of the Nasdaq Review Council shall have authority to order the disqualification of the Chair of the Nasdaq Review Council;

**(c) Rule 9331 Subcommittee or Extended Proceeding Committee**

Disqualification of a Panelist of a Subcommittee or Extended Proceeding Committee appointed under the Rule 9300 Series shall be governed by Rule 9332;

**(d) Reserved**

**(e) Panelist of Hearing Panel or Extended Hearing Panel**

Disqualification of a Panelist of a Hearing Panel or Extended Hearing Panel appointed under the Rule 9200 Series shall be governed by Rule 9234; and

**(f) Hearing Officer**

Disqualification of a Hearing Officer of a Hearing Panel or an Extended Hearing Panel shall be governed by Rule 9233.

**9200. DISCIPLINARY PROCEEDINGS**

**9210. Complaint and Answer**

**9211. Authorization of Complaint**

**(a) Complaint**

(1) If the Department of Enforcement or the Department of Market Regulation believes that any Nasdaq member or associated person is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and the regulations thereunder, which Nasdaq has jurisdiction to enforce, Nasdaq Regulation, including the Department of Enforcement or the Department of Market Regulation may request authorization from the Office of Disciplinary Affairs to issue a complaint.

(2) The Nasdaq Board shall have the authority to direct Nasdaq Regulation, including the Office of Disciplinary Affairs, to authorize and the

Department of Enforcement or the Department of Market Regulation to issue a complaint when, on the basis of information and belief, the Nasdaq Board is of the opinion that any Nasdaq member or associated person is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and the regulations thereunder, which Nasdaq has jurisdiction to enforce.

**(b) Commencement of Disciplinary Proceeding**

A disciplinary proceeding shall begin when the complaint is served and filed.

**9212. Complaint Issuance -- Requirements, Service, Amendment, Withdrawal, and Docketing**

**(a) Form, Content, Notice, Docketing, and Service**

(1) If a complaint is authorized, the Department of Enforcement or the Department of Market Regulation shall issue the complaint. Each complaint shall be in writing and signed by the Department of Enforcement or the Department of Market Regulation. The complaint shall specify in reasonable detail the conduct alleged to constitute the violative activity and the rule, regulation, or statutory provision the Respondent is alleged to be violating or to have violated. If the complaint consists of several causes of action, each cause shall be stated separately. Complaints shall be served by the Department of Enforcement or the Department of Market Regulation on each Party pursuant to Rules 9131 and 9134, and filed at the time of service with the Office of Hearing Officers pursuant to Rules 9135, 9136, and 9137.

(2) At the time of issuance of a complaint, the Department of Enforcement or the Department of Market Regulation may propose:

(A) an appropriate location for the hearing; and

(B) if the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120(u), that the Chief Hearing Officer select a Market Regulation Committee Panelist for the Hearing Panel, or, if applicable, the Extended Hearing Panel as described in Rule 9231.

**(b) Amendments to Complaint**

The Department of Enforcement or the Department of Market Regulation may file and serve an amended complaint once as a matter of course at any time before the Respondent answers the complaint. Otherwise, upon motion by the Department of Enforcement or the Department of Market Regulation, the Hearing Officer may permit the Department of Enforcement or the Department of Market Regulation to amend the complaint, including amendments so as to make the complaint conform to the evidence

presented, after considering whether the Department of Enforcement or the Department of Market Regulation has shown good cause for the amendment and whether any Respondent will suffer any unfair prejudice if the amendment is allowed. Amendments to complaints will be freely granted when justice so requires.

**(c) Withdrawal of Complaint**

With prior leave of the Hearing Officer, the Department of Enforcement or the Department of Market Regulation may withdraw a complaint. If the Department of Enforcement or the Department of Market Regulation withdraws the complaint before the earlier of (1) the Hearing Panel's or, if applicable, the Extended Hearing Panel's, issuance of a ruling on a motion for summary disposition, or (2) the start of the hearing on the merits, the withdrawal of the complaint by the Department of Enforcement or the Department of Market Regulation shall be without prejudice and the Department of Enforcement or the Department of Market Regulation shall be permitted to refile a case based on allegations concerning the same facts and circumstances that are set forth in the withdrawn complaint. If the Department of Enforcement or the Department of Market Regulation requests to withdraw such complaint after the occurrence of either of the two events set forth in (1) and (2) in this paragraph, the Hearing Panel or, if applicable, the Extended Hearing Panel, after considering the facts and circumstances of the request, shall determine whether the withdrawal shall be granted with prejudice.

**(d) Disciplinary Proceeding Docket**

The Office of Hearing Officers shall promptly record each complaint filed with it in Nasdaq's disciplinary proceeding docket, and record in the disciplinary proceeding docket each event, filing, and change in the status of a disciplinary proceeding.

**9213. Assignment of Hearing Officer and Appointment of Panelists to Hearing Panel or Extended Hearing Panel**

**(a) Assignment of Hearing Officer**

As soon as practicable after the Department of Enforcement or the Department of Market Regulation has filed a complaint with the Office of Hearing Officers, the Chief Hearing Officer shall assign a Hearing Officer to preside over the disciplinary proceeding and shall serve the Parties with notice of the Hearing Officer's assignment pursuant to Rule 9132.

**(b) Appointment of Panelists**

As soon as practicable after assigning a Hearing Officer to preside over a disciplinary proceeding, the Chief Hearing Officer shall appoint Panelists pursuant to Rules 9231 and 9232 to a Hearing Panel or, if the Chief Hearing Officer determines that an Extended Hearing Panel should be appointed, to an Extended Hearing Panel.

## **9214. Consolidation or Severance of Disciplinary Proceedings**

### **(a) Consolidation Initiated by Chief Hearing Officer**

The Chief Hearing Officer may order the consolidation of two or more disciplinary proceedings, upon his or her own motion, under circumstances where such consolidation would further the efficiency of the disciplinary process, and where the subject complaints involve common questions of law or fact, or one or more of the same Respondents. In determining whether to order the consolidation of such disciplinary proceedings, the Chief Hearing Officer shall consider:

- (1) whether the same or similar evidence reasonably would be expected to be offered at each of the hearings;
- (2) whether the proposed consolidation would conserve the time and resources of the Parties; and
- (3) whether any unfair prejudice would be suffered by one or more Parties as a result of the consolidation.

If the Chief Hearing Officer proposes to consolidate two or more disciplinary proceedings, the Chief Hearing Officer shall serve upon the Parties notice of the proposed consolidation of disciplinary proceedings, together with a copy of each relevant complaint and any answer that has been filed thereto, pursuant to Rule 9132. The Parties shall have 14 days after service to file a response, stating any arguments in favor of or opposition to consolidation.

### **(b) Consolidation Initiated by a Party**

A Party may file a motion to consolidate two or more disciplinary proceedings if such consolidation would further the efficiency of the disciplinary process, if the subject complaints involve common questions of law or fact or one or more of the same Respondents, or if one or more of the factors favoring consolidation set forth in paragraph (a) appear to be present. If a Party moves to consolidate two or more disciplinary proceedings, the Party shall file such motion, together with a copy of each relevant complaint and any answer thereto that has been filed, with the Office of Hearing Officers, and, pursuant to Rule 9133, shall serve the same upon the Parties in each of the cases proposed to be consolidated. The Parties shall have 14 days after service to file a response, stating any arguments in favor of or opposition to consolidation, and shall serve the response upon the Parties in each of the cases proposed to be consolidated. The Chief Hearing Officer shall issue an order approving or denying the request for consolidation.

### **(c) Impact on Hearing Panel or Extended Hearing Panel**

If the Chief Hearing Officer issues an order to consolidate two or more disciplinary proceedings for which Hearing Panels or, if applicable, Extended Hearing Panels, have been appointed, the Chief Hearing Officer's order shall specify which Hearing Panel or, if applicable, Extended Hearing Panel, shall preside over the

consolidated disciplinary proceeding, or shall appoint a new Hearing Panel or, if applicable, Extended Hearing Panel, to preside, based on the criteria set forth in Rules 9231 and 9232.

**(d) Severance Initiated by Chief Hearing Officer**

The Chief Hearing Officer may order the severance of a disciplinary proceeding into two or more disciplinary proceedings, upon his or her own motion. In determining whether to order the severance of such disciplinary proceedings, the Chief Hearing Officer shall consider:

- (1) whether the same or similar evidence reasonably would be expected to be offered at each of the possible hearings;
- (2) whether the severance would conserve the time and resources of the Parties; and
- (3) whether any unfair prejudice would be suffered by one or more Parties if the severance is (not) ordered.

If the Chief Hearing Officer proposes to sever a disciplinary proceeding, the Chief Hearing Officer shall serve upon the Parties notice of the proposed severance of disciplinary proceedings pursuant to Rule 9132. The Parties shall have 14 days after service to file a response, stating any arguments in favor of or opposition to severance.

**(e) Severance Initiated by a Party**

A Party may file a motion to sever a disciplinary proceeding if one or more of the factors favoring severance set forth in paragraph (d) appear to be present. If a Party moves to sever a disciplinary proceeding, the Party shall file such motion with the Office of Hearing Officers, and, pursuant to Rule 9133, shall serve the same upon each of the parties to the action proposed to be severed. The Parties shall have 14 days after service to file a response, stating any arguments in favor of or opposition to severance, and shall serve the response upon the Parties in the case proposed to be severed. The Chief Hearing Officer shall issue an order approving or denying the request for severance.

**(f) Impact on Hearing Panel or Extended Hearing Panel of Severance**

If the Chief Hearing Officer issues an order to sever a disciplinary proceeding for which a Hearing Panel or, if applicable, Extended Hearing Panel, has been appointed, the Chief Hearing Officer's order shall specify whether the same Hearing Panel or, if applicable, Extended Hearing Panel, shall preside over the severed disciplinary proceedings, or shall appoint a new Hearing Panel(s) or, if applicable, Extended Hearing Panel(s), to preside over any or all of the severed proceedings, based on the criteria set forth in Rules 9231 and 9232.

## **9215. Answer to Complaint**

### **(a) Form, Service, Notice**

Pursuant to Rule 9133, each Respondent named in a complaint shall serve an answer to the complaint on all other Parties within 25 days after service of the complaint on such Respondent, and at the time of service shall file such answer with the Office of Hearing Officers pursuant to Rules 9135, 9136 and 9137. The Hearing Officer assigned to a disciplinary proceeding pursuant to Rule 9213 may extend such period for good cause. Upon the receipt of a Respondent's answer, the Office of Hearing Officers shall promptly send written notice of the receipt of such answer to all Parties.

### **(b) Content, Affirmative Defenses**

Unless otherwise ordered by the Hearing Officer, an answer shall specifically admit, deny, or state that the Respondent does not have and is unable to obtain sufficient information to admit or deny, each allegation in the complaint. When a Respondent intends to deny only part of an allegation, the Respondent shall specify so much of it as is admitted and deny only the remainder. A statement of lack of information shall be deemed a denial. Any allegation not denied in whole or in part shall be deemed admitted. Any affirmative defense shall be asserted in the answer.

### **(c) Motion for More Definite Statement**

A Respondent may file with an answer a motion for a more definite statement of specified matters of fact or law to be considered or determined. Such motion shall state why each such matter of fact or law should be required to be made more definite. If the motion is granted, the order granting such motion shall set the periods for filing such a statement and any answer thereto.

### **(d) Amendments to Answer**

Upon motion by a Respondent, the Hearing Officer may, after considering good cause shown by the Respondent and any unfair prejudice which may result to any other Party, permit an answer to be amended.

### **(e) Extension of Time to Answer Amended Complaint**

If a complaint is amended pursuant to Rule 9212(b), the time for filing an answer or amended answer shall be the greater of the original time period within which the Respondent is required to respond, or 14 days after service of the amended complaint. If any Respondent has already filed an answer, such Respondent shall have 14 days after service of the amended complaint, unless otherwise ordered by the Hearing Officer, within which to file an amended answer.

### **(f) Failure to Answer, Default**

If a Respondent does not file an answer or make any other filing or request related to the complaint with the Office of Hearing Officers within the time required, the Department of Enforcement or the Department of Market Regulation shall send a second notice to such Respondent requiring an answer within 14 days after service of the second notice. The second notice shall state that failure of the Respondent to reply within the period specified shall allow the Hearing Officer, in the exercise of his or her discretion, pursuant to Rule 9269 to: (1) treat as admitted by the Respondent the allegations in the complaint; and (2) issue a default decision against the Respondent. If the Respondent fails to file an answer with the Office of Hearing Officers within the time required, the Hearing Officer may issue, a default decision against the Respondent pursuant to Rule 9269.

**9216. Acceptance, Waiver, and Consent; Plan Pursuant to SEC Rule 19d-1(c)(2)**

**(a) Acceptance, Waiver, and Consent Procedures**

(1) Notwithstanding Rule 9211, if the Department of Enforcement or the Department of Market Regulation has reason to believe a violation has occurred and the member or associated person does not dispute the violation, the Department of Enforcement or the Department of Market Regulation may prepare and request that the member or associated person execute a letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive such member's or associated person's right to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, and any right of appeal to the Nasdaq Review Council, the Commission, and the courts, or to otherwise challenge the validity of the letter, if the letter is accepted. The letter shall describe the act or practice engaged in or omitted, the rule, regulation, or statutory provision violated, and the sanction or sanctions to be imposed. Unless the letter states otherwise, the effective date of any sanction(s) imposed will be a date to be determined by Nasdaq Regulation staff.

(2) (A) If a member or person associated with a member submits an executed letter of acceptance, waiver, and consent, by the submission such member or person associated with a member also waives:

(i) any right of such member or person associated with a member to claim bias or prejudgment of the Chief Regulatory Officer, the Nasdaq Review Council, or any member of the Nasdaq Review Council, in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent; and

(ii) any right of such member or person associated with a member to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144,

in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent.

(B) If a letter of acceptance, waiver, and consent is rejected, the member or associated person shall be bound by the waivers made under subparagraphs (a)(1) and (a)(2)(A) for conduct by persons or bodies occurring during the period beginning on the date the letter of acceptance, waiver, and consent was executed and submitted and ending upon the rejection of the letter of acceptance, waiver, and consent.

(3) If the member or associated person executes the letter of acceptance, waiver, and consent, it shall be submitted to the Nasdaq Review Council. The Review Subcommittee or the Office of Disciplinary Affairs may accept such letter or refer it to the Nasdaq Review Council for acceptance or rejection by the Nasdaq Review Council. The Review Subcommittee may reject such letter or refer it to the Nasdaq Review Council for acceptance or rejection by the Nasdaq Review Council.

(4) If the letter is accepted by the Nasdaq Review Council, the Review Subcommittee, or the Office of Disciplinary Affairs, it shall be deemed final and shall constitute the complaint, answer, and decision in the matter. If the letter is rejected by the Review Subcommittee or the Nasdaq Review Council, Nasdaq Regulation may take any other appropriate disciplinary action with respect to the alleged violation or violations. If the letter is rejected, the member or associated person shall not be prejudiced by the execution of the letter of acceptance, waiver, and consent under subparagraph (a)(1) and the letter may not be introduced into evidence in connection with the determination of the issues set forth in any complaint or in any other proceeding.

**(b) Procedure for Violation Under Plan Pursuant to SEC Rule 19d-1(c)(2)**

(1) Notwithstanding Rule 9211, the Nasdaq Review Council may, subject to the requirements set forth in subparagraphs (b)(2) through (b)(4) and in SEC Rule 19d-1(c)(2), impose a fine (not to exceed \$2,500) and/or a censure on any member or associated person with respect to any rule listed in IM-9216. If the Department of Enforcement or the Department of Market Regulation has reason to believe a violation has occurred and if the member or associated person does not dispute the violation, the Department of Enforcement or the Department of Market Regulation may prepare and request that the member or associated person execute a minor rule violation plan letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive such member's or associated person's right to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, and any right of appeal to the Nasdaq Review Council, the Commission, and the courts, or to otherwise challenge the validity of

the letter, if the letter is accepted. The letter shall describe the act or practice engaged in or omitted, the rule, regulation, or statutory provision violated, and the sanction or sanctions to be imposed. Unless the letter states otherwise, the effective date of any sanction(s) imposed will be a date to be determined by Nasdaq Regulation staff.

(2) (A) If a member or person associated with a member submits an executed minor rule violation plan letter, by the submission such member or person associated with a member also waives:

(i) any right of such member or person associated with a member to claim bias or prejudgment of the Chief Regulatory Officer, the Nasdaq Review Council, or any member of the Nasdaq Review Council, in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule violation plan letter; and

(ii) any right of such member or person associated with a member to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule violation plan letter.

(B) If a minor rule violation plan letter is rejected, the member or person associated with a member shall be bound by the waivers made under subparagraphs (b)(1) and (b)(2)(A) for conduct by persons or bodies occurring during the period beginning on the date the minor rule violation plan letter was executed and submitted and ending upon the rejection of the minor rule violation plan letter.

(3) If the member or associated person executes the minor rule violation plan letter, it shall be submitted to the Nasdaq Review Council. The Review Subcommittee or the Office of Disciplinary Affairs may accept such letter or refer it to the Nasdaq Review Council for acceptance or rejection by the Nasdaq Review Council. The Review Subcommittee may reject such letter or refer it to the Nasdaq Review Council for acceptance or rejection by the Nasdaq Review Council.

(4) If the letter is accepted by the Nasdaq Review Council, the Review Subcommittee, or the Office of Disciplinary Affairs, it shall be deemed final and Nasdaq shall report the violation to the Commission as required by the Commission pursuant to a plan approved under SEC Rule 19d-1(c)(2). If the

letter is rejected by the Review Subcommittee or the Nasdaq Review Council, Nasdaq Regulation may take any other appropriate disciplinary action with respect to the alleged violation or violations. If the letter is rejected, the member or associated person shall not be prejudiced by the execution of the minor rule violation plan letter under subparagraph (b)(1) and the letter may not be introduced into evidence in connection with the determination of the issues set forth in any complaint or in any other proceeding.

**IM-9216. Violations Appropriate for Disposition Under Plan Pursuant to SEC Rule 19d-1(c)(2)**

- Rule 2210 and Rule 2220 -- Failure to have advertisements and sales literature approved by a principal prior to use; failure to maintain separate files of advertisements and sales literature containing required information; and failure to file advertisements with Nasdaq within the required time limits.
- Rule 3360 -- Failure to timely file reports of short positions on Form NS-1.
- Rule 3110 -- Failure to keep and preserve books, accounts, records, memoranda, and correspondence in conformance with all applicable laws, rules, regulations and statements of policy promulgated thereunder, and with the Rules of Nasdaq.
- Rule 8211 -- Failure to submit trading data as requested.
- Rule 1013 -- Failure to timely submit amendments to Form BD.
- Rules 1013 and 1014 -- Failure to timely submit amendments to Form U4.
- Rule 1013 -- Failure to timely submit amendments to Form U5.
- Rule 1120 -- Failure to comply with the Firm Element of the continuing education requirements.
- Rule 3010 -- Failure to timely file reports pursuant to Rule 3010(b).
- Rule 3070 -- Failure to timely file reports.
- Rule 4619(d) -- Failure to timely file notifications pursuant to SEC Regulation M.
- Rule 11870 -- Failure to abide by Customer Account Transfer Contracts.
- SEC Exchange Act Rule 11Ac1-4 -- Failure to properly display limit orders.
- SEC Exchange Act Rule 11Ac1-1(c)(5) -- Failure to properly update published quotations in certain Electronic Communication Networks (“ECN’s”).
- SEC Exchange Act Rule 17a-5 -- Failure to timely file FOCUS reports and annual audit reports.

**9220. Request for Hearing; Extensions of Time, Postponements, Adjournments**

**9221. Request for Hearing**

**(a) Respondent Request for Hearing**

With the filing of any Respondent’s answer, such Respondent may:

- (1) request a hearing;
- (2) propose an appropriate location for the hearing; and
- (3) propose, if the complaint alleges at least one cause of action involving a violation of a statute or rule described in Rule 9120(u), that the Chief Hearing Officer select a Market Regulation Committee Panelist for a Hearing Panel or, if applicable, an Extended Hearing Panel as described in Rule 9231.

If a Respondent requests a hearing, a hearing shall be granted. A Respondent who fails to request a hearing with the filing of his or her answer waives the right to a hearing unless a Hearing Officer, Hearing Panel, or, if applicable, an Extended Hearing Panel, grants, for good cause shown, a later filed motion by such Respondent requesting a hearing.

**(b) Hearing Officer Order Requiring Hearing**

In the absence of a request for a hearing from any Respondent, the Hearing Officer may order any complaint set down for hearing.

**(c) Authority of Hearing Panel, Extended Hearing Panel to Order Hearing**

If all Respondents waive a hearing, and the Hearing Officer does not order a hearing on his or her own motion, the Hearing Panel or, if applicable, the Extended Hearing Panel, may order a hearing or may consider the matter on the record, as defined in Rule 9267. If fewer than all Respondents waive a hearing, the Hearing Officer, the Hearing Panel, or, if applicable, the Extended Hearing Panel, may, in the exercise of its discretion, order that a hearing be held as to all Respondents. Alternatively, the Hearing Officer, the Hearing Panel, or, if applicable, the Extended Hearing Panel, may conduct a hearing as to only those Respondents who requested a hearing and consider the matter on the record as to those Respondents who waived a hearing.

**(d) Notice of Hearing**

The Hearing Officer shall issue a notice stating the date, time, and place of the hearing, and whether the hearing shall be held before a Hearing Panel or an Extended Hearing Panel, and shall serve such notice on the Parties at least 28 days before the hearing, unless:

- (1) in the discretion of the Hearing Officer, he or she determines that extraordinary circumstances require a shorter notice period; or
- (2) the Parties waive the notice period.

**9222. Extensions of Time, Postponements, and Adjournments**

**(a) Availability**

At any time prior to the issuance of the decision of the Hearing Panel or, if applicable, the Extended Hearing Panel, the Hearing Officer may, for good cause shown, extend or shorten any time limits prescribed by the Code for the filing of any papers and may, consistent with paragraph (b), postpone or adjourn any hearing.

**(b) Limitations on Postponements, Adjournments, and Extensions**

A hearing shall begin at the time and place ordered, unless the Hearing Officer, for good cause shown, changes the place of the hearing, postpones the commencement of the hearing, or adjourns a convened hearing for a reasonable period of time, subject to the limitations in subparagraph (b)(2).

(1) Additional Considerations

In considering a motion for the postponement of the start of a hearing or, adjournment once a hearing has begun, the Hearing Officer shall consider:

- (A) the length of the proceeding to date;
- (B) the number of postponements, adjournments, or extensions already granted;
- (C) the stage of the proceedings at the time of the request;
- (D) potential harm to the investing public if an extension of time, adjournment, or postponement is granted; and
- (E) such other matters as justice may require.

(2) Time Limit

Postponements, adjournments, or extensions of time for filing papers shall not exceed 28 days unless the Hearing Officer states on the record or provides by written order the reasons a longer period is necessary.

**9230. Appointment of Hearing Panel, Extended Hearing Panel**

**9231. Appointment by the Chief Hearing Officer of Hearing Panel or Extended Hearing Panel or Replacement Hearing Officer**

**(a) Appointment**

The Chief Hearing Officer shall appoint a Hearing Panel or an Extended Hearing Panel to conduct the disciplinary proceeding and issue a decision.

**(b) Hearing Panel**

The Hearing Panel shall be composed of a Hearing Officer and two Panelists,

except as provided in paragraph (e) and in Rule 9234 (a), (c), (d), or (e). The Hearing Officer shall serve as the chair of the Hearing Panel. Each Panelist shall be associated with a member of Nasdaq or retired therefrom.

(1) Except as provided in (2), the Chief Hearing Officer shall select as a Panelist a person who:

(A) previously served on the Nasdaq Review Council;

(B) previously served on a disciplinary subcommittee of the Nasdaq Review Council, including a Subcommittee, an Extended Proceeding Committee, or their predecessor subcommittees; or,

(C) previously served as a Director, , but does not serve currently in that position.

(2) If the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120(u), the Chief Hearing Officer may select as a Panelist a person who currently serves on the Market Regulation Committee or who previously served on the Market Regulation Committee not earlier than four years before the date the complaint was served upon the Respondent who was the first served Respondent in the disciplinary proceeding for which the Hearing Panel or the Extended Hearing Panel is being appointed.

**(c) Extended Hearing Panel**

Upon consideration of the complexity of the issues involved, the probable length of the hearing, or other factors that the Chief Hearing Officer deems material, the Chief Hearing Officer may determine that a matter shall be designated an Extended Hearing, and that such matter shall be considered by an Extended Hearing Panel. The Extended Hearing Panel shall be composed of a Hearing Officer and two Panelists, except as provided in Rule 9234(a), (c), (d), or (e). The Hearing Officer will serve as the chair of the Extended Hearing Panel. The Panelists shall be associated with a member of Nasdaq, or retired therefrom. The Chief Hearing Officer shall have discretion to compensate any or all Panelists of an Extended Hearing Panel at the rate then in effect for arbitrators appointed under the Rule 10000 Series.

(1) Except as provided in (2), the Chief Hearing Officer shall select as a Panelist a person who meets the criteria set forth in paragraph (b)(1).

(2) If the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120(u), the Chief Hearing Officer may select as a Panelist a person who currently serves on the Market Regulation Committee or who previously served on the Market Regulation Committee not earlier than four years before the date the complaint was served upon the Respondent who was the first served Respondent in the disciplinary

proceeding for which the Hearing Panel or the Extended Hearing Panel is being appointed.

**(d) Observer**

A person who is qualified to serve as a Panelist may be designated by the Chief Hearing Officer to serve as an observer to a Hearing Panel or an Extended Hearing Panel. If the Chief Hearing Officer designates more than two people to serve as observers to a Hearing Panel or an Extended Hearing Panel, the Chief Hearing Officer shall obtain the consent of the Parties. An observer may attend any hearing of a disciplinary proceeding and observe the proceeding, but may not vote or participate in any other manner in the hearing or the deliberations of the Hearing Panel or the Extended Hearing Panel, or participate in the administration of the disciplinary proceeding.

**(e) Appointment of Replacement Hearing Officer**

In the event that a Hearing Officer withdraws, is incapacitated, or otherwise is unable to continue service after being appointed, the Chief Hearing Officer shall appoint a replacement Hearing Officer. To ensure fairness to the parties and expedite completion of the proceeding when a replacement Hearing Officer is appointed after the hearing has commenced, the replacement Hearing Officer has discretion to exercise the following powers:

(1) Allow the Hearing Panelists to resolve the issues in the proceeding and issue a decision without the participation of the replacement Hearing Officer in the decision. The replacement Hearing Officer may advise the Hearing Panelists regarding legal issues, and shall exercise the powers of the Hearing Officer under Rule 9235(a), including preparing and signing the decision on behalf of the Hearing Panel, in accordance with Rule 9268; or

(2) Certify familiarity with the record and participate in the resolution of the issues in the case and in the issuance of the decision. In exercising this power, the replacement Hearing Officer may recall any witness before the Hearing Panel.

**9232. Criteria for Selection of Panelists and Replacement Panelists**

**(a) Chief Hearing Officer Selection Alternatives**

Following a determination of whether a Hearing Panel or an Extended Hearing Panel should be appointed, the Chief Hearing Officer shall determine whether one of the Panelists may be selected from the Market Regulation Committee.

**(b) Criteria for Selection of Panelist from Market Regulation Committee**

The Chief Hearing Officer may select one but not more than one Panelist from the Market Regulation Committee, as provided in Rule 9231, to serve in a disciplinary proceeding if the complaint alleges at least one cause of action involving a violation of a

statute or a rule described in Rule 9120(u).

**(c) Criteria for Appointment of a Panelist**

After the Chief Hearing Officer designates the Primary District Committee, the Chief Hearing Officer shall select Panelists from the current members of the Primary District Committee, the other categories of persons eligible to serve as Panelists as set forth in Rule 9231(b)(1)(A) through (D) or, if applicable, in Rule 9231(c), who are located in the same geographic area as the Primary District Committee, and, if applicable, from the current or former members of the Market Regulation Committee, based upon the following criteria:

- (1) expertise;
- (2) the absence of any conflict of interest or bias, and any appearance thereof;
- (3) availability; and,
- (4) the frequency with which a person has served as a Panelist on a Hearing Panel or an Extended Hearing Panel during the past two years, favoring the selection of a person as a Panelist who has never served or served infrequently as a Panelist during the period.

**9233. Hearing Panel or Extended Hearing Panel: Recusal and Disqualification of Hearing Officers**

**(a) Recusal, Withdrawal of Hearing Officer**

If at any time a Hearing Officer determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned, the Hearing Officer shall notify the Chief Hearing Officer and the Chief Hearing Officer shall issue and serve on the Parties a notice stating that the Hearing Officer has withdrawn from the matter. In the event that a Hearing Officer withdraws, is incapacitated, or otherwise is unable to continue service after being appointed, the Chief Hearing Officer shall appoint a replacement Hearing Officer. In such a case, the replacement Hearing Officer shall proceed according to Rule 9231(e).

**(b) Motion for Disqualification**

A Party may move for the disqualification of a Hearing Officer. A motion shall be based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Hearing Officer's fairness might reasonably be questioned, and shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the Party learned of those facts. Such motions shall be filed not later than 15 days after the later of:

- (1) when the Party learned of the facts believed to constitute the

disqualification; or

(2) when the Party was notified of the assignment of the Hearing Officer.

**(c) Disposition of Disqualification Motion**

A motion for disqualification of a Hearing Officer shall be decided by the Chief Hearing Officer who shall promptly investigate whether disqualification is required and issue a written ruling on the motion. In the event of a disqualification of the Hearing Officer, the Chief Hearing Officer shall appoint a replacement Hearing Officer.

**9234. Hearing Panel or Extended Hearing Panel: Recusal and Disqualification of Panelists**

**(a) Recusal, Withdrawal of Panelist**

If at any time a Panelist of a Hearing Panel or an Extended Hearing Panel determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned, the Panelist shall notify the Hearing Officer and the Hearing Officer shall issue and serve on the Parties a notice stating that the Panelist has withdrawn from the matter. In the event that a Panelist withdraws, is incapacitated, or otherwise is unable to continue service after being appointed, the Chief Hearing Officer may, in the exercise of discretion, determine whether to appoint a replacement Panelist. In the event that both Panelists withdraw, are incapacitated, or otherwise are unable to continue service after being appointed, the Chief Hearing Officer shall appoint two replacement Panelists.

**(b) Disqualification: Motion of Party; Order of Chief Hearing Officer**

(1) A Party may file a motion to disqualify a Panelist of a Hearing Panel or an Extended Hearing Panel. A motion shall be based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Panelist's fairness might reasonably be questioned, and shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the Party learned of those facts.

(2) Such motions shall be filed not later than 15 days after the later of:

(A) when the Party learned of the facts believed to constitute the disqualification; or

(B) when the Party was notified of the appointment of the Panelist.

(3) The Chief Hearing Officer may order the disqualification of a Panelist of a Hearing Panel or an Extended Hearing Panel if the Chief Hearing Officer

determines that a conflict of interest or bias exists or circumstances otherwise exist where the Panelist's fairness might reasonably be questioned, and shall state the facts constituting the grounds for disqualification.

**(c) Disposition of Disqualification Motion: Challenge to Single Member of Hearing Panel**

If a Party files a motion to disqualify a Panelist of a Hearing Panel or an Extended Hearing Panel, the Hearing Officer shall promptly investigate whether disqualification is required and shall issue a written ruling on the motion. In the event a Panelist is disqualified, the Chief Hearing Officer may, in the exercise of discretion, appoint a replacement Panelist.

**(d) Disposition of Disqualification Motion: Challenge to Both Panelists of Hearing Panel or Extended Hearing Panel**

If a Party files a motion to disqualify both Panelists of a Hearing Panel or an Extended Hearing Panel, the Hearing Officer shall promptly investigate whether disqualification is required and shall issue a written ruling on the motion. In the event one Panelist is disqualified, the Chief Hearing Officer may, in the exercise of discretion, appoint a replacement Panelist. In the event both Panelists are disqualified, the Chief Hearing Officer shall promptly appoint two persons as replacement Panelists.

**(e) Disposition of Disqualification Motion: Challenge to Both Panelists of Hearing Panel or Extended Hearing Panel and Hearing Officer**

If a Party files a motion to disqualify both Panelists of a Hearing Panel or an Extended Hearing Panel, and the Hearing Officer, the Chief Hearing Officer shall promptly investigate whether disqualification is required and shall issue a written ruling on the motion. In the event a Panelist is disqualified, the Chief Hearing Officer may, in the exercise of discretion, appoint a replacement Panelist. In the event both Panelists are disqualified, the Chief Hearing Officer shall promptly appoint two persons as replacement Panelists. In the event a Hearing Officer and a Panelist are disqualified, the Chief Hearing Officer shall promptly appoint a replacement Hearing Officer. In the event both Panelists and the Hearing Officer are disqualified, the Chief Hearing Officer shall promptly appoint a replacement Hearing Officer and two persons as replacement Panelists.

**(f) Criteria for Replacement Panelist**

If the Chief Hearing Officer appoints a replacement Panelist by operation of this Rule, the Chief Hearing Officer shall do so using the criteria set forth in Rule 9232.

**9235. Hearing Officer Authority**

**(a) Hearing Officer Authority**

The Hearing Officer shall be selected by the Chief Hearing Officer and shall have authority to do all things necessary and appropriate to discharge his or her duties. In addition to the powers exercised by all members of the Hearing Panel or, if applicable, the Extended Hearing Panel, the powers of the Hearing Officer include, but are not limited to:

- (1) holding pre-hearing and other conferences and requiring the attendance at any such conference of at least one representative of each Party who has authority to negotiate the resolution of issues in controversy;
- (2) regulating the course of the hearing;
- (3) ordering the Parties to present oral arguments at any stage of the disciplinary proceeding;
- (4) resolving any and all procedural and evidentiary matters, discovery requests, and other non-dispositive motions, subject to any limitations set forth elsewhere in the Code;
- (5) reopening any hearing, upon notice to all Parties, prior to the issuance of the decision of the Hearing Panel or, if applicable, the Extended Hearing Panel;
- (6) creating and maintaining the official record of the disciplinary proceeding; and
- (7) drafting a decision that represents the views of the majority of the Hearing Panel or, if applicable, the Extended Hearing Panel.

**(b) Authority in the Absence of Hearing Officer**

If the Hearing Officer appointed to a case is temporarily unavailable or unable for any reason to discharge his or her duties in a particular proceeding under conditions not requiring the appointment of a replacement Hearing Officer, the Chief Hearing Officer or the Deputy Chief Hearing Officer in his or her discretion may exercise the necessary authority in the same manner as if he or she had been appointed Hearing Officer in the particular proceeding.

**9240. Pre-hearing Conference and Submission**

**9241. Pre-hearing Conference**

**(a) Purposes**

The purposes of a pre-hearing conference include, but are not limited to:

- (1) expediting the disposition of the proceeding;
- (2) establishing procedures to manage the proceeding efficiently; and

(3) improving the quality of the hearing through more thorough preparation.

**(b) Procedure**

On his or her own motion or at the request of a Party, the Hearing Officer may, in his or her discretion, order counsel or any Party to meet for a pre-hearing conference. Such conferences also may be held with one or more persons participating by telephone or other remote means.

**(c) Subjects to be Discussed**

At a pre-hearing conference, the Hearing Officer shall schedule an expedited proceeding as required by Rule 9290, and may consider and take action with respect to any or all of the following:

- (1) simplification and clarification of the issues;
- (2) exchange of witness and exhibit lists and copies of exhibits;
- (3) stipulations, admissions of fact, and stipulations concerning the contents, authenticity, or admissibility into evidence of documents;
- (4) matters of which official notice may be taken;
- (5) the schedule for exchanging pre-hearing motions or briefs, if any;
- (6) the method of service and filing of papers by the Parties;
- (7) determination of hearing dates;
- (8) amendments to the complaint or answers thereto;
- (9) production of documents as set forth in Rule 9251; and
- (10) such other matters as may aid in the orderly and expeditious disposition of the proceeding.

**(d) Scheduling**

An initial pre-hearing conference, unless determined by the Hearing Officer to be unnecessary or premature, shall be held within 21 days after filing of an answer, or after the expiration of the second period provided for filing an answer as set forth in Rule 9215(f). When a complaint names multiple Respondents, the 21-day period shall commence from the later of (i) the date on which the last timely answer was filed, or (ii) if one or more Respondents have failed to answer, from the expiration of the second period provided for filing an answer under Rule 9215(f).

**(e) Pre-hearing Order**

At or following the conclusion of any conference held pursuant to this Rule, the Hearing Officer shall enter a written ruling or order that recites any agreements reached and any procedural determinations made by the Hearing Officer.

**(f) Failure to Appear: Default**

The Hearing Officer may issue a default decision, pursuant to Rule 9269, against a Party that fails to appear, in person or through counsel or a representative, at a pre-hearing conference of which the Party has been due notice.

**9242. Pre-hearing Submission**

**(a) Requirement to Furnish Information**

Prior to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, the Hearing Officer, in the exercise of his or her discretion, may order a Party to furnish to all other Parties and the Hearing Panel or, if applicable, the Extended Hearing Panel, such information as deemed appropriate, including any or all of the following:

- (1) an outline or narrative summary of a Party's case or defense;
- (2) the legal theories upon which a Party shall rely;
- (3) a list and copies of documents that a Party intends to introduce at the hearing;
- (4) a list of witnesses who shall testify on a Party's behalf, including the witnesses' names, occupations, addresses, and a brief summary of their expected testimony; and,
- (5) if a witness shall be called to testify as an expert, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, a list of the expert's publications, and copies of those publications that are not readily available to the other Parties and the Hearing Panel or, if applicable, the Extended Hearing Panel.

**9250. Discovery**

**9251. Inspection and Copying of Documents in Possession of Staff**

**(a) Documents to be Available for Inspection and Copying**

(1) Unless otherwise provided by this Rule, or by order of the Hearing Officer, the Department of Enforcement or the Department of Market Regulation shall make available for inspection and copying by any Respondent, Documents prepared or obtained by Interested Staff in connection with the investigation that led to the institution of proceedings. Such Documents include but are not limited

to:

- (A) requests for information issued pursuant to Rule 8210;
- (B) every other written request directed to persons not employed by Nasdaq to provide Documents or to be interviewed;
- (C) the Documents provided in response to any such requests described in (A) and (B) above;
- (D) all transcripts and transcript exhibits; and
- (E) all other Documents obtained from persons not employed by Nasdaq.

(2) The Department of Enforcement or the Department of Market Regulation shall promptly inform the Hearing Officer and each other Party if, after the issuance of a complaint, requests for information under Rule 8210 are issued under the same investigative file number under which the investigation leading to the institution of disciplinary proceedings was conducted. If Interested Staff receives Documents pursuant to a request for information under Rule 8210 after Documents have been made available to a Respondent for inspection and copying as set forth in paragraph (a), and if such Documents are material and relevant to the disciplinary proceeding in which such Respondent is a Party, the additional Documents shall be made available to the Respondent not later than 14 days after the Interested Staff receives such Documents. If a hearing on the merits is scheduled to begin, Interested Staff shall make the additional Documents available to the Respondent not less than ten days before the hearing. If Interested Staff receives such Documents ten or fewer days before a hearing on the merits is scheduled to begin or after such hearing begins, Interested Staff shall make the additional Documents available immediately to the Respondent.

(3) Nothing in subparagraph (a)(1) shall limit the discretion of the Department of Enforcement or the Department of Market Regulation to make available any other Document or the authority of the Hearing Officer to order the production of any other Document.

**(b) Documents That May Be Withheld**

(1) The Department of Enforcement or the Department of Market Regulation may withhold a Document if:

- (A) the Document is privileged or constitutes attorney work product;
- (B) the Document is an examination or inspection report, an internal memorandum, or other note or writing prepared by a Nasdaq employee that shall not be offered in evidence;

(C) the Document would disclose (i) an examination, investigatory or enforcement technique or guideline of Nasdaq, a federal, state, or foreign regulatory authority, or any self-regulatory organization; (ii) the identity of a source, including a federal, state, or foreign regulatory authority or a self-regulatory organization that furnished information or was furnished information on a confidential basis regarding an investigation, an examination, an enforcement proceeding, or any other type of civil or criminal enforcement action; or (iii) an examination, an investigation, an enforcement proceeding, or any other type of civil or criminal enforcement action under consideration by, or initiated by Nasdaq, a federal, state, or foreign regulatory authority, or a self-regulatory organization; or

(D) the Hearing Officer grants leave to withhold a Document or category of Documents as not relevant to the subject matter of the proceeding, or for other good cause shown.

(2) Nothing in subparagraph (b)(1) authorizes the Department of Enforcement or the Department of Market Regulation to withhold a Document, or a part thereof, that contains material exculpatory evidence.

**(c) Withheld Document List**

The Hearing Officer may require the Department of Enforcement or the Department of Market Regulation to submit to the Hearing Officer a list of Documents withheld pursuant to subparagraphs (b)(1)(A) through (D) or to submit to the Hearing Officer any Document withheld. Upon review, the Hearing Officer may order the Department of Enforcement or the Department of Market Regulation to make the list or any Document withheld available to the other Parties for inspection and copying. A motion to require the Department of Enforcement or the Department of Market Regulation to produce a list of Documents withheld pursuant to paragraph (b) shall be based upon some reason to believe that a Document is being withheld in violation of the Code.

**(d) Timing of Inspection and Copying**

The Hearing Officer shall determine the schedule of production of documents pursuant to this Rule. Unless otherwise ordered by the Hearing Officer, the Department of Enforcement or the Department of Market Regulation shall commence making Documents available to a Respondent for inspection and copying pursuant to this Rule not later than 21 days after service of the Respondent's answer or, if there are multiple Respondents, not later than 21 days after the last timely answer is filed. If a Respondent in a multi- Respondent case fails to answer, the Department of Enforcement or the Department of Market Regulation shall make Documents available to all other Respondents not later than the later of:

(1) 21 days after the filing date of the last timely answer, or

(2) the expiration of the second period provided for filing an answer as set forth in Rule 9215(f).

**(e) Place and Time of Inspection and Copying**

Documents subject to inspection and copying pursuant to this Rule shall be made available to the Respondent for inspection and copying at the Nasdaq office where they are ordinarily maintained, or at such other location as the Hearing Officer, in his or her discretion, shall designate, or as the Parties otherwise agree. A Respondent shall be given access to the Documents during normal business hours. A Respondent shall not be given custody of or be permitted to remove the Documents.

**(f) Copying Costs**

A Respondent may obtain a photocopy of all Documents made available for inspection. A Respondent shall be responsible for the cost of photocopying. Unless otherwise ordered, charges for copies made at the request of a Respondent shall be at a rate to be established by the Nasdaq.

**(g) Failure to Make Documents Available -- Harmless Error**

In the event that a Document required to be made available to a Respondent pursuant to this Rule is not made available by the Department of Enforcement or the Department of Market Regulation, no rehearing or amended decision of a proceeding already heard or decided shall be required unless the Respondent establishes that the failure to make the Document available was not harmless error. The Hearing Officer, or, upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the Nasdaq Review Council, shall determine whether the failure to make the document available was not harmless error.

**9252. Requests for Information**

**(a) Content and Timing of Requests**

A Respondent who requests that Nasdaq invoke Rule 8210 to compel the production of Documents or testimony at the hearing shall do so in writing and serve copies on all Parties. Such request shall: be submitted to the Hearing Officer no later than 21 days before the scheduled hearing date; describe with specificity the Documents, the category or type of Documents, or the testimony sought; state why the Documents, the category or type of Documents, or the testimony are material; describe the requesting Party's previous efforts to obtain the Documents, the category or type of Documents, or the testimony through other means; and state whether the custodian of each Document, or the custodian of the category or type of Documents, or each proposed witness is subject to Nasdaq's jurisdiction.

**(b) Standards for Issuance**

A request that the Nasdaq Regulation compel the production of Documents or testimony shall be granted only upon a showing that: the information sought is relevant, material, and non-cumulative; the requesting Party has previously attempted in good faith to obtain the desired Documents and testimony through other means but has been unsuccessful in such efforts; and each of the persons from whom the Documents and testimony are sought is subject to Nasdaq's jurisdiction. In addition, the Hearing Officer shall consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.

**(c) Limitations on Requests**

If, after consideration of all the circumstances, the Hearing Officer determines that a request submitted pursuant to this Rule is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she shall deny the request, or grant it only upon such conditions as fairness requires. In making the foregoing determination, the Hearing Officer may inquire of the other Parties whether they shall stipulate to the facts sought to be proved by the Documents or testimony sought. If the Hearing Officer grants the request, the Hearing Officer shall order that requested Documents be produced to all Parties not less than ten days before the hearing, and order that witnesses whose testimony was requested appear and testify at the hearing. If the Hearing Officer grants the request ten or fewer days before a hearing on the merits is scheduled to begin or after such hearing begins, the Documents or testimony shall be produced immediately to all Parties.

**9253. Production of Witness Statements**

**(a) Availability**

Notwithstanding the provisions of Rule 9251(b),

(1) A Respondent in a disciplinary proceeding may file a motion requesting that the Department of Enforcement or the Department of Market Regulation produce for inspection and copying any statement of any person called or to be called as a witness by the Department of Enforcement or the Department of Market Regulation that pertains, or is expected to pertain, to his or her direct testimony and which is "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement," as that phrase is used in 18 U.S.C. § 3500(e)(2).

(2) A Respondent in a disciplinary proceeding may also file a motion requesting that the Department of Enforcement or the Department of Market Regulation produce for inspection and copying any contemporaneously written statement made by an Interested Staff member during a routine examination or inspection about the substance of oral statements made by a non-Nasdaq person when (a) either the Interested Staff member or non-Nasdaq person is called as a witness by the Department of Enforcement or the Department of Market Regulation, and (b) that portion of the statement for which production is sought

directly relates to the Interested Staff member's testimony or the testimony of the non-Nasdaq witness.

**(b) Failure to Produce -- Harmless Error**

In the event that a statement required to be made available for inspection and copying by a Respondent is not provided by the Department of Enforcement or the Department of Market Regulation, there shall be no rehearing of a proceeding already heard, or issuance of an amended decision in a proceeding already decided, unless the Respondent establishes that the failure to provide the statement was not harmless error. The Hearing Officer, or upon appeal or review, a Subcommittee, an Extended Proceeding Committee, or the Nasdaq Review Council, shall determine whether the failure to provide any statement was not harmless error.

**9260. Hearing and Decision**

**9261. Evidence and Procedure in Hearing**

**(a) Submission of Documentary Evidence and List of Witnesses Before Hearing**

No later than ten days before the hearing, or at such earlier date as may be specified by the Hearing Officer, each Party shall submit to all other Parties and to the Hearing Officer copies of documentary evidence and the names of the witnesses each Party intends to present at the hearing.

**(b) Party's Right to Be Heard**

If a hearing is held, a Party shall be entitled to be heard in person, by counsel, or by the Party's representative.

**(c) Request to Submit Additional Evidence**

Notwithstanding paragraph (a), a Party, for good cause shown, may seek to submit any additional evidence at the hearing as the Hearing Officer, in his or her discretion, determines may be relevant and necessary for a complete record.

**9262. Testimony**

A person who is subject to the jurisdiction of Nasdaq shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter or a notary public.

**9263. Evidence: Admissibility**

**(a) Criteria for Receiving and Excluding Evidence**

The Hearing Officer shall receive relevant evidence, and may exclude all

evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial.

**(b) Objections**

Objections to the admission or exclusion of evidence shall be made on the record and shall succinctly state the grounds relied upon. Excluded material shall be deemed a supplemental document, which shall be attached to the record and retained under Rule 9267.

**9264. Motion for Summary Disposition**

**(a) Pre-hearing**

After a Respondent's answer has been filed and Documents have been made available to that Respondent for inspection and copying pursuant to Rule 9251, the Respondent or the Department of Enforcement or the Department of Market Regulation, without leave of the Hearing Officer, may make a motion for summary disposition of any or all the causes of action in the complaint with respect to that Respondent, as well as any defense raised in a Respondent's answer. All pre-hearing motions for summary disposition and supporting papers shall be filed at least 21 days before the time set for the hearing, or at such earlier time as ordered by the Hearing Officer. Notwithstanding the provisions of Rule 9146(d), any opposition or response to a pre-hearing motion for summary disposition shall be filed at least seven days before the time set for the hearing.

**(b) After Commencement of Hearing on Merits**

After a hearing on the merits has commenced, a Respondent or the Department of Enforcement or the Department of Market Regulation may make a motion for summary disposition of any or all of the causes of action in the complaint with respect to that Respondent or defenses raised in that Respondent's answer only with leave of the Hearing Officer.

**(c) Case Not Fully Adjudicated on Motion**

If on motion under this rule a decision is not rendered upon the whole case or for all the relief asked and a hearing is necessary, the Hearing Panel or, if applicable, the Extended Hearing Panel, at the hearing of the motion, by examining the pleadings and the evidence before it and by questioning counsel, shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, and directing such further proceedings in the action as are just. Upon the hearing of the action the facts so specified shall be deemed established, and the hearing shall be conducted accordingly.

**(d) Form of Papers**

A motion for summary disposition pursuant to paragraph (a) shall be

accompanied by the following: a statement of undisputed facts; a supporting memorandum of points and authorities; and affidavits or declarations that set forth such facts as would be admissible at the hearing and show affirmatively that the affiant is competent to testify to the matters stated therein. A memorandum of points and authorities in support or opposition shall not exceed 35 pages.

**(e) Rulings on Motion**

The Hearing Officer may promptly deny or defer decisions on any motion for summary disposition, however, only the Hearing Panel or, if applicable, the Extended Hearing Panel, may grant a motion for summary disposition, except the Hearing Officer may grant motions for summary disposition with respect to questions of jurisdiction. The Hearing Panel or, if applicable, the Extended Hearing Panel, may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law. If a Party files a motion under paragraph (a), the facts alleged in the pleadings of the Party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by the non-moving Party, by uncontested affidavits or declarations, or by facts officially noticed pursuant to Rule 9145. If a Party opposing a motion for summary disposition made under paragraph (a) cannot present, by affidavit prior to the hearing, facts essential to justify the Party's opposition to the motion, the Hearing Panel or, if applicable, the Extended Hearing Panel, may deny the motion for summary disposition or defer the decision on the motion.

**9265. Record of Hearing**

**(a) Recordation**

A hearing shall be recorded by a court reporter and a transcript shall be prepared. Unless otherwise ordered by a Hearing Officer, a pre-hearing conference shall be recorded by a court reporter and a transcript shall be prepared.

**(b) Availability of a Transcript**

A transcript of a pre-hearing conference and a transcript of a hearing shall be available to a Party for purchase from the court reporter at prescribed rates. A witness may purchase from the court reporter a transcript of his or her own testimony.

**(c) Transcript Correction**

Prior to the filing of post-hearing briefs or proposed findings and conclusions, or within such earlier time as ordered by the Hearing Officer, a Party or witness may seek to correct his or her transcript. A proposed correction of the transcript shall be submitted to the Hearing Officer by affidavit. Upon notice to all Parties to the disciplinary proceeding, the Hearing Officer may order the correction to the transcript as requested or sua sponte.

## **9266. Proposed Findings of Fact, Conclusions of Law, and Post-Hearing Briefs**

### **(a) Discretion of Hearing Officer to Require Proposed Findings of Fact, Conclusions of Law, and Post-Hearing Briefs**

At the discretion of the Hearing Officer, the Parties may be ordered to file proposed findings of facts and conclusions of law, or post-hearing briefs, or both. The Hearing Officer may order that such proposed findings and conclusions be filed together with, or as part of, post-hearing briefs.

### **(b) Reference to Record Required**

Proposed findings of fact or other statements of fact in briefs shall be supported by specific references to the record.

### **(c) Period for Filing**

In any case in which the Hearing Officer ordered the filing of proposed findings or conclusions of law, or post-hearing briefs, the Hearing Officer shall, after consultation with the Parties, prescribe the period within which proposed findings and conclusions of law and post-hearing briefs are to be filed. Such period shall be reasonable under all the circumstances but the total period allowed for the filing of post-hearing submissions shall not exceed 60 days after the conclusion of the hearing unless the Hearing Officer, for good cause shown, permits a different period and sets forth in an order the reasons why a longer period is necessary.

### **(d) Form, Length of Papers**

Unless the Hearing Officer orders otherwise, each post-hearing submission shall not exceed 25 pages, exclusive of cover sheets, tables of contents, and tables of authorities.

## **9267. Record; Supplemental Documents Attached to Record; Retention**

### **(a) Contents of the Record, Retention**

The record shall consist of:

(1) the complaint, answers, each notice of hearing, pre-hearing order, and any amendments thereto;

(2) each application, motion, submission, and other paper, and any amendments, motions, objections, and exceptions to or regarding them;

(3) each transcript of a pre-hearing conference and of a hearing, and each stipulation, transcript of testimony, Document, and other item admitted into evidence;

(4) each written communication accepted at the discretion of the Hearing

Officer;

(5) with respect to a motion to disqualify a Hearing Officer under Rule 9233 or a Panelist under Rule 9234, each affidavit or transcript of testimony taken and the ruling made in connection with the request;

(6) all proposed findings and conclusions;

(7) each written ruling, order, and decision issued by the Chief Hearing Officer, Hearing Officer, Hearing Panel or, if applicable, Extended Hearing Panel; and,

(8) any other Document or item accepted into the record by the Hearing Officer, the Hearing Panel or, if applicable, the Extended Hearing Panel.

**(b) Supplemental Documents Attached To Record; Retention**

(1) A supplemental Document attached to the record is any Document submitted to the Hearing Officer that did not become part of the record, including:

(A) a Document not admitted by the Hearing Officer, Hearing Panel or, if applicable, the Extended Hearing Panel;

(B) any matter stricken from any filing or stricken during an oral presentation, including any matter stricken from any filing or stricken during any oral presentation because the Adjudicator determined it was scandalous or impertinent as provided in Rule 9136(e); and

(C) a list of Documents, if any, that a Respondent unsuccessfully sought by motion to inspect and copy under Rule 9251(c).

(2) A supplemental Document attached to the record shall not constitute part of the record, but shall be retained until the date upon which Nasdaq's decision becomes final disciplinary action or, if applicable, upon the conclusion of any review by the Commission or the federal courts.

**(c) Substitution of Copies**

Parties may submit to the Hearing Officer for substitution a true copy of a Document in the record.

**9268. Decision of Hearing Panel or Extended Hearing Panel**

**(a) Majority Decision**

Within 60 days after the final date allowed for filing proposed findings of fact, conclusions of law, and post-hearing briefs, or by a date established at the discretion of the Chief Hearing Officer, the Hearing Officer shall prepare a written decision that

reflects the views of the Hearing Panel or, if applicable, the Extended Hearing Panel, as determined by majority vote.

**(b) Contents of Decision**

The decision shall include:

- (1) a statement describing the investigative or other origin of the disciplinary proceeding;
- (2) the specific statutory or rule provisions that were alleged to have been violated;
- (3) a statement setting forth the findings of fact with respect to any act or practice the Respondent was alleged to have committed or omitted;
- (4) the conclusions of the Hearing Panel, or Extended Hearing Panel, as to whether the Respondent violated any provision alleged in the complaint;
- (5) a statement of the Hearing Panel, or the Extended Hearing Panel, in support of the disposition of the principal issues raised in the proceeding; and
- (6) a statement describing any sanction imposed, the reasons therefor, and the date upon which such sanction shall become effective. Unless otherwise provided in the decision, the sanction(s) shall become effective on a date to be determined by Nasdaq Regulation staff.

**(c) Dissenting Opinion**

Within 65 days after the final date allowed for filing proposed findings of fact and conclusions of law, and post-hearings briefs, or by a date established at the discretion of the Chief Hearing Officer, the Hearing Officer or any Panelist may prepare a written dissenting opinion.

**(d) Service, Notice, And Dissemination Requirements**

The Office of Hearing Officers shall promptly serve the decision of the Hearing Panel, or the Extended Hearing Panel, and any dissenting opinion on the Parties; publish notice of the decision and any dissenting opinion in the Central Registration Depository; and provide a copy of the decision and any dissenting opinion to each member of Nasdaq with which a Respondent is associated.

**(e) Appeal or Review**

If not timely appealed pursuant to Rule 9311 or timely called for review pursuant to Rule 9312, the majority decision shall constitute final disciplinary action of Nasdaq for purposes of SEC Rule 19d-1(c)(1).

## **9269. Default Decisions**

### **(a) Issuance of Default Decisions**

(1) The Hearing Officer may issue a default decision against a Respondent that fails to answer the complaint within the time afforded under Rule 9215, or a Party that fails to appear at any hearing that a Party is required to attend under the Rule 9200 Series of which the Party has due notice.

(2) If the defaulting Party is the Respondent, the Hearing Officer may deem the allegations against that Respondent admitted. If the Defaulting Party is the Department of Enforcement or the Department of Market Regulation, the Hearing Officer may issue a default decision ordering that the complaint be dismissed with prejudice.

(3) The Hearing Officer may order a Party that fails to appear at the pre-hearing conference or the hearing to pay the costs incurred by other Parties in connection with their appearance.

### **(b) Contents of Decision**

The contents of a default decision shall conform to the requirements of Rule 9268(b).

### **(c) Review of Default Decision**

A Party may, for good cause shown, file a motion to set aside a default, dismissal, and the imposition of costs. Upon a showing of good cause, the Hearing Officer that entered the original order shall decide the motion. If the Hearing Officer that issued the original order is not available, the Chief Hearing Officer shall appoint another Hearing Officer to decide the motion.

### **(d) Final Disciplinary Action of Nasdaq; Effectiveness of Sanctions**

If a default decision is not appealed pursuant to Rule 9311 or called for review pursuant to Rule 9312 within 25 days after the date the Office of Hearing Officers serves it on the Parties, the default decision shall become the final disciplinary action of Nasdaq for purposes of SEC Rule 19d-1(c)(1). Unless otherwise provided in the default decision, the sanctions shall become effective on a date to be determined by Nasdaq Regulation staff, except that a bar or expulsion shall become effective immediately upon the default decision becoming the final disciplinary action of Nasdaq. The decision shall be served on a Respondent by courier, facsimile or other means reasonably likely to obtain prompt service when the sanction is a bar or an expulsion.

## **9270. Settlement Procedure**

### **(a) When Offer Allowed; No Stay of Proceeding**

A Respondent who is notified that a proceeding has been instituted against him or her may propose in writing an offer of settlement at any time. If a Respondent proposes an offer of settlement before the hearing on the merits has begun, the making of an offer of settlement shall not stay the proceeding, unless otherwise decided by the Hearing Officer. If a Respondent proposes an offer of settlement after the hearing on the merits has begun, the making of an offer of settlement shall not stay the proceeding, unless otherwise decided by the Hearing Panel or, if applicable, the Extended Hearing Panel.

### **(b) Settlement Offer Shall Conform to Rule**

A Respondent who makes an offer of settlement shall do so in conformity with the provisions of this Rule and shall not make such an offer of settlement frivolously or propose a sanction inconsistent with the seriousness of the violations to be found.

### **(c) Content and Signature Requirements**

An offer of settlement shall be in writing and signed by the person making the offer, and, if the person is represented by counsel or a representative, signed also by the counsel or representative. The offer of settlement shall contain in reasonable detail:

- (1) a statement describing the investigative or other origin of the disciplinary action;
- (2) the specific statutory or rule provisions that the member or associated person is alleged to have violated;
- (3) a statement containing the acts or practices which the member or associated person is alleged to have engaged in or omitted;
- (4) a statement consenting to findings of fact and violations consistent with the statements contained in the offer of settlement required by subparagraphs (c)(2) and (c)(3);
- (5) a proposed sanction to be imposed that is consistent with the current sanction guidelines or, if inconsistent with the sanction guidelines, a detailed statement supporting the proposed sanction; and,
- (6) the effective date of any sanction(s) imposed, or a statement that the effective date of the sanction(s) will be a date to be determined by Nasdaq Regulation staff.

### **(d) Waiver**

(1) If a Respondent submits an offer of settlement, by the submission such Respondent waives:

(A) any right of such Respondent to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, and any right of appeal to the Nasdaq Review Council, the Commission, and the courts, or any right otherwise to challenge or contest the validity of the order issued, if the offer of settlement and order of acceptance are accepted;

(B) any right of such Respondent to claim bias or prejudgment of the Chief Hearing Officer, Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, a Panelist on a Hearing Panel, or, if applicable, an Extended Hearing Panel, the Chief Regulatory Officer, the Nasdaq Review Council, or any member of the Nasdaq Review Council, in connection with such person's or body's participation in discussions regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of acceptance, including acceptance, or rejection of such offer of settlement and order of acceptance; and

(C) any right of such Respondent to claim that a person or body violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of settlement, including acceptance or rejection of such offer of settlement and order of acceptance.

(2) If an offer of settlement and an order of acceptance are rejected, the Respondent shall be bound by the waivers made in this paragraph (d) for conduct by persons or bodies occurring during the period beginning from the date the offer of settlement was submitted and ending upon the rejection of the offer of settlement and order of acceptance.

**(e) Uncontested Offers of Settlement**

If a Respondent makes an offer of settlement and the Department of Enforcement or the Department of Market Regulation does not oppose it, the offer of settlement is uncontested. If an offer of settlement is determined to be uncontested by the Department of Enforcement or the Department of Market Regulation before a hearing on the merits has begun, the Department of Enforcement or the Department of Market Regulation shall transmit the uncontested offer of settlement and a proposed order of acceptance to the Nasdaq Review Council with its recommendation. If an offer of settlement is determined to be uncontested by the Department of Enforcement or the Department of Market Regulation after a hearing on the merits has begun, the Department of Enforcement or the Department of Market Regulation shall transmit the offer of settlement and a proposed order of acceptance to the Hearing Panel or, if applicable, the Extended Hearing Panel for

acceptance or rejection. If accepted by the Hearing Panel or, if applicable, Extended Hearing Panel, the offer of settlement and the order of acceptance shall be forwarded to the Nasdaq Review Council to accept or reject.

(1) A proposed order of acceptance shall make findings of fact, including a statement of the rule, regulation, or statutory provision violated, and impose sanctions consistent with the terms of the offer of settlement.

(2) Before an offer of settlement and an order of acceptance shall become effective, they shall be submitted to and accepted by the Nasdaq Review Council. The Review Subcommittee or the Office of Disciplinary Affairs may accept such offer of settlement and order of acceptance or refer them to the Nasdaq Review Council for acceptance or rejection by the Nasdaq Review Council. The Review Subcommittee may reject such offer of settlement and order of acceptance or refer them to the Nasdaq Review Council for acceptance or rejection by the Nasdaq Review Council.

(3) If the offer of settlement and order of acceptance are accepted by the Nasdaq Review Council, the Review Subcommittee, or the Office of Disciplinary Affairs, they shall become final and the Director of the Office of Disciplinary Affairs shall issue the order and notify the Office of Hearing Officers.

**(f) Contested Offers of Settlement**

If a Respondent makes an offer of settlement and the Department of Enforcement or the Department of Market Regulation opposes it, the offer of settlement is contested. When the Department of Enforcement or the Department of Market Regulation opposes an offer of settlement, the Respondent's written offer and the Department of Enforcement's or the Department of Market Regulation's written opposition shall be submitted to a Hearing Panel or, if applicable, an Extended Hearing Panel. The Hearing Panel or, if applicable, the Extended Hearing Panel, may order the Department of Enforcement or the Department of Market Regulation and the Respondent to attend a settlement conference.

(1) If a contested offer of settlement is approved by the Hearing Panel or, if applicable, Extended Hearing Panel, the Hearing Officer shall draft an order of acceptance of the offer of settlement. The order of acceptance shall make findings of fact, including a statement of the rule, regulation, or statutory provision violated, and impose sanctions consistent with the terms of the offer of settlement. The offer of settlement, any written opposition thereto, and the order of acceptance shall be forwarded to the Nasdaq Review Council to accept or reject.

(2) Before an offer of settlement and order of acceptance shall become effective, they shall be submitted to, and accepted by, the Nasdaq Review Council. The Review Subcommittee may accept or reject such offer of settlement and order of acceptance or refer them to the Nasdaq Review Council for

acceptance or rejection by the Nasdaq Review Council.

(3) If the offer of settlement and order of acceptance are accepted by the Nasdaq Review Council or the Review Subcommittee, the Chief Regulatory Officer shall issue the order and notify the Office of Hearing Officers.

**(g) Final Disciplinary Action**

The proceeding shall conclude as of the date the order of acceptance is issued. The order of acceptance shall constitute final disciplinary action of Nasdaq. The sanction shall take effect as set forth in the order.

**(h) Rejection of Offer of Settlement**

If an uncontested offer of settlement or an order of acceptance is rejected by the Hearing Panel or, if applicable, the Extended Hearing Panel, the Review Subcommittee, or the Nasdaq Review Council, the Respondent shall be notified in writing and the offer of settlement and proposed order of acceptance shall be deemed withdrawn. If a contested offer of settlement or an order of acceptance is rejected by the Hearing Panel or, if applicable, the Extended Hearing Panel, the Review Subcommittee, or the Nasdaq Review Council, the Respondent shall be notified in writing and the offer of settlement and proposed order of acceptance shall be deemed withdrawn. The rejected offer and proposed order of acceptance shall not constitute a part of the record in any proceeding against the Respondent making the offer.

**(i) Disciplinary Proceeding With Multiple Respondents**

When a disciplinary proceeding names multiple Respondents, settlement offers may be accepted or rejected as to any one or all of the Respondents submitting offers. The proceedings shall thereafter be terminated as to those Respondents whose offers of settlement are accepted, but such Respondents may be required to participate in any hearing conducted as to those Respondents that did not submit offers of settlement or whose offers of settlement were rejected.

**(j) No Prejudice from Rejected Offer of Settlement**

If an offer of settlement is rejected by a Hearing Panel or, if applicable, an Extended Hearing Panel, the Review Subcommittee, or the Nasdaq Review Council, the Respondent shall not be prejudiced by the offer, which may not be introduced into evidence in connection with the determination of the issues involved in the pending complaint or in any other proceeding.

**9280. Contemptuous Conduct**

**(a) Persons Subject to Sanctions**

If a Party, attorney for a Party, or other person authorized to represent others by

Rule 9141, engages in conduct in violation of an order of a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, or other contemptuous conduct during a proceeding, a Hearing Officer, Hearing Panel or, if applicable, an Extended Hearing Panel, may:

- (1) subject the Party, attorney for a Party, or other person authorized to represent others by Rule 9141, to the sanctions set forth in paragraph (b); and
- (2) exclude an attorney for a Party, or other person authorized to represent others by Rule 9141, under Rule 9150.

**(b) Sanctions Other Than Exclusion**

A Hearing Officer, Hearing Panel or, if applicable, an Extended Hearing Panel, may make such orders as are just in regard to a Party, an attorney for a Party, or other person authorized to represent others by Rule 9141.

- (1) Such orders may include:
  - (A) an order providing that the matters on which the order is made or any other designated facts shall be taken to be established for the purposes of the disciplinary proceeding in accordance with the claim of the Party obtaining the order;
  - (B) an order providing that the disobedient Party may not support or oppose designated claims or defenses, or may not introduce designated matters in evidence;
  - (C) an order providing that pleadings or a specified part of the pleading shall be stricken, or an order providing that the proceeding shall be stayed until the Party subject to the order obeys it;
  - (D) in lieu of any of the foregoing orders or in addition thereto, an order providing that contemptuous conduct includes the failure to obey any order; and
  - (E) an order as provided in subparagraphs (A), (B), and (C) where a Party has failed to comply with an order to produce a person for examination, unless the Party failing to comply shows that such Party is unable to produce such person for examination.

(2) A Party that without substantial justification fails to disclose information required by the Rule 9240 Series and the Rule 9250 Series or otherwise required by order of the Hearing Officer, Hearing Panel or, if applicable, the Extended Hearing Panel, shall not, unless such failure is harmless, be permitted to use as evidence at a hearing, in a motion or in any other filing of papers, or in oral argument, any witness or information not so disclosed. In addition to, or in lieu of this sanction, the Hearing Officer, Hearing Panel or, if

applicable, the Extended Hearing Panel, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. These sanctions may include any of the sanctions provided for in subparagraphs (b)(1)(A) through (C).

**(c) Nasdaq Review Council Review of Exclusions**

If an attorney for a Party, or other person authorized to represent others by Rule 9141, is excluded from a disciplinary hearing or conference, or any portion thereof, such attorney or other person may seek review of the exclusion by filing a motion to vacate with the Nasdaq Review Council. Such motion to vacate shall be filed and served on all Parties within five days after service of the exclusion order. Any response shall be filed with the Nasdaq Review Council and served on all Parties within five days after the service of the motion to vacate. The Nasdaq Review Council or the Review Subcommittee shall consider such motion on an expedited basis and promptly issue a written order. The filing of a motion to vacate shall stay all aspects of the disciplinary proceeding until at least seven days after service of the order of the Nasdaq Review Council or the Review Subcommittee. The review proceedings shall be conducted on the basis of the written record without oral argument.

**(d) Adjournment**

The hearing, conferences, or other activities relating to the disciplinary proceeding shall be stayed pending the review by the Nasdaq Review Council or the Review Subcommittee of an exclusion order in paragraph (c). In the event that the Nasdaq Review Council or the Review Subcommittee upholds an exclusion of an attorney or other person authorized to represent others by Rule 9141, the Hearing Officer may, upon motion by a Party represented by an attorney or other person subject to an order of exclusion, grant an adjournment to allow the retention of new counsel or selection of a new representative. In determining whether to grant an adjournment or the length of an adjournment, the Hearing Officer shall consider whether there are other counsel or representatives of record on behalf of the Party, the availability of other counsel or other members of an excluded attorney's firm, or the availability of other representatives for the Party, and any other relevant factors.

**9290. Expedited Disciplinary Proceedings**

For any disciplinary proceeding, the subject matter of which also is subject to a temporary cease and desist proceeding initiated pursuant to Rule 9810 or a temporary cease and desist order, hearings shall be held and decisions shall be rendered at the earliest possible time. An expedited hearing schedule shall be determined at a pre-hearing conference held in accordance with Rule 9241.

**9300. REVIEW OF DISCIPLINARY PROCEEDING BY NASDAQ REVIEW COUNCIL AND NASDAQ BOARD; APPLICATION FOR COMMISSION REVIEW**

### **9310. Appeal to or Review by Nasdaq Review Council**

### **9311. Appeal by Any Party; Cross-Appeal**

#### **(a) Time to File Notice of Appeal**

A Respondent or the Department of Enforcement or the Department of Market Regulation may file a written notice of appeal within 25 days after service of a decision issued pursuant to Rule 9268 or Rule 9269.

#### **(b) Effect**

An appeal to the Nasdaq Review Council from a decision issued pursuant to Rule 9268 or Rule 9269 shall operate as a stay of that decision until the Nasdaq Review Council issues a decision pursuant to Rule 9349 or, in cases called for discretionary review by the Nasdaq Board, until a decision is issued pursuant to Rule 9351. Any such appeal, however, will not stay a decision, or that part of a decision, that imposes a permanent cease and desist order.

#### **(c) Notice of Appeal Content and Signature Requirements**

A Party appealing pursuant to this Rule shall file a written notice of appeal with the Office of Hearing Officers and serve the notice on the Parties. The notice of appeal shall be signed by the appealing Party, or his or her counsel or representative, and shall contain:

- (1) the name of the disciplinary proceeding;
- (2) the disciplinary proceeding docket number;
- (3) the name of the Party on whose behalf the appeal is made;
- (4) a statement on whether oral argument before the Nasdaq Review Council is requested; and
- (5) a brief statement of the findings, conclusions, or sanctions as to which exceptions are taken.

#### **(d) Notice of Cross-Appeal**

A Party who is served with a notice of appeal may file a written notice of cross-appeal and serve the notice of cross-appeal on the Parties. The notice of cross-appeal shall be filed within five days after service of the notice of appeal. The notice of cross-appeal shall be signed by the Party cross-appealing, or his or her counsel, and shall contain the information set forth in subparagraphs (c)(1), (c)(2), (c)(4), and (c)(5), and the name of the Party on whose behalf the cross-appeal is made.

**(e) Waiver of Issues Not Raised**

The Nasdaq Review Council may, in its discretion, deem waived any issue not raised in the notice of appeal or cross-appeal. The Nasdaq Review Council, the Review Subcommittee, a Subcommittee, the Chief Regulatory Officer or, if applicable, an Extended Proceeding Committee, shall provide the Parties with notice of, and an opportunity to submit briefs on, any issue that shall be considered by the Nasdaq Review Council if such issue was not previously set forth in the notice of appeal. Parties may submit motions to either the Review Subcommittee or the Nasdaq Review Council challenging requests for briefing made by the Chief Regulatory Officer under this Rule of issues that were not previously set forth in the notice of appeal.

**(f) Withdrawal of Notice of Appeal or Cross-Appeal**

A Party may withdraw a notice of appeal or a notice of cross-appeal filed by him or her at any time by filing a written notice of withdrawal of appeal or cross-appeal with the Office of Hearing Officers and serving notice thereof on the Parties. The notice of withdrawal of appeal or cross-appeal shall contain: the name of the disciplinary proceeding; the disciplinary proceeding docket number; and the name of the Party on whose behalf the notice of appeal or cross-appeal was filed previously. The notice of withdrawal of appeal or cross-appeal shall be signed by the Party, or his or her counsel or representative. Upon the withdrawal of a notice of appeal, any outstanding cross-appeal shall be treated as an appeal unless it is withdrawn.

**9312. Review Proceeding Initiated By Nasdaq Review Council**

**(a) Call for Review**

(1) Rule 9268 Decision

A decision issued pursuant to Rule 9268 may be subject to a call for review by any member of the Nasdaq Review Council or, pursuant to authority delegated from the Nasdaq Review Council, by any member of the Review Subcommittee. A decision issued pursuant to Rule 9268 shall be subject to a call for review within 45 days after the date of service of the decision. If called for review, such decision shall be reviewed by the Nasdaq Review Council.

(2) Rule 9269 Decision

A default decision issued pursuant to Rule 9269 shall be subject to a call for review by the Chief Regulatory Officer, on his or her own motion within 25 days after the date of service of the decision. If called for review, such decision shall be reviewed by the Nasdaq Review Council.

**(b) Effect**

Institution of review by a member of the Nasdaq Review Council on his or her

own motion, a member of the Review Subcommittee on his or her own motion, or the Chief Regulatory Officer, on his or her own motion, shall operate as a stay of a final decision issued pursuant to Rule 9268 or Rule 9269 as to all Parties subject to the notice of review, until the Nasdaq Review Council issues a decision pursuant to Rule 9349, or, in cases called for discretionary review by the Nasdaq Board, until a decision is issued pursuant to Rule 9351. Institution of any such review, however, will not stay a decision, or that part of a decision, that imposes a permanent cease and desist order.

**(c) Requirements**

(1) If a member of the Nasdaq Review Council, a member of the Review Subcommittee, or, for a disciplinary proceeding decided under Rule 9269, the Chief Regulatory Officer determines to call a case for review, a written notice of review shall be served promptly on each Party to the proceeding and filed with the Office of Hearing Officers. Such notice of review shall contain:

(A) the name of the disciplinary proceeding;

(B) the disciplinary proceeding docket number; and

(C) a brief statement of the findings, conclusions, or sanctions with respect to which the Nasdaq Review Council, the Review Subcommittee, or the Chief Regulatory Officer determined that a call for review was necessary.

(2) The statement contained in the notice of review shall not limit the scope of the Nasdaq Review Council's authority under Rule 9346 to review any issues raised in the record. The Nasdaq Review Council, the Review Subcommittee, a Subcommittee, the Chief Regulatory Officer or, if applicable, an Extended Proceeding Committee, shall provide the Parties with notice of, and an opportunity to submit briefs on, any issue that shall be considered by the Nasdaq Review Council if such issue was not previously set forth in the notice of review. Parties may submit motions to either the Review Subcommittee or the Nasdaq Review Council challenging requests for briefing made by the Chief Regulatory Officer under this Rule of issues that were not previously set forth in the notice of appeal.

**(d) Effect of Withdrawal of Notice of Appeal, Cross-Appeal**

If the review of a disciplinary proceeding by the Nasdaq Review Council is terminated before the Nasdaq Review Council issues a decision on the merits because all appealing Parties file a notice of withdrawal of appeal and no Party previously filed a notice of cross-appeal, or all Parties who previously filed a notice of cross-appeal file a notice of withdrawal of cross-appeal:

(1) a member of the Nasdaq Review Council or the Review Subcommittee shall have the right to call for review a decision issued pursuant to Rule 9268 in

accordance with Rule 9312(a)(1), except that the 45 day period during which a call for review may be made shall begin on the day Nasdaq receives the last filed notice of withdrawal of appeal or, if applicable, the last filed notice of withdrawal of cross-appeal; and,

(2) the Chief Regulatory Officer shall have the right to call for review a decision issued pursuant to Rule 9269 in accordance with Rule 9312(a)(2), except that the 25 day period during which a call for review may be made shall begin on the day Nasdaq receives the last filed notice of withdrawal of appeal or, if applicable, the last filed notice of withdrawal of cross-appeal.

### **9313. Counsel to Nasdaq Review Council**

#### **(a) Authority**

A Counsel to the Nasdaq Review Council shall have authority to take ministerial and administrative actions to further the efficient administration of a proceeding, including the authority to:

(1) direct the Office of Hearing Officers to complete and transmit a record of a disciplinary proceeding to the Nasdaq Review Council in accordance with Rule 9267;

(2) establish or amend a briefing schedule under Rule 9347(b) but not shorten a briefing schedule except with the consent of the Parties;

(3) permit a brief or any other document required to be filed to vary from the requirements of the Rule 9130 Series as provided in Rule 9347(a);

(4) establish the date, time, and location of an oral argument and provide for notice of the hearing under Rule 9341;

(5) for other than a Party and counsel or a person acting in a representative capacity, determine who may attend a hearing;

(6) rule on a motion by a Party to request to lengthen or shorten a period of time prescribed by the Code for the filing of any papers, or request that a hearing be postponed or adjourned under Rule 9322, except that a period may not be shortened and a hearing may not be postponed or adjourned without the consent of the Parties; and

(7) create and maintain the official record of the disciplinary proceeding on appeal or review.

#### **(b) Review**

A Party seeking the review of a decision of a Counsel to the Nasdaq Review

Council may make a motion to the Nasdaq Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee.

### **9320. Transmission of Record; Extensions of Time, Postponements, Adjournments**

#### **9321. Transmission of Record**

Within 21 days after the filing of a notice of appeal or notice of review, or at such later time as the Nasdaq Review Council may designate, the Office of Hearing Officers shall assemble and prepare an index to the record, transmit the record and the index to the Nasdaq Review Council, and serve copies of the index upon all Parties. The Hearing Officer who participated in the disciplinary proceeding, or the Chief Hearing Officer, shall certify that the record transmitted to the Nasdaq Review Council is complete.

#### **9322. Extensions of Time, Postponements, Adjournments**

##### **(a) Availability**

At any time prior to the issuance of a decision pursuant to Rule 9349, the Nasdaq Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or Counsel to the Nasdaq Review Council, for good cause shown, may extend or shorten a period prescribed by the Code for the filing of any papers, except that Counsel to the Nasdaq Review Council may shorten a period so prescribed only with the consent of the Parties. The Nasdaq Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or Counsel to the Nasdaq Review Council, for good cause shown, may postpone or adjourn a hearing consistent with paragraph (b), except that Counsel to the Nasdaq Review Council may postpone or adjourn a hearing only with the consent of the Parties.

##### **(b) Limitations on Postponements, Adjournments, and Changes in Location**

Oral argument shall begin at the time and place ordered, unless the Nasdaq Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or Counsel to the Nasdaq Review Council, for good cause shown, postpones, adjourns, or changes the location of the oral argument, except that Counsel to the Nasdaq Review Council may postpone or adjourn the oral argument only with the consent of the Parties. In considering a motion for the postponement or adjournment of an oral argument, the Nasdaq Review Council, the Review Subcommittee, a Subcommittee or, if applicable, an Extended Proceeding Committee, or Counsel to the Nasdaq Review Council shall consider, in addition to any other relevant factors:

- (1) the length of time the disciplinary proceeding has been pending to date, and the timeliness of the request for a postponement, an adjournment, or an extension;

(2) the number of postponements, adjournments, or extensions already granted;

(3) the stage of the proceedings at the time of the request;

(4) the prejudice to the other Parties;

(5) the potential harm to the investing public if an extension of time, an adjournment, or a postponement is granted; and

(6) any other matter that justice may require.

**9330. Appointment of Subcommittee or Extended Proceeding Committee; Disqualification and Recusal**

**9331. Appointment of Subcommittee or Extended Proceeding Committee**

**(a) Appointment by Nasdaq Review Council**

Following the filing of a notice of appeal pursuant to Rule 9311 or a notice of review pursuant to Rule 9312, the Nasdaq Review Council or the Review Subcommittee shall appoint a Subcommittee or an Extended Proceeding Committee to participate, subject to Rule 9345, in a disciplinary proceeding appealed or called for review.

(1) Subcommittee

Except as provided in subparagraph (2), for each disciplinary proceeding appealed or called for review, the Nasdaq Review Council or the Review Subcommittee shall appoint a Subcommittee to participate, subject to Rule 9345, in the appeal or review. A Subcommittee shall be composed of two or more persons who shall be current or former members of the Nasdaq Review Council or former Directors.

(2) Extended Proceeding Committee

Upon consideration of the volume and complexity of the certified record, or other factors the Nasdaq Review Council or the Review Subcommittee deems material, the Nasdaq Review Council or the Review Subcommittee may determine that a disciplinary proceeding appealed or called for review shall be designated an Extended Proceeding and shall appoint an Extended Proceeding Committee to participate, subject to Rule 9345, in the appeal or review. The Extended Proceeding Committee shall be composed of two or more persons who shall be current or former members of the Nasdaq Review Council or former Directors. The Review Subcommittee shall have discretion to compensate any or all Panelists of an Extended Proceeding Committee at the rate then in effect for arbitrators appointed under the Rule 10000 Series.

**(b) Function**

If a hearing is held, the Subcommittee or, if applicable, the Extended Proceeding Committee, shall hear oral arguments and consider, if allowed under Rule 9346(b), any new evidence. Based on the hearing and the record on appeal or review, the Subcommittee or, if applicable, the Extended Hearing Committee, shall make a recommendation to the Nasdaq Review Council regarding the disposition of all matters on appeal, cross-appeal, or review. The recommendation shall be in the form of a written recommended decision.

**9332. Disqualification and Recusal**

**(a) Recusal, Withdrawal of Member or Panelist**

If at any time a member of the Nasdaq Review Council, including a member of the Review Subcommittee, a Panelist of a Subcommittee or an Extended Proceeding Committee, or a Counsel to the Nasdaq Review Council determines that the member, the Panelist, or the Counsel to the Nasdaq Review Council has a conflict of interest or bias or circumstances otherwise exist where the fairness of the member, the Panelist, or the Counsel to the Nasdaq Review Council might reasonably be questioned, the member, the Panelist, or the Counsel to Nasdaq Review Council shall notify the Chair of the Nasdaq Review Council, and the Chair of the Nasdaq Review Council shall issue and serve on the Parties a notice stating that the member, the Panelist, or the Counsel to the Nasdaq Review Council has withdrawn from the matter. In the event that a Panelist withdraws, is incapacitated, or is otherwise unable to continue service after a hearing has been convened, the Chair of the Nasdaq Review Council shall appoint a replacement Panelist. In the event that a member of the Review Subcommittee withdraws, is incapacitated, or is otherwise unable to continue service after assignment, the Chair of the Nasdaq Review Council shall appoint another member of the Nasdaq Review Council to serve on the Review Subcommittee for the limited purpose of considering the issues raised in the disciplinary proceeding in which the withdrawal action was taken. The replacement member of the Review Subcommittee must have the same classification (Industry or Non-Industry) as the member who withdrew. In the event that a Counsel to the Nasdaq Review Council withdraws, is incapacitated, or is otherwise unable to continue service after assignment, the Chief Regulatory Officer shall assign a replacement Counsel to the Nasdaq Review Council.

**(b) Motion for Disqualification**

A Party may move for the disqualification of a member of the Nasdaq Review Council, the Review Subcommittee, a Panelist of a Subcommittee or an Extended Proceeding Committee, or a Counsel to the Nasdaq Review Council. All such motions shall be based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the fairness of the member, the Panelist, or the Counsel to the Nasdaq Review Council might reasonably be questioned, and shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the Party learned of those facts. Such motions shall be filed not later than 15 days after the later of:

(1) when the Party learned of the facts believed to constitute the disqualification; or

(2) when the Party was notified of the composition of the Subcommittee or, if applicable, the Extended Proceeding Committee or the assignment to the disciplinary proceeding of the Counsel to the Nasdaq Review Council.

**(c) Disposition of Disqualification Motions: Challenges to Single Member of Nasdaq Review Council or Review Subcommittee, Single Panelist of Subcommittee or Extended Hearing Committee, or Counsel to the Nasdaq Review Council**

Motions for disqualification of a member of the Nasdaq Review Council, including a member of the Review Subcommittee, a Panelist of a Subcommittee or an Extended Proceeding Committee, or a Counsel to the Nasdaq Review Council shall be decided by the Chair of the Nasdaq Review Council, who shall promptly determine whether disqualification is required and issue a written ruling on the motion. If a member of the Review Subcommittee is disqualified, the Chair of the Nasdaq Review Council shall appoint another member of the Nasdaq Review Council to serve on the Review Subcommittee for the limited purpose of considering the issues raised in the disciplinary proceeding in which the motion was made. The replacement member of the Review Subcommittee must have the same classification (Member, Industry or Non-Industry) as the member being replaced. If a Panelist is disqualified, the Chair of the Nasdaq Review Council shall appoint a replacement Panelist. If a Counsel is disqualified, the Chief Regulatory Officer shall assign a replacement Counsel to the Nasdaq Review Council.

**(d) Disposition of Disqualification Motions: Challenges to Multiple Members or Panelists**

(1) Nasdaq Review Council

If a Party files a motion to disqualify more than one member of the Nasdaq Review Council, the Chair of the Nasdaq Review Council shall promptly determine whether disqualification is required, and shall issue a written ruling on the matter. In the event of such disqualification, the remaining members of the Nasdaq Review Council shall consider the review or appeal of the disciplinary matter.

(2) Review Subcommittee

If a Party files a motion to disqualify more than one member of the Review Subcommittee, the Chair of the Nasdaq Review Council shall promptly determine whether disqualification is required, and shall issue a written ruling on the matter. If members of the Review Subcommittee are disqualified, the Chair of the Nasdaq Review Council shall appoint other members of the Nasdaq Review Council to serve on the Review Subcommittee for the limited purpose of considering the issues raised in the disciplinary proceeding in which the motion

was made. The replacement members of the Review Subcommittee must have the same classification (Member, Industry or Non-Industry) as the members being replaced.

(3) Subcommittee; Extended Proceeding Committee

If a Party files a motion to disqualify more than one Panelist of a Subcommittee or an Extended Proceeding Committee, the Chair of the Nasdaq Review Council shall promptly determine whether disqualification is required, and shall issue a written ruling on the motion. If multiple Panelists are disqualified, the Chair of the Nasdaq Review Council shall appoint replacement Panelists.

**9340. Proceedings**

**9341. Oral Argument**

**(a) Request for Oral Argument**

A Party may request oral argument before the Subcommittee or, if applicable, the Extended Proceeding Committee. Oral argument shall be requested in writing either in the Party's notice of appeal or cross-appeal or within 15 days after service of the Nasdaq Review Council's notice of review. Subject to the limitations of Rules 9342 and 9344, oral argument shall be granted if timely requested. The right to oral argument set forth in this Rule is unaffected by a Party's waiver of, or failure to request, a hearing pursuant to the Rule 9200 Series.

**(b) Discretion to Proceed With or Without Oral Argument**

In the absence of a request for oral argument, the Subcommittee or, if applicable, the Extended Proceeding Committee, in its discretion, may order that a matter be set down for oral argument or may consider the matter on the basis of the record.

**(c) Notice Regarding Oral Argument**

If oral argument is held, a notice stating the date, time, and location of the oral argument shall be served on the Parties at least 21 days before the hearing. The Parties may agree in writing to waive the notice period or, in extraordinary circumstances, the Subcommittee or, if applicable, the Extended Proceeding Committee, or Counsel to the Nasdaq Review Council may provide for a shorter notice period, except that Counsel to the Nasdaq Review Council may provide for a shorter notice period only with the consent of the Parties.

**(d) Attendance Required**

The Parties shall make oral arguments before the Subcommittee or, if applicable, the Extended Proceeding Committee. Unless otherwise agreed to by all of the Parties, all

Panelists comprising the Subcommittee or, if applicable, the Extended Proceeding Committee shall be present for the oral argument.

**(e) Time Limits**

Unless the Subcommittee or, if applicable, the Extended Proceeding Committee, orders otherwise for good cause shown, each Party's oral argument before the Subcommittee or, if applicable, the Extended Proceeding Committee, shall be limited to a total of 30 minutes.

**(f) Recordation; Transcript Correction**

(1) Oral arguments shall be recorded by a court reporter and a transcript shall be prepared.

(2) A transcript of a hearing shall be available to a Party for purchase from the court reporter at prescribed rates. A witness may purchase a transcript of his or her own testimony from the court reporter.

(3) Prior to the filing of post-hearing briefs or within such earlier time as reasonably ordered by the Subcommittee or, if applicable, the Extended Proceeding Committee, a Party or witness may seek to correct his or her transcript. A proposed correction of the transcript shall be submitted by affidavit to the Subcommittee or, if applicable, the Extended Proceeding Committee. Upon notice to all Parties to the disciplinary proceeding, the Subcommittee or, if applicable, the Extended Proceeding Committee may order the correction to the transcript as requested or sua sponte.

**9342. Failure to Appear at Oral Argument**

A Party who requests oral argument but fails to appear after being duly notified shall be deemed to have waived any opportunity for oral argument provided under the Rule 9300 Series. The Subcommittee or, if applicable, the Extended Proceeding Committee, shall permit argument to go forward as to those Parties who appear. The Subcommittee or, if applicable, the Extended Proceeding Committee, in the exercise of its discretion, may consider the matter on the basis of the record without oral argument as to those Parties who failed to appear.

**9343. Disposition Without Oral Argument**

If an oral argument is not held, the matter shall be considered by a Subcommittee or, if applicable, an Extended Proceeding Committee, on the basis of the record, as defined in Rule 9267, and supplemented by any written materials submitted to or issued by the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Nasdaq Review Council in connection with the appeal, cross-appeal, or call for review.

#### **9344. Failure to Participate Below; Abandonment of Appeal**

##### **(a) Failure to Participate Below**

When an appealing Party did not participate in the disciplinary proceeding before a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, but shows good cause for the failure to participate, the Nasdaq Review Council or the Review Subcommittee may dismiss the appeal and remand the matter for further proceedings, or may order that the appeal proceed. If the appealing Party did not participate in the disciplinary proceeding before a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, and fails to show good cause for the failure to participate, the matter shall be considered by the Subcommittee or, if applicable, the Extended Proceeding Committee, and the Nasdaq Review Council on the basis of the record and other documents, as provided in Rules 9346 and 9347. Alternatively, the Nasdaq Review Council or Review Subcommittee may remand the disciplinary proceeding with instructions. For purposes of this paragraph, failure to participate shall include failure to file an answer or otherwise respond to a complaint, or failure to appear at a scheduled hearing, but shall not include failure to request a hearing pursuant to Rule 9221.

##### **(b) Abandonment of Appeal**

If an appealing Party fails to advise the Nasdaq Review Council or the Review Subcommittee of the basis for seeking review or otherwise fails to provide information or submit a written brief in response to a request pursuant to Rules 9346 and 9347, the Nasdaq Review Council or the Review Subcommittee may dismiss the appeal as abandoned, and the decision of the Hearing Officer, the Hearing Panel or, if applicable, the Extended Hearing Panel, shall become the final disciplinary action of Nasdaq. If a cross-appealing Party fails to advise the Nasdaq Review Council or the Review Subcommittee of the basis for seeking review or otherwise fails to provide information or submit a written brief in response to a request pursuant to Rules 9346 and 9347, the Nasdaq Review Council or the Review Subcommittee may dismiss the cross-appeal as abandoned. Upon a showing of good cause, the Nasdaq Review Council may withdraw any dismissal entered pursuant to this Rule.

#### **9345. Subcommittee or Extended Proceeding Committee Recommended Decision to Nasdaq Review Council**

A Subcommittee or, if applicable, an Extended Proceeding Committee, shall present a recommended decision in writing to the Nasdaq Review Council before the meeting of the Nasdaq Review Council at which the disciplinary proceeding shall be considered.

#### **9346. Evidence in Nasdaq Review Council Proceedings**

##### **(a) Scope of Review**

Except as otherwise set forth in this paragraph, the Nasdaq Review Council's review shall be limited to consideration of:

(1) the record, as defined in Rule 9267, supplemented by briefs and other papers submitted to the Subcommittee or, if applicable, the Extended Proceeding Committee, and the Nasdaq Review Council; and

(2) any oral argument permitted under this Code.

A Party may introduce additional evidence only with prior approval of the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Nasdaq Review Council, upon a showing that extraordinary circumstances exist under paragraph (b). If an appealing Party shows good cause for failure to participate in the disciplinary proceeding below, the Nasdaq Review Council may hear evidence and consider the disciplinary proceeding pursuant to Rule 9344(a).

**(b) Leave to Introduce Additional Evidence**

A Party may apply to the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Nasdaq Review Council for leave to introduce additional evidence by motion filed not later than 30 days after the Office of Hearing Officers transmits to the Nasdaq Review Council and serves upon all Parties the index to the record, pursuant to Rule 9321. The motion shall describe each item of proposed new evidence, demonstrate that there was good cause for failing to introduce it below, demonstrate why the evidence is material to the proceeding, and be filed and served. The Party may attach the documentary evidence as an exhibit to the motion. By a motion filed in accordance with Rule 9146, a Party may request an extension of the period during which a Party may file a motion for leave to introduce additional evidence. A Party shall demonstrate that there was good cause for failing to file the motion for leave to introduce additional evidence during the period prescribed.

**(c) Motion In Opposition; Motion to Introduce Rebuttal Evidence**

A Party may file an opposition to a motion, as provided in Rule 9146(d), for leave to introduce new evidence, and may move for leave to introduce rebuttal evidence in response to the proposed new evidence. A Party who moves to introduce rebuttal evidence in response to the proposed new evidence of another Party shall describe each item of proposed rebuttal evidence and explain why the evidence is material to the proceeding, and shall file and serve such motion.

**(d) Discretion Regarding Review of Additional Evidence**

Upon consideration of any motion to introduce additional evidence and any opposition thereto, the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Nasdaq Review Council may permit the evidence to be introduced into the record on review, or the Nasdaq Review Council may remand the disciplinary proceeding for further proceedings consistent with its ruling or for further fact finding.

**(e) Requirements for Submitting Additional Documentary Evidence**

A Party that is permitted to introduce additional documentary evidence before the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Nasdaq Review Council pursuant to paragraph (d) shall make copies of the evidence available to the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Nasdaq Review Council, and to all Parties at such time as the Subcommittee or, if applicable, the Extended Proceeding Committee, the Nasdaq Review Council, or Counsel to the Nasdaq Review Council may specify.

**(f) Subcommittee or Extended Proceeding Committee Order Requiring Additional Evidence**

On its own motion, the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Nasdaq Review Council may order that the record be supplemented with such additional evidence as it may deem relevant. Among other things, the Subcommittee, or if applicable, the Extended Proceeding Committee, or the Nasdaq Review Council may order a Respondent who asserts his or her inability to pay a monetary sanction to file a sworn financial statement and to keep such statement current as ordered by the Subcommittee or, if applicable, the Extended Proceeding Committee, or the Nasdaq Review Council.

**(g) Rules of Evidence Not Applicable**

The formal rules of evidence shall not apply.

**(h) Testimony**

A person who is subject to the jurisdiction of Nasdaq shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter or a notary public.

**9347. Filing of Papers in Nasdaq Review Council Proceedings**

**(a) Briefs; Reply Briefs; Requirements**

Parties may file briefs in connection with proceedings governed by the Rule 9300 Series. Briefs shall be confined to the particular matters at issue. An exception to findings, conclusions, or sanctions shall be supported by citation to the relevant portions of the record, including references to specific pages relied upon, and by concise argument, including citation of such statutes, decisions, and other authorities as may be relevant. If an exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, an appendix thereto, or by citation to the record. Parties may file reply briefs. If a Party files a reply brief, such brief shall be limited to matters in reply. All briefs shall conform to the requirements of the Rule 9130 Series, and, except with advance leave of the Subcommittee or, if applicable, the Extended Proceeding Committee, the Nasdaq Review

Council, the Review Subcommittee, or Counsel to the Nasdaq Review Council, exclusive of pages containing tables of contents or tables of authorities, a brief other than a reply brief shall not exceed 25 double-spaced pages, and a reply brief shall not exceed 12 double-spaced pages.

**(b) Timely Filing of Briefs**

Briefs shall be due upon dates established by the Subcommittee or, if applicable, the Extended Proceeding Committee, the Nasdaq Review Council, the Review Subcommittee, or Counsel to the Nasdaq Review Council in a scheduling order. Unless the Subcommittee or, if applicable, the Extended Proceeding Committee, the Nasdaq Review Council, the Review Subcommittee, or Counsel to the Nasdaq Review Council specifies otherwise, opening briefs shall be submitted not less than 21 days from the date of the scheduling order, and answering briefs shall be submitted 21 days thereafter. When reply briefs are submitted, such briefs shall be filed not later than ten days after service of the answering brief. Counsel to the Nasdaq Review Council may not shorten a period previously established for the filing of briefs except with the consent of the Parties. The time periods listed in this provision are only applicable to the filing of opening briefs, answering briefs, and reply briefs.

**9348. Powers of the Nasdaq Review Council on Review**

In any appeal or review proceeding pursuant to the Rule 9300 Series, the Nasdaq Review Council may affirm, dismiss, modify, or reverse with respect to each finding, or remand the disciplinary proceeding with instructions. The Nasdaq Review Council may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction.

**9349. Nasdaq Review Council Formal Consideration; Decision**

**(a) Decision of Nasdaq Review Council, Including Remand**

In an appeal or review of a disciplinary proceeding governed by the Rule 9300 Series that is not withdrawn or dismissed prior to a decision on the merits, the Nasdaq Review Council, after considering all matters presented in the appeal or review and the written recommended decision of the Subcommittee or, if applicable, the Extended Proceeding Committee, may affirm, dismiss, modify or reverse the decision of the Hearing Panel or, if applicable, Extended Hearing Panel, with respect to each Respondent who has appealed or cross-appealed or is subject to a call for review. The Nasdaq Review Council may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the Nasdaq Review Council or the Review Subcommittee may remand the disciplinary proceeding with instructions. The Nasdaq Review Council shall prepare a proposed written decision pursuant to paragraph (b).

**(b) Contents of Decision**

The decision shall include:

- (1) a statement describing the investigative or other origin of the disciplinary proceeding;
- (2) the specific statutory or rule provisions that were alleged to have been violated;
- (3) a statement setting forth the findings of fact with respect to any act or practice the Respondent was alleged to have committed or omitted;
- (4) the conclusions as to whether the Respondent violated any provision alleged in the complaint;
- (5) a statement in support of the disposition of the principal issues raised in the proceeding; and
- (6) a statement describing any sanction imposed, the reasons therefor, and, pursuant to Rule 9360, the date upon which such sanction shall become effective.

**(c) Issuance of Decision After Expiration of Call for Review Period**

The Nasdaq Review Council shall provide its proposed written decision to the Nasdaq Board. The Nasdaq Board may call the disciplinary proceeding for review pursuant to Rule 9351. If the Nasdaq Board does not call the disciplinary proceeding for review, the proposed written decision of the Nasdaq Review Council shall become final, and the Nasdaq Review Council shall serve its written decision on the Parties and provide a copy to each member of Nasdaq with which a Respondent is associated. The decision shall constitute the final disciplinary action of Nasdaq for purposes of SEC Rule 19d-1(c)(1), unless the Nasdaq Review Council remands the proceeding.

**9350. Discretionary Review by Board**

**9351. Discretionary Review by Nasdaq Board**

**(a) Call for Review by Director**

A Director may call a disciplinary proceeding for review by the Nasdaq Board if the call for review is made within the period prescribed in paragraph (b).

**(b) 15 Day Period; Waiver**

- (1) A Director shall make his or her call for review not later than the next meeting of the Nasdaq Board that is at least 15 days after the date on which the Nasdaq Board receives the proposed written decision of the Nasdaq Review Council.

(2) Waiver

By a unanimous vote of the Nasdaq Board, the Nasdaq Board may shorten the period in subparagraph (1) to less than 15 days. By an affirmative vote of the majority of the Nasdaq Board then in office, the Nasdaq Board may, during the 15 day period in subparagraph (1), vote to extend the period in subparagraph (1) to more than 15 days.

**(c) Review at Next Meeting**

If a Director calls a disciplinary proceeding for review within the period prescribed in paragraph (b), the Nasdaq Board shall review the disciplinary proceeding not later than the next meeting of the Nasdaq Board. The Nasdaq Board may order the Parties (excluding any Respondent who did not appeal or cross-appeal, or as to whom the issues appealed or called for review do not apply) to file briefs in connection with the review proceedings pursuant to this Rule.

**(d) Decision of Nasdaq Board, Including Remand**

After review, the Nasdaq Board may affirm, modify, or reverse the proposed written decision of the Nasdaq Review Council. The Nasdaq Board may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the Nasdaq Board may remand the disciplinary proceeding with instructions. The Nasdaq Board shall prepare a written decision that includes all of the elements described in Rule 9349(b)(1) through (6).

**(e) Issuance of Decision After Expiration of Call for Review Period**

The Nasdaq Board shall issue and serve its written decision on the Parties and provide a copy to each member of Nasdaq with which a Respondent is associated. The decision shall constitute the final disciplinary action of Nasdaq for purposes of SEC Rule 19d-1(c)(1), unless the Nasdaq Board remands the proceeding.

**9360. Effectiveness of Sanctions**

Unless otherwise provided in the decision issued under Rule 9349 or Rule 9351, a sanction (other than a bar, an expulsion, or a permanent cease and desist order) specified in a decision constituting final disciplinary action of Nasdaq for purposes of SEC Rule 19d-1(c)(1) shall become effective on a date to be determined by Nasdaq staff. A bar, an expulsion, or a permanent cease and desist order shall become effective upon service of the decision constituting final disciplinary action of Nasdaq, unless otherwise specified therein. Nasdaq shall serve the decision on a Respondent by courier, facsimile or other means reasonably likely to obtain prompt service when the sanction is a bar, an expulsion, or a permanent cease and desist order.

## **9370. Application to Commission for Review**

### **(a) Appeal to Commission; Effect**

A Respondent aggrieved by final disciplinary action pursuant to the Rule 9200 Series or the Rule 9300 Series may apply for review by the Commission pursuant to Section 19(d)(2) of the Act. The filing with the Commission of an application for review by the Commission shall stay the effectiveness of any sanction, other than a bar or an expulsion, imposed in a decision constituting final disciplinary action of Nasdaq for purposes of SEC Rule 19d-1(c)(1).

### **(b) Notification to Member**

Nasdaq shall promptly notify any member with which a Respondent is associated if the Respondent files an application for review to the Commission.

## **9400. Reserved**

## **9500. OTHER PROCEEDINGS**

## **9510. Reserved**

## **9520. Eligibility Proceedings**

## **9521. Purpose and Definitions**

### **(a) Purpose**

The Rule 9520 Series sets forth procedures for a person to become or remain associated with a member, notwithstanding the existence of a statutory disqualification as defined in the Nasdaq By-Laws and for a current member or person associated with a member to obtain relief from the eligibility or qualification requirements of the Nasdaq By-Laws and the Rules of Nasdaq. Such actions hereinafter are referred to as “eligibility proceedings.”

### **(b) Definitions**

(1) The term “Application” means NASD Regulation’s Form MC-400 for individuals or Form MC-400A for members, filed with the Central Registration Depository/Public Disclosure.

(2) The term “disqualified member” means a broker, dealer, municipal securities broker or dealer, government securities broker or dealer, or member that is or becomes subject to a disqualification or is otherwise ineligible for membership under the Nasdaq By-Laws.

(3) The term “disqualified person” means an associated person or person seeking to become an associated person who is or becomes subject to a disqualification or is otherwise ineligible for association under the Nasdaq By-Laws.

(4) The term “sponsoring member” means the member or applicant for membership pursuant to Rule 1013 that is sponsoring the association or continued association of a disqualified person to be admitted, readmitted, or permitted to continue in association.

## **9522. Initiation of Eligibility Proceeding; Member Regulation Consideration**

### **(a) Initiation**

#### (1) Issuance of Notice of Disqualification or Ineligibility

If Nasdaq Regulation staff has reason to believe that a disqualification exists or that a member or person associated with a member otherwise fails to meet the eligibility requirements of Nasdaq, Nasdaq Regulation staff shall issue a written notice to the member or applicant for membership under Rule 1013. The notice shall specify the grounds for such disqualification or ineligibility.

#### (2) Notice Regarding a Member

A notice issued to a disqualified member shall state that the disqualified member may apply for relief by filing an application or, in the case of a matter set forth in Rule 9522(e)(1), a written request for relief, within ten business days after service of the notice. If the member fails to file the application or, where appropriate, the written request for relief, within the 10-day period, the membership of the member shall be canceled, unless the Department of Member Regulation grants an extension for good cause shown.

#### (3) Notice Regarding an Associated Person

A notice issued regarding a disqualified person to a member or applicant for membership under Rule 1013 shall state that such member or applicant for membership may file an application on behalf of itself and such person or, in the case of a matter set forth in Rule 9522(e)(1), a written request for relief, within ten business days after service of the notice. If the member fails to file the application or, where appropriate, the written request for relief, within the 10-day period, the registration of the disqualified person shall be revoked, unless the Department of Member Regulation grants an extension for good cause shown.

#### (4) Service

A notice issued under this section shall be served by facsimile or pursuant to Rules 9131 and 9134.

### **(b) Obligation of Member to Initiate Proceeding**

A member shall file an application or, in the case of a matter set forth in Rule

9522(e)(1), a written request for relief, with the Central Registration Depository/ Public Disclosure, if the member determines prior to receiving a notice under paragraph (a) that:

- (1) it has become a disqualified member;
- (2) a person associated with such member or whose association is proposed by an applicant for membership under Rule 1013 has become a disqualified person; or
- (3) the member or applicant for membership under Rule 1013 wishes to sponsor the association of a person who is a disqualified person.

**(c) Withdrawal of Application**

A member may withdraw its application or written request for relief prior to a hearing by filing a written notice with the Central Registration Depository/Public Disclosure pursuant to Rules 9135, 9136, and 9137. A member may withdraw its application after the start of a hearing but prior to the issuance of a decision by the Nasdaq Review Council with prior written consent of the Nasdaq Review Council.

**(d) Ex Parte Communications**

The prohibitions against ex parte communications set forth in Rule 9143 shall become effective under the Rule 9520 Series when Nasdaq Regulation staff has initiated the eligibility proceeding and Nasdaq Regulation staff has knowledge that a member intends to file an application or written request for relief pursuant to the Rule 9520 Series.

**(e) Member Regulation Consideration**

**(1) Matters that may be Approved by the Department of Member Regulation without the Filing of an Application**

The Department of Member Regulation, as it deems consistent with the public interest and the protection of investors, may grant a written request for relief from the eligibility requirements by a disqualified member or a sponsoring member without the filing of an application by such disqualified member or sponsoring member if a disqualified member or disqualified person is subject to one or more of the following conditions but is not otherwise subject to disqualification:

- (A) a disqualified member or disqualified person is subject to a disqualification based on an injunction that was entered ten or more years prior to the proposed admission or continuance by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, transfer agent, foreign person performing a function substantially equivalent to any of the

above, entity or person required to be registered under the Commodity Exchange Act, or any substantially equivalent foreign statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(B) a sponsoring member makes a request to change the supervisor of a disqualified person; or

(C) a disqualified member or sponsoring member is a member of both Nasdaq and another self-regulatory organization; and:

(i) the other self-regulatory organization intends to file a Notice under SEC Rule 19h-1 approving the membership continuance of the disqualified member or, in the case of a sponsoring member, the proposed association or continued association of the disqualified person; and

(ii) the Department of Member Regulation concurs with that determination.

## **(2) Matters that may be Approved by the Department of Member Regulation after the Filing of an Application**

The Department of Member Regulation, as it deems consistent with the public interest and the protection of investors, may approve an application filed by a disqualified member or sponsoring member if a disqualified member or disqualified person is subject to one or more of the following conditions but is not otherwise subject to disqualification (other than a matter set forth in subparagraph(e)(1)):

(A) The disqualified person is already a participant in, a member of, or a person associated with a member of, a self-regulatory organization (other than Nasdaq), and the terms and conditions of the proposed admission to Nasdaq are the same in all material respects as those imposed or not disapproved in connection with such person's prior admission or continuance pursuant to an order of the Commission under SEC Rule 19h-1 or other substantially equivalent written communication;

(B) The Department of Member Regulation finds, after reasonable inquiry, that except for the identity of the employer concerned, the terms and conditions of the proposed admission or continuance are the same in all material respects as those imposed or not disapproved in connection

with a prior admission or continuance of the disqualified person pursuant to an order of the Commission under SEC Rule 19h-1 or other substantially equivalent written communication, and that there is no intervening conduct or other circumstance that would cause the employment to be inconsistent with the public interest or the protection of investors;

(C) The disqualification previously was a basis for the institution of an administrative proceeding pursuant to a provision of the federal securities laws, and was considered by the Commission in determining a sanction against such disqualified person in the proceeding; and the Commission concluded in such proceeding that it would not restrict or limit the future securities activities of such disqualified person in the capacity now proposed, or, if it imposed any such restrictions or limitations for a specified time period, such time period has elapsed; or

(D) The disqualification consists of a court order or judgment of injunction or conviction, and such order or judgment:

(i) expressly includes a provision that, on the basis of such order or judgment, the Commission will not institute a proceeding against such person pursuant to Section 15(b) or 15B of the Act or that the future securities activities of such persons in the capacity now proposed will not be restricted or limited; or

(ii) includes such restrictions or limitations for a specified time period and such time period has elapsed; or

(E) The disqualified person's functions are purely clerical and/or ministerial in nature.

### **(3) Rights of Disqualified Member, Sponsoring Member, Disqualified Person, and Department of Member Regulation**

(A) In the event the Department of Member Regulation does not approve a written request for relief from the eligibility requirements pursuant to subparagraph (e)(1), the disqualified member or sponsoring member may file an application, and such member shall have the right to proceed under Rule 9523 or 9524, as applicable. The Department of Member Regulation may require a disqualified member or sponsoring member to file an application with the Central Registration Depository/Public Disclosure, notwithstanding the provisions of subparagraph (e)(1).

(B) In the event the Department of Member Regulation does not approve an application pursuant to subparagraph (e)(2), the disqualified member or sponsoring member shall have the right to proceed under Rule

9523 or 9524, as applicable.

**9523. Acceptance of Member Regulation Recommendations and Supervisory Plans by Consent Pursuant to SEC Rule 19h-1**

(a) After an application is filed, the Department of Member Regulation may recommend the membership or continued membership of a disqualified member or sponsoring member or the association or continuing association of a disqualified person pursuant to a supervisory plan where the disqualified member, sponsoring member, and/or disqualified person, as the case may be, consent to the recommendation and the imposition of the supervisory plan. The disqualified member, sponsoring member, and/or disqualified person, as the case may be, shall execute a letter consenting to the imposition of the supervisory plan.

(b) (1) If a disqualified member, sponsoring member, and/or disqualified person submitted an executed letter consenting to a supervisory plan, by the submission of such letter, the disqualified member, sponsoring member and/or disqualified person waive:

(A) the right to a hearing before a Hearing Panel and any right of appeal to the Nasdaq Review Council, the Commission, and the courts, or otherwise challenge the validity of the supervisory plan, if the supervisory plan is accepted.

(B) any right of the disqualified member, sponsoring member, and/or disqualified person to claim bias or prejudice by the Department of Member Regulation, the Chief Regulatory Officer, the Nasdaq Review Council, or any member of the Nasdaq Review Council, in connection with such person's or body's participation in discussions regarding the terms and conditions of the Department of Member Regulation's recommendation or the supervisory plan, or other consideration of the recommendation or supervisory plan, including acceptance or rejection of such recommendation or supervisory plan; and

(C) any right of the disqualified member, sponsoring member, and/or disqualified person to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of the recommendation or supervisory plan, or other consideration of the recommendation or supervisory plan, including acceptance or rejection of such recommendation or supervisory plan.

(2) If a recommendation or supervisory plan is rejected, the disqualified member, sponsoring member, and/or disqualified person shall be bound by the waivers made under subparagraph (b)(1) for conduct by persons or bodies

occurring during the period beginning on the date the supervisory plan was submitted and ending upon the rejection of the supervisory plan and shall have the right to proceed under this rule and Rule 9524, as applicable.

(c) If the disqualified member, sponsoring member, and/or disqualified person execute the letter consenting to the supervisory plan, it shall be submitted to Nasdaq Regulation by the Department of Member Regulation with a proposed Notice under SEC Rule 19h-1, where required. Nasdaq Regulation shall forward the supervisory plan and proposed Notice under SEC Rule 19h-1, if any, to the Chairman of the Statutory Disqualification Committee, acting on behalf of the Nasdaq Review Council. The Chairman of the Statutory Disqualification Committee may accept or reject the recommendation of the Department of Member Regulation and the supervisory plan or refer them to the Nasdaq Review Council for acceptance or rejection by the Nasdaq Review Council.

(d) If the recommendation and supervisory plan is accepted by the Nasdaq Review Council or the Chairman of the Statutory Disqualification Committee, it shall be deemed final and, where required, the proposed Notice under SEC Rule 19h-1 will be filed by Nasdaq. If the recommendation and supervisory plan are rejected by the Chairman of the Statutory Disqualification Committee or the Nasdaq Review Council, Nasdaq Regulation may take any other appropriate action with respect to the disqualified member, sponsoring member, and/or disqualified person. If the recommendation and supervisory plan are rejected, the disqualified member, sponsoring member, and/or disqualified person shall not be prejudiced by the execution of the letter consenting to the supervisory plan under subparagraph (a) and the letter may not be introduced into evidence in any proceeding.

## **9524. Nasdaq Review Council Consideration**

### **(a) Hearing Panel Consideration**

#### **(1) Appointment of Hearing Panel**

When the disqualified member, sponsoring firm, or applicant requests a hearing, the Nasdaq Review Council or the Review Subcommittee shall appoint a Hearing Panel composed of two or more members, who shall be current or former members of the Nasdaq Review Council or the Statutory Disqualification Committee or former Directors. The Hearing Panel shall conduct a hearing and recommend a decision on the request for relief.

#### **(2) Notice of Hearing**

The disqualified member or sponsoring member, as the case may be, and the Department of Member Regulation shall be notified via mail, facsimile, or overnight courier of the location, time, and date of the hearing not less than fourteen business days before the hearing, unless the parties agree to shorten the time period.

### (3) Transmission of Documents

(A) Upon receipt of an application, the Central Registration Depository shall gather all of the information necessary to process the application, including (i) the Central Registration Depository records for the disqualified member, sponsoring member, and/or disqualified person, as the case may be, and the proposed supervisor; and (ii) all of the information submitted by the disqualified member or sponsoring member in support of the application. The Central Registration Depository will prepare an index of these documents, and simultaneously provide this index and copies of the documents to the disqualified member or sponsoring member, as the case may be, Nasdaq Regulation, and the Department of Member Regulation. Such documents shall be served on the disqualified member or sponsoring member, as the case may be, by mail, facsimile, or overnight courier as soon as practicable. The Department of Member Regulation shall serve its recommendation and its supporting documents on Nasdaq Regulation and the disqualified member or sponsoring member, as the case may be, within ten business days of the hearing, unless the Parties agree otherwise. The disqualified member or sponsoring member, as the case may be, shall serve its documents on the Nasdaq Regulation and the Department of Member Regulation within ten business days of the hearing, unless the Parties agree otherwise. Nasdaq Regulation shall forward all documents transmitted to it pursuant to this subparagraph (a)(3) to the Hearing Panel.

(B) Not less than ten business days before the hearing, the Department of Member Regulation, which shall act as a Party in the eligibility proceeding, and the disqualified member or sponsoring member, as the case may be, shall serve proposed exhibit and witness lists on each other and Nasdaq Regulation. The exhibit and witness lists shall be served by facsimile or overnight courier.

(C) At any time prior to the issuance of its recommendation, the Hearing Panel may order the Parties to supplement the record with any additional information that the Hearing Panel deems necessary.

### (4) Rights of Disqualified Member, Sponsoring Member, Disqualified Person, and Department of Member Regulation

The disqualified member, sponsoring member, and/or disqualified person, as the case may be, and, the Department of Member Regulation, shall be entitled to be heard in person, to be represented by an attorney, and to submit any relevant evidence.

### (5) Extensions of Time, Postponements, and Adjournments

At any time prior to the issuance of the decision of the Hearing Panel, after obtaining consent of all the Parties, the Hearing Panel may extend or shorten

any time limits prescribed by the Code for the filing of any papers and may postpone or adjourn any hearing.

(6) Recordation of Hearing

The hearing shall be recorded and a transcript prepared by a court reporter. The disqualified member, sponsoring member, and/or disqualified person, as the case may be, may purchase a copy of the transcript from the court reporter at prescribed rates. A witness may purchase a copy of the transcript of his or her own testimony from the court reporter at prescribed rates. Proposed corrections to the transcript may be submitted by affidavit to the Hearing Panel within a reasonable time determined by the Hearing Panel. Upon notice to the participants in the hearing, the Hearing Panel may order corrections to the transcript as requested or sua sponte.

(7) Record

The record shall consist of:

- (A) the notice issued pursuant to Rule 9522(a), if applicable;
- (B) all documents relied upon in issuing the notice under Rule 9522(a), if applicable;
- (C) the application for relief filed pursuant to Rule 9522(b);
- (D) any other submissions by the disqualified member, sponsoring member, and/or disqualified person, as the case may be, and the Department of Member Regulation;
- (E) any evidence considered at the hearing; and
- (F) the transcript of the hearing and any corrections thereto.

(8) Custodian of the Record

The custodian of the record shall be Nasdaq Regulation .

(9) Evidence Not Admitted

Evidence that is proffered but not admitted during the hearing shall not be part of the record, but shall be retained by the custodian of the record until the date when Nasdaq's decision becomes final or, if applicable, upon the conclusion of any review by the Commission or the federal courts.

(10) Recommendation

On the basis of the record, the Hearing Panel shall present a recommended decision in writing on the request for relief to the Statutory Disqualification Committee. After considering the record and recommendation of the Hearing Panel, the Statutory Disqualification Committee shall present its recommended decision in writing to the Nasdaq Review Council.

**(b) Decision**

(1) Decision of the Nasdaq Review Council

After considering all matters presented in the request for relief, the Statutory Disqualification Committee's recommended decision, the public interest, and the protection of investors, the Nasdaq Review Council may grant or deny the request for relief, and, if relief is granted, impose conditions on the disqualified member, sponsoring member, and/or disqualified person, as the case may be. At any time prior to the issuance of its recommendation, the Nasdaq Review Council may order the Parties to supplement the record with any additional information that the Nasdaq Review Council deems necessary. Alternatively, the Nasdaq Review Council may remand the eligibility proceeding. The Nasdaq Review Council shall prepare a proposed written decision pursuant to subparagraph (2).

(2) Contents of Decision

The decision shall include:

(A) a description of the origin of the eligibility proceeding and the nature of the disqualification;

(B) a description of the prospective business or employment requested to be engaged in; and

(C) a statement in support of the disposition of the request for relief, which, if granted, includes any of the applicable elements under SEC Rule 19h-1(e) and a description of any conditions that are imposed on the disqualified member, sponsoring member, or disqualified person, as the case may be.

(3) Issuance of Decision After Expiration of Call for Review Period

The Nasdaq Review Council shall provide its proposed written decision to the Nasdaq Board. The Nasdaq Board may call the eligibility proceeding for review pursuant to Rule 9525. If the Nasdaq Board does not call the eligibility proceeding for review, the proposed written decision of the Nasdaq Review Council shall become final, and the Nasdaq Review Council shall serve its written decision on the disqualified member, sponsoring member, and/or disqualified person, as the case may be, and the Department of Member Regulation pursuant

to Rules 9132 and 9134. The decision shall constitute final action of Nasdaq, unless the Nasdaq Review Council remands the eligibility proceeding. A decision to deny re-entry or continued association shall be effective immediately. A decision to approve shall be effective after the Commission issues an acknowledgment letter or, in cases involving Commission ordered sanctions, an order.

## **9525. Discretionary Review by the Nasdaq Board**

### **(a) Call for Review by Director**

A Director may call an eligibility proceeding for review by the Nasdaq Board if the call for review is made within the period prescribed in paragraph (b).

### **(b) 15 Day Period; Waiver**

A Director shall make his or her call for review not later than the next meeting of the Nasdaq Board that is at least 15 days after the date on which the Nasdaq Board receives the proposed written decision of the Nasdaq Review Council. By a unanimous vote of the Nasdaq Board, the Nasdaq Board may shorten the period to less than 15 days. By an affirmative vote of the majority of the Nasdaq Board then in office, the Nasdaq Board may, during the 15 day period, vote to extend the period to more than 15 days.

### **(c) Review at Next Meeting**

If a Director calls an eligibility proceeding for review within the period prescribed in paragraph (b), the Nasdaq Board shall review the eligibility proceeding not later than the next meeting of the Nasdaq Board. The Nasdaq Board may order the filing of briefs in connection with its review proceedings pursuant to this Rule.

### **(d) Decision of Nasdaq Board, Including Remand**

After review, the Nasdaq Board may affirm, modify, or reverse the proposed written decision of the Nasdaq Review Council. Alternatively, the Nasdaq Board may remand the eligibility proceeding with instructions. The Nasdaq Board shall prepare a written decision that includes all of the elements described in Rule 9524(b)(2).

### **(e) Issuance of Decision**

The Nasdaq Board shall issue and serve its written decision on the disqualified member, sponsoring member, and/or disqualified person, as the case may be, and the Department of Member Regulation pursuant to Rules 9132 and 9134. The decision shall constitute the final action of Nasdaq, unless the Nasdaq Board remands the proceeding. A decision to deny re-entry or continued association shall be effective immediately. A decision to approve shall be effective after the Commission issues an acknowledgment letter or, in cases involving Commission-ordered sanctions, an order.

## **9526. Expedited Review**

### **(a) Direction by Executive Committee**

Notwithstanding Rules 9524 and 9525, the Nasdaq Board Executive Committee, upon request of the Statutory Disqualification Committee, may direct an expedited review of a recommended written decision of the Statutory Disqualification Committee if the Nasdaq Board Executive Committee determines that expedited review is necessary for the protection of investors.

### **(b) Call for Review Period**

If a recommended decision is subject to expedited review, a Director may call the eligibility proceeding for review within seven days after receipt of the recommended written decision.

### **(c) No Call for Review**

If no Director calls the proceeding for review within the time prescribed, the decision shall become final, and the Statutory Disqualification Committee shall serve the decision on the disqualified member, sponsoring member, and/or disqualified person, as the case may be, and the Department of Member Regulation pursuant to Rules 9132 and 9134. The decision shall constitute final action of Nasdaq. The decision shall be effective upon approval by the Commission.

### **(d) Call for Review**

If a Director calls the eligibility proceeding for review within the prescribed time, a review panel shall meet and conduct a review not later than 14 days after the call for review. The review panel shall be composed of the Nasdaq Board Executive Committee, except that the Director who calls the proceeding for review shall serve on the review panel in lieu of a member of the Executive Committee who has the same classification (Member, Industry, Non-Industry, or Public) as such Director. The review panel may affirm, modify, or reverse the recommended written decision of the Statutory Disqualification Committee or remand the eligibility proceeding with instructions. The review panel shall prepare, issue, and serve its decision pursuant to Rule 9525(d) and (e).

## **9527. Application to Commission for Review**

The right to have any action taken pursuant to this Rule Series reviewed by the Commission is governed by Section 19 of the Act. The filing of an application for review shall not stay the effectiveness of final action by Nasdaq, unless the Commission otherwise orders.

## **9530. Suspension or Cancellation for Failure to Pay Dues, Fees and Other Charges**

### **9531. Notice**

#### **(a) Notice**

Nasdaq Regulation staff may issue a written notice suspending or canceling the membership of a member or the registration of a person who has failed to pay a fee, due, assessment, other charge, or submit a required report or information related to such payment.

#### **(b) Service of Notice**

Nasdaq Regulation staff shall serve the notice via personal service, facsimile or overnight courier and shall file a copy of the notice with the Office of Hearing Officers.

#### **(c) Effective Date of Notice**

A notice issued and served under this Rule shall become effective 15 days after the date of service of the notice.

### **9532. Hearing**

#### **(a) Request for Hearing**

Within five days after the date of service of a notice issued under Rule 9531, the member or person served with such notice may file with the Office of Hearing Officers a written request for a hearing. The request shall state with specificity why the member or person believes that the notice should be set aside. The request for the hearing shall stay the effective date of the notice.

#### **(b) Hearing Procedures**

##### **(1) Appointment of Hearing Officer**

If a hearing is requested, the Chief Hearing Officer shall appoint a Hearing Officer to conduct the hearing and decide whether the member or the person's registration should be suspended or canceled.

##### **(2) Parties**

The Parties shall be the member or person to whom the notice was issued and the Nasdaq Treasurer.

##### **(3) Time of Hearing**

The hearing shall be held within 45 days after the date of service of the

notice under Rule 9531. Not later than seven days before the hearing, the Hearing Officer shall serve the Parties with written notice of the date and time of the hearing.

(4) Transmission of Documents

Not later than seven days before the hearing, the Nasdaq Treasurer shall serve the member or person associated with a member via overnight courier with all documents that were considered in connection with the decision to issue a notice under Rule 9531 and provide copies of the same to the Hearing Officer.

(5) Counsel

The Parties may be represented by counsel at a hearing conducted under this Rule.

(6) Evidence

Formal rules of evidence shall not apply to a hearing under this Rule. Not later than four days before the hearing, the Parties shall exchange copies of proposed hearing exhibits and witness lists and provide copies of the same to the Hearing Officer.

(7) Witnesses

A person who is subject to the jurisdiction of Nasdaq shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter or a notary public.

(8) Additional Information

At any time during its consideration, the Hearing Officer may direct the Parties to submit additional information. Any additional information submitted shall be provided promptly to all Parties at least one business day before the Hearing Officer renders his or her decision.

(9) Transcript

The hearing shall be recorded and a transcript prepared by a court reporter. A Party may purchase a copy of the transcript from the court reporter at prescribed rates. A witness may purchase a copy of the transcript of his or her own testimony from the court reporter at prescribed rates. Proposed corrections to the transcript may be submitted by affidavit to the Hearing Officer within a reasonable time determined by the Hearing Officer. Upon notice to the participants in the hearing, the Hearing Officer may order corrections to the transcript as requested or sua sponte.

(10) Record

The record shall consist of all documents that were considered in connection with the decision to issue a notice under Rule 9531, the notice issued under Rule 9531, the request for hearing filed under Rule 9532, the transcript of the hearing, and each document or other item of evidence presented to or considered by the Hearing Officer. The Office of Hearing Officers shall be the custodian of the record.

(11) Failure to Appear at Hearing

If a member or person fails to appear at a hearing for which he has notice, the Hearing Officer may dismiss the request for a hearing as abandoned, and the notice issued under Rule 9531 shall become final. Upon a showing of good cause, the Hearing Officer may withdraw a dismissal entered pursuant to this subparagraph.

**9533. Decision**

The Hearing Officer may suspend or cancel the membership of a member or the registration of a person for failure to pay a due, fee, assessment, other charge, or for failure to submit a required report or information related to such payment. The Hearing Officer shall prepare a proposed written decision, and if the Hearing Officer determines that a suspension or cancellation should be imposed, the proposed written decision shall state the grounds for the suspension or cancellation, and in the case of a suspension, the conditions for terminating the suspension. The written decision served under this Rule shall become effective upon service and shall constitute final action of Nasdaq.

**9534. Notice to Membership**

Nasdaq shall provide notice of a suspension or cancellation under this Rule Series and the grounds therefor in the next membership supplement.

**9535. Termination of Suspension**

A suspended member or person may file a written request for termination of the suspension on the ground of full compliance with the notice issued under Rule 9531 or, if applicable, the conditions of a decision under Rule 9533, with the Office of Hearing Officers. The Office of Hearing Officers shall respond to the request in writing within five days after receipt of the request. The Office of Hearing Officers shall send the written response via overnight courier or facsimile.

### **9536. Copies of Notices and Decisions to Member**

A copy of a notice or decision under the Rule 9530 Series that is served on a person associated with a member shall be served on such member.

### **9537. Other Action Not Foreclosed**

Action by Nasdaq under the Rule 9530 Series shall not foreclose action by Nasdaq under any other Rule.

### **9550. Reserved**

### **9552. Failure to Provide Information or Keep Information Current**

#### **(a) Notice of Suspension of Member, Person Associated with a Member or Person Subject to Nasdaq's Jurisdiction if Corrective Action is Not Taken**

If a member, person associated with a member or person subject to Nasdaq's jurisdiction fails to provide any information, report, material, data, or testimony requested or required to be filed pursuant to the Nasdaq By-Laws or the Nasdaq Rules, or fails to keep its membership application or supporting documents current, Nasdaq staff may provide written notice to such member or person specifying the nature of the failure and stating that the failure to take corrective action within 21 days after service of the notice will result in suspension of membership or of association of the person with any member.

#### **(b) Service of Notice of Suspension**

Nasdaq Regulation staff shall serve the member or person with such notice in accordance with Rule 9134. A copy of a notice under this Rule that is served on a person associated with a member also shall be served on such member.

#### **(c) Contents of Notice**

A notice issued under this Rule shall state the specific grounds and include the factual basis for the Nasdaq action. The notice shall state when the Nasdaq action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Nasdaq action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

**(d) Effective Date of Suspension**

The suspension referenced in a notice issued and served under this Rule shall become effective 21 days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559.

**(e) Request for Hearing**

A member or person served with a notice under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made before the effective date of the notice, as indicated in paragraph (d) of this Rule. A request for a hearing must set forth with specificity any and all defenses to the Nasdaq action.

**(f) Request for Termination of the Suspension**

A member or person subject to a suspension pursuant to this Rule may file a written request for termination of the suspension on the ground of full compliance with the notice or decision. Such request shall be filed with the head of the Association department or office that issued the notice or, if another Association department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the Association department or office that is so designated. The head of the appropriate department or office may grant relief for good cause shown.

**(g) Settlement Procedure**

Uncontested offers of settlement shall be permitted under this Rule and shall conform to the requirements of Rule 9270, except that, if an uncontested offer of settlement, made under Rule 9270(e) after a hearing on the merits has begun, is accepted by the Hearing Officer, the Hearing Officer shall issue the order of acceptance, which shall constitute final Nasdaq action. Contested offers of settlement shall not be considered in proceedings initiated under this Rule.

**(h) Defaults**

A member or person who is suspended under this Rule and fails to request termination of the suspension within six months of issuance of the original notice of suspension will automatically be expelled or barred.

**9553. Failure to Pay Nasdaq Dues, Fees and Other Charges**

**(a) Notice of Suspension, Cancellation or Bar**

If a member, person associated with a member or person subject to Nasdaq's jurisdiction fails to pay any fees, dues, assessment or other charge required to be paid under the Nasdaq By-Laws or Rules, or to submit a required report or information related to such payment, Nasdaq Regulation staff may issue a written notice to such member or

person stating that the failure to comply within 21 days of service of the notice will result in a suspension or cancellation of membership or a suspension or bar from associating with any member.

**(b) Service of Notice of Suspension, Cancellation or Bar**

Nasdaq Regulation staff shall serve the member or person with such notice in accordance with Rule 9134. A copy of a notice under this Rule that is served on a person associated with a member also shall be served on such member.

**(c) Contents of Notice**

A notice issued under this Rule shall state the specific grounds and include the factual basis for the Nasdaq action. The notice shall state when the Nasdaq action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Nasdaq action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

**(d) Effective Date of Suspension, Cancellation or Bar**

The suspension, cancellation or bar referenced in a notice issued and served under this Rule shall become effective 21 days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559.

**(e) Request for Hearing**

A member or person served with a notice under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made before the effective date of the notice, as indicated in paragraph (d) of this Rule. A request for a hearing must set forth with specificity any and all defenses to the Nasdaq action.

**(f) Failure to Request Hearing**

If a member or person does not timely request a hearing, the suspension, cancellation or bar specified in the notice shall become effective 21 days after service of the notice and the notice shall constitute final Nasdaq action.

**(g) Request for Termination of the Suspension**

A member or person subject to a suspension under this Rule may file a written request for termination of the suspension on the ground of full compliance with the notice

or decision. Such request shall be filed with the head of the Association department or office that issued the notice or, if another Association department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the Association department or office that is so designated. The appropriate head of the department or office may grant relief for good cause shown.

#### **9554. Failure to Comply with an Arbitration Award or Related Settlement**

##### **(a) Notice of Suspension, Cancellation or Bar**

If a member, person associated with a member or person subject to Nasdaq's jurisdiction fails to comply with an arbitration award or a settlement agreement related to an arbitration or mediation under the Nasdaq By-Laws, Nasdaq Regulation staff may provide written notice to such member or person stating that the failure to comply within 21 days of service of the notice will result in a suspension or cancellation of membership or a suspension or bar from associating with any member.

##### **(b) Service of Notice of Suspension, Cancellation or Bar**

Nasdaq Regulation staff shall serve the member or person with such notice in accordance with Rule 9134. A copy of a notice under this Rule that is served on a person associated with a member also shall be served on such member.

##### **(c) Contents of Notice**

A notice issued under this Rule shall state the specific grounds and include the factual basis for the Nasdaq action. The notice shall state when the Nasdaq action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Nasdaq action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

##### **(d) Effective Date of Suspension, Cancellation or Bar**

The suspension, cancellation or bar referenced in a notice issued and served under this Rule shall become effective 21 days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559.

##### **(e) Request for Hearing**

A member or person served with a notice under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a

hearing shall be made before the effective date of the notice, as indicated in paragraph (d) of this Rule. A request for a hearing must set forth with specificity any and all defenses to the Nasdaq action.

**(f) Failure to Request Hearing**

If a member or person does not timely request a hearing, the suspension, cancellation or bar specified in the notice shall become effective 21 days after the service of the notice and the notice shall constitute final Nasdaq action.

**(g) Request for Termination of the Suspension**

A member or person subject to a suspension under this Rule may file a written request for termination of the suspension on the ground of full compliance with the notice or decision. Such request shall be filed with the head of the Association department or office that issued the notice or, if another Association department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the Association department or office that is so designated. The appropriate head of the department or office may grant relief for good cause shown.

**9555. Failure to Meet the Eligibility or Qualification Standards or Prerequisites for Access to Services**

**(a) Notice to Member or Person of Suspension, Cancellation, Bar, or Limitation or Prohibition on Access to Services**

(1) If a member or an associated person does not meet the eligibility or qualification standards set forth in the Nasdaq By-Laws or Rules, Nasdaq Regulation staff may provide written notice to such member or person stating that the failure to become eligible or qualified will result in a suspension or cancellation of membership or a suspension or bar from associating with any member.

(2) If a member, associated person, or other person does not meet the prerequisites for access to services offered by Nasdaq or a member thereof or cannot be permitted to continue to have access to services offered by Nasdaq or a member thereof with safety to investors, creditors, members, or Nasdaq, Nasdaq Regulation staff may provide written notice to such member or person limiting or prohibiting access to services offered by Nasdaq or a member thereof.

**(b) Service of Notice**

Nasdaq Regulation staff shall serve the member or person with such notice in accordance with Rule 9134. A copy of a notice under this Rule that is served on a person associated with a member also shall be served on such member.

**(c) Contents of Notice**

A notice issued under this Rule shall state the specific grounds and include the factual basis for the Nasdaq action. The notice shall state when the Nasdaq action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Nasdaq action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

**(d) Effective Date of Limitation, Prohibition, Suspension, Cancellation or Bar**

The limitation, prohibition, suspension, cancellation or bar referenced in a notice issued under this Rule shall become effective 14 days after service of the notice, except that the effective date for a notice of a limitation or prohibition on access to services offered by Nasdaq or a member thereof with respect to services to which the member or person does not have access shall be upon service of the notice. A request for a hearing, pursuant to Rule 9559, shall stay the effectiveness of the notice, except that the effectiveness of a notice of a limitation or prohibition on access to services offered by Nasdaq or a member thereof with respect to services to which the member or person does not have access shall not be stayed by a request for a hearing.

**(e) Request for Hearing**

A member or person served with a notice under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made within 14 days after service of the notice. A request for a hearing must set forth with specificity any and all defenses to the Nasdaq action.

**(f) Failure to Request Hearing**

If a member or person does not timely request a hearing, the limitation, prohibition, suspension, cancellation or bar specified in the notice shall become effective 14 days after service of the notice, except that the effective date for a notice of a limitation or prohibition on access to services offered by Nasdaq or a member thereof with respect to services to which the member or person does not have access shall be upon service of the notice. The notice shall constitute final Nasdaq action if the member or person does not request a hearing within 14 days after service of the notice.

**(g) Request for Termination of the Limitation, Prohibition or Suspension**

A member or person subject to a limitation, prohibition or suspension under this Rule may file a written request for termination of the limitation, prohibition or suspension

on the ground of full compliance with the notice or decision. Such request shall be filed with the head of the Association department or office that issued the notice or, if another Association department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the Association department or office that is so designated. The appropriate head of the department or office may grant relief for good cause shown.

**9556. Failure to Comply with Temporary and Permanent Cease and Desist Orders**

Rule 9556, and related provisions of Rule 8310, IM-8310-2(d)(1), 9120(aa), 9241(c), 9290, 9311(b), 9312(b), 9360 and the Rule 9800 Series, shall expire on June 23, 2007, unless extended or permanently adopted pursuant to SEC approval at or before such date.

**(a) Notice of Suspension, Cancellation or Bar**

If a member, person associated with a member or person subject to Nasdaq's jurisdiction fails to comply with a temporary or permanent cease and desist order issued under the Rule 9200, 9300 or 9800 Series, Nasdaq Regulation staff-after receiving written authorization from the Chief Regulatory Officer-may issue a notice to such member or person stating that the failure to comply with the temporary or permanent cease and desist order within seven days of service of the notice will result in a suspension or cancellation of membership or a suspension or bar from associating with any member.

**(b) Service of Notice**

Nasdaq Regulation staff shall serve the member or person subject to a notice issued under this Rule by facsimile, overnight courier or personal delivery. Papers served on a member or person by overnight courier or personal delivery shall conform to paragraphs (a)(1) and (3) and (b)(1) and (2) of Rule 9134. Papers served on a member by facsimile shall be sent to the facsimile number listed in the member's contact questionnaire submitted to Nasdaq pursuant to Nasdaq's By-Laws, except that, if Nasdaq Regulation staff has actual knowledge that an entity's contact questionnaire facsimile number is out of date, duplicate copies shall be sent to the entity by overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(2) of Rule 9134. Papers served on a person by facsimile shall be sent to the person's last known facsimile number and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) of Rule 9134. A copy of a notice under this Rule that is served on a person associated with a member also shall be served on such member. Service is complete upon sending the notice by facsimile, mailing the notice by overnight courier or delivering it in person, except that, where duplicate service is required, service is complete upon sending the duplicate service.

**(c) Contents of Notice**

The notice shall explicitly identify the provision of the permanent or temporary

cease and desist order that is alleged to have been violated and shall contain a statement of facts specifying the alleged violation. The notice shall state when the Nasdaq action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Nasdaq action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

**(d) Effective Date of Suspension, Cancellation or Bar**

The suspension, cancellation or bar referenced in a notice issued and served under this Rule shall become effective seven days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559.

**(e) Request for a Hearing**

A member served with a notice under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made before the effective date of the notice, as indicated in paragraph (d) of this Rule. A request for a hearing must set forth with specificity any and all defenses to the Nasdaq action.

**(f) Failure to Request Hearing**

If a member or person does not timely request a hearing, the suspension, cancellation or bar specified in the notice shall become effective seven days after the service of the notice and the notice shall constitute final Nasdaq action.

**(g) Request for Termination of the Suspension**

A member or person subject to a suspension under this Rule may file a written request for termination of the suspension on the ground of full compliance with the notice or decision. Such request shall be filed with the head of the Association department or office that issued the notice or, if another Association department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the Association department or office that is so designated. The appropriate head of the department or office may grant relief for good cause shown.

**9557. Procedures for Regulating Activities Under Rules 3130 and 3131 Regarding a Member Experiencing Financial or Operational Difficulties**

**(a) Notice of Restriction**

Nasdaq Regulation staff may issue a notice directing a member to restrict its business activities, either by limiting or ceasing to conduct those activities, if Nasdaq

Regulation staff has reason to believe that a condition specified in Rule 3130 or Rule 3131 exists.

**(b) Service of Notice**

Nasdaq Regulation staff shall serve the member subject to a notice issued under this Rule by facsimile, overnight courier or personal delivery. Papers served on a member by overnight courier or personal delivery shall conform to paragraphs (a)(1) and (3) and (b)(2) of Rule 9134. Papers served on a member by facsimile shall be sent to the facsimile number listed in the member's contact questionnaire submitted to Nasdaq pursuant to Nasdaq's By-Laws, except that, if Nasdaq Regulation staff has actual knowledge that an entity's contact questionnaire facsimile number is out of date, duplicate copies shall be sent to the entity by overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(2) of Rule 9134. Service is complete upon sending the notice by facsimile, mailing the notice by overnight courier or delivering it in person, except that, where duplicate service is required, service is complete upon sending the duplicate service.

**(c) Contents of Notice**

A notice issued under this Rule shall state the specific grounds and include the factual basis for the Nasdaq action. The notice shall state when the Nasdaq action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Nasdaq action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

**(d) Effective Date of Restriction**

The restrictions referenced in a notice issued and served under this Rule shall become effective seven days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559.

**(e) Request for a Hearing**

A member served with a notice under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made before the effective date of the notice, as indicated in paragraph (d) of this Rule. A request for a hearing must set forth with specificity any and all defenses to the Nasdaq action.

**(f) Failure to Request Hearing**

If a member does not timely request a hearing, the restrictions specified in the notice shall become effective seven days after service of the notice. The restrictions

specified in the notice shall remain in effect until the head of the Association department or office that issued the notice or, if another Association department or office is named as the party handling the matter on behalf of the issuing department or office, the head of the Association department or office that is so designated reduces or removes the restrictions pursuant to paragraph (h) of this Rule.

**(g) Order to Enforce Sanctions**

If Nasdaq Regulation staff determines that a member has failed to comply with any restrictions imposed by a decision or an effective notice under this Rule that have not been stayed, Nasdaq Regulation staff shall issue an order imposing the sanctions set forth in the decision or notice and specifying the effective date and time of such sanctions. The order shall inform the member that it may apply for relief from the sanctions imposed by the order by filing a written request for a hearing before the Office of Hearing Officers under Rule 9559. The procedures delineated in this Rule shall be applicable.

**(h) Additional Restrictions or the Reduction or Removal of Restrictions**

(1) Additional Restrictions

If a member continues to experience financial or operational difficulty specified in Rule 3130 or 3131, notwithstanding an effective notice, order or decision under this Rule, Nasdaq Regulation Staff may impose additional restrictions by issuing a notice under paragraph (b) of this Rule. The notice shall inform the member that it may apply for relief from the additional restrictions by filing a written request for a hearing before the Office of Hearing Officers under Rule 9559. The procedures delineated in this Rule shall be applicable to such a notice.

(2) Reduction or Removal of Restrictions

If Nasdaq Regulation staff determines that any restrictions previously imposed under this Rule should be reduced or removed, Nasdaq Regulation staff shall serve a written notice on the member pursuant to Rule 9134.

**9558. Summary Proceedings for Actions Authorized by Section 6(d)(3) of the Act**

**(a) Notice of Initiation of Summary Proceedings**

The Chief Regulatory Officer of Nasdaq may provide written authorization to Association staff to issue on a case-by-case basis a written notice that summarily:

(1) suspends a member, person associated with a member or person subject to Nasdaq's jurisdiction who has been and is expelled or suspended from any self-regulatory organization or barred or suspended from being associated with a member of any self-regulatory organization;

(2) suspends a member who is in such financial or operating difficulty that Association staff determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors, creditors, other members, or Nasdaq; or

(3) limits or prohibits any person with respect to access to services offered by Nasdaq if paragraphs (1) or (2) of this Rule or the provisions of Section 6(d)(3) of the Act applies to such person or, in the case of a person who is not a member, if the Chief Regulatory Officer of Nasdaq determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, members, or Nasdaq, and so notifies the Commission.

**(b) Service of Notice**

The member or person subject to a notice issued under this Rule shall be served by facsimile, overnight courier or personal delivery. Papers served on a member or person by overnight courier or personal delivery shall conform to paragraphs (a)(1) and (3) and (b)(1) and (2) of Rule 9134. Papers served on a member by facsimile shall be sent to the facsimile number listed in the member's contact questionnaire submitted to Nasdaq pursuant to Nasdaq's By-Laws, except that, if Nasdaq Regulation staff has actual knowledge that an entity's contact questionnaire facsimile number is out of date, duplicate copies shall be sent to the entity by overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(2) of Rule 9134. Papers served on a person by facsimile shall be sent to the person's last known facsimile number and shall also be served by either overnight courier or personal delivery in conformity with paragraphs (a)(1) and (3) and (b)(1) of Rule 9134. A copy of a notice under this Rule that is served on a person associated with a member also shall be served on such member. Service is complete upon sending the notice by facsimile, mailing the notice by overnight courier or delivering it in person, except that, where duplicate service is required, service is complete upon sending the duplicate service.

**(c) Contents of Notice**

A notice issued under this Rule shall state the specific grounds and include the factual basis for the Nasdaq action. The notice shall state when the Nasdaq action will take effect and explain what the respondent must do to avoid such action. The notice shall state that the respondent may file a written request for a hearing with the Office of Hearing Officers pursuant to Rule 9559. The notice also shall inform the respondent of the applicable deadline for filing a request for a hearing and shall state that a request for a hearing must set forth with specificity any and all defenses to the Nasdaq action. In addition, the notice shall explain that, pursuant to Rules 8310(a) and 9559(n), a Hearing Officer or, if applicable, Hearing Panel, may approve, modify or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.

**(d) Effective Date of Limitation, Prohibition or Suspension**

The limitation, prohibition or suspension referenced in a notice issued and served under this Rule is immediately effective. The limitation, prohibition or suspension specified in the notice shall remain in effect unless, after a timely written request for a hearing and written request for a stay, the Chief Hearing Officer or Hearing Officer assigned to the matter finds good cause exists to stay the limitation, prohibition or suspension.

**(e) Request for a Hearing and Stay**

A member or person subject to a notice issued under this Rule may file with the Office of Hearing Officers a written request for a hearing pursuant to Rule 9559. A request for a hearing shall be made within seven days after service of the notice issued under this Rule. A request for a hearing must set forth with specificity any and all defenses to the Nasdaq action.

A member or person subject to a notice issued under this Rule may, concurrent with or after filing a request for a hearing, file with the Office of Hearing Officers a written request for a stay of the limitation, prohibition or suspension specified in the notice. A request for a stay must set forth with specificity any and all relevant facts and arguments supporting the request for a stay.

**(f) Failure to Request Hearing**

If a member or person subject to a notice issued under this Rule does not timely request a hearing within the time period specified in paragraph (e) of this Rule, the notice shall constitute final Nasdaq action.

**(g) Request for Termination of the Limitation, Prohibition or Suspension**

A member or person subject to a limitation, prohibition or suspension under this Rule may file a written request for termination of the limitation, prohibition or suspension on the ground of full compliance with the notice or decision. Such request shall be filed with the head of the Association department or office that issued the notice or, if another Association department or office is named as the party handling the matter on behalf of the issuing department or office, with the head of the Association department or office that is so designated. The appropriate head of the department or office may grant relief for good cause shown.

**9559. Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series**

**(a) Applicability**

The hearing procedures under this Rule shall apply to a member, person associated with a member, person subject to Nasdaq's jurisdiction or other person who is served with a notice issued under the Rule 9550 Series and who timely requests a

hearing. For purposes of this Rule, such members or persons shall be referred to as respondents.

**(b) Computation of Time**

Rule 9138 shall govern the computation of time in proceedings brought under the Rule 9550 Series, except that intermediate Saturdays, Sundays and Federal holidays shall be included in the computation in proceedings brought under Rules 9556 through 9558.

**(c) Stays**

Unless the Chief Hearing Officer or the Hearing Officer assigned to the matter orders otherwise for good cause shown, a timely request for a hearing shall stay the effectiveness of a notice issued under Rules 9551 through 9557, except that the effectiveness of a notice of a limitation or prohibition on access to services offered by Nasdaq or a member thereof under Rule 9555 with respect to services to which the member or person does not have access shall not be stayed by a request for a hearing. A timely request for a hearing shall not stay the effectiveness of a notice issued under Rule 9558, unless the Chief Hearing Officer or the Hearing Officer assigned to the matter orders otherwise for good cause shown.

**(d) Appointment and Authority of Hearing Officer and/or Hearing Panel**

(1) For proceedings initiated under Rules 9553 and 9554, the Chief Hearing Officer shall appoint a Hearing Officer to preside over and act as the sole adjudicator for the matter.

(2) For proceedings initiated under Rules 9551, 9552, 9555, 9556, 9557 and 9558, the Chief Hearing Officer shall appoint a Hearing Panel composed of a Hearing Officer and two Panelists. The Hearing Officer shall serve as the chair of the Hearing Panel. The Chief Hearing Officer shall select as Panelists persons who meet the qualifications delineated in Rules 9231 and 9232.

(3) Rules 9231(e), 9233 and 9234 shall govern disqualification, recusal or withdrawal of a Hearing Officer or, if applicable, Hearing Panelist.

(4) A Hearing Officer appointed pursuant to this provision shall have authority to do all things necessary and appropriate to discharge his or her duties as set forth under Rules 9235 and 9280.

(5) Hearings under the Rule 9550 Series shall be held by telephone conference, unless the Hearing Officer orders otherwise for good cause shown.

(6) For good cause shown, or with the consent of all of the parties to a proceeding, the Hearing Officer or, if applicable, the Hearing Panel may extend or shorten any time limits prescribed by this Rule.

**(e) Consolidation or Severance of Proceedings**

Rule 9214 shall govern the consolidation or severance of proceedings, except that, where one of the notices that are the subject of consolidation under this Rule requires that a hearing be held before a Hearing Panel, the hearing of the consolidated matters shall be held before a Hearing Panel. Where two consolidated matters contain different timelines under this Rule, the Chief Hearing Officer or Hearing Officer assigned to the matter has discretion to determine which timeline is appropriate under the facts and circumstances of the case. Where one of the consolidated matters includes an action brought under Rule 9558, the limitation, prohibition or suspension specified in the notice shall not be stayed pending resolution of the case unless the Chief Hearing Officer or Hearing Officer assigned to the matter orders otherwise for good cause shown. Where one of the consolidated matters includes an action brought under Rule 9555 with respect to services to which the member or person does not have access, the effectiveness of a notice of a limitation or prohibition on access to services offered by Nasdaq or a member thereof shall not be stayed pending resolution of the case.

**(f) Time of Hearing**

(1) A hearing shall be held within 14 days after a respondent subject to a notice issued under Rules 9556 through 9558 files a written request for a hearing with the Office of Hearing Officers.

(2) A hearing shall be held within 60 days after a respondent subject to a notice issued under Rules 9551 through 9555 files a written request for a hearing with the Office of Hearing Officers.

(3) The timelines established by paragraphs (f)(1) and (2) confer no substantive rights on the parties.

**(g) Notice of Hearing**

The Hearing Officer shall issue a notice stating the date, time, and place of the hearing as follows:

(1) At least seven days prior to the hearing in the case of an action brought pursuant to Rules 9556 through 9558 and

(2) At least 21 days prior to the hearing in the case of an action brought pursuant to Rules 9551 through 9555.

**(h) Transmission of Documents**

(1) Not less than seven days before the hearing in an action brought under Rules 9556 through 9558 and not less than 40 days before the hearing in an action brought under Rules 9551 through 9555, Nasdaq Regulation staff shall provide to the respondent who requested the hearing, by facsimile or overnight courier, all documents that were considered in issuing the notice unless a document meets the

criteria of Rule 9251(b)(1)(A), (B) or (C). A document that meets such criteria shall not constitute part of the record, but shall be retained until the date upon which the Nasdaq's final decision is served or, if applicable, upon the conclusion of any review by the Securities and Exchange Commission or the federal courts.

(2) Not less than three days before the hearing in an action brought under Rules 9556 through 9558 and not less than 14 days before the hearing in an action brought under Rules 9551 through 9555, the parties shall exchange proposed exhibit and witness lists. The exhibit and witness lists shall be served by facsimile or by overnight courier.

**(i) Evidence**

Formal rules of evidence shall not apply to a hearing under this Rule Series. Rules 9262 and 9263 shall govern testimony and the admissibility of evidence.

**(j) Additional Information**

The Hearing Officer or, if applicable, the Hearing Panel may direct the Parties to submit additional information.

**(k) Record of Hearing**

Rule 9265 shall govern the requirements for the record of the hearing.

**(l) Record of Proceeding**

Rule 9267 shall govern the record of the proceeding.

**(m) Failure to Appear at a Pre-Hearing Conference or Hearing or to Comply with a Hearing Officer Order Requiring the Production of Information**

Failure of any respondent to appear before the Hearing Officer or, if applicable, the Hearing Panel at any status conference, pre-hearing conference or hearing, or to comply with any order of the Hearing Officer or, if applicable, Hearing Panel requiring production of information to support any defense to the notice that respondent has raised, shall be considered an abandonment of the respondent's defense and waiver of any opportunity for a hearing provided by the Rule 9550 Series. In such cases, the notice issued under the Rule 9550 Series shall be deemed to be final Nasdaq action. The Hearing Officer or, if applicable, the Hearing Panel may permit the hearing to go forward as to those parties who appear and otherwise comply with this Rule.

**(n) Sanctions, Costs and Remands**

(1) The Hearing Officer or, if applicable, the Hearing Panel may approve, modify or withdraw any and all sanctions or limitations imposed by the notice.

The Hearing Officer or, if applicable, the Hearing Panel also may impose any other fitting sanction, pursuant to Rule 8310(a).

(2) The Hearing Officer or, if applicable, the Hearing Panel may impose costs pursuant to Rule 8330.

(3) The Hearing Officer or, if applicable, the Hearing Panel may remand the matter to the department or office that issued the notice for further consideration of specified matters.

**(o) Timing of Decision**

(1) Proceedings initiated under Rules 9553 and 9554

Within 60 days of the date of the close of the hearing, the Hearing Officer shall prepare a written decision and provide it to the Nasdaq Review Council's Review Subcommittee.

(2) Proceedings initiated under Rules 9556 through 9558

Within 21 days of the date of the close of the hearing, the Hearing Officer shall prepare a written decision that reflects the views of the Hearing Panel, as determined by majority vote, and provide it to the Nasdaq Review Council's Review Subcommittee.

(3) Proceedings initiated under Rules 9551, 9552 and 9555

Within 60 days of the date of the close of the hearing, the Hearing Officer shall prepare a written decision that reflects the views of the Hearing Panel, as determined by majority vote, and provide it to the Nasdaq Review Council's Review Subcommittee.

(4) If not timely called for review by the Nasdaq Review Council's Review Subcommittee pursuant to paragraph (q) of this Rule, the Hearing Officer's or, if applicable, the Hearing Panel's written decision shall constitute final Nasdaq action. The Office of Hearing Officers shall promptly serve the decision of the Hearing Officer or, if applicable, the Hearing Panel on the Parties and provide a copy to each Nasdaq member with which the respondent is associated.

(5) The timelines established by paragraphs (o)(1)-(4) confer no substantive rights on the parties.

**(p) Contents of Decision**

The decision shall include:

- (1) a statement describing the investigative or other origin of the notice issued under the Rule 9550 Series;
- (2) the specific statutory or rule provisions that were alleged to have been violated;
- (3) a statement setting forth the findings of fact with respect to any act or practice the respondent was alleged to have committed or omitted;
- (4) the conclusions of the Hearing Officer or, if applicable, Hearing Panel as to whether the respondent violated any provision alleged in the notice;
- (5) a statement of the Hearing Officer or, if applicable, Hearing Panel in support of the disposition of the principal issues raised in the proceeding; and
- (6) a statement describing any sanction or limitation imposed, the reasons therefore, and the date upon which such sanction or limitation shall become effective.

**(q) Call for Review by the Nasdaq Review Council**

(1) The Nasdaq Review Council's Review Subcommittee may call for review a decision issued under the Rule 9550 Series within 21 days after receipt of the decision from the Office of Hearing Officers. Rule 9313(a) is incorporated by reference.

(2) If the Review Subcommittee calls the proceeding for review within the prescribed time, a Subcommittee of the Nasdaq Review Council shall meet and conduct a review not later than 40 days after the call for review. The Subcommittee shall be composed pursuant to Rule 9331(a)(1). The Subcommittee may elect to hold a hearing or decide the matter on the basis of the record made before the Hearing Officer or, if applicable, the Hearing Panel. Not later than 60 days after the call for review, the Subcommittee shall make its recommendation to the Nasdaq Review Council. Not later than 60 days after receipt of the Subcommittee's recommendation, the Nasdaq Review Council shall serve a final written decision on the parties via overnight courier or facsimile. The Nasdaq Review Council may affirm, modify or reverse the decision of the Hearing Officer or, if applicable, the Hearing Panel. The Nasdaq Review Council also may impose any other fitting sanction, pursuant to Rule 8310(a), and may impose costs, pursuant to 8330. In addition, the Nasdaq Review Council may remand the matter to the Office of Hearing Officers for further consideration of specified matters.

(3) For good cause shown, or with the consent of all of the parties to a proceeding, the Review Subcommittee, the Nasdaq Review Council Subcommittee or the Nasdaq Review Council may extend or shorten any time limits prescribed by this Rule.

(4) The Nasdaq Review Council's written decision shall constitute final Nasdaq action.

(5) The Nasdaq Review Council shall promptly serve the decision on the Parties and provide a copy of the decision to each Nasdaq member with which the respondent is associated.

(6) The timelines established by paragraphs (q)(1)-(5) confer no substantive rights on the parties.

**(r) Reserved**

**(s) Application to Commission for Review**

The right to have any action pursuant to this Rule reviewed by the Securities and Exchange Commission is governed by Section 19(f) of the Securities Exchange Act. The filing of an application for review by the Securities and Exchange Commission shall not stay the effectiveness of final Nasdaq action, unless the Securities and Exchange Commission otherwise orders.

## **9600. PROCEDURES FOR EXEMPTIONS**

### **9610. Application**

**(a) Where to File**

A member seeking exemptive relief as permitted under Rules 1021, 1050, 1070, 2210, 2315, 2320, 2340, 2520, 2710, 2720, 2790, 2810, 2850, 2851, 2860, Interpretive Material 2860-1, 3010(b)(2), 3020, 3150, 3210, 3230, 3350, 8211, 11870, or 11900, shall file a written application with the appropriate Association department or staff and provide a copy of the application to the Nasdaq Regulation .

**(b) Content**

An application filed pursuant to this Rule shall contain the member's name and address, the name of a person associated with the member who will serve as the primary contact for the application, the Rule from which the member is seeking an exemption, and a detailed statement of the grounds for granting the exemption. If the member does not want the application or the decision on the application to be publicly available in whole or in part, the member also shall include in its application a detailed statement, including supporting facts, showing good cause for treating the application or decision as confidential in whole or in part.

**(c) Applicant**

A member that files an application under this Rule is referred to as "Applicant" hereinafter in the Rule 9600 Series.

**9620. Decision**

After considering an application, Nasdaq Regulation staff shall issue a written decision setting forth its findings and conclusions. The decision shall be served on the Applicant pursuant to Rules 9132 and 9134. After the decision is served on the Applicant, the application and decision shall be publicly available unless Nasdaq Regulation staff determines that the Applicant has shown good cause for treating the application or decision as confidential in whole or in part.

**9630. Appeal****(a) Notice**

An Applicant may file a written notice of appeal within 15 calendar days after service of a decision issued under Rule 9620. The notice of appeal shall be filed with Nasdaq Regulation, with a copy of the notice also provided to the appropriate Nasdaq Regulation staff. The notice of appeal shall contain a brief statement of the findings and conclusions as to which exception is taken. Appeals of decisions issued by Nasdaq Regulation staff pursuant to Rule 9620 shall be decided by the Nasdaq Review Council, except with respect to exemptive relief under Rule 1070 (Qualification Examinations and Waiver of Requirements), which shall be decided by the Waiver Subcommittee of the Nasdaq Review Council. If the Applicant does not want the decision on the appeal to be publicly available in whole or in part, the Applicant also shall include in its notice of appeal a detailed statement, including supporting facts, showing good cause for treating the decision as confidential in whole or in part. The notice of appeal shall be signed by the Applicant.

**(b) Expedited Review**

Where the failure to promptly review a decision to deny a request for exemption would unduly or unfairly harm the applicant, the Nasdaq Review Council or the Waiver Subcommittee of the Nasdaq Review Council, as the case may be, shall provide expedited review.

**(c) Withdrawal of Appeal**

An Applicant may withdraw its notice of appeal at any time by filing a written notice of withdrawal of appeal with the Nasdaq Review Council.

**(d) Oral Argument**

(1) Subject to paragraph (2) below, following the filing of a notice of appeal, the Nasdaq Review Council or Review Subcommittee may order oral argument and may designate a Subcommittee to hear such oral argument. The Subcommittee may consider any new evidence if the Applicant can show good cause for not including it in its application, and the Subcommittee will recommend to the Nasdaq Review Council a disposition of all matters on appeal.

(2) With respect to exemptive relief requested under Rule 1070, the Waiver Subcommittee of the Nasdaq Review Council may order oral argument and consider any new evidence if the Applicant can show good cause for not including it in its application.

**(e) Decision**

(1) Subject to paragraph (2) below, after considering all matters on appeal, and, as applicable, the Subcommittee's recommendation, the Nasdaq Review Council shall affirm, modify, or reverse the decision issued under Rule 9620. The Nasdaq Review Council shall issue a written decision setting forth its findings and conclusions and serve the decision on the Applicant. The decision shall be served pursuant to Rules 9132 and 9134. The decision shall be effective upon service and shall constitute final action of Nasdaq.

(2) With respect to exemptive relief requested under Rule 1070, after considering all matters on appeal, the Waiver Subcommittee of the Nasdaq Review Council shall affirm, modify, or reverse the decision issued under Rule 9620. The Waiver Subcommittee shall issue a written decision setting forth its findings and conclusions and serve the decision on the Applicant. The decision shall be served pursuant to Rules 9132 and 9134. The decision shall be effective upon service and shall constitute final action of Nasdaq. The Waiver Subcommittee shall retain the discretion to refer the appeal to the Nasdaq Review Council, in which case the Nasdaq Review Council shall act on such appeal pursuant to its authority under this 9600 Series.

**9700. Reserved**

**9800. TEMPORARY CEASE AND DESIST ORDERS**

The entire Rule 9800 Series, and related provisions of Rules 8310, IM-8310-2(d)(1), 9120(aa), 9241(c), 9290, 9311(b), 9312(b), 9360, and 9556, shall expire on June 23, 2007, unless extended or permanently adopted pursuant to SEC approval at or before such date.

**9810. Initiation of Proceeding**

**(a) Department of Enforcement or Department of Market Regulation**

With the prior written authorization of the President of NASD Regulatory Policy and Oversight or the Executive Vice President for NASD Regulatory Policy and Programs, the Department of Enforcement or the Department of Market Regulation may initiate a temporary cease and desist proceeding with respect to alleged violations of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 thereunder; SEC Rules 15g-1 through 15g-9; Nasdaq Rule 2110 (if the alleged violation is unauthorized trading, or misuse or conversion of customer assets, or based on violations of Section 17(a) of the Securities Act of 1933); Nasdaq Rule 2120; or Nasdaq Rule 2330

(if the alleged violation is misuse or conversion of customer assets). The Department of Enforcement or the Department of Market Regulation shall initiate the proceeding by serving a notice on a member or associated person (hereinafter “Respondent”) and filing a copy thereof with the Office of Hearing Officers. The Department of Enforcement or the Department of Market Regulation shall serve the notice by personal service, overnight commercial courier, or facsimile. If service is made by facsimile, the Department of Enforcement or the Department of Market Regulation shall send an additional copy of the notice by overnight commercial courier. The notice shall be effective upon service.

**(b) Contents of Notice**

The notice shall set forth the rule or statutory provision that the Respondent is alleged to have violated and that the Department of Enforcement or the Department of Market Regulation is seeking to have the Respondent ordered to cease violating. The notice also shall state whether the Department of Enforcement or the Department of Market Regulation is requesting the Respondent to be required to take action or to refrain from taking action. The notice shall be accompanied by:

(1) a declaration of facts, signed by a person with knowledge of the facts contained therein, that specifies the acts or omissions that constitute the alleged violation; and

(2) a proposed order that contains the required elements of a temporary cease and desist order (except the date and hour of the order’s issuance), which are set forth in Rule 9840(b).

**(c) Filing of Underlying Complaint**

If the Department of Enforcement or the Department of Market Regulation has not issued a complaint under Rule 9211 against the Respondent relating to the subject matter of the temporary cease and desist proceeding and alleging violations of the rule or statutory provision specified in the notice described in paragraph (b), the Department of Enforcement or the Department of Market Regulation shall serve and file such a complaint with the notice initiating the temporary cease and desist proceeding.

**9820. Appointment of Hearing Officer and Hearing Panel**

(a) As soon as practicable after the Department of Enforcement or the Department of Market Regulation files a copy of the notice initiating a temporary cease and desist proceeding with the Office of Hearing Officers, the Chief Hearing Officer shall assign a Hearing Officer to preside over the temporary cease and desist proceeding. The Chief Hearing Officer shall appoint two Panelists to serve on a Hearing Panel with the Hearing Officer. The Panelists shall be current or former Directors or Nasdaq Review Council members, and at least one Panelist shall be an associated person.

(b) If at any time a Hearing Officer or Hearing Panelist determines that he or she

has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned, or if a Party files a motion to disqualify a Hearing Officer or Hearing Panelist, the recusal and disqualification proceeding shall be conducted in accordance with Rules 9233 and 9234, except that:

(1) a motion seeking disqualification of a Hearing Officer or Hearing Panelist must be filed no later than 5 days after the later of the events described in paragraph (b) of Rules 9233 and 9234; and

(2) the Chief Hearing Officer shall appoint a replacement Panelist using the criteria set forth in paragraph (a) of this Rule.

### **9830. Hearing**

#### **(a) When Held**

The hearing shall be held not later than 15 days after service of the notice and filing initiating the temporary cease and desist proceeding, unless otherwise extended by the Hearing Officer with the consent of the Parties for good cause shown. If a Hearing Officer or Hearing Panelist is recused or disqualified, the hearing shall be held not later than five days after a replacement Hearing Officer or Hearing Panelist is appointed.

#### **(b) Service of Notice of Hearing**

The Office of Hearing Officers shall serve a notice of date, time, and place of the hearing on the Department of Enforcement or the Department of Market Regulation and the Respondent not later than seven days before the hearing, unless otherwise ordered by the Hearing Officer. Service shall be made by personal service, overnight commercial courier, or facsimile. If service is made by facsimile, the Office of Hearing Officers shall send an additional copy of the notice by overnight commercial courier. The notice shall be effective upon service.

#### **(c) Authority of Hearing Officer**

The Hearing Officer shall have authority to do all things necessary and appropriate to discharge his or her duties as set forth under Rule 9235.

#### **(d) Witnesses**

A person who is subject to the jurisdiction of Nasdaq shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter or a notary public.

#### **(e) Additional Information**

At any time during its consideration, the Hearing Panel may direct a Party to submit additional information. Any additional information submitted shall be provided to

all Parties at least one day before the Hearing Panel renders its decision.

**(f) Transcript**

The hearing shall be recorded by a court reporter and a written transcript thereof shall be prepared. A transcript of the hearing shall be available to the Parties for purchase from the court reporter at prescribed rates. A witness may purchase a copy of the transcript of his or her own testimony from the court reporter at prescribed rates. Proposed corrections to the transcript may be submitted by affidavit to the Hearing Panel within a reasonable time determined by the Hearing Panel. Upon notice to all the Parties to the proceeding, the Hearing Panel may order corrections to the transcript as requested or sua sponte.

**(g) Record and Evidence Not Admitted**

The record shall consist of the notice initiating the proceeding, the declaration, and the proposed order described in Rule 9810(b); the transcript of the hearing; all evidence considered by the Hearing Panel; and any other document or item accepted into the record by the Hearing Officer or the Hearing Panel. The Office of Hearing Officers shall be the custodian of the record. Proffered evidence that is not accepted into the record by the Hearing Panel shall be retained by the custodian of the record until the date when the Nasdaq's decision becomes final or, if applicable, upon the conclusion of any review by the Commission or the federal courts.

**(h) Failure to Appear at Hearing**

If a Respondent fails to appear at a hearing for which it has notice, the allegations in the notice and accompanying declaration may be deemed admitted, and the Hearing Panel may issue a temporary cease and desist order without further proceedings. If the Department of Enforcement or Department of Market Regulation fails to appear at a hearing for which it has notice, the Hearing Panel may order that the temporary cease and desist proceeding be dismissed.

**9840. Issuance of Temporary Cease and Desist Order by Hearing Panel**

**(a) Basis for Issuance**

The Hearing Panel shall issue a written decision stating whether a temporary cease and desist order shall be imposed. The Hearing Panel shall issue the decision not later than ten days after receipt of the hearing transcript, unless otherwise extended by the Hearing Officer with the consent of the Parties for good cause shown. A temporary cease and desist order shall be imposed if the Hearing Panel finds:

(1) by a preponderance of the evidence that the alleged violation specified in the notice has occurred; and

(2) that the violative conduct or continuation thereof is likely to result in significant dissipation or conversion of assets or other significant harm to

investors prior to the completion of the underlying disciplinary proceeding under the Rule 9200 and 9300 Series.

**(b) Content, Scope, and Form of Order**

A temporary cease and desist order shall:

(1) be limited to ordering a Respondent to cease and desist from violating a specific rule or statutory provision, and, where applicable, to ordering a Respondent to cease and desist from dissipating or converting assets or causing other harm to investors;

(2) set forth the alleged violation and the significant dissipation or conversion of assets or other significant harm to investors that is likely to result without the issuance of an order;

(3) describe in reasonable detail the act or acts the Respondent is to take or refrain from taking; and

(4) include the date and hour of its issuance.

**(c) Duration of Order**

A temporary cease and desist order shall remain effective and enforceable until the issuance of a decision under Rule 9268 or Rule 9269.

**(d) Service**

The Office of Hearing Officers shall serve the Hearing Panel's decision and any temporary cease and desist order by personal service, overnight commercial courier, or facsimile. If service is made by facsimile, the Office of Hearing Officers shall send an additional copy of the Hearing Panel's decision and any temporary cease and desist order by overnight commercial courier. The temporary cease and desist order shall be effective upon service.

**9850. Review by Hearing Panel**

At any time after the Office of Hearing Officers serves the Respondent with a temporary cease and desist order, a Party may apply to the Hearing Panel to have the order modified, set aside, limited, or suspended. The application shall set forth with specificity the facts that support the request. The Hearing Panel shall respond to the request in writing within ten days after receipt of the request, unless otherwise extended by the Hearing Officer with the consent of the Parties for good cause shown. The Hearing Panel's response shall be served on the Respondent via personal service, overnight commercial courier, or facsimile. If service is made by facsimile, the Office of Hearing Officers shall send an additional copy of the temporary cease and desist order by

overnight commercial courier. The filing of an application under this Rule shall not stay the effectiveness of the temporary cease and desist order.

**9860. Violation of Temporary Cease and Desist Orders**

A Respondent who violates a temporary cease and desist order imposed under this Rule Series may have its association or membership suspended or canceled under the Rule 9510 Series. The Chief Regulatory Officer of Nasdaq must authorize the initiation of any such proceeding in writing.

**9870. Application to Commission for Review**

Temporary cease and desist orders issued pursuant to this Rule Series constitute final and immediately effective disciplinary sanctions imposed by Nasdaq. The right to have any action under this Rule Series reviewed by the Commission is governed by Section 19 of the Exchange Act. The filing of an application for review shall not stay the effectiveness of the temporary cease and desist order, unless the Commission otherwise orders.