

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50099; File No. SR-NASD-2004-100)

July 27, 2004

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. to Amend the Rule 9600 Series

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 28, 2004, the National Association of Securities Dealers, Inc. (“NASD”), filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. On July 23, 2004, NASD filed Amendment No. 1 to the proposed rule change.³ Pursuant to Section 19(b)(3)(A)(iii) of the Act⁴ and Rule 19b-4(f)(6) thereunder,⁵ NASD has designated this proposal as non-controversial, which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

NASD proposes to amend its Rule 9600 Series to permit a Waiver Subcommittee of the National Adjudicatory Council (“NAC”) to affirm, modify, or reverse a decision of NASD’s

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Shirley H. Weiss, Associate General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated July 22, 2004 (“Amendment No 1”). In Amendment No. 1, NASD made several non-substantive changes to clarify the proposed rule text and the discussion of the proposed rule in the Purpose section.

⁴ 15 U.S.C. 78s(b)(3)(A)(iii).

⁵ 17 CFR 240.19b-4(f)(6).

Department of Member Regulation (“Department”) denying a request for a waiver from a required qualifications examination pursuant to NASD Rule 1070. The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in brackets.

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9600. PROCEDURES FOR EXEMPTIONS

9610. Application

(a) Where to File

A member seeking exemptive relief as permitted under Rules 1021, 1070, 2210, 2315, 2320, 2340, 2520, 2710, 2720, 2810, 2850, 2851, 2860, Interpretive Material 2860-1, 3010(b)(2), 3020, 3150, 3210, 3230, 3350, 8211, 8212, 8213, 11870, or 11900, or Municipal Securities Rulemaking Board Rule G-37, shall file a written application with the appropriate department or staff of [the Association] NASD and provide a copy of the application to the Office of General Counsel of NASD Regulation.

(b) and (c) No change

9620. Decision

After considering an application, NASD [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 NASD [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 the Office of General Counsel of NASD Regulation, with a copy of the notice also provided to the appropriate department or staff of [the Association] NASD. 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 NASD staff pursuant to Rule 9620 shall be decided by the National Adjudicatory 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 National Adjudicatory Council. [The National Adjudicatory Council may order oral argument.] If the Applicant does not want the [National Adjudicatory Council's] 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 National Adjudicatory Council or the Waiver Subcommittee of the National Adjudicatory Council, as the case may be, shall provide expedited review.

(c) No change

(d) [Appointment of Subcommittee] Oral Argument

(1) Subject to paragraph (2) below, [F]following the filing of a notice of appeal, the National Adjudicatory Council or Review Subcommittee may order oral argument and may designate a Subcommittee to hear [an] such oral argument[, if ordered]. The Subcommittee may consider any new evidence [that] if the Applicant can show good cause for not including it in its application, and the Subcommittee will recommend to the National Adjudicatory Council a disposition of all matters on appeal.

(2) With respect to exemptive relief requested under Rule 1070, the Waiver Subcommittee of the National Adjudicatory 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, [A]after considering all matters on appeal, and, as applicable, the Subcommittee's recommendation, the National Adjudicatory Council shall affirm, modify, or reverse the decision issued under Rule 9620. The National Adjudicatory 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 [the Association] NASD.

(2) With respect to exemptive relief requested under Rule 1070, after considering all matters on appeal, the Waiver Subcommittee of the National Adjudicatory 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 NASD. The Waiver Subcommittee shall retain the discretion to refer the appeal to the National Adjudicatory Council, in which case the National Adjudicatory Council shall act on such appeal pursuant to its authority under this 9600 Series.

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

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

NASD's Rule 9600 Series sets forth the procedures pursuant to which NASD members and their associated persons may seek exemptive relief from those NASD rules that allow NASD staff to grant exemptions. The purpose of this proposed rule change is to permit a subcommittee of the NAC, consisting of one industry and one non-industry NAC member, to affirm, modify, or reverse a decision of NASD's Department of Member Regulation denying a request for a waiver from an applicable qualification examination requirement and issue decisions in such matters

that will constitute final NASD action. The subcommittee will be appointed by the NAC annually.

Under NASD's Rule 9600 Series, an initial application for relief under any NASD rule for which exemptive relief may be granted is filed with the appropriate NASD department or staff. NASD staff examines the merits of the application, determines whether to grant or deny the application for relief, and communicates its decision to the applicant. If NASD staff denies the application, the applicant may appeal the adverse decision to the NAC, which may affirm, modify, or reverse the decision.

Currently, persons seeking a waiver of a required qualification examination under NASD Rule 1070 must file a written application with the Department, including a detailed statement of the grounds for the waiver. The Department examines the merits of the waiver request based on the NASD Qualification Examination Waiver Guidelines ("Guidelines") and communicates its decision to the applicant in a letter that grants or denies the waiver.⁶ The applicant may then appeal any adverse Department decision to the NAC, which considers the decision, determines whether to affirm, modify, or reverse the decision, and issues a decision that constitutes final NASD action.

After reviewing the qualifications examination waiver process, the NAC determined that a subcommittee of the NAC, rather than the full NAC, should have authority to consider appeals of adverse Department decisions with respect to NASD Rule 1070 and to issue final NASD decisions in such matters. In reaching this determination, the NAC recognized that a

⁶ The Guidelines, last updated on May 6, 2004, are available on NASD's web site at http://www.nasdr.com/5200_waiver.asp.

subcommittee would have the flexibility to review adverse Department decisions on a timelier basis than the full NAC, which generally meets only five times each year. NASD believes that any delay arising from the NAC's schedule may harm the associated person on whose behalf the NASD member is appealing, as well as the member, because the associated person is unable to function in the requested registered capacity while his or her firm's appeal is pending. The NAC also considered that its specialized expertise in reviewing disciplinary matters and policy issues is not required in the examination waiver process because appellate review of examination waivers is based on application of the Guidelines to the specific facts of the case. The subcommittee would retain discretion to refer an appeal to the full NAC when, for example, there is a split vote or the subcommittee believes that the issues in the appeal warrant consideration by the full NAC.

NASD is therefore proposing this rule change to permit a subcommittee of the NAC to review appeals of Department denials of requests to waive an applicable qualification examination requirement and to issue decisions that affirm, modify, or reverse such Department decisions. The subcommittee of the NAC would also be given the authority, where appropriate, to provide expedited review, order oral argument, and consider new evidence.

Finally, NASD no longer refers to itself or its subsidiary, NASD Regulation, Inc., using its full corporate name, "the Association," "the NASD" or "NASD Regulation, Inc." Instead, NASD uses "NASD" unless otherwise appropriate for corporate or regulatory reasons. Accordingly, the proposed rule change replaces several references to "Association" and "NASD Regulation" in the text of the proposed rule change with "NASD." NASD Rule 9630(a) appropriately designates "the Office of General Counsel of NASD Regulation."

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁷ which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change is consistent with the provisions of the Act noted above because it will enable individuals who are appealing denials of examination waivers to get a decision and become registered in their desired capacity more expeditiously, whether as a result of a waiver or of being required to take the necessary examination.

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

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

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

Written comments were neither solicited nor received with respect to the proposed rule change.

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

The foregoing proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Act⁸ and Rule 19b-4(f)(6) thereunder⁹ because the proposed rule change (1) does not significantly affect the protection of investors or the public interest, (2) does not

⁷ 15 U.S.C. 78q-3(b)(6).

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f)(6).

impose any significant burden on competition, and (3) by its terms, does not become operative for 30 days from the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. NASD has satisfied the five-day pre-filing requirement. NASD intends to make the proposed rule change operative on September 1, 2004.

At any time with 60 days of the filing of the proposed rule change, the Commission may summarily abrogate this proposal if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.¹⁰

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2004-100 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

¹⁰ See Section 19(b)(3)(C) of the Act, 15 U.S.C. 78s(b)(3)(C).

All submissions should refer to File Number SR-NASD-2004-100. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to

make available publicly. All submissions should refer to File Number SR-NASD-2004-100 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Jill M. Peterson
Assistant Secretary

¹¹ 17 CFR 200.30-3(a)(12).