

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-50446; File No. SR-NASD-2004-121)

September 24, 2004

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the National Association of Securities Dealers, Inc. to Include Failures to Timely Submit Amendments to Form U5 in its Minor Rule Violation Plan

I. Introduction

On August 11, 2004, the National Association of Securities Dealers, Inc. (“NASD”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² filed with the Securities and Exchange Commission (“Commission” or “SEC”) a proposed rule change to amend NASD Interpretative Material 9216 (“IM-9216”) (Violations Appropriate for Disposition Under the Plan Pursuant to SEC Rule 19d-1(c)(2)). NASD amended the proposal on August 17, 2004,³ and August 19, 2004.⁴ The proposed rule change, including Amendment Nos. 1 and 2, was published for notice and comment in the Federal Register on August 25, 2004.⁵ The Commission received one comment on the proposal.⁶ This order approves the proposed rule change, as amended.

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 August 16, 2004 (“Amendment No. 1”). In Amendment No. 1, NASD alphabetically rearranged the contents of Exhibit 3 to the proposed rule change. Exhibit 3 included comment letters NASD received from its members with respect to the proposed rule change.

⁴ See letter from Shirley H. Weiss, Associate General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated August 19, 2004 (“Amendment No. 2”). In Amendment No. 2, NASD made technical corrections to accurately reflect the existing text of IM-9216.

⁵ See Securities Exchange Act Release No. 50221 (August 19, 2004), 69 FR 52317.

⁶ See letter from Colon Brown, Jr., President, Brown & Brown Securities, Inc., dated September 9, 2004.

II. Description of the Proposed Rule Change

NASD proposes to amend IM-9216 to expand the list of violations eligible for disposition under NASD's Minor Rule Violation Plan ("MRVP") to include failure to timely submit amendments to Form U5, as required by Article V, Section 3(a) of the NASD By-Laws. The proposed rule change also changes references of "U-4" to "U4," to be consistent with the most recent amendments to that form.

NASD represents that the inclusion of the failure to timely submit amendments to Form U5 would be consistent with the current MRVP, which includes failure to timely submit amendments to Form U4, as required by Article V, Section 2(c) of the NASD By-Laws, and failure to timely submit amendments to Form BD, as required by Article IV, Section 1(c) of the NASD By-Laws. In addition, NASD believes that the addition of this violation to the MRVP would provide NASD staff with the ability to impose a meaningful sanction for violations that warrant more than a Letter of Caution but do not necessarily rise to a level meriting a full disciplinary proceeding.

III. Comment Received

The Commission received one comment on the proposal. The commenter, while supportive of NASD's efforts to regulate behavior that is contrary to the best interest of the investing public, questioned whether additional rules and more severe sanctions deter individuals with dishonest motives. The commenter also argued that increasing the severity of sanctions for minor or technical violations places additional undue burdens on many practitioners, and warned against increases in the level of fines.

NASD responded⁷ that the proposed rule change would not create any additional requirements on the securities industry. Further, NASD responded that the addition of this violation to the MRVP would not place additional undue burdens on the industry; rather, the addition would provide NASD staff with the ability to impose a meaningful sanction (currently limited to a maximum of \$2,500) on a member for failing to timely file an amendment to a Form U5 that warrants more than a Letter of Caution but less than a more expensive and time-consuming formal disciplinary proceeding.

IV. Discussion

After careful review of the proposed rule change, the comment letter, and NASD's response to comment letter, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.⁸ Specifically, the Commission believes that the proposed rule change is consistent with Section 15A(b)(6) of the Act,⁹ in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to protect investors and the public interest. Further, the Commission believes that the proposed rule change is consistent with Section 15A(b)(7) of the Act¹⁰ in that it provides for the appropriate discipline for violation of Commission rules and NASD rules. Moreover, the Commission

⁷ See letter from Shirley H. Weiss, Associate General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated September 22, 2004.

⁸ In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁹ 15 U.S.C. 78o-3(b)(6).

¹⁰ 15 U.S.C. 78o-3(b)(7).

believes the proposed rule change is consistent with Section 15A(b)(8) of the Act¹¹ in that it provides a fair procedure for the disciplining of NASD members and associated persons. Finally, the Commission finds that the proposed rule change is consistent with Rule 19d-1(c)(2) under the Act,¹² which governs minor rule violation plans. The Commission believes it is reasonable for NASD to be able to sanction late filings of Form U5 amendments pursuant to its MRVP. The Commission does not believe that the comment submitted raises any issue that would preclude approval of this proposal.

In approving the proposed rule change, the Commission in no way minimizes the importance of compliance with NASD rules, and all other NASD rules subject to the imposition of fines under the MRVP. The Commission believes that the violation of any self-regulatory organization's rules, as well as Commission rules, is a serious matter. However, in an effort to provide NASD with greater flexibility in addressing certain violations of NASD rules, the MRVP provides a reasonable means to address violations that do not rise to the level of requiring formal NASD disciplinary proceedings. The Commission expects that NASD will continue to conduct surveillance with due diligence, and make a determination based on its findings whether fines of more or less than the recommended amount are appropriate for violations of NASD rules under the MRVP, on a case by case basis, or if a violation requires formal disciplinary action.

¹¹ 15 U.S.C. 78o-3(b)(8).

¹² 17 CFR 240.19d-1(c)(2).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-NASD-2004-121) and Amendment Nos. 1 and 2 are approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland
Deputy Secretary

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).