

January 12, 2000

Katherine A. England
Assistant Director
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-1001
Mail Stop 10-1

**Re: File No. SR-NASD-00-02 - Amendments to NASD Code of Arbitration
Procedure Rules 10335 and 10205(h) Relating to Injunctive Relief**

Dear Ms. England:

Pursuant to Rule 19b-4, the enclosed rule filing replaces SR-NASD-98-49, which is hereby withdrawn. Also enclosed is a 3-1/2" disk containing the rule filing in Microsoft Word 7.0 to facilitate production of the Federal Register release.

If you have any questions, please contact Laura Leedy Gansler, Office of General Counsel, NASD Regulation, Inc., at (202) 728-8275; e-mail Laura.Gansler@nasd.com. The fax number of the Office of General Counsel is (202) 728-8264.

Very truly yours,

Joan C. Conley
Senior Vice President and
Corporate Secretary

Attachment

SECURITIES AND EXCHANGE COMMISSION

Washington, D. C.

Form 19b-4

Proposed Rule Change

by

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

Pursuant to Rule 19b-4 under the
Securities Exchange Act of 1934

1. Text of Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 (“Act”), the National Association of Securities Dealers, Inc. (“NASD” or “Association”), through its wholly owned subsidiary, NASD Regulation, Inc. (“NASD Regulation”), is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to amend NASD Rules 10335 and 10205 of the NASD’s Code of Arbitration Procedure. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

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RULES OF THE ASSOCIATION

* * *

10000. CODE OF ARBITRATION PROCEDURE

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10300. UNIFORM CODE OF ARBITRATION

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

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

(a) Temporary Injunctive Orders

(1) In industry or clearing disputes required to be submitted to arbitration pursuant to Rule 10201, parties may seek a temporary injunctive order, as defined in subparagraph (a)(2) of this Rule, from a court of competent jurisdiction. Parties to a pending arbitration may seek a temporary injunctive order from a court of competent jurisdiction even

if another party has already filed a claim arising from the same dispute in arbitration pursuant to this paragraph, provided that an arbitration hearing on a request for permanent injunctive relief has not yet commenced.

(2) For purposes of this Rule, temporary injunctive order means a temporary restraining order, preliminary injunction or other form of initial, temporary injunctive relief.

(3) A party seeking a temporary injunctive order from a court with respect to an industry or clearing dispute required to be submitted to arbitration pursuant to Rule 10201 shall simultaneously file with the Director a Statement of Claim requesting permanent relief with respect to the same dispute in the manner specified under this Code, and shall simultaneously serve the Statement of Claim requesting permanent relief on all parties.

Filings and service under this Rule may be made by facsimile, overnight delivery service or messenger. A party obtaining a court-issued temporary injunctive order shall notify the Director and the other parties of the issuance of the order within one business day.

(4) Unless otherwise stated, for purposes of computation of time under any paragraph of this Rule, any reference to days means calendar days, including Saturdays, Sundays or any NASD holiday. However, if a party must provide notice or a response to the Director and the day on which that notice or response to the Director must be given falls on a Saturday, Sunday or any NASD holiday, then the time period is extended until the next business day.

a) Hearing on Request for Permanent Injunctive Relief

(1) Scheduling of Hearing

If a court issues a temporary injunctive order, an arbitration hearing on the request for permanent injunctive relief shall commence within 15 days of the date the court issues the temporary injunctive order. If the 15th day falls on a Saturday, Sunday, or NASD holiday, the 15-day period shall expire on the next business day. The Director shall provide to all parties notice of the date, time and place of the hearing at least three days prior to the commencement of the hearing.

(2) Composition of Arbitration Panel

The hearing on the request for permanent injunctive relief shall be heard by a panel of three arbitrators, who shall either be all non-public arbitrators as defined in Rule 10308(a)(4), or, if the underlying dispute would be heard by a public arbitrator or panel consisting of a majority of public arbitrators under Rule 10202, a majority of public arbitrators as defined in Rule 10308(a)(5).

(3) Selection of Arbitrators and Chairperson

In cases in which all of the members of the arbitration panel are non-public under paragraph (b)(2) of this Rule, the Director shall generate and provide to the parties a list of seven arbitrators from a national roster of arbitrators. At least a majority of the arbitrators listed shall be lawyers specializing in injunctive relief. Each party may exercise one strike to the arbitrators on the list. Within three days of receiving the list, each party shall inform the Director which arbitrator, if any, it wishes to strike, and shall rank the remaining arbitrators in order of preference.

(B) In cases in which the panel of arbitrators consists of a majority of public arbitrators under paragraph (b)(2) of this Rule, the Director shall generate and provide to the parties a list of nine arbitrators from a national roster of arbitrators. At least a majority of the arbitrators listed shall be (1) public arbitrators and (2) lawyers specializing in injunctive relief. Each party may exercise two strikes to the arbitrators on the list. Within three days of receiving the list, each party shall inform the Director which arbitrators, if any, it wishes to strike, and shall rank the remaining arbitrators in order of preference.

(C) Each party shall inform the Director of its preference of chairperson of the arbitration panel by the close of business on the next business day after receiving notice of the panel members. If the parties do not agree on a chairperson within that time, the Director shall select the chairperson. In cases in which the panel consists of a majority of public arbitrators, the chairperson shall be one of the public arbitrators who is a lawyer specializing in injunctive relief. In cases in which the panel consists of non-public arbitrators, the chairperson shall be a lawyer specializing in injunctive relief. Whenever possible, the Director shall select as chairperson the lawyer specializing in injunctive relief whom the parties have ranked the highest.

(D) The Director may exercise discretionary authority and make any decision that is consistent with the purposes of this Rule and Rule 10308

to facilitate the appointment of arbitration panels and the selection of chairperson.

(4) Applicable Legal Standard

The legal standard for granting or denying a request for permanent injunctive relief is that of the state where the events upon which the request is based occurred, or as specified in an enforceable choice of law agreement between the parties.

(5) Effect of Pending Temporary Injunctive Order

Upon a full and fair presentation of the evidence from all relevant parties on the request for permanent injunctive relief, the panel may prohibit the parties from seeking an extension of any court-issued temporary injunctive order remaining in effect, or, if appropriate, order the parties jointly to move to modify or dissolve any such order. In the event that a panel's order conflicts with a pending court order, the panel's order will become effective upon expiration of the pending court order.

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

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

(B) The party seeking injunctive relief shall pay the expedited hearing fees pursuant to Rule 10205(h), or, where both sides seek such relief, both parties shall pay such fees. In either event, however, the arbitrator(s) shall have the authority to allocate such fees among the parties.

(C) Notwithstanding any other provision in the Code, the chairperson of the panel hearing a request for permanent injunctive relief pursuant to this Rule shall receive an honorarium of \$375 for each single session, and \$700 for each double session, of the hearing. Each other member of the panel shall receive an honorarium of \$300 for each single session, and \$600 for each double session, of the hearing . The parties shall equally pay the difference between these amounts and the amounts panel members and the chairperson receive under the Code pursuant to IM-10104. The arbitrators shall not reallocate such amount among the parties.

(c) Hearing on Damages or other Relief

(1) Upon completion of the hearing on the request for permanent relief, the panel, may, if necessary, set a date for any subsequent hearing on damages or other relief, which shall be held before the same panel of arbitrators and which shall include, but not be limited to, the same record.

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

(d) Effective Date

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

10200. INDUSTRY AND CLEARING CONTROVERSIES

10205. Schedule of Fees for Industry and Clearing Controversies

(h) [In each industry dispute or clearing controversy which is required to be submitted to arbitration before the Association as set forth in Rule 10201, above, where interim injunctive relief is requested or where a court has issued a temporary injunction and a party requests expedited proceedings, a total non-refundable surcharge of \$2,500 shall be paid by the party or parties requesting the expedited proceedings as provided by Rule 10335. For purposes of this Rule, where expedited proceedings are mandated by Rule 10335(g), the party that sought and was granted injunctive relief by a court shall be deemed a party requesting expedited proceedings. These surcharges shall be in addition to all other non-refundable filing fees, hearing deposits, or costs which may be required. The arbitrator may determine that a party shall reimburse another party for any non-refundable surcharge it has paid.] A party seeking a temporary injunctive order in court pursuant to Rule 10335 shall pay a total non-refundable surcharge of \$2,500 at the time the party files its Statement of Claim and Request for Permanent Relief as required by Rule 10335. Where more than one party seeks such relief, all such parties shall pay the surcharge. The arbitrator may determine that a party shall reimburse another party for part or all of any non-refundable surcharge it has paid. These surcharge fees shall be in addition to all other non-refundable filing fees, hearing deposits, or costs which may be required.

* * *

- (b) Not applicable.
- (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

(a) The proposed rule change was approved by the Board of Directors of NASD Regulation at its meeting on December 8, 1999, which authorized the filing of the rule change with the SEC. The Nasdaq Stock Market has been provided an opportunity to consult with respect to the proposed rule change, pursuant to the Plan of Allocation and Delegation of Functions by the NASD to its Subsidiaries. The NASD Board of Governors had an opportunity to review the proposed rule change at its meeting on December 9, 1999. No other action by the NASD is necessary for the filing of the proposed rule change. Section 1(a)(ii) of Article VII of the NASD By-Laws permits the NASD Board of Governors to adopt amendments to NASD Rules without recourse to the membership for approval.

The NASD will announce the implementation date of the proposed rule change in a Notice to Members to be published no later than 45 days following Commission notice of the effective date of the proposed rule change. The implementation date will be 60 days after the date of Commission approval.

(b) Questions regarding this rule filing may be directed to Laura Leedy Gansler, Assistant General Counsel, NASD Regulation, Office of General Counsel, at (202) 728-8275.

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

(a) Purpose

Rule 10335, the NASD's pilot injunctive relief rule, allows interim injunctive relief to be obtained in controversies involving member firms and associated persons in arbitration. The rule has primarily been used in "raiding cases," or cases involving the transfer of an employee to another firm. Rule 10335 took effect on January 3, 1996 for a one-year pilot

period. The Securities and Exchange Commission (“SEC”) has periodically extended the initial pilot period in order to permit NASD Regulation’s Office of Dispute Resolution to assess the effectiveness of the rule. The pilot rule is currently due to expire on January 5, 2001.

In November 1997, the NASD published Notice to Members 97-59, which sought comment on how the injunctive relief and expedited proceedings work and how they could be improved, and identified more than twenty specific questions based on previous comments received from users of the rule. Based on comments received in response to Notice to Members 97-59, the NASD filed a rule filing proposing to amend Rule 10335 and to make it a permanent part of the Code (SR-NASD-98-49) in July 1998. The NASD filed amendments and responses to comments received by the Commission regarding the rule filing in December 1998.

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

After more than six months of lengthy deliberation and careful compromise, the Subcommittee recommended withdrawing the previous rule filing and replacing it with the proposed amendments summarized below. The NAMC approved the proposed amendments

at its September 1999 meeting. The proposed amendments were then submitted to and approved by the Small Firm Advisory Board and the Board of Directors of NASD Regulation in December 1999.

Summary of the Current Rule

Rule 10335 currently provides, among other things, that:

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

Summary of Proposed Rule Change

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

Availability of Injunctive Relief in Arbitration

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

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

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

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

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

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

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

In cases in which the panel of arbitrators consists of a majority of public arbitrators, the Director of Arbitration would generate and provide to the parties a list of nine arbitrators

from a national roster of arbitrators. At least a majority of the arbitrators in those cases would be (1) public arbitrators and (2) lawyers specializing in injunctive relief. In those cases, the parties would be able to exercise two strikes to the arbitrators on the list.

Regardless of the number of strikes given to the parties, the rule would incorporate by reference other Code of Arbitration rules providing unlimited strikes for cause, so that parties would always be able to strike arbitrators who were unqualified due to conflicts of interest or for other reasons.

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

The timing of the hearing, the composition of the panel and the selection of the chairperson are the result of a carefully crafted compromise that is intended to balance the

need to ensure fairness for all parties with the need to commence the arbitration process as quickly as possible.

Applicable Legal Standard

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

Temporary Injunctive Order in Effect During Hearing

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

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

may order the parties to jointly move the court to modify or dissolve the pending court order. In the event that a panel's order conflicts with a pending court order, the panel's order will become effective upon expiration of the pending court order.

Fees

Expediting the hearing on the request for permanent relief and providing arbitrators who meet the special requirements of the rule may involve additional costs and expenses. The proposed amendments provide that the parties would jointly bear the travel-related costs and expenses of the arbitrators appointed to hear the request for permanent injunctive relief. The rule would also prohibit the arbitrators from reallocating such costs and expenses among the parties.

In addition, the rule provides that party seeking injunctive relief shall pay the expedited hearing fees pursuant to Rule 10205(h), or, where both sides seek such relief, both parties shall pay such fees. In either event, however, the arbitrators shall have the authority to allocate such fees among the parties.

Finally, the rule provides that, notwithstanding any other provision in the Code, the chairperson of the panel hearing a request for permanent injunctive relief pursuant to this Rule shall receive an honorarium of \$375 for each single session, and \$700 for each double session, of the hearing. Each other member of the panel shall receive an honorarium of \$300 for each single session, and \$600 for each double session, of the hearing. The parties shall equally pay the difference between these amounts and the amounts panel members and the chairperson receive would otherwise receive under the Code. The rule also provides that the arbitrators shall not reallocate these amounts among the parties.

Subsequent Hearings on Damages or Other Relief

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

Rule 10205(h)

Rule 10205(h), Schedule of Fees in Industry and Clearing Controversies, currently provides that when temporary injunctive relief is sought in arbitration or in court, a non-refundable surcharge of \$2,500 shall be paid by the party or parties requesting the expedited proceedings as provided in Rule 10335. To harmonize Rule 10205(h) with the proposed amendments to Rule 10335, the proposed rule change would also amend Rule 10205(h) to eliminate reference to the availability of temporary injunctive relief in arbitration, and to clarify the application of the provision to temporary injunctive orders sought in court.

(b) Statutory Basis

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that the Association's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The NASD believes that it is in the best interest of investors and the parties involved in intra-industry disputes to provide for fast and efficient resolution of requests for temporary injunctive relief, and to provide clear and simple rules governing the integration of court-ordered relief with the arbitration of the underlying disputes.

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

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

5. 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.

6. Extension of Time Period for Commission Action

NASD Regulation does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

1. Completed notice of proposed rule change for publication in the Federal Register.

Pursuant to the requirements of the Securities Exchange Act of 1934, NASD Regulation has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

NASD REGULATION, INC.

BY: _____
Joan C. Conley, Senior Vice President and
Corporate Secretary

Date: January 12, 2000

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- [leave space] ; File No. SR-NASD-00-02)

[leave space for date]

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

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 [leave space] , the National Association of Securities Dealers, Inc. (“NASD”), through its wholly owned subsidiary, NASD Regulation, Inc. (“NASD Regulation”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD Regulation. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

NASD Regulation is proposing to amend Rules 10335 and 10205(h) of the Code of Arbitration Procedure of the National Association of Securities Dealers, Inc. (“NASD” or “Association”), to simplify and clarify the procedures for obtaining injunctive relief in certain disputes subject to arbitration. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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RULES OF THE ASSOCIATION

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10000. CODE OF ARBITRATION PROCEDURE

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10300. UNIFORM CODE OF ARBITRATION

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

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

(a) Temporary Injunctive Orders

(1) In industry or clearing disputes required to be submitted to arbitration pursuant to Rule 10201, parties may seek a temporary injunctive order, as defined in subparagraph (a)(2) of this Rule, from a court of competent jurisdiction. Parties to a pending arbitration may seek a temporary injunctive order from a court of competent jurisdiction even if another party has already filed a claim arising from the same dispute in arbitration pursuant to this paragraph, provided that an arbitration hearing on a request for permanent injunctive relief has not yet commenced.

(2) For purposes of this Rule, temporary injunctive order means a temporary restraining order, preliminary injunction or other form of initial, temporary injunctive relief.

(3) A party seeking a temporary injunctive order from a court with respect to an industry or clearing dispute required to be submitted to arbitration pursuant to Rule 10201 shall simultaneously file with the Director a Statement of Claim requesting permanent relief with respect to the same dispute in the manner specified under this Code, and shall

simultaneously serve the Statement of Claim requesting permanent relief on all parties.

Filings and service under this Rule may be made by facsimile, overnight delivery service or messenger. A party obtaining a court-issued temporary injunctive order shall notify the Director and the other parties of the issuance of the order within one business day.

(4) Unless otherwise stated, for purposes of computation of time under any paragraph of this Rule, any reference to days means calendar days, including Saturdays, Sundays or any NASD holiday. However, if a party must provide notice or a response to the Director and the day on which that notice or response to the Director must be given falls on a Saturday, Sunday or any NASD holiday, then the time period is extended until the next business day.

(b) Hearing on Request for Permanent Injunctive Relief

(1) Scheduling of Hearing

If a court issues a temporary injunctive order, an arbitration hearing on the request for permanent injunctive relief shall commence within 15 days of the date the court issues the temporary injunctive order. If the 15th day falls on a Saturday, Sunday, or NASD holiday, the 15-day period shall expire on the next business day. The Director shall provide to all parties notice of the date, time and place of the hearing at least three days prior to the commencement of the hearing.

(2) Composition of Arbitration Panel

The hearing on the request for permanent injunctive relief shall be heard by a panel of three arbitrators, who shall either be all non-public arbitrators as defined in Rule 10308(a)(4), or, if the underlying dispute would be heard by a public arbitrator or panel consisting of a majority of public arbitrators under Rule 10202, a majority of public arbitrators as defined in Rule 10308(a)(5).

(3) Selection of Arbitrators and Chairperson

(A) In cases in which all of the members of the arbitration panel are non-public under paragraph (b)(2) of this Rule, the Director shall generate and provide to the parties a list of seven arbitrators from a national roster of arbitrators. At least a majority of the arbitrators listed shall be lawyers specializing in injunctive relief. Each party may exercise one strike to the arbitrators on the list. Within three days of receiving the list, each party shall inform the Director which arbitrator, if any, it wishes to strike, and shall rank the remaining arbitrators in order of preference.

(B) In cases in which the panel of arbitrators consists of a majority of public arbitrators under paragraph (b)(2) of this Rule, the Director shall generate and provide to the parties a list of nine arbitrators from a national roster of arbitrators. At least a majority of the arbitrators listed shall be (1) public arbitrators and (2) lawyers specializing in injunctive relief. Each party may exercise two strikes to the arbitrators on the list. Within three days of receiving the list, each party shall inform the Director which arbitrators, if any,

it wishes to strike, and shall rank the remaining arbitrators in order of preference.

(C) Each party shall inform the Director of its preference of chairperson of the arbitration panel by the close of business on the next business day after receiving notice of the panel members. If the parties do not agree on a chairperson within that time, the Director shall select the chairperson. In cases in which the panel consists of a majority of public arbitrators, the chairperson shall be one of the public arbitrators who is a lawyer specializing in injunctive relief. In cases in which the panel consists of non-public arbitrators, the chairperson shall be a lawyer specializing in injunctive relief. Whenever possible, the Director shall select as chairperson the lawyer specializing in injunctive relief whom the parties have ranked the highest.

(D) The Director may exercise discretionary authority and make any decision that is consistent with the purposes of this Rule and Rule 10308 to facilitate the appointment of arbitration panels and the selection of chairperson.

(4) Applicable Legal Standard

The legal standard for granting or denying a request for permanent injunctive relief is that of the state where the events upon which the request is based occurred, or as specified in an enforceable choice of law agreement between the parties.

(5) Effect of Pending Temporary Injunctive Order

Upon a full and fair presentation of the evidence from all relevant parties on the request for permanent injunctive relief, the panel may prohibit the parties from seeking an extension of any court-issued temporary injunctive order remaining in effect, or, if appropriate, order the parties jointly to move to modify or dissolve any such order. In the event that a panel's order conflicts with a pending court order, the panel's order will become effective upon expiration of the pending court order.

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

(A) The parties shall jointly bear the travel-related costs and expenses of the arbitrators appointed to hear the request for permanent injunctive relief.

The arbitrators shall not reallocate such costs and expenses among the parties.

(B) The party seeking injunctive relief shall pay the expedited hearing fees pursuant to Rule 10205(h), or, where both sides seek such relief, both parties shall pay such fees. In either event, however, the arbitrator(s) shall have the authority to allocate such fees among the parties.

(C) Notwithstanding any other provision in the Code, the chairperson of the panel hearing a request for permanent injunctive relief pursuant to this Rule shall receive an honorarium of \$375 for each single session, and \$700 for each double session, of the hearing. Each other member of the panel shall receive an honorarium of \$300 for each single session, and \$600 for each double session, of the hearing . The parties shall equally pay the difference between these amounts and the amounts panel members and the chairperson

receive under the Code pursuant to IM-10104. The arbitrators shall not reallocate such amount among the parties.

(c) Hearing on Damages or other Relief

(1) Upon completion of the hearing on the request for permanent relief, the panel, may, if necessary, set a date for any subsequent hearing on damages or other relief, which shall be held before the same panel of arbitrators and which shall include, but not be limited to, the same record.

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

(d) Effective Date

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

* * *

10200. INDUSTRY AND CLEARING CONTROVERSIES

10205. Schedule of Fees for Industry and Clearing Controversies

(h) [In each industry dispute or clearing controversy which is required to be submitted to arbitration before the Association as set forth in Rule 10201, above, where interim injunctive relief is requested or where a court has issued a temporary injunction and a party requests expedited proceedings, a total non-refundable surcharge of \$2,500 shall be paid by the party or parties requesting the expedited proceedings as provided by Rule 10335.

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

* * *

II. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE PURPOSE OF, AND STATUTORY BASIS FOR, THE PROPOSED RULE CHANGE

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

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

(a) **Purpose**

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

In November 1997, the NASD published Notice to Members 97-59, which sought comment on how the injunctive relief and expedited proceedings work and how they could be improved, and identified more than twenty specific questions based on previous comments received from users of the rule. Based on comments received in response to Notice to Members 97-59, the NASD filed a rule filing proposing to amend Rule 10335 and to make it a permanent part of the Code (SR-NASD-98-49) in July 1998. The NASD filed amendments and responses to comments received by the Commission regarding the rule filing in December 1998.

In response to additional formal and informal comments received after the amendments and responses to comments were filed, the Injunctive Relief Rule Subcommittee of NASD Regulation, Inc.'s National Arbitration and Mediation Committee ("NAMC") undertook to reconsider every aspect of the proposed rule change. In addition to its NAMC

members, the Subcommittee included representatives from member firms that had expressed an interest in the rule, including all of the retail firms that commented negatively on the prior rule filing.

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

Summary of the Current Rule

Rule 10335 currently provides, among other things, that:

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

Summary of Proposed Rule Change

The NASD continues to believe that it is important that parties be able to obtain immediate temporary injunctive relief in cases that warrant such relief. However, users of the

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

Availability of Injunctive Relief in Arbitration

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

Under the proposed amendments, parties would still be able to seek temporary injunctive relief in a court of competent jurisdiction. The rule would continue to require parties seeking such relief to simultaneously file a Statement of Claim in arbitration

requesting permanent relief regarding the same dispute. This requirement reflects the intent of the rule to provide parties with an ability to seek immediate relief, but to ensure that the underlying disputes remain subject to arbitration.

One question that has arisen in the application of the pilot rule is whether parties can seek temporary injunctive relief in court even if a Statement of Claim has already been filed in arbitration regarding the underlying dispute. Under the proposed amendments, parties to a pending arbitration would be able to seek a temporary injunctive order in court even if another party has already filed a claim arising from the same dispute in arbitration, provided that an arbitration hearing on a request for permanent injunctive relief had not yet commenced.

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

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

In cases in which all of the members of the arbitration panel are non-public, the Director of Arbitration would generate and provide to the parties a list of seven arbitrators

from a national roster of arbitrators, at least a majority of whom would be lawyers specializing in injunctive relief. Each party would be able to exercise one strike to the arbitrators on the list.

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

Under the proposed amendments, the parties would be required to inform the Director of their preference of chairperson of the arbitration panel by the close of business on the next business day after receiving notice of the panel members. If the parties did not agree on a chairperson within that time, the Director would select the chairperson. In cases in which the panel consists of a majority of public arbitrators, the chairperson would be one of the public arbitrators who is a lawyer specializing in injunctive relief. In cases in which the panel consists of non-public arbitrators, the chairperson would be a lawyer specializing in injunctive relief. Whenever possible, the Director would select as chairperson the lawyer specializing in injunctive relief whom the parties have ranked the highest. The rule would also provide that the Director of Arbitration may exercise discretionary authority and make

any decision that is consistent with the purposes of the rule and the arbitrator selection rule (Rule 10308) to facilitate the appointment of arbitration panels and the selection of chairperson.

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

Applicable Legal Standard

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

Temporary Injunctive Order in Effect During Hearing

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

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

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

Fees

Expediting the hearing on the request for permanent relief and providing arbitrators who meet the special requirements of the rule may involve additional costs and expenses. The proposed amendments provide that the parties would jointly bear the travel-related costs and expenses of the arbitrators appointed to hear the request for permanent injunctive relief. The rule would also prohibit the arbitrators from reallocating such costs and expenses among the parties.

In addition, the rule provides that party seeking injunctive relief shall pay the expedited hearing fees pursuant to Rule 10205(h), or, where both sides seek such relief, both parties shall pay such fees. In either event, however, the arbitrators shall have the authority to allocate such fees among the parties.

Finally, the rule provides that, notwithstanding any other provision in the Code, the chairperson of the panel hearing a request for permanent injunctive relief pursuant to this Rule shall receive an honorarium of \$375 for each single session, and \$700 for each double

session, of the hearing. Each other member of the panel shall receive an honorarium of \$300 for each single session, and \$600 for each double session, of the hearing. The parties shall equally pay the difference between these amounts and the amounts panel members and the chairperson receive would otherwise receive under the Code. The rule also provides that the arbitrators shall not reallocate these amounts among the parties.

Subsequent Hearings on Damages or Other Relief

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

Rule 10205(h)

Rule 10205(h), Schedule of Fees in Industry and Clearing Controversies, currently provides that when temporary injunctive relief is sought in arbitration or in court, a non-

refundable surcharge of \$2,500 shall be paid by the party or parties requesting the expedited proceedings as provided in Rule 10335. To harmonize Rule 10205(h) with the proposed amendments to Rule 10335, the proposed rule change would also amend Rule 10205(h) to eliminate reference to the availability of temporary injunctive relief in arbitration, and to clarify the application of the provision to temporary injunctive orders sought in court.

(b) Statutory Basis

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that the Association's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The NASD believes that it is in the best interest of investors and the parties involved in intra-industry disputes to provide for fast and efficient resolution of requests for temporary injunctive relief, and to provide clear and simple rules governing the integration of court-ordered relief with the arbitration of the underlying disputes.

(B) Self-Regulatory Organization's Statement on Burden on Competition

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

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

Written comments were neither solicited nor received.

III. DATE OF EFFECTIVENESS OF THE PROPOSED RULE CHANGE AND TIMING FOR COMMISSION ACTION

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- A. by order approve such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. SOLICITATION OF COMMENTS

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by [insert date 21 days from the date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Jonathan G. Katz
Secretary