

May 17, 2001

Florence Harmon
Senior Special Counsel
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-1001

**Re: File No. SR-NASD-00-02 - Amendments to NASD Code of Arbitration Procedure
Rules 10335 and 10205(h) Relating to Injunctive Relief – Amendment No. 4 and Extension of
Time for Commission Action**

Dear Ms. Harmon:

NASD Dispute Resolution, Inc. hereby amends the above-referenced rule filing as described below, and extends the time for Commission action on the above-referenced rule filing to June 18, 2001.

Amendments to the Text of the Proposed Rule Language

Timing of Requests for Temporary Injunctive Orders in Court

The proposed rule provides that parties to a pending arbitration may seek temporary injunctive relief in court even if another party has already filed a claim arising from the same dispute in arbitration, provided that a hearing on the request for permanent injunctive relief has not yet begun. NASD Dispute Resolution is amending this provision to clarify that this provision refers to the hearing on the merits of the request for permanent injunctive relief, and not to any pre-hearing conferences related to the hearing on the request for permanent injunctive relief. In addition, the Commission staff has commented that it believes that the word “commence” is vague and confusing as used throughout the proposed rule. Therefore, paragraph (a)(1) of the proposed rule is amended as follows:

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 paragraph (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 pursuant to paragraph (b) of this Rule has not yet begun [commenced].

Content and Service of Statement of Claims

The Commission staff has suggested that the text of the proposed rule be amended to clarify that when parties file a Statement of Claim in arbitration pursuant to paragraph (a)(3) of the proposed rule, the Statement of Claim must include requests for all permanent relief, whether injunctive or otherwise. The staff has also suggested that the same provision be amended to clarify that service under the rule must be made on all parties at the same time and in the same manner, unless the parties agree otherwise. Therefore, paragraph (a)(3) of the proposed rule is amended as follows:

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 injunctive and all other relief with respect to the same dispute in the manner specified under this Code, and shall simultaneously serve the Statement of Claim requesting such [permanent] relief on all parties. Filings and service under this Rule may be made by facsimile, overnight delivery service or messenger. Service shall be made on all parties at the same time and in the same manner unless the parties agree otherwise. 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.

Consecutive Hearing Days

The Commission staff has suggested that to further ensure prompt presentation of evidence in such cases, the proposed rule should be amended to provide that, to the extent possible, hearings on requests for permanent injunctive relief lasting more than one day should be held on consecutive days, unless the parties agree otherwise. As noted above, the staff has also suggested that the word “commence” be replaced throughout the rule. Therefore, at the staff’s suggestion, paragraph (b)(1) is amended as follows:

If a court issues a temporary injunctive order, an arbitration hearing on the request for permanent injunctive relief shall begin [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. Unless the parties agree otherwise, a hearing lasting more than one day shall be held on consecutive days when reasonably possible. The Director shall provide to all parties

notice of the date, time and place of the hearing at least three days prior to the beginning [commencement] of the hearing.

Panel Composition

Under the proposed rule, requests for permanent injunctive and other relief shall be heard by a panel of three arbitrators. The proposed rule provides that in cases in which all of the members of the arbitration panel are non-public, the Director shall generate and provide to the parties a list of seven arbitrators, at least a majority of whom must be lawyers with experience litigating cases involving injunctive relief. In such cases, each party may 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 shall generate and provide to the parties a list of nine arbitrators, at least a majority of whom shall be (1) public arbitrators and (2) lawyers with experience litigating cases involving injunctive relief. In such cases, each party may exercise two strikes to the arbitrators on the list.

Several commenters, and the Commission staff, have expressed concern that the requirement that a majority of the arbitrators on the lists be lawyers with experience litigating cases involving injunctive relief would result in arbitration panels with bias in favor of member firms. NASD Dispute Resolution continues to believe that the list should include some lawyers who have experience with injunctive relief cases. However, to address the concerns raised by commenters and Commission staff, NASD Dispute Resolution is amending the proposed rule to provide that some, but not a majority, of the arbitrators on the selection lists provided to the parties be lawyers with experience litigating cases involving injunctive relief.

In non-public cases, therefore, at least three, rather than a majority, of the seven listed arbitrators, would be required to have such experience. Specifically, paragraph (b)(3)(A) is amended as follows:

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 three [a majority] of the arbitrators listed shall be lawyers with experience litigating cases involving 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.

Likewise, in public cases, at least four, rather than a majority, of listed arbitrators, would be lawyers with experience litigating cases involving injunctive relief. Therefore, paragraph (b)(3)(B) is amended as follows:

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)] at least four of the arbitrators listed shall be lawyers with experience litigating cases involving 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.

Finally, the provisions relating to the selection of chairperson must be amended to reflect the changes to the panel composition provisions described above. Therefore, paragraph (b)(3)(C) is amended as follows:

(i) 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.

(ii) 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 Director shall select a public arbitrator as chairperson. [shall be one of the public arbitrators who is a lawyer with experience in cases involving injunctive relief. In cases in which the panel consists of non-public arbitrators, the chairperson shall be a lawyer with experience in cases involving injunctive relief.] Whenever possible, the Director shall select as chairperson the lawyer with experience litigating cases involving injunctive relief whom the parties have ranked the highest.

Reallocation of Fees, Expenses and Costs

The proposed rule change provides that the parties shall jointly bear travel costs and expenses, expedited hearing fees, and additional honoraria required by the rule. In some instances, the proposed rule currently prohibits arbitrators from reallocating some of these costs, expenses, fees and honoraria among the parties. In response to comments from the Commission staff, NASD Dispute Resolution is amending the text of the proposed rule change to delete all prohibitions on reallocation of the costs, expenses, fees and honoraria. In addition, the rule language is amended to expressly provide that the arbitrators may reallocate these costs, expenses and honoraria in the award.

NASD Dispute Resolution is also amending the provisions relating to travel costs and expenses to clarify that the parties are only responsible for reasonable travel-related costs and expenses incurred by arbitrators who are required to travel to a hearing location other than their primary hearing location(s) in order to participate in the hearing on the request for permanent injunctive relief or subsequent hearings on other forms of relief.

Specifically, paragraph (b)(6)(A) is amended as follows:

The parties shall jointly bear [the] reasonable travel-related costs and expenses incurred by arbitrators who are required to travel to a hearing location other than their primary hearing location(s) in order to participate in [of the arbitrators appointed to hear] the hearing on the request for permanent injunctive relief. The arbitrators may reallocate such costs and expenses among the parties in the award.

In addition, paragraph (b)(6)(B) is amended as follows:

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) may [shall have the authority to] reallocate such fees among the parties in the award.

In addition, paragraph (b)(6)(C) is amended as follows:

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 may [shall not] reallocate such amount among the parties in the award.

Finally, paragraph (c)(2) is amended as follows:

The parties shall jointly bear [the] reasonable travel-related costs and expenses incurred by arbitrators who are required to travel to a hearing location other than their primary hearing location(s) in order to participate in [of the arbitrators resulting from] any subsequent hearings on damages or other relief. The arbitrators may [shall not] reallocate such costs and expenses among the parties in the award.

Amendments to the Text of the Rule Filing

Hearing on Requests for Permanent Injunctive Relief

The proposed rule change would provide that a hearing on a request for permanent relief must commence within 15 days of the issuance of a court-issued temporary injunctive order. In the event that the 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 jointly to move the court to modify or dissolve the pending court order.

As discussed in previous filings pertaining to the proposed rule change, a number of commenters have expressed concern that prohibiting arbitrators from ordering parties to seek modification or dissolution of a pending court order before a “full and fair presentation” of the evidence deprives arbitrators of their authority to order immediate permanent injunctive relief.

Also as noted in previous filings pertaining to the proposed rule change, NASD Dispute Resolution does not believe that arbitration panels have the authority to dissolve, modify or supersede a pending court order. 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. However, NASD Dispute Resolution believes that arbitrators should not exercise this authority until they have heard a full and fair presentation of the evidence regarding a request for permanent injunctive relief. This ensures that arbitrators will be in a position to make an informed decision before ordering parties to take the extraordinary step of jointly asking a court to modify or dissolve a pending court order.

NASD Dispute Resolution believes that some of the criticism of this provision may stem from confusion regarding its application and scope. The provision would not prevent arbitrators from ordering at any time permanent injunctive relief that did not conflict with a pending court order. Furthermore, because the “full and fair presentation of the evidence” requirement only applies when a court order is in effect, it would not apply to court orders that expire by their own terms when arbitration on the merits of the underlying dispute begins, or that otherwise contain provisions that confer authority on arbitrators to modify, amend, or dissolve the order.

To more fully explain this provision, the text of the proposed rule filing is amended by modifying the last paragraph of the section headed “Temporary Injunctive Order in Effect During Hearing” as follows:

NASD Dispute Resolution 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] if a court-issued temporary

injunctive order is still in effect at the time the hearing on the request for permanent injunctive relief begins, the arbitrators may not order parties to jointly move the court to modify or dissolve the order, or prohibit a party from seeking an extension of the court order, until the arbitrators have heard a full and fair presentation of the evidence from all relevant parties. This provision does not limit the authority of arbitrators to order any permanent relief, injunctive or otherwise, that does not conflict with a pending court order. Moreover, because this provision only applies to pending court orders, it does not apply to instances in which a court order expires by its own terms when arbitration begins, or explicitly confers authority on arbitrators to modify, amend or dissolve the order. [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.] The proposed rule also makes clear that, i[I]n 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.

Subsequent Hearings On Damages or Other Relief

The proposed rule provides that, after the expedited hearing on a request for permanent injunctive relief, the panel may determine that additional hearings are necessary to decide requests for damages and other relief. NASD Dispute Resolution is amending the text of the rule filing to clarify that the arbitrators are not required to schedule such hearings, but may do so if they decide that, given the expedited nature of the hearing on the request for permanent injunctive relief, additional time is necessary to allow the parties to gather and present all relevant evidence on any remaining issues. Specifically, the following section is added after the section entitled "Temporary Injunctive Order in Effect During Hearing."

Subsequent Hearings on Damages and Other Relief

Parties seeking temporary injunctive relief in court are required to simultaneously file a Statement of Claim in arbitration seeking permanent injunctive and all other relief, including any damages. Arbitrators may decide requests for damages and other relief on the basis of the evidence presented at the hearing on the request for permanent injunctive relief. However, because the hearing on the request for permanent injunctive relief is required to be held on an expedited basis, there may be cases in which the parties or the arbitrators feel that more time is needed to allow the parties to gather or present additional evidence relating to requests for damages or other relief. The proposed rule provides that, in such cases, the arbitrators may decide to hold subsequent hearing sessions before ruling on issues of damages or other relief. If the arbitrators decide that subsequent hearing sessions are necessary, the arbitrators shall decide the time and place of the subsequent hearings. Any such hearings shall be before the same panel if reasonably possible, and shall include, but not be limited to, the same record.

If you have any questions, please contact me at (202) 728-8275; e-mail
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Very truly yours,

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