

INFORMATIONAL

Imposition And Collection Of Monetary Sanctions

NASD Regulation Adopts Policy Regarding Imposition And Collection Of Monetary Sanctions**SUGGESTED ROUTING**

The Suggested Routing function is meant to aid the reader of this document. Each NASD member firm should consider the appropriate distribution in the context of its own organizational structure.

- Legal & Compliance
- Senior Management

KEY TOPICS

- Disciplinary Actions

Executive Summary

The purpose of this *Notice to Members* is to give National Association of Securities Dealers, Inc. (NASD[®]) members notice of the policies adopted by the National Adjudicatory Council (NAC) at its June 1999 meeting regarding the imposition and collection of monetary sanctions imposed in disciplinary matters. This policy applies to all Letters of Acceptance, Waiver, and Consent (AWCs) and Offers of Settlement executed by respondents beginning on November 1, 1999, and to all NAC, Hearing Panel, and default decisions decided and issued on or after November 1, 1999. Members are directed to attach this *Notice to Members* as an amendment to the *NASD Sanction Guidelines*.

Questions/Further Information

Questions concerning this *Notice to Members* may be directed to Shirley H. Weiss, Associate General Counsel, Office of General Counsel, NASD Regulation, Inc., (NASD RegulationSM) at (202) 728-8844.

Discussion

The NAC has adopted policies regarding the imposition and collection of monetary sanctions (restitution, disgorgement of ill-gotten gains, and fines). As discussed in the *NASD Sanction Guidelines*, the overriding and ultimate purpose of any disciplinary sanction is to remedy misconduct, deter future misconduct, and protect the investing public. The policies adopted by the NAC, which apply equally to both settled¹ and litigated disciplinary matters, identify the circumstances under which NASD Regulation (including staff and adjudicators) will impose and collect monetary sanctions.

The policies described in this *Notice to Members* are guided by the following principles:

- * In certain categories of cases, if an individual is barred, NASD Regulation generally will not impose a fine.
- * Where quantifiable customer harm has been demonstrated, or a respondent has been unjustly enriched, NASD Regulation generally will order restitution or disgorgement.
- * In sales practice cases where there has been widespread, significant, and identifiable customer harm or the respondent has retained substantial ill-gotten gains, NASD Regulation generally will require the payment of restitution and disgorgement and will also pursue the collection of any fine.
- * Where there has been no widespread customer harm, and individuals are barred or suspended, NASD Regulation may forego the imposition of a fine and require that any order of restitution or disgorgement be satisfied upon the individual's re-entry into the securities industry. This will allow NASD Regulation to act quickly to get those persons out of the securities industry.
- * As required by the Securities and Exchange Commission, NASD Regulation will consider a respondent's inability to pay when imposing monetary sanctions.

The policies described in this *Notice to Members* will be applied in a manner consistent with the *NASD Sanction Guidelines*, that is, they are advisory and are intended

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to provide direction to NASD staff and adjudicators in determining appropriate sanctions consistently and fairly.

NASD Regulation will consider the following factors in determining the imposition and collection of monetary sanctions.

Monetary Sanctions

In the following types of cases, if an individual is barred and there has been no customer loss, NASD Regulation generally will not impose a fine:

- failure to respond violations under Rule 8210
- exam cheating cases
- private securities transactions of an associated person under Rule 3040 (in which no disgorgement or restitution is ordered)

In the following types of cases, if an individual is barred, NASD Regulation generally will order restitution or disgorgement of ill-gotten gains where appropriate, but generally will not otherwise impose a fine.

- conversion
- forgery
- sales practice and private securities transaction cases where only one or a small number of customers are harmed

NASD Regulation generally will require the payment of restitution and disgorgement and will also pursue the collection of any fine in sales practice cases, even if an individual is barred, if:

- there has been widespread, significant, and identifiable customer harm; or
- the respondent has retained substantial ill-gotten gains

In other sales practice cases and in cases involving violations other than those mentioned above, NASD Regulation may exercise its discretion and make a monetary sanction payable when a respondent re-enters the securities industry. NASD Regulation will consider such factors as whether:

- the respondent is suspended or not in the industry at the time the sanction is imposed
- only one or a small number of customers are harmed

In such cases, the respondent will not be eligible for association with a member firm until the monetary sanction is satisfied.

NASD Regulation staff and adjudicators will have the discretion to impose post-judgment interest on restitution.

Inability To Pay Monetary Sanctions

NASD Regulation will consider a respondent's inability to pay in imposing monetary sanctions under the following circumstances:

- Respondents will be required to document their financial status at the time the settlement is negotiated or at the Hearing Panel level if litigated. NASD Regulation staff will provide standard documents to respondents for this purpose.
- If respondents do not raise the issue of inability to pay at the

time the settlement is negotiated (or in a litigated matter during the proceedings before a Hearing Panel), they will be considered to have waived the issue, and they will not be permitted to raise the issue of inability to pay at a later time.

- If NASD Regulation staff or adjudicators determine that a respondent has demonstrated an inability to pay part or all of a monetary sanction, they may modify the monetary sanction.
- Settlement documents and decisions will indicate whether a monetary sanction was modified on the basis of a respondent's demonstrated financial inability to pay.

Payment

- A respondent who is permitted to use an installment plan will also be required to execute a promissory note that tracks the installment plan. Installment plans generally will be limited to two years. In extraordinary cases, installment plans may be extended to not more than five years. The amount and timing of installment payments will be set forth in the settlement documents.
- Respondents may also charge monetary sanctions to a credit card.

These policies apply to all AWCs, Minor Rule Violation plan settlements, and Offers of Settlement executed by respondents beginning on November 1, 1999, and to all NAC, Hearing Panel decisions, and default decisions decided and issued on or after November 1, 1999.

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Members are directed to attach this *Notice to Members* as an amendment to their *NASD Sanction Guidelines*.

Endnote

¹Settlements include Letters of Acceptance, Waiver, and Consent; Offers of Settlement; and settlements under the Minor Rule Violation plan.

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