

NASD Notice to Members 99-68

NASD Regulation Announces Its Policy On Enforcement Of Disciplinary Sanctions During The Pendency Of Circuit Court Appeals

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Executive Summary

NASD Regulation, Inc. (NASD Regulation®) announces its policy to refrain from enforcing disciplinary sanctions, other than bars and expulsions, during the pendency of appeals of National Association of Securities Dealers, Inc. (NASD®) disciplinary cases from the Securities and Exchange Commission (SEC) to Circuit Courts of Appeal.

Questions regarding this *Notice to Members* may be directed to Carla Carloni, Assistant General Counsel, Office of General Counsel, NASD Regulation, at (202) 728-8019.

Discussion

In accordance with long-standing practice, NASD Regulation does not bill respondents for disciplinary fines during the course of Circuit Court appeals, notwithstanding whether sanctions are stayed in the matter. In the past, however, NASD Regulation enforced suspensions in cases in which sanctions were not stayed pending Circuit Court appeals. Thus, while NASD Regulation refrained from billing respondents for fines imposed in NASD disciplinary cases pending appeal to Circuit Courts of Appeal, it imposed suspensions and requalification requirements in the very same cases.

In order to harmonize NASD Regulation's sanction enforcement efforts in cases pending appeal to Circuit Courts of Appeal, NASD Regulation has revisited its policy and concluded that the most efficient and fairest method of dealing with the enforcement of sanctions at the Court of Appeals level (and during the pendency of petitions for certiorari or ongoing proceedings before the U.S. Supreme Court) is to follow the policy that it currently follows at the SEC appellate level, *i.e.*, enforce

only bars and expulsions (absent a stay), but refrain from enforcing all other sanctions, regardless of whether a stay is in effect. This method ensures investor protection by enforcing bars and expulsions while fairly providing respondents with the opportunity to pursue appeals without the threat of the enforcement of other sanctions.

Legally, NASD Regulation can enforce sanctions absent a stay while a matter is pending appeal in a Circuit Court of Appeals. NASD Regulation has concluded, however, that the fairer and more efficient policy is to refrain from doing so for the following reasons:

- 1) If a Court of Appeals reverses SEC/NASD findings, the sanctions may be eliminated. If an individual or a firm is forced to serve a suspension or to requalify while an appeal is pending, he/she will have done so for naught if the sanction ultimately is eliminated. NASD cannot return suspension time to an individual or a member firm if the findings are reversed, so the individual or firm loses that time in the industry.
- 2) Consistency is important in the area of enforcement of sanctions. Since NASD Regulation refrains from collecting fines and revoking respondents for failing to pay fines while an appeal is pending in a Circuit Court of Appeals, it is inconsistent to require that those same respondents serve suspensions while a matter is pending appeal.
- 3) An across-the-board policy to refrain from enforcing all sanctions (except bars and expulsions) while cases are on appeal will ensure that NASD Regulation does not inadvertently violate a stay

order. Although ideally NASD Regulation receives timely notice of all stay orders, since it is not always noticed as a party to Circuit Court appeals, there is a danger that timely notice may not be forthcoming.

- 4) The SEC readily grants stay requests when matters are pending appeal in a Circuit Court of Appeals. In many cases, a stay already is in

effect, so this policy change should not drastically alter the current state of affairs with respect to the enforcement of sanctions.

- 5) Since NASD Regulation always enforces bars and expulsions (absent a stay), the investing public is protected in cases involving more egregious misconduct.

NASD Regulation believes that this policy change will ensure the fair and efficient treatment of all disciplinary respondents with respect to the enforcement of sanctions pending Circuit Court appeals.

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