

Notice to Members

AUGUST 2004

SUGGESTED ROUTING

Legal & Compliance
Registered Representatives
Senior Management

KEY TOPICS

National Adjudicatory Council
Qualifications Examinations
Rule 1070
Rule 9600 Series

GUIDANCE

Appeals of Qualification Examination Waiver Requests

SEC Announces Immediate Effectiveness of Amendments to the Rule 9600 Series Establishing Waiver Subcommittee of the National Adjudicatory Council;
Effective Date: September 1, 2004

Executive Summary

On July 27, 2004, the Securities and Exchange Commission (SEC) announced the immediate effectiveness of amendments to the Rule 9600 Series (Procedures for Exemptions) establishing a Waiver Subcommittee of the National Adjudicatory Council (NAC). Effective September 1, 2004, the Waiver Subcommittee, rather than the full NAC, will have the authority to affirm, modify, or reverse a decision of NASD's Department of Member Regulation (Member Regulation) denying a request for a waiver from a required qualifications examination pursuant to NASD Rule 1070.¹

Questions/Further Information

Questions concerning this *Notice* may be directed to Shirley H. Weiss, Associate General Counsel, Office of General Counsel, Regulatory Policy and Oversight, at (202) 728-8844.

Discussion

NASD's Rule 9600 Series sets forth the procedures under which NASD members and their associated persons may seek exemptive relief from the NASD rules enumerated in Rule 9610(a). Among those rules is Rule 1070, which governs qualification examinations and waiver of requirements. As a result of this rule change, a subcommittee of the National Adjudicatory Council (NAC), consisting of one industry NAC member and one non-industry NAC member, will have the authority to affirm, modify, or reverse a Member Regulation decision denying a request for a waiver from an applicable qualification examination requirement and issue decisions in such matters that will constitute final NASD action. The subcommittee will be appointed by the NAC annually and will be known as the "Waiver Subcommittee."

Under the Rule 9600 Series, an initial application for relief under any NASD rule for which exemptive relief may be granted, including Rule 1070, is filed with the appropriate NASD department or staff. NASD staff examines the merits of the application, determines whether to grant or deny the application for relief, and communicates its decision to the applicant. If NASD staff denies the application, the applicant may appeal the adverse decision to the NAC, which may affirm, modify, or reverse the decision.

Persons seeking a waiver of a required qualification examination under Rule 1070 must file a written application with Member Regulation, including a detailed statement of the grounds for the waiver. Member Regulation staff examines the merits of the waiver request based on the NASD Qualification Examination Waiver Guidelines (Guidelines) and communicates its decision to the applicant in a letter that grants or denies the waiver.² Prior to these amendments, an applicant who chose to appeal a Member Regulation decision denying a request for an exam waiver was required to appeal the decision to the NAC, which would consider the decision, determine whether to affirm, modify, or reverse the decision, and issue a decision that would constitute final NASD action.

After reviewing the qualifications examination waiver process, the NAC determined that a subcommittee of the NAC, rather than the full NAC, should have authority to consider appeals of adverse Member Regulation decisions with respect to Rule 1070 and issue final NASD decisions in such matters. In reaching this determination, the NAC recognized that a subcommittee would have the flexibility to review such decisions on a timelier basis than the full NAC, which generally meets only five times each year. The NAC considered that any delay arising from the NAC's schedule may harm the associated person on whose behalf the NASD member is appealing, as well as the member, because the associated person is unable to function in the requested registered capacity while his or her firm's appeal is pending. The NAC also considered that its specialized expertise in reviewing disciplinary matters and policy issues is not required in the examination waiver process because appellate review of examination waivers is based on application of the Guidelines to the specific facts of the case.

The Rule 9600 Series, as amended, will permit the Waiver Subcommittee to review appeals of Department denials of requests to waive an applicable qualification examination requirement and issue decisions that affirm, modify, or reverse such Department decisions. The Waiver Subcommittee will also have the authority, where appropriate, to provide expedited review, order oral argument, and consider new evidence. The Waiver Subcommittee will retain discretion to refer an appeal to the full NAC when, for example, there is a split vote or the subcommittee believes that the issues in the appeal warrant consideration by the full NAC.

Endnotes

- 1 See SEC Release No. 34-50099 (July 27, 2004), 69 FR 46607 (Aug. 3, 2004) (File No. SR-NASD-2004-100).
- 2 The Guidelines, last updated on April 22, 2003, are available on NASD's Web site at http://www.nasdr.com/5200_waiver.asp.

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ATTACHMENT A

Below is the text of the proposed rule change. Additions are underlined; deletions are in brackets.

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9600. PROCEDURES FOR EXEMPTIONS

9610. Application

(a) Where to File

A member seeking exemptive relief as permitted under Rules 1021, 1070, 2210, 2315, 2320, 2340, 2520, 2710, 2720, 2810, 2850, 2851, 2860, Interpretive Material 2860-1, 3010(b)(2), 3020, 3150, 3210, 3230, 3350, 8211, 8212, 8213, 11870, or 11900, or Municipal Securities Rulemaking Board Rule G-37, shall file a written application with the appropriate department or staff of [the Association] NASD and provide a copy of the application to the Office of General Counsel of NASD Regulation.

(b) and (c) No change

9620. Decision

After considering an application, NASD [Regulation] staff shall issue a written decision setting forth its findings and conclusions. The decision shall be served on the Applicant pursuant to Rules 9132 and 9134. After the decision is served on the Applicant, the application and decision shall be publicly available unless NASD [Regulation] staff determines that the Applicant has shown good cause for treating the application or decision as confidential in whole or in part.

9630. Appeal

(a) Notice

An Applicant may file a written notice of appeal within 15 calendar days after service of a decision issued under Rule 9620. The notice of appeal shall be filed with the Office of General Counsel of NASD Regulation, with a copy of the notice also provided to the appropriate department or staff of [the Association] NASD. The notice of appeal shall contain a brief statement of the findings and conclusions as to which exception is taken. Appeals of decisions issued by NASD staff pursuant to Rule 9620 shall be decided by the National Adjudicatory Council, except with respect to exemptive relief under Rule 1070 (Qualification Examinations and Waiver of Requirements), which shall be decided by the Waiver Subcommittee of the National Adjudicatory Council. [The National Adjudicatory Council may order oral argument.] If the Applicant does not want the [National Adjudicatory Council's] decision on the appeal to be publicly

available in whole or in part, the Applicant also shall include in its notice of appeal a detailed statement, including supporting facts, showing good cause for treating the decision as confidential in whole or in part. The notice of appeal shall be signed by the Applicant.

(b) Expedited Review

Where the failure to promptly review a decision to deny a request for exemption would unduly or unfairly harm the applicant, the National Adjudicatory Council or the Waiver Subcommittee of the National Adjudicatory Council, as the case may be, shall provide expedited review.

(c) No change

(d) [Appointment of Subcommittee] Oral Argument

(1) Subject to paragraph (2) below, [F]following the filing of a notice of appeal, the National Adjudicatory Council or Review Subcommittee may order oral argument and may designate a Subcommittee to hear [an] such oral argument[, if ordered]. The Subcommittee may consider any new evidence [that] if the Applicant can show good cause for not including it in its application, and the Subcommittee will recommend to the National Adjudicatory Council a disposition of all matters on appeal.

(2) With respect to exemptive relief requested under Rule 1070, the Waiver Subcommittee of the National Adjudicatory Council may order oral argument and consider any new evidence if the Applicant can show good cause for not including it in its application.

(e) Decision

(1) Subject to paragraph (2) below, [A]after considering all matters on appeal, and, as applicable, the Subcommittee's recommendation, the National Adjudicatory Council shall affirm, modify, or reverse the decision issued under Rule 9620. The National Adjudicatory Council shall issue a written decision setting forth its findings and conclusions and serve the decision on the Applicant. The decision shall be served pursuant to Rules 9132 and 9134. The decision shall be effective upon service and shall constitute final action of [the Association] NASD.

(2) With respect to exemptive relief requested under Rule 1070, after considering all matters on appeal, the Waiver Subcommittee of the National Adjudicatory Council shall affirm, modify, or reverse the decision issued under Rule 9620. The Waiver Subcommittee shall issue a written decision setting forth its findings and conclusions and serve the decision on the Applicant. The decision shall be served pursuant to Rules 9132 and 9134. The decision shall be effective upon service and shall constitute final action of NASD. The Waiver Subcommittee shall retain the discretion to refer the appeal to the National Adjudicatory Council, in which case the National Adjudicatory Council shall act on such appeal pursuant to its authority under this 9600 Series.

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