

FINRA Automated Systems

SEC Approves Amendments to the Rule 9700 Series to Streamline Existing Procedural Rules Applicable to General Grievances Related to FINRA Automated Systems

Effective Date: August 1, 2008

Executive Summary

Effective August 1, 2008, reviews of FINRA staff determinations under the Rule 9700 Series (Procedures on Grievances Concerning the Automated Systems) will be adjudicated by a Hearing Officer appointed by FINRA's Office of Hearing Officers, subject to discretionary review by the National Adjudicatory Council.¹ The text of the amended rules is set forth in Attachment A of this *Notice*.

Questions regarding this *Notice* may be directed to FINRA Operations at (866) 776-0800; or the Office of General Counsel at (202) 728-8071.

Background and Discussion

The Rule 9700 Series provides redress, where justified, for persons aggrieved by the operations of any automated quotation, execution or communication system owned or operated by FINRA that is not otherwise provided for under the Code of Procedure (Rule 9000 Series) or the Uniform Practice Code (Rule 11000 Series). Historically, the Rule 9700 Series has been used for appeals of staff Over-the-Counter Bulletin Board (OTCBB) eligibility determinations under Rule 6530.²

July 2008

Notice Type

- Rule Amendment

Suggested Routing

- Executive Representatives
- Legal
- Operations
- Systems
- Trading

Key Topic(s)

- Automated Systems
- General Grievances
- Over-the-Counter Bulletin Board (OTCBB)
- OTCBB Eligibility Rule

Referenced Rules & Notices

- NASD Rule 6530
- NASD Rule 9000 Series
- NASD Rule 9700 Series
- NASD Rule 11000 Series

Under the current version of the Rule 9700 Series, a party that is aggrieved by the operation of a FINRA automated system may request a review by a hearing panel. In accordance with the current provisions, the aggrieved party may, in turn, request a review of the hearing panel's decision by a "Committee" designated by FINRA's Board of Governors (Board).³ With respect to OTCBB eligibility reviews, both of these reviews pursuant to the Rule 9700 Series are solely to determine whether the issuer filed a complete report with the SEC or other appropriate regulator by the applicable due date and, thus, its security is eligible for continued quotation. There is no discretion to grant extensions of time for ineligible securities to become eligible or for any other form of relief.

Given that these reviews focus on one narrow issue, FINRA proposed, and the SEC approved, amendments to the Rule 9700 Series to streamline the review process.⁴ As amended, reviews of staff determinations under the Rule 9700 Series are adjudicated by a Hearing Officer appointed by the FINRA Office of Hearing Officers, subject to discretionary review by the National Adjudication Committee (NAC) (acting through its Review Subcommittee).⁵ If a staff determination is appealed to a Hearing Officer, the Hearing Officer prepares a written decision that is provided to the NAC's Review Subcommittee, which has the ability to call the decision for review within 21 days after receipt of such decision. Any call for review is at the sole discretion of the NAC's Review Subcommittee and, as such, there is no right to appeal a Hearing Officer decision to the NAC's Review Subcommittee. The Hearing Officer decision, if not called for review by the NAC's Review Subcommittee, constitutes final FINRA action on the matter.

Additionally, the amendments provide that, if a decision is called for review by the NAC's Review Subcommittee, a Subcommittee of the NAC will conduct the review.⁶ Based on its review, the Subcommittee makes a recommendation to the NAC which, in turn, will issue a decision on the matter. The decision of the NAC constitutes final FINRA action. An aggrieved party continues to have the right to appeal the Hearing Officer's decision, or the NAC decision, as applicable, to the SEC.

These amendments become effective on August 1, 2008. Additional information relating to the operation of the amendments, including how an aggrieved person may request a review and where review requests and applicable fees should be directed, can be found in the "Frequently Asked Questions" on the OTCBB Web site at www.otcbb.com.

Endnotes

- 1 See Securities Exchange Act Release No. 57786 (May 6, 2008), 73 FR 27595 (May 13, 2008) (order approving SR-NASD-2007-052).
- 2 The OTCBB is a facility for the publication of quotations in eligible OTC equity securities of issuers that are subject to the filing of financial reports with the SEC (or other appropriate regulator) and are current in their reporting. FINRA staff monitors the submission of such periodic reports to determine an issuer's initial and continued eligibility for quotation on the OTCBB and, pursuant to Rule 6530, restricts the quoting of securities of issuers that are late or delinquent in filing periodic reports.
- 3 Currently, the NASDAQ Listing and Hearing Review Council (NLHRC) has authority to review hearing panel decisions. NLHRC decisions may be called for further review by the Board solely upon the request of one or more Governors. Finally, an aggrieved party also has the right to appeal a decision to the SEC.
- 4 FINRA also made conforming and non-substantive changes to Rules 6530 and 9120 to reflect the amended review process contained in the Rule 9700 Series.
- 5 Other aspects of the review process, including the scope of review, notifications and time periods for requesting review and applicable fees for review under the Rule 9700 Series, will not be changed by the amendments.
- 6 The timelines for such a review are set forth in amended Rule 9760.

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ATTACHMENT A

Below is the text of the rule changes. New language is underlined; deletions are in brackets.

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6530. OTCBB-Eligible Securities

A member shall be permitted to quote the following categories of securities in the Service:

(a) through (d) No Change.

(e)(1) Notwithstanding the foregoing paragraphs, a member shall not be permitted to quote a security if:

(A)~~(1)~~ while quoted on the OTCBB, the issuer of the security has failed to file a complete required annual or quarterly report by the due date for such report (including, if applicable, any extensions permitted by SEC Rule 12b-25) three times in the prior two-year period; or

(B)~~(2)~~ the security has been removed from the OTCBB due to the issuer's failure to satisfy paragraph (a)(2), (3) or (4), above, two times in the prior two-year period.

(2) If an issuer's security becomes ineligible for quotation on the OTCBB pursuant to paragraph (e)(1)(A) above, the security will be removed from quotation on the OTCBB without the benefit of any grace period for the third delinquency, except that NASD will provide seven calendar days from the date notification is mailed to the issuer pursuant to paragraph (f)(1) to permit an aggrieved party to request a review of the determination by a Hearing Officer (as defined in Rule 9120(p))~~[hearing panel]~~ pursuant to paragraph (f) below. Following the removal of an issuer's security pursuant to this paragraph (e), such security shall not be eligible for quotation until the issuer has timely filed in a complete form all required annual and quarterly reports due in a one-year period. For purposes of this paragraph, a report filed within any applicable extensions permitted by Rule 12b-25 under the Exchange Act will be considered timely filed. [Furthermore, filings for reporting periods ending before October 1, 2005 will not be considered for purposes of this paragraph (e).]

(f)(1) No Change.

(2) Pursuant to the Rule 9700 Series, as modified herein, an aggrieved party may request a review by a H[hearing [panel]Officer of the determination that an issuer's security is ineligible for quotation under this rule. NASD must receive the request for review at least two business days prior to the scheduled removal of the security, together with a \$4,000 hearing fee payable to NASD to cover the cost of review. A request for review under this paragraph (f)(2) will stay the removal of the issuer's security from the Service until the H[hearing [panel]Officer issues a decision under Rule 9750. The H[hearing [panel]Officer will consider only the issues of whether the issuer's security is then eligible for quotation in the Service and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. The H[hearing [panel]Officer shall not have discretion to grant any extensions of time for ineligible securities to become eligible. Notwithstanding any contrary provision in the Rule 9700 Series, hearings will be conducted via telephone and NASD will provide the aggrieved party at least five business days notice of the hearing unless the aggrieved party waives such notice.

(3) [The aggrieved party may request a review of a hearing panel's decision under Rule 9760. Such a request for review must be accompanied by a \$4,000 fee payable to NASD to cover the cost of review.] The decision of the Hearing Officer may be called for review by the Review Subcommittee of the National Adjudicatory Council as set forth in Rule 9760. This review will only consider whether the issuer's security, at the time of the initial review under paragraph (f)(2), was eligible for quotation in the Service and/or whether the issuer filed a complete report by the applicable due date taking into account any extensions pursuant to Rule 12b-25 under the Exchange Act. There will be no discretion to grant extensions of time for ineligible securities to become eligible. [A request for review under this paragraph (f)(3) shall not stay t] The removal of the issuer's security from the Service will be stayed until the earlier of written notice that the National Adjudicatory Council's Review Subcommittee will not call the decision for review, the expiration of the time allowed to exercise a call for review under Rule 9760 or a decision is issued by the National Adjudicatory Council as set forth in Rule 9760[and there will be no discretion to grant extensions of time for ineligible securities to become eligible]. Notwithstanding any contrary provision in the Rule 9700 Series, a review under this paragraph (f)(3) will be based on the written record, unless additional hearings are ordered by the Subcommittee as set forth in Rule 9760. If any further hearings are ordered, the hearings may[will] be conducted via telephone and NASD will provide the aggrieved party at least five business days notice of the hearing unless the aggrieved party waives such notice.

9120. Definitions

(a) through (o) No Change.

(p) “Hearing Officer”

The term “Hearing Officer” means an employee of NASD who is an attorney and who is appointed by the Chief Hearing Officer to act in an adjudicative role and fulfill various adjudicative responsibilities and duties described in the Rule 9200 Series regarding disciplinary proceedings, the Rule 9550 Series regarding expedited proceedings, the Rule 9700 Series relating to grievances concerning NASD automated systems, and the Rule 9800 Series regarding temporary cease and desist proceedings brought against members and associated persons.

(q) through (cc) No Change.

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9700. Procedures on Grievances Concerning the Automated Systems

9710. Purpose

The purpose of this Rule 9700 Series is to provide, where justified, redress for persons aggrieved by the operations of any automated quotation, execution, or communication system owned or operated by NASD, or any subsidiary thereof, and approved by the Commission, not otherwise provided for by NASD Rules[the Code of Procedure as set forth in the Rule 9000 Series, or the Uniform Practice Code as set forth in the Rule 11000 Series].

9720. Form of Application

All applications shall be in writing, and shall specify in reasonable detail the nature of and basis for the redress requested. If the application consists of several allegations, each allegation shall be stated separately. All applications must be signed and shall be directed to NASD’s Office of Hearing Officers relating to automated quotation, execution or communications system owned or operated by NASD.

9730. Request for Hearing

Upon request, the applicant shall be granted a hearing after reasonable notice. In the absence of such request for a hearing, NASD's Office of Hearing Officers may, in its discretion, have any application set down for hearing or consider the matter on the basis of the application and supporting documents.

9740. Consideration of Applications

All applications shall be considered by a Hearing Officer (as defined in Rule 9120(p)) appointed by the Chief Hearing Officer (as defined in Rule 9120(b))[hearing panel designated by the Board of Governors]. Unless otherwise specified in NASD rules, [T]he applicant shall be entitled to be heard in person or telephonically and by counsel and to submit any relevant matter. In any such proceeding a record shall be kept.

9750. Decision

Decisions on applications shall be in writing and a copy shall be sent to the National Adjudicatory Council's Review Subcommittee (as defined in Rule 9120(aa)) [by mail to the applicant]. If not called for review in accordance with Rule 9760, the Hearing Officer shall issue its decision after being notified by the National Adjudicatory Council's Review Subcommittee that the decision will not be called for review or upon expiration of the time allowed for call for review. The Hearing Officer[hearing panel may] shall promptly[communicate its determination] provide a copy of the written decision to the applicant [prior to the issuance of a written decision], which shall be effective as of the time of such issuance[communication]. The written decision shall contain the reasons supporting the Hearing Officer's[hearing panel's] conclusions. The Hearing Officer's decision shall constitute final NASD action.

9760. [Review by the Committee]

[The decision shall be subject to review by a committee designated by the Board of Governors that is comprised of at least 50% non-industry committee members (the "Committee") on its own motion within 45 calendar days after issuance of the written decision. Any such decision shall also be subject to review upon application of any person aggrieved thereby, filed within 15 calendar days after issuance. The institution of a review, whether on application or on the initiative of the Committee, shall not operate as a stay of the decision.]

[9770. Findings of the Committee on Review]

[Upon consideration of the record, and after such further hearings as it shall order, the Committee shall affirm, modify, reverse, dismiss, or remand the decision. The Committee shall set forth specific grounds upon which its determination is based.]

[9780. Discretionary Review by the Board] Call for Review by the National Adjudicatory Council

[Determinations of the Committee may be reviewed by the NASD Board of Governors solely upon the request of one or more Governors not later than the NASD Board meeting next following the Committee's decision but which is 15 calendar days or more following the decision of the Committee. Notwithstanding the preceding sentence, the NASD Board may determine it is advisable to call for review any decision of the Committee within the 15 calendar day period following the decision of the Committee. Such review, which may be undertaken solely at the discretion of the Board, shall be in accordance with resolutions of the Board governing the review of Committee determinations. The Board shall affirm, modify or reverse the determinations of the Committee or remand the matter to the Committee with appropriate instructions. The institution of discretionary review by the Board shall not operate as a stay of the decision.]

The National Adjudicatory Council's Review Subcommittee (as defined in Rule 9120(aa)) may call for review a proposed decision that was prepared pursuant to Rule 9750 within 21 days after receipt of the decision from the Office of Hearing Officers. If the Review Subcommittee calls the proceeding for review within the prescribed time, a Subcommittee (as defined in Rule 9120(cc)) of the National Adjudicatory Council shall meet and conduct a review not later than 40 days after the call for review. The Subcommittee shall be composed in accordance with Rule 9331(a)(1). The Subcommittee may elect to hold a hearing or decide the matter on the basis of the record made before the Hearing Officer. Not later than 60 days after the call for review, the Subcommittee shall make its recommendation to the National Adjudicatory Council. Not later than 60 days after receipt of the Subcommittee's recommendation, the National Adjudicatory Council shall serve a final written decision on the applicant via overnight courier or facsimile. The National Adjudicatory Council may affirm, modify or reverse the decision of the Hearing Officer. In addition, the National Adjudicatory Council may remand the matter to the Office of Hearing Officers for further consideration of specified matters. In any such proceeding a record shall be

kept. The National Adjudicatory Council's written decision shall constitute final NASD action. The institution of a call for review by the National Adjudicatory Council shall stay the effectiveness of the Hearing Officer's decision.

[9790.]9770. Application to Commission for Review

Any decision issued [not appealed] under Rule 9750 or Rule 9760, as applicable, [or called for review under Rule 9760 or Rule 9780] shall constitute [become the] final NASD action [upon expiration of the time allowed for appeal or call for review]. [In any case where a]A person [feels] aggrieved by any final NASD action issued pursuant to Rule 9750[9770] or Rule 9760[9780, the person] may make application for review to the Commission in accordance with the Act.