

June 28, 2000

BY ELECTRONIC MAIL AND HAND DELIVERY

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Securities and Exchange Commission
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Washington, D.C. 20549-1001

Re: **SR-NASD-99-76; Response to Comment Letter, and Amendment No. 2;
Proposed Change to NASD Conduct Rules and Code of Procedure and Other
Provisions**

Dear Ms. England:

NASD Regulation, Inc. ("NASD Regulation") hereby responds to a commenter letter received by the Securities and Exchange Commission ("Commission") in response to the publication in the *Federal Register* of Notice of Filing of SR-NASD-99-76 as amended.¹

In the above referenced rule filing, NASD Regulation is proposing to amend its Rules, among other things to: (1) clarify the Department of Market Regulation's role in disciplinary proceedings; (2) require members to designate, as the custodian of the record on the Form BDW, persons who are associated with the firm at the time the forms are filed; (3) clarify the authority of hearing officers and making some limited changes to that authority; (4) clarify the scope of the Association's document production requirements; (5) provide for hearing panel review of staff determinations to impose limitations on member firms' business activities because of financial and/or operational difficulties; (6) provide for changes to the process for appeals of disciplinary actions, statutory disqualification proceedings, and certain other accelerated proceedings; (7) provide for a streamlined process to impose bars or expulsions for the failure to provide information to the Association; and (8) provide for a process by which the Association can more

¹ Release No. 42751, 65 Fed. Reg. 30163 (May 10, 2000)

expeditiously cancel memberships of firms that fail to meet the Association's eligibility and qualification standards.

The Commission received one comment letter in response to the proposed rule changes.² This letter is from George Brunelle at the law firm of Brunelle & Hadjiko, New York, New York ("Comment Letter") and is dated May 25, 2000. Mr. Brunelle contends that the proposal will make "it even easier than it is now for SRO staff members to deliberately conceal exculpatory evidence."

National Association of Securities Dealers, Inc. ("NASD") Rule 9251(a) requires NASD Regulation staff to make available to respondents documents prepared or obtained by the staff in connection with the investigations that led to the institution of a disciplinary proceeding. Exceptions to the production requirements are listed in Rule 9251(b), and include examination and inspection reports and internal employee communications. NASD Regulation is concerned that, notwithstanding these exceptions, documents containing the staff's investigative techniques might become discoverable under Rule 9253 if staff members are called as witnesses during hearings.³ In most cases, because the staff lacks subpoena power to compel testimony, the staff has no choice but to introduce the evidence it gathers through its examiners. In SR-NASD-99-76, NASD Regulation is proposing to clarify that the only portions of routine examination or inspection reports, internal employee communications, and any other internal documents that are required to be produced, under Rule 9253, are the portions outlining the substance of (and any conclusions regarding) oral statements made by persons who are not employees of the NASD when evidence of those statements are offered by NASD staff during disciplinary hearings.

Mr. Brunelle appears to be concerned that the proposed changes to Rule 9253 could make it more difficult for respondents to gain access to exculpatory information. NASD Regulation believes that this is not a valid concern. Under Rule 9251(b)(2), NASD Regulation staff may not withhold material exculpatory evidence. The subject proposal does not change the

² In *Notice to Members* 99-73, NASD Regulation published an earlier version of the proposed changes for comment. However, no comment letters were submitted in response to this *Notice to Members*.

³ Rule 9253 requires NASD Regulation staff to produce written statements made or adopted by staff members, if they relate to the subject matter of those persons' testimony. It also requires the staff to produce contemporaneously recorded recitals of oral statements made by witnesses, if those written statements are substantially verbatim.

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staff's obligation to produce material exculpatory information. Accordingly, NASD Regulation continues to believe that the proposal is an appropriate and reasonable resolution of the issues.

Very Truly Yours,

Alden S. Adkins
General Counsel and
Senior Vice President