

April 14, 2003

VIA COURIER

Ms. Katherine A. England
Assistant Director
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-1001

Re: **File No. SR-NASD-98-80; Amendment No. 5** - Establishing Procedures to Enable NASD to Issue Temporary Cease and Desist Orders

Dear Ms. England:

Pursuant to discussions with the SEC staff, NASD hereby amends the above-numbered rule filing as described below.

1. Clarifying Discussion in the Proposed Rule Change Regarding Proposed Rule 9850

Proposed Rule 9850 provides that a party served with a temporary cease and desist order may apply to the Hearing Panel to have the order modified, set aside, limited or suspended. Proposed Rule 9850 does not specify the bases upon which a Respondent may seek to modify, set aside, limit or suspend a temporary cease and desist order. NASD is not proposing to specify or otherwise limit, in the proposed rule change, the bases upon which a temporary cease and desist order may be challenged. To eliminate possible confusion that the discussion in the proposed rule change attempts to limit the availability of Rule 9850 to challenge temporary cease and desist orders, NASD hereby amends the second and third paragraphs of Section II(A)(1)(vii) ("Duration of Temporary Cease and Desist Orders") of Exhibit 1 of the proposed rule change as follows:

In addition, [a Respondent is provided the opportunity to challenge a temporary cease and desist order, pursuant to proposed Rule 9850,] if a Respondent [it] believes the underlying disciplinary proceeding is not being conducted on an expedited basis, the Respondent may seek to have the order modified, set aside, limited or suspended under proposed Rule 9850. [If a Respondent can prove by a preponderance of the evidence that the underlying disciplinary proceeding is not being conducted on an expedited basis due to bad faith conduct by NASD, the hearing panel that issued the temporary cease and desist order can modify, set aside, limit, or suspend the order as it believes is appropriate. If a challenge on such a basis is pursued by a Respondent, the hearing panel's consideration would be limited to determining whether the underlying disciplinary proceeding was not

being conducted on an expedited basis due to the bad faith conduct of NASD.]

[The proposed rules provide Respondents with several opportunities to challenge a temporary cease and desist order. A Respondent may apply to the hearing panel, pursuant to proposed Rule 9850, to have the order modified, set aside, limited, or suspended,] Further, [or] the Respondent may seek to challenge the order by filing an application for review with the SEC pursuant to Section 19 of the Exchange Act.^{FN 18} A Respondent's application to challenge [challenging] an order, however, will not stay the effectiveness of the order, unless otherwise ordered by the Commission.

2. Amending Discussion in the Proposed Rule Change Regarding the Imposition of Permanent Cease and Desist Orders

Since the time the proposed rule change was submitted, the U.S. Court of Appeals for the District of Columbia denied reconsideration of SEC's decision to impose a cease and desist order against KPMG, LLP. *KPMG, LLP v. SEC*, 289 F.3d 109 (D.C. Cir. 2002). In that case, the SEC successfully argued that the showing of a likelihood of future violation for a cease and desist order is lower than the showing required in injunctive actions. In recognition of that appellate court decision, NASD hereby amends the discussion in Section II(A)(1)(x) of the proposed rule change concerning permanent cease and orders as follows:

(x) Context in Which Permanent Cease and Desist Orders will be Sought

NASD staff does not anticipate seeking permanent cease and desist orders on a routine basis. Factors that NASD staff will consider in determining whether a permanent cease and desist order is appropriate include whether the party's violation was isolated or part of a pattern, whether the violation was flagrant and deliberate or merely technical in nature, and whether the party's business will present opportunities to engage in future violative conduct. *Footnote 21*: [Although courts have considered these factors in evaluating the likelihood of future violations, *see SEC v. Steadman*, 967 F.2d 636, 647-48 (D.C. Cir. 1992). NASD does not propose requiring Hearing Officers to find a substantial likelihood of future violations before issuing cease and desist orders. NASD is only stating that these are factors that the staff of NASD will consider in determining whether to seek a permanent cease and desist order.] *Cf. In Re KPMG*, Exchange Act Release No. 43862 (Jan. 12, 2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002), where the SEC indicated that in determining whether a cease and desist order is appropriate, it would consider factors that provide some showing of risk of future violation, although such showing need not be as great as that required for the imposition of an injunction. Nothing in this proposed rule change is intended to impose any standards on NASD staff in exercising its prosecutorial discretion in any particular matter, nor is it intended to require that Hearing Officers find that the standards advocated by the SEC in the *KPMG* litigation described above are met in imposing a permanent cease and desist order.

Ms. Katherine A. England

April 14, 2003

Page 3

If you have any questions, please call me at (202) 728-8083; e-mail sarah.williams@nasd.com. The fax number of the Office of General Counsel is (202) 728-8264.

Very truly yours,

Sarah J. Williams
Associate General Counsel