

November 10, 1998

BY ELECTRONIC MAIL AND HAND DELIVERY

Katherine A. England
Assistant Director
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549
Mail Stop 10-1

Re: **SR-NASD-98-57; Response to Comment Letter, and Amendment No. V;
Proposed Change to NASD Membership and Registration, Investigation
and Sanctions, Conduct and Code of Procedure Rules**

Dear Ms. England:

NASD Regulation hereby responds to a commenter letter received by the Commission in response to the publication in the *Federal Register* of Notice of Filing of SR-NASD-98-57,¹ and submits Amendment No. V to this rule filing.

In the above referenced rule filing, NASD Regulation is proposing to amend its Rules to permit the Department of Enforcement to amend complaints, without Hearing Officer approval, prior to the filing of responsive pleadings; to clarify and consolidate default provisions and shorten the call period for default decisions to 25 days; to require the Office of the General Counsel rather than the Office of Hearing Officers to issue National Adjudatory Council decisions, in settled cases; to change the trigger date for which the timing of motions to introduce new evidence is keyed; to permit Advertising Department staff to impose advertising pre-use filing requirements on members; to consolidate procedures for cancellation or suspension for failure to provide requested information; to simplify and expedite certain non-summary procedures in Rule 9500 series; and for other purposes.²

¹ Release No. 34-40378 (August 27, 1998); 63 F.R. 47064 (September 3, 1998).

² The filing is proposing amendments to Rules 0120, 2210, 2220, 2320, 8210, the Rule 8220 Series, IM-8310-2, 9212, 9215, 9241, 9269, 9270, 9312, 9346, 9360, the Rule 9500 Series, and 9610, specifically.

The Commission received one comment letter in response to the proposed rule changes. This letter is from Anne C. Flannery and Ben A. Indek, at the law firm of Morgan, Lewis & Bockius, LLP, New York, New York (“Comment Letter”), and is dated October 6, 1998. The Comment Letter states that the views expressed in the letter are those of the authors, and do not represent those of their clients, colleagues or law firm. The letter expresses general support for the proposed rule changes. The Comment Letter, however, does make a couple of recommendations that relate to the filing of and responding to amended complaints.

NASD Regulation is proposing changes to Rule 9212 to enable the Department of Enforcement to amend complaints, without hearing officer approval, prior to the filing of responsive pleadings. Rule 9212 currently requires the Department of Enforcement to move to amend any complaint, and a Hearing Officer to grant such a motion before the complaint may be amended. Generally such motions are routinely granted if the motion is filed before responsive pleadings are filed. In the rule filing, NASD Regulation stated that the requirement of making such motions and obtaining Hearing Officer approval can be eliminated without imposing any unfairness to respondents.

The Comment Letter suggests that NASD Regulation be limited to a single “of right” amendment prior to the filing of the responsive pleadings. As the Comment letter notes, the Federal Rules of Civil Procedure limit parties to one of right amendment prior to the filing of responsive pleadings.³ The Comment Letter also contends that the proposed amendments to Rule 9212 arguably could shorten the time period under which responsive pleadings are to be filed. This is not an effect that NASD Regulation intends. NASD Regulation, as outlined below, is proposing amendments to the rule filing to incorporate a limitation on “of right” amendments, and to clarify that the period pursuant to which responsive pleadings are considered timely is not shortened by the filing of an amended complaint.

The Comment Letter also makes a recommendation that is unrelated to the subject rule filing. This suggestion relates to NASD Regulation’s designation of a time period by when a hearing panel decision will be completed. Under Rule 9268(a), the Hearing Officer shall prepare a majority decision within 60 days of the “final date allowed for filing proposed findings of fact, conclusions of law, and post-hearing briefs, or by a date established at the discretion of the Chief Hearing Officer.” The Comment Letter contends that “where the 60 day period runs from a ‘date established at the discretion of the Chief Hearing Officer,’ the respondent will have no way of knowing when she can expect a majority decision to be rendered, unless a notification to that effect is sent to the parties.” The Comment Letter recommends that NASD Regulation, either by rule change, or by the adoption of an internal policy, require that “the Chief Hearing Officer inform the parties of the date chosen to begin the 60 day period if it is different from the final date for all post-hearing filings.” NASD Regulation believes that the issue is not

³ See Federal Rule of Civil Procedure 15(a).

what starting date the Chief Hearing Officer selects, but when the parties may expect to receive a decision. NASD Regulation will adopt a written policy pursuant to which it will send a letter to respondents informing them if a decision will not be prepared approximately 60 days after receipt of transcripts or post hearing submissions, whichever is later.

The following changes implement the proposed amendments discussed above. Assuming that all proposed rule changes were adopted as proposed, please incorporate the following additional changes. New language is in italics; proposed deletions are in brackets.

9212. Complaint Issuance--Requirements, Service, Amendment, Withdrawal, and Docketing

* * *

(b) Amendments to Complaint

The Department of Enforcement may file and serve an amended complaint that includes new matters of fact or law once as a matter of course at any time before the Respondent answers the complaint. Otherwise [After the Respondent answers], upon motion by the Department of Enforcement, the Hearing Officer may permit the Department of Enforcement to amend the complaint to include new matters of fact or law, after considering whether the Department of Enforcement has shown good cause for the amendment.

* * *

9215. Answer to Complaint

(a) Form, Service, Notice

Pursuant to Rule 9133, each Respondent named in a complaint shall serve an answer to the complaint on all other Parties within 25 days after service of the complaint on such Respondent, and at the time of service shall file such answer with the Office of Hearing Officers pursuant to Rules 9135, 9136 and 9137. The Hearing Officer assigned to a disciplinary proceeding pursuant to Rule 9213 may extend such period for good cause. Upon the receipt of a Respondent's answer, the Office of Hearing Officers shall promptly send written notice of the receipt of such answer to all Parties.

* * *

(e) Extension of Time to Answer Amended Complaint

If a complaint is amended pursuant to Rule 9212(b), the time for filing an answer or amended answer shall be the greater of the original time period within which the Respondent is required to respond, or [extended to]14 days after service of the amended complaint. If any Respondent has already filed an answer, such Respondent shall have 14 days after service of the amended complaint, unless otherwise ordered by the Hearing Officer, within which to file an amended answer.

* * *

If you have any questions, please call Eric Moss, Office of the General Counsel, at 728-8982.

Very truly yours,

Alden Adkins
General Counsel