

## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

#### Extension:

Rule 13e-3 and Schedule 13E-3, SEC File No. 270-1, OMB Control No. 3235-0007

Form S-8, SEC File No. 270-66, OMB Control No. 3235-0066

Regulations 14D & E and Schedules 14D-1 and 14D-9, SEC File No. 270-114, OMB Control No. 3235-0102

Industry Guides, SEC File No. 270-69, OMB Control No. 3235-0069

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget request[s] for extension of the previously approved collection[s] of information discussed below.

Rule 13e-3 and Schedule 13E-3 under the Securities Exchange Act of 1934 ("Exchange Act"), contains requirements regarding going private transactions by certain issuers or their affiliates. Issuers of affiliates engaging in a Rule 13e-3 transaction file a Schedule 13E-3 to disclose information to security holders about the transaction. Schedule 13E-3 results in an estimated total annual reporting burden of 30,996 hours.

Form S-8 is used by registrants to register employee benefit plan securities under the Securities Act of 1933 ("Securities Act"). The form provides information to the registrant's employees about the plan and registrant that enables them to make informed investment decisions. Form S-8 results in an estimated total annual reporting burden of 131,284 hours.

Regulations 14D applies to tender offers subject to Section 14(d)(1) of the Exchange Act, including, but not limited to any tender offer for securities of a class described in that section which is made by an affiliate of the issuer of such class. Regulation 14E applies to any tender offer for securities other than exempted securities. Schedule 14D-1 contains disclosure about tender offers subject to Section 14(d)(1) of the Exchange Act. Schedule 14D-9 contains disclosure about solicitation/recommendation statements with respect to certain tender offers. The

Regulations and Schedule result in an estimated total annual reporting burden of 129,656 hours.

The Industry Guides provide guidelines for disclosure in documents submitted by registrants in specific industry groups such as oil and gas, insurance, and mining. They do not directly impose any reporting burden and therefore are assigned a total annual reporting burden of one reporting hour.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 3208, New Executive Office Building, Washington, D.C. 20503; and (ii) Michael E. Bartell, Associate Executive Director, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: December 23, 1997.

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39510; File No. SR-NASD-97-24]

### Self-Regulatory Organizations; Order Approving Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 1 to the Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Supervision and Record Retention Rules

December 31, 1997.

#### I. Introduction

On April 11, 1997, the NASD Regulation, Inc. ("NASDR") submitted to the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the supervision and record retention rules of the National Association of Securities

Dealers, Inc.'s ("NASD" or "Association") to provide firms with flexibility in developing reasonable procedures for the review of correspondence with the public. The proposed rule change was published for comment in the **Federal Register** on May 2, 1997.<sup>3</sup> One comment was received on the proposal.<sup>4</sup>

On December 4, 1997, NASDR submitted Amendment No. 1 to the proposed rule change.<sup>5</sup> This order approves the proposal, and approves Amendment No. 1 to the proposed rule change on an accelerated basis. The Commission also is approving a substantially identical proposal by the New York Stock Exchange, Inc. ("NYSE").<sup>6</sup>

#### II. Background and Description of the Proposal

In May 1996, the Commission issued an Interpretive Release on the Use of Electronic Media by Broker-Dealers, Transfer Agents, and Investment Advisers for Delivery of Information.<sup>7</sup> The release expressed the views of the Commission with respect to the delivery of information through electronic media pursuant to the federal securities laws, but did not address the applicability of any self-regulatory organization ("SRO") rules. In the release the Commission did, however, strongly encourage the SROs to work with broker-dealer firms to adapt SRO supervisory review requirements governing communications with customers to accommodate the use of electronic communications.<sup>8</sup>

On September 12, 1996, the NYSE filed with the Commission a proposal to update its rules governing supervision of its member firms' communications

<sup>3</sup> See Securities Exchange Act Release No. 38548 (April 25, 1997), 62 FR 24147.

<sup>4</sup> See Letter from William P. Hayes, Chairman, PSA The Bond Market Trade Association ("PSA") Fixed Income Practices and Procedures Working Group, to Jonathan G. Katz, Secretary, Commission, dated June 3, 1997 ("PSA Letter").

<sup>5</sup> See Letter from Mary N. Revell, Associate General Counsel, NASDR, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated December 1, 1997 ("Amendment No. 1"). Amendment No. 1 contains a Notice to Members ("Notice to Members"), to be issued following Commission approval of the proposed rule change, which describes the new rules for supervision of public correspondence and provides guidance to NASD members on the implementation of the new rules.

<sup>6</sup> See Securities Exchange Act Release No. 39511 (December 31, 1997) (order approving File No. SR-NYSE-96-26).

<sup>7</sup> See Release Nos. 33-7288, 34-37182, IC-21945, IA-1562 (May 9, 1996) 61 FR 24644 (May 15, 1996) (File No. S7-13-96).

<sup>8</sup> *Id.*

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

with the public.<sup>9</sup> Similarly, NASDR proposes to amend NASD Rules 3010, "Supervision," and 3110, "Books and Records," to provide firms with flexibility in developing reasonable procedures for the review of correspondence with the public. The NASDR's proposal, like the NYSE's proposal, reflects the growing use of new technology and means of communication (e.g., "e-mail" and the Internet) which have affected the way broker-dealers and their associated persons conduct business and communicate with customers and other members of the public. According to NASDR, to ensure a coordinated regulatory framework for the supervision of written and electronic correspondence, its proposal is designed to be consistent with the NYSE's proposal.

Currently, NASD Rule 3010(d) requires each member firm to establish procedures for the review and endorsement by a registered principal of all transactions and all correspondence of its registered representatives pertaining to the solicitation or execution of any securities transactions. Under the proposal, a review of each item of correspondence no longer will be required. Instead, proposed NASD Rule 3010(d)(1) provides that a firm must establish procedures for the review by a registered principal of each registered representative's outgoing and incoming written and electronic correspondence with the public relating to the member's investment banking or securities business. Under the proposal, member firms must: (1) Develop written supervisory policies and procedures; (2) design policies and procedures to provide reasonable supervision of each registered representative; and (3) maintain evidence that supervisory policies and procedures have been implemented and executed and make that evidence available to the Association upon request.

A broker-dealer's policies and procedures for reviewing the public correspondence of registered representatives also must satisfy the requirements of new NASD Rule 3010(d)(2). As proposed, NASD Rule 3010(d)(2) requires each member to develop written procedures for review of incoming and outgoing written and electronic correspondence that are appropriate to the broker-dealer's business, size, structure and customers. Pursuant to the proposal, a broker-

dealer that does not require pre-use review of all correspondence must: (1) Educate and train associated persons as to the firm's procedures governing correspondence; (2) document such education and training; and (3) monitor and test to ensure implementation of and compliance with the firm's policies and procedures.

The NASD has developed a Notice to Members that provides additional guidance and requirements for supervisory procedures adopted pursuant to NASD Rule 3010. In developing written supervisory procedures, members should, among other things: (1) Specify the firm's policies and procedures for reviewing different types of communications; (2) identify how supervisory reviews will be conducted and documented; (3) identify what types of communications will be pre-reviewed or post-reviewed; (4) identify the organizational positions responsible for conducting reviews of the different types of communications; (5) specify the minimum frequency of reviews for each type of communication; (6) monitor the implementation of and compliance with the firm's procedures for reviewing public correspondence; and (7) periodically re-evaluate the effectiveness of the firm's procedures for reviewing public communications and consider any necessary revisions.

In addition, the Notice to Members requires broker-dealer to: (1) Specify procedures for reviewing registered representatives' recommendations to customers; (2) require supervisory review of some of each registered representative's public communications, including his or her recommendations to customers; and (3) consider the complaint and overall disciplinary history, if any, of registered representatives and other employees. The Notice to Members also states that a broker-dealer's supervisory policies and procedures must ensure that all customer complaints, whether received via e-mail or in written form from the customer, are reported to the NASD in compliance with NASD Rule 3070(c)<sup>10</sup> and that a broker-dealer must prohibit employees' use of electronic correspondence to the public unless the communications are subject to the supervisory and review procedures developed by the firm.

Moreover, under new NASD 3010(d)(3), each member must retain correspondence in accordance with

amended NASD Rule 3110. NASD Rule 3010(d) (3) further requires that the names of the persons who prepared and reviewed outgoing correspondence must be ascertainable from the retained records and the records must be made available to the NASD upon request.

Finally, the NASD proposes to amend NASD Rule 3110 to require that records must be made and preserved as prescribed by all applicable laws, rules, regulations, NASD rules and with Rule 17a-3 under the Act. The record keeping format, medium, and retention period must comply with Rule 17a-4 under the Act.

### III. Summary of Comments

The Commission received one comment letter on the proposed rule change.<sup>11</sup> The commenter generally supported the proposal. Specifically, the PSA believes the proposal will provide flexibility for member firms to develop procedures for review of correspondence. The PSA believes that procedures tailored by individual firms to meet their needs are preferable to a uniform set of detailed requirements that may be inappropriate for many firms or that may quickly become obsolete. The PSA expressed its support for the Association's efforts to ensure a coordinated regulatory framework for the supervision of manual and electronic communications by harmonizing its new requirements with those of the Commission and the NYSE.<sup>12</sup>

### IV. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.<sup>13</sup> Specifically, the Commission believes the proposal is consistent with the requirements of Section 15A(b)(6) of the Act<sup>14</sup> in that it is designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public interest. As noted above, NASD Rule 3010(d)(1), as amended, will allow broker-dealers to establish reasonable procedures for review of registered representatives' correspondence with the public relating to their business. New NASD Rule 3010(d)(2) will require broker-dealers to develop written policies and procedures for the review of all associated persons'

<sup>11</sup> See PSA Letter, *supra* note 4.

<sup>12</sup> *Id.*

<sup>13</sup> In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>14</sup> 15 U.S.C. 78o-3(b)(6).

<sup>9</sup> See Securities Exchange Act Release No. 37941 (November 13, 1996) 61 FR 58919 (November 19, 1996) (File No. SR-NYSE-96-26) (soliciting comment on the NYSE's proposed rule change).

<sup>10</sup> Among other things, NASD Rule 3070(c) requires members to report to the NASD statistical information regarding customer complaints relating to matters specified by the NASD.

public communications that are appropriate for the broker-dealer's business, size, structure, and customers. The Commission believes that the proposed rules will provide broker-dealers with some flexibility in adopting and implementing supervisory procedures for reviewing associated persons' public communications while establishing minimum requirements, guidelines, and standards governing the supervisory procedures a broker-dealer may adopt. The Commission believes that these standards and guidelines will help to ensure that broker-dealers continue to provide appropriate supervision of the public communications of their associated persons.

The Commission believes that the proposal does not diminish the general supervisory responsibilities of broker-dealers. In this regard, the Commission emphasizes, as it has stated previously, that broker-dealers must monitor the trading and sales activities of their associated persons and establish effective compliance and supervisory procedures to prevent and detect possible violations of firm policies and procedures, rules of the SROs, and federal and state securities laws.<sup>15</sup> The Commission believes that review of registered representatives' and other associated persons' public correspondence is an important component of a broker-dealer duty to supervise its employees, and that broker-dealers have substantial supervisory obligations arising from the public communications of their associated persons.

The Commission believes that the minimum standards and requirements specified in NASD Rule 3010 and in the Notice to Members will help to ensure that broker-dealers continue to provide appropriate supervision of the public communications of their registered representatives and other associated persons. In this regard, the Commission notes that NASD Rule 3010(d)(1) states that a broker-dealer's supervisory policies and procedures must be designed to reasonably supervise each registered representative. Under NASD Rule 3010(d)(2), a broker-dealer that chooses not to require pre-use review of public communications must educate employees about the firm's current communications policies and procedures, document the employees' education and training, and ensure that

the firm's policies are implemented and adhered to.

In addition, the Notice to Members require broker-dealers to: (1) Specify, in writing, the firm's policies and procedures for reviewing different types of communications; (2) identify how supervisory reviews will be conducted and documented; (3) identify what types of communications will be pre-reviewed or post-reviewed; (4) identify the positions within the organization responsible for conducting reviews of the different types of communications; (5) specify the minimum frequency of reviews for different types of communications; (6) monitor the implementation of and compliance with the firm's procedures for reviewing public communications; and (7) periodically re-evaluate the effectiveness of the firm's procedures for reviewing public communications and consider any necessary revisions.

The Commission believes that these requirements will provide guidance to broker-dealers in developing policies for supervising public communications and to associated persons in complying with the firm's policies. The requirements should help to ensure that broker-dealers carefully consider the supervisory procedures appropriate for different types of communications, closely monitor compliance with their firm's policies, and periodically reevaluate their firm's policies and procedures. The Commission expects broker-dealers to monitor the effectiveness of their supervisory policies and procedures and to promptly make any necessary revisions.

The Notice to Members also requires broker-dealers to: (1) Specify procedures for reviewing registered representatives' recommendations to customers; (2) require supervisory review of some of each registered representative's public communications, including his or her recommendations to customers; (3) consider the complaint and overall disciplinary history, if any of registered representatives and other employees in developing procedures for supervising their communications with the public; (4) provide that all customer complaints, whether received via e-mail or in written form from the customer, are reported to the NASD in compliance with NASD Rule 3070(c); and (5) prohibit employees' use of electronic communications to the public unless the communications are subject to supervisory and review procedures developed by the firm.

The Commission believes that these standards will help to ensure that broker-dealers adopt effective and appropriate supervisory procedures. For

example, reviewing at least some of each registered representative's recommendations<sup>16</sup> and providing for the reporting of customer complaints in compliance with NASD Rule 3070(c) may help firms to identify potential sales practice problems. Similarly, considering a registered representative's complaint and overall disciplinary history will help to ensure that broker-dealers implement supervisory procedures appropriate for each representative. In this regard, the Commission would expect a broker-dealer to consider providing heightened supervision for a registered representative with a history or pattern of customer complaints, disciplinary actions or arbitrations.<sup>17</sup> Moreover, the Commission notes that the requirements specified in NASD Rule 3010 and in the Notice to Members are minimum requirements; the Commission expects each broker-dealer to implement any additional procedures the broker-dealer believes are necessary to provide appropriate supervision of all of its associated persons.

The Commission believes that several requirements specific to electronic communications will further help to ensure that firms adopt appropriate supervisory procedures. In this regard, the Commission notes that the Notice to Members provides that a firm's policies and procedures must prohibit registered representatives' and other employees' use of electronic communications to the public unless those communications are subject to supervisory and review procedures developed by the firm. The NASD Notice to Members also states that the Association expects members to prohibit communications with the public from employees' home computers or through third party computer systems unless the firm is

<sup>16</sup> With regard to recommendations, the Commission notes that NASD Rule 2310 requires, among other things, that a recommendation have a basis which can be substantiated as reasonable. Regardless of the supervisory procedures a broker-dealer adopts, the broker-dealer must continue to ensure compliance with NASD Rule 2310 and any other relevant rule.

<sup>17</sup> Similarly, the Joint Sweep Report stated that "[f]irms that hire registered persons that have a history or pattern of customer complaints, disciplinary actions, or arbitrations are responsible for imposing close supervision over those persons. 'Normal' supervision is simply not enough; firms must craft special supervisory procedures tailored to the individual representative." See Joint Sweep Report, *supra* note 21, at vi. See also NASD Notice to Members 97-19 (firm that hires a registered representative with a recent history of customer complaints, final disciplinary actions involving sales practice abuse or other customer harm, or adverse arbitration decision should determine if it is necessary to develop and implement special supervisory procedures tailored to the individual registered representative).

<sup>15</sup> See NASD, NYSE, North American Securities Administrators Association, Inc. and Office of Compliance, Inspections and Examinations, Commission, *Joint Regulatory Sales Practice Sweep* (1996) ("Joint Sweep Report") at 1.

capable of monitoring the communications.

The Commission believes that the provision for review of incoming non-electronic correspondence also is designed to protect investors. The Commission notes that the Notice to Members mandates that Rule 3010(d) will continue to require review of all incoming non-electronic correspondence directed to registered representatives.<sup>18</sup> The Commission believes that this requirement may provide a broker-dealer with early notice of sales practice problems and help to ensure proper handling of customer funds. Incoming non-electronic correspondence directed to associated persons other than registered representatives, and all incoming communications in electronic format, will be subject to the policies and procedures the firm establishes pursuant to NASD Rule 3010(d).

The NASD represents that it will review members' procedures and systems periodically to ensure that they are reasonable in view of the firm's structure, the nature and size of its business, and its customer base.<sup>19</sup> The Commission expects the NASD to monitor closely the policies and procedures firms adopt pursuant to the proposal to ensure that they satisfy the requirements of NASD Rule 3010. In addition, the Commission expects the NASD to review NASD Rule 3010 as it gains experience with the rules and to consider any necessary revisions, including additional minimum requirements for broker-dealers' communication policies.

Finally, the Commission believes that it is reasonable for the NASD to amend NASD Rule 3110 to indicate that members must preserve books and records as required under SEC Rule 17a-3 and comply with the recordkeeping format, medium and retention period specified in SEC Rule 17a-4 in order to clarify the recordkeeping requirements applicable to broker-dealers.

The Commission finds good cause for approving proposed Amendment No. 1

<sup>18</sup> See Notice to Members, *supra* note 5. The requirement to review all incoming non-electronic correspondence directed to registered representatives is not specified in the text of the rule language. This requirement parallels a NYSE provision contained in Interpretation 342.16/04 in the NYSE *Interpretation Handbook*. The NASD's requirement is set forth only in its Notice to Members which was submitted by NASDR as an amendment to the original rule filing; therefore, NASD member firms must comply with this additional requirement, as well as with the other specific requirements set forth in the Notice to Members.

<sup>19</sup> *Id.*

prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission notes that Amendment No. 1, which incorporates the Notice to Members into the proposal, further clarifies the Association's new rules by providing additional guidance to NASD members. As discussed more fully above, the Notice to Members provides additional requirements and guidelines for broker-dealers' supervisory policies. Accordingly, the Commission believes that it is consistent with Section 15(b)(6) of the Act<sup>20</sup> to approve Amendment No. 1 to the proposed rule change on an accelerated basis.

## V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 1. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of all such filings will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-97-24 and should be submitted by January 29, 1998.

## VI. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>21</sup> That the proposed rule change (SR-NASD-97-24), including Amendment No. 1, is approved.

For the Commission, by the Division of Market Regulations, pursuant to delegated authority.<sup>22</sup>

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<sup>20</sup> 15 U.S.C. 78o-3(b)(6).

<sup>21</sup> 15 U.S.C. 78s(b)(2).

<sup>22</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-39504; File No. SR-NASD-97-96]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Incorporated Relating to the Hearing Process Fees on Members That Are Parties to Arbitration Proceedings

December 31, 1997.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on December 23, 1997, the National Association of Securities Dealers, Incorporated ("NASD" or "Association") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD Regulation is proposing to amend Rule 10333(d) of the NASD's Code of Arbitration Procedure ("Code") to adjust the Hearing Process Fee Schedule so that the amounts in dispute of the lowest brackets in the Rule 10333(d) hearing Process Fee Schedule are consistent with the dollar amount at which the Prehearing Process Fee is imposed. Below is the text of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in *brackets*.

#### 10333. Member Surcharge and Process Fees

\* \* \* \* \*

Hearing Process Fee Schedule (accrues and becomes due and payable when the parties are notified of the date and location of the first hearing session)

Damages requested	Hearing process fee
\$1-\$25,000[30,000] .....	\$0
\$25,000.01[30,000.01]-\$50,000 .....	1,000
\$50,000.01-\$100,000 .....	1,500
\$100,000.01-\$500,000 .....	2,500
\$500,000.01-\$1,000,000 .....	3,500
\$1,000,000.01-\$5,000,000 .....	4,500
More than \$5,000,000 .....	5,000