NASD NOTICE TO MEMBERS 97-76

Nasdaq Eliminates Excess Spread Rule For Nasdaq Securities

Suggested Routing

- ☐ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ☐ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
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- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ☐ Syndicate
- ■ Systems
- ■ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

The Nasdaq Stock Market, Inc. (Nasdaq®) Board of Directors approved, and the National Association of Securities Dealers, Inc. (NASD®) Board of Governors ratified, a decision to allow NASD Rule 4613(d)—the "excess spread" rule for Nasdaq securities—to lapse as of October 13, 1997. Accordingly, NASD member firms are no longer required to comply with excess spread parameters for Nasdaq securities, as of October 13, 1997.

Questions regarding this rule change should be directed to John F. Malitzis, Senior Attorney, Office of General Counsel, The Nasdaq Stock Market, Inc., at (202) 728-8245.

Background And Summary

Prior to January 20, 1997, the NASD's excess spread rule (the Rule or the Excess Spread Rule) provided that registered market makers in Nasdaq securities could not enter quotations that exceeded 125 percent of the average of the three narrowest market maker spreads in that issue, provided, however, that the maximum allowable spread could never be less than 1/4 of a point (125 Percent Rule). The Rule originally was designed to enhance the quality of the Nasdaq market by preventing firms from holding themselves out as market makers without having a meaningful quote in the system. Despite the regulatory objectives underlying the Rule, however, certain market participants believed that the Rule produced a variety of unintended consequences that undermined the integrity of Nasdaq. Most notably, the Securities and Exchange Commission (SEC) found in its 21(a) Report on the NASD and Nasdaq that the then-current Excess Spread Rule posed the potential for discouraging, rather than encouraging, the narrowing of spreads.[1] Accordingly, the SEC requested that the NASD "modify the rule to eliminate its undesirable effects, or to repeal it."[2]

In response to the SEC's 21(a) Report, the NASD submitted a proposal, which was approved by the SEC and which amended the Excess Spread Rule on a pilot basis.[3] Under the revised Excess Spread Rule, a registered market maker in a Nasdaq security was precluded from being a registered market maker in that issue for 20 business days if its average spread in the security over the course of any full calendar month exceeded 150 percent of the average of all dealer spreads in such issue for the month (150 Percent Rule). While the SEC approved the 150 Percent Rule on a pilot basis, in its approval order for the new rule, the SEC stated that "[a]lthough the amended excess spread rule may reduce some of the anticompetitive concerns outlined in the 21(a) Report, the Commission believes that the amendment . . . may not completely satisfy the NASD's obligations under the Commission's Order with regard to the excess spread rule. Specifically, it may not remove completely the anticompetitive incentives for market makers to refrain from narrowing quotes because the market makers' quotation obligation continues to be dependent to some extent upon quotations of other market makers in the stock."[4]

Furthermore, almost simultaneous with the implementation of the Excess Spread Rule, the SEC's Order Handling Rules were implemented in a specified number of Nasdaq securities, and thereafter in the remaining Nasdaq securities on a rolling basis.[5] The rollout schedule for the implementation of these rules was recently amended, so that all Nasdaq securities will be subject to the Order Handling Rules (*i.e.*, the Limit Order Display Rule and the Electronic Communications Network (ECN) Amendments to the Quote Rule) by

October 13, 1997.[6] Under these rules, market maker spreads are affected by both customer limit orders and market maker quotes, adding a new dimension to the Nasdaq market which previously did not exist. In addition, studies by the NASD's Economic Research Department have shown that the Order Handling Rules have narrowed dealer spreads in stock in which these rules have been implemented—a primary aim of the Excess Spread Rule.[7]

In light of the foregoing, the Nasdaq Board of Directors and the NASD Board of Governors determined to allow NASD Rule 4613(d) to lapse as of October 13, 1997. The NASD and Nasdaq determined this appropriate because: (1) the need for the Rule is obviated by the implementation of the Order Handling Rules in all Nasdaq-listed securities as of October 13; and (2) the SEC has continuing concerns with the Excess Spread Rule. Accordingly, NASD member firms are no longer required to comply with excess spread parameters for Nasdaq securities as of October 13, 1997.

Endnotes

[1] *See Appendix to Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and The Nasdaq Stock Market* at p. 98 (21(a) Report) (SEC, Aug. 8, 1996).

[2] *Id.* at 99.

[3] *See* Exchange Act Rel. No. 38180 (Jan. 16, 1997), 62 FR 3725 (Pilot Program Approval Order). The pilot originally was set to expire on July 1, 1997, but was extended through September 30, 1997, and again through October 13, 1997. *See* Securities Exchange Act Rel. No. 38804 (July 1, 1997); Securities Exchange Act Rel. No. 39120 (Sept. 23, 1997).

[4] Pilot Program Approval Order, *supra* note 4.

[5] *See* Securities Exchange Act Rel. No. 37619A (Sept. 6, 1996), 61 FR 48290 (Sept. 12, 1996) (Order Handling Rule Adopting Release). Among other things, the SEC in the Order Handling Rule Adopting Release amended Rule 11Ac1-1 (ECN Amendments to Quote Rule) to the Securities Exchange Act of 1934 (Exchange Act), and adopted new Rule 11Ac1-4 (Limit Order Display Rule).

[6] *See* Securities Exchange Act Rel. No. 38870 (July 24, 1997).

[7] *See Effects of the Removal of Minimum Sizes for Proprietary Quotes in The Nasdaq Stock Market, Inc.*, p. 6, NASD Economic Research Department (June 5, 1997).

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NASD NOTICE TO MEMBERS 97-77

NASD Regulation Requests Comment On Proposed Rule Regarding Forms U-4 and U-5, Qualified Immunity, And Advance Employee Notice; **Comment Period Expires December 31, 1997**

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ☐ Operations
- ☐ Options
- ■ Registered Representatives
- ■ Registration
- ☐ Research
- ☐ Syndicate
- ☐ Systems
- ☐ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

NASD Regulation, Inc. (NASD Regulation℠) requests comment on a proposed new rule, National Association of Securities Dealers, Inc. (NASD®) Rule 1150 (Rule), which would provide NASD members with a qualified immunity in arbitration proceedings for statements made in good faith in certain disclosures filed with the NASD on Forms U-4 and U-5. The Rule would also require that member firms give notice of the contents of a Form U-5 (and amendments) to the subject of the form at least 10 days prior to filing the form with the NASD. Members would also be required to provide immediate notification to employees of material revisions to be filed on Form U-5.

Questions concerning this *Request For Comment* should be directed to Jean Feeney, Assistant General Counsel, Office of General Counsel, NASD Regulation, at (202) 728-6959, or Laura Gansler, Attorney, Office of General Counsel, NASD Regulation, at (202) 728-8275.

Request For Comment

NASD Regulation encourages all members and interested parties to respond to the issues raised in this *Notice*. Comments should be mailed to:

Joan Conley
Office of the Corporate Secretary
NASD Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006-1500;

or e-mailed to:
pubcom@nasd.com

Comments must be received **by December 31, 1997.** Before becoming effective, any rule change developed as a result of the comments received must be adopted by the NASD Regulation, Inc., Board of Directors, may be reviewed by the NASD Board of Governors, and must be approved by the SEC.

NASD Regulation Request for Comment 97-77

Executive Summary

NASD Regulation, Inc. (NASD Regulation℠) requests comment on a proposed new rule, National Association of Securities Dealers, Inc. (NASD®) Rule 1150 (Rule), which would provide NASD members with a qualified immunity in arbitration proceedings for statements made in good faith in certain disclosures filed with the NASD on Forms U-4 and U-5. The Rule would also require that member firms give notice of the contents of a Form U-5 (and amendments) to the subject of the form at least 10 days prior to filing the form with the NASD. Members would also be required to provide immediate notification to employees of material revisions to be filed on Form U-5.[1]

The purpose of the Rule is to encourage more candid and accurate disclosure by member firms on Forms U-4 and U-5 concerning the reasons for terminating employees, while affording employees an opportunity to review the Form U-5 prior to filing with the NASD. The Rule would be implemented on a four-year pilot basis, during which time NASD Regulation would assess the impact of the Rule on the nature and quality of disclosure by member firms.

Questions concerning this *Request For Comment* should be directed to Jean Feeney, Assistant General Counsel, Office of General Counsel, NASD Regulation, at (202) 728-6959, or Laura Gansler, Attorney, Office of General Counsel, NASD Regulation, at (202) 728-8275.

Background

The NASD By-Laws (Article IV, Sections 2 and 3) require that members make certain disclosures concerning registered persons, and certain other employees associated with them, in order to help the NASD and its members fulfill their statutory mandate to register, qualify and oversee securities industry personnel. In particular, the Form U-5 provides information about disciplinary or regulatory problems in an employee's work history. Candid and accurate disclosure of a regulatory or disciplinary problem that contributed to an employee's termination is critical to ensuring that prospective broker/dealer employers make informed hiring decisions and establish appropriate supervisory systems.

For purposes of the proposed Rule, the most important of these disclosures are those required by Form U-5, the "Uniform Termination Notice for Securities Industry Registration." Members are required to file a Form U-5 with the NASD within 30 days of the termination of certain employees, and simultaneously to provide a copy of the filed form to the employee. The By-Laws also require that the member notify the NASD in writing, and send a copy to the registered person, within 30 days if the member learns of facts or circumstances causing any information in the prior notice to become inaccurate or incomplete. Members are also required to disclose certain information about employees on Form U-4, the "Uniform Application for Securities Industry Registration or Transfer."

In recent years, registered persons have brought a number of defamation[2] claims for allegedly untrue or misleading statements made on Form U-5. The claims are primarily brought in arbitration; at present, the number of defamation cases relative to the NASD's overall arbitration caseload is small.[3] However, because of the personal and financial interests at issue, the members' potential exposure to liability as a result of such claims may be substantial.

At common law, courts have generally found that employers are entitled to a qualified privilege for statements

made about former employees to prospective employers.[4] This qualified privilege has been codified in many state statutes. However, the privilege is not absolute, and may be overcome by proof that the employer knew or was reckless in not knowing that the statement was false. State law varies with respect to the standard of proof required to overcome a qualified privilege: some states require clear and convincing evidence, while others apply a preponderance of the evidence standard.

The potential liability for statements made on Forms U-5 has created a disincentive for member firms to provide full disclosure. Members have also questioned the fairness of exposure to potentially significant liability for disclosures they are required by the NASD to make.

At the same time, registered representatives are concerned that unless they are able to pursue an action against an employer in a particular case, member firms will be free to unfairly penalize them for their decisions to seek employment at another firm, or otherwise unfairly injure or tarnish their reputation.

As noted above, full disclosure of disciplinary problems on Forms U-4 and U-5 is in the public interest. Accordingly, NASD Regulation believes it is appropriate to provide some degree of protection for members for statements made on required forms in order to encourage full disclosure. Inadequate disclosure has the potential to compromise the integrity of the Central Registration Depository, and hinders regulatory enforcement action by the NASD and other regulators. At the same time, NASD Regulation recognizes that employees must have recourse for untruthful statements designed, for example, to penalize a departing employee, or to prevent him or her from obtaining new employment or attracting existing customers to another member firm. NASD Regulation and other regulators have worked with representatives of NASD member firms and employees in an effort to formulate a fair and workable solution to this problem.

The proposed Rule is designed to strike a balance between the interests of the member firms, the employees, and the public by providing qualified immunity for statements made in good faith by member firms on certain required forms, and by providing employees with an opportunity to seek changes to disclosures contained in Forms U-5 prior to their filing. NASD Regulation seeks comment on all aspects of the proposed Rule from all interested persons and their representatives, including members, registered persons, other employees and employee groups, industry groups, and customers. In particular, NASD seeks comment on the specific issues raised below.

Description

Disclosure Obligations

NASD members are currently required to make truthful and accurate disclosures to the NASD regarding securities industry personnel, and are currently subject to disciplinary proceedings for failure to do so. Paragraph (a)(1) of the proposed Rule would reaffirm the current disclosure obligations of NASD members. It is not intended to impose any additional or higher disclosure obligations on NASD members than that which currently exists under NASD rules. NASD Regulation seeks comment regarding whether the reiteration of NASD members' current disclosure obligations in paragraph (a)(1) should be included in the proposed Rule.

Qualified Immunity

The proposed rule would create a uniform qualified immunity standard for statements made in good faith by members in "covered forms." The qualified immunity would apply in all arbitrations between employees and members arising out of disclosures contained in "covered forms" instead of the various immunity standards that currently apply under state law.

Under the qualified immunity, a defending party would not be liable to a "covered person" for any defamation claim related to an alleged untrue statement contained in a "covered form" unless the covered person showed by clear and convincing evidence that the defending party either knew or was reckless in not knowing that the statement was materially false at the time it was made.

Definitions And Scope Of Qualified Immunity

The qualified immunity would apply to statements contained in a covered form that is filed with a regulatory agency or self-regulatory organization, or that is disseminated by reason of such filing, or otherwise disseminated orally, in writing, or through any electronic medium to an "appropriate person."

The Rule defines "covered forms" as those forms required to be filed pursuant to Article IV, Sections 2 and 3, of the NASD By-Laws, which include both Forms U-4 and U-5. Although defamation claims against members for statements contained in required filings generally have involved disclosures made on Form U-5 in connection with employee terminations, members of the industry have indicated that required disclosures pertaining to employees on Form U-4 provide the same potential

for defamation liability, and NASD Regulation believes that the same regulatory interests in complete disclosure apply to statements on that form.

The Rule defines "appropriate person" as "any federal or state government or regulatory authority, any self-regulatory organization, any employer or prospective employer of a covered person, any person who requests information concerning the covered person from the defending party and as to whom the defending party has a legal obligation to provide such information, or any person who has a legal obligation to obtain such information." Accordingly, the Rule would apply to a request made, for example, by a pension fund if legal requirements imposed an obligation to obtain information concerning persons investing on behalf of the fund.

The Rule would apply to statements made by a member on a covered form with respect to a "covered person," defined as any present or former registered person or employee of the member who is party to a proceeding relating to a dispute within the scope of the Rule. The Rule would also apply to the liability of both member firms and associated persons, and accordingly would protect the signatory of the form or other persons involved in the preparation of the form as well as the member itself.

NASD Regulation seeks comment regarding the scope of the qualified immunity. In particular, is the definition of "appropriate persons" too broad? Too narrow? Should disclosures to customers be explicitly included? Should disclosures to the media be included?

Standard Of Proof

Most states recognize a qualified immunity for required disclosures, although at least one New York court has applied absolute immunity with respect to statements contained in Form U-5. In most states, the qualified immunity can be overcome by evidence that the member knew, or was reckless in not knowing, that the information in the required disclosure was false. However, state law varies with respect to the standard of proof required to demonstrate knowledge of, or recklessness with respect to, a statement's falsity. Some states require clear and convincing evidence, while others apply a preponderance of the evidence standard. In still other states, there are conflicting decisions regarding the appropriate standard of proof.

In light of the variation among state laws regarding the standard of proof required to overcome a qualified immunity for required disclosures, NASD Regulation has considered the regulatory and public policy interests underlying the proposed Rule in determining the appropriate standard of proof. As discussed above, the purpose of the proposed Rule is to enhance disclosure of information concerning matters of public interest. A preponderance of the evidence standard might not provide sufficient protection to members to ensure full disclosure. On the other hand, absolute immunity might not enhance the quality of disclosure because of its potential to immunize defamatory statements. Because the clear and convincing standard provides significant protection to member firms for required disclosures without depriving employees of recourse for false statements made knowingly or recklessly, NASD Regulation preliminarily believes that a qualified immunity that may be overcome by clear and convincing standard may be more consistent with the purpose of the Rule, and represent a reasonable balance between the competing interests involved.[5]

NASD Regulation seeks comment as to whether a uniform qualified privilege should be applied in arbitration proceedings, and whether the clear and convincing evidence standard is an appropriate standard of proof.

Signatory Requirement

The proposed Rule does not require that the person signing the covered form on behalf of a member firm be a registered person, a compliance officer, or an attorney in order for the qualified immunity to apply. Nonetheless, such a requirement could enhance the quality of disclosure on the covered form by raising the level of accountability within the member firm. Those opposed to such a requirement argue that it would unduly interfere with current industry practice without enhancing the quality of disclosure.

NASD Regulation specifically requests comment regarding whether the Rule should include a provision requiring that the person signing a covered form be either a registered person or lawyer in order for the qualified immunity to apply to statements contained in the form. In particular, commenters are asked to consider the effect of such a requirement on current industry practice, the additional burdens, if any, such a requirement would place on member firms, and the benefits of such a requirement.

Applicability Of Qualified Immunity To Statements Made Prior To Filing Of Covered Forms

Another issue involves whether immunity would attach to statements made prior to filing of covered forms. In some cases, members may be asked by prospective employers to

verify the reasons for a registered person's termination prior to the time the Form U-5 is submitted to the NASD. The Rule provides that the qualified immunity would attach to statements made prior to the filing of a Form U-4 or U-5 that are subsequently included in a filed form in the same language that is provided to an appropriate person.

NASD Regulation requests comment regarding whether the qualified immunity should attach to statements that are subsequently filed in a covered form in the same language.

Ten-Day Advance Review Period

In addition to the qualified immunity provisions, the proposed Rule would require members to provide employees with copies of Forms U-5 or amendments to Forms U-5 at least 10 days before the form or amendment is filed with the NASD. Further, members would be required to provide material revisions to the employee immediately. The purpose of these provisions is to provide an employee with an opportunity to seek amended disclosure language prior to filing where he or she can demonstrate that the proposed language is inaccurate. The Rule explicitly states, however, that failure by an employee to respond during the 10-day period would not constitute a waiver of any rights of the employee.

NASD Regulation seeks comment concerning the appropriateness of the 10-day advance review period. In particular, commenters are asked to consider the impact of this provision on the nature of the disclosure contained in the filing. Would this provision encourage "negotiated disclosure" prior to filing that would lead to less complete and accurate information or limit its usefulness for regulatory purposes? Would it be likely to lead to delays in filing? Is the requirement that firms notify employees immediately of material revisions to Forms U-5 practicable?

Where commenters believe that the requirement is appropriate, they are asked to consider whether it provides adequate opportunity for employees to make additional disclosure or to propose changes. Does it provide a member firm sufficient time to prepare the filing? Should the time period be shorter? Longer? How should notice be delivered, and should the method be specified in the Rule? Should there be a provision for extending the 30-day period in some cases? If so, what form should it take, and under what circumstances would extension be appropriate?

Expedited Mediation Or Arbitration

Another issue is whether the proposed Rule should provide an expedited arbitration or mediation procedure for resolving disputes concerning disclosures contained in Forms U-5 before the forms are filed with the NASD. It is arguable that such a procedure could help to avoid or minimize post-filing disputes. While one difficulty of such a procedure is that the NASD's By-Laws currently require that Forms U-5 be filed within 30 days of termination, NASD Regulation would be able to provide qualified mediators on an expedited basis. Because timely reporting of the information required by Form U-5 is important for regulatory purposes, extension of the 30-day filing period could arguably undermine the goal of enhanced disclosure underlying the proposed Rule. Moreover, pre-filing mediation or arbitration could ultimately produce less, rather than more, candid disclosure than is currently the case.

NASD Regulation solicits comments regarding whether the proposed rule should include a procedure for expedited pre-filing mediation or arbitration. Commenters are asked to consider how such a procedure would work, whether it would be effective, and how it would be funded. Should there be an option to obtain pre-filing mediation or arbitration, or should it be mandatory on the demand of either party? Is mediation appropriate in the instance where the question is a member firm's response to a regulatory requirement? Would there be enough time to complete mediation before the 30-day filing period expired? Who would pay for the procedure?

Pilot Program

The Rule would be implemented on a four-year pilot basis, during which time NASD Regulation would assess the impact of the Rule on the nature and quality of disclosure by member firms. If NASD Regulation determines at the end of the pilot period that the Rule has had little or no positive impact on the nature and quality of the disclosures made on Forms U-4 and U-5, it will not seek to renew the Rule.

NASD Regulation seeks comment regarding the pilot program. Should the Rule be implemented on a pilot basis? Is four years a sufficient amount of time to assess the impact of the Rule on the nature and quality of the disclosure by members? Should it be shorter, or longer? Are there particular measures NASD Regulation should use in determining whether the Rule has had a positive impact on the nature and quality of disclosures?

Request For Comment

NASD Regulation encourages all members and interested parties to respond to the issues raised in this *Notice*. Comments should be mailed to:

Joan Conley
Office of the Corporate Secretary
NASD Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006-1500;

or e-mailed to:
pubcom@nasd.com

Comments must be received **by December 31, 1997.** Before becoming effective, any rule change developed as a result of the comments received must be adopted by the NASD Regulation, Inc., Board of Directors, may be reviewed by the NASD Board of Governors, and must be approved by the SEC.

Text Of Proposed Rule 1150

(Note: All language is new.)

Rule 1150. Regulatory Form Disclosures

(a) Mandatory Disclosures

(1) A member must make truthful, accurate, and complete statements on the covered forms required under Article IV, Sections 2 and 3 of the By-Laws ("mandatory disclosures").

(2) A notice of termination (Form U-5) and any amendment to the notice required to be provided to an associated person pursuant to Article IV, Section 3 of the By-Laws shall be delivered to such associated person at least 10 days before the notice or amendment is filed with the Association.

(3) If a member makes a material revision to a notice of termination or amendment delivered to an associated person pursuant to subparagraph (2), the member must deliver the revision to the associated person immediately.

(4) An associated person's failure to respond to a notice delivered pursuant to subparagraph (2) or (3) shall not constitute a waiver of any rights of the associated person.

(b) Qualified Immunity

(1) This paragraph shall apply to any arbitration proceeding between a member or other party and a covered person relating to statements made in response to an information requirement of a covered form with respect to such covered person, to the extent that such statements are contained in a covered form that has been or, at a subsequent point in time, is (A) filed with a regulatory authority or self-regulatory organization, and (B) disseminated by reason of such filing, or otherwise disseminated orally, in writing, or through any electronic medium to an appropriate person.

(2) A defending party shall not be liable in a proceeding to a covered person for any defamation claim related to an alleged untrue statement that is contained in a covered form if the statement was true at the time that the statement was made.

(3) A defending party shall not be liable in a proceeding to a covered person for any defamation claim related to an alleged untrue statement that is contained in a covered form unless the covered person shows by clear and convincing evidence that:

(A) the defending party knew at the time that the statement was made that it was false in any material respect; or

(B) the defending party acted in reckless disregard as to the statement's truth or falsity.

(c) Definitions

For purposes of this Rule:

(1) The term "appropriate person" means any federal or state governmental or regulatory authority, any self-regulatory organization, any employer or prospective employer of a covered person, any person who requests information concerning the covered person from the defending party and as to whom the defending party has a legal obligation to provide such information, or any person who has a legal obligation to obtain such information.

(2) The term "claim" means any claim, counterclaim, third-party claim, or cross-claim.

(3) The term "covered form" means any form or notice required under Article IV, Sections 2 and 3 of the By-Laws, including Forms U-4 and U-5, Disclosure Reporting Pages, and related explanatory materials.

(4) The term "covered person" means any present or former registered person or other employee of a member who is a party to a proceeding relating to a dispute within the scope of this Rule.

(5) The term "defending party" means any member who is a party to a proceeding and who is adverse to a covered person who is a party, and any associated person of such member.

(Rule 1150 is effective beginning on [Date] 1998 and ending on [Date] 2002, and applies to claims relating to any covered forms, as defined in Rule 1150, that are filed during that period.)

Endnotes

[1] The proposed Rule would require related changes to Article IV, Sections 3(a) and 3(b), of the NASD's By-Laws.

[2] "Defamation" has been defined as an "intentional false communication, either published or publicly spoken, that injures another's reputation or good name." *Black's Law Dictio-*

nary 417 (6th ed. 1990). "Libel" (written defamation) and "slander" (spoken defamation) are both forms of defamation. *Id.* at 1388.

[4] In 1996, approximately 3 percent of the arbitrations filed with NASD Regulation involved defamation claims.

[5] For example, states with large numbers of registered representatives which recognize some degree of immunity for statements contained in required disclosures include New York, New Jersey, Florida, California, Illinois, Texas and Pennsylvania.

[6] The standard of proof has no bearing on what evidence is admissible under the Code of Arbitration Procedure. NASD Rule 10323 provides that admissibility of evidence shall be determined by arbitrators based on materiality and relevance. Arbitrators are instructed that, although the Federal Rules of Evidence do not strictly govern the admissibility of evidence in arbitration proceedings, they may provide guidance on what evidence is probative.

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NASD NOTICE TO MEMBERS 97-78

SEC Approves Rule Relating To Distribution Of Information Concerning NASD Regulation's Public Disclosure Program

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ■ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ■ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ☐ Syndicate
- ☐ Systems
- ☐ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

On September 10, 1997, the Securities and Exchange Commission (SEC) approved new National Association of Securities Dealers, Inc. (NASD®) Conduct Rule 2280, Investor Education and Protection, which requires certain NASD members to provide customers with the following information in writing not less than once every calendar year: (1) the NASD Regulation, Inc., Public Disclosure Program hotline number; (2) the NASD Regulation℠ Web Site address; and (3) a statement regarding the availability of an investor brochure that includes information describing the Public Disclosure Program. The new rule is effective January 1, 1998.

Questions concerning this *Notice* should be directed to Gary L. Goldsholle, Senior Attorney, Office of General Counsel, NASD Regulation, at (202) 728-8104.

Background And Discussion

Under the Public Disclosure Program (Program), NASD Regulation provides certain information regarding the disciplinary history of NASD members and their associated persons in response to written inquiries, electronic inquiries, or telephonic inquiries via NASD Regulation's toll-free telephone listing (1-800-289-9999). In 1995, at the request of Rep. Edward J. Markey (D-MA), the General Accounting Office (GAO) reviewed the effectiveness of the toll-free telephone information service used by NASD Regulation to disseminate information under the Program. The GAO recommended that NASD Regulation publicize and educate investors about the availability of information through the Program. Specifically, the GAO recommended that NASD Regulation "explore other ways of publicizing the hotline to a wider audience of investors, such as including the hotline number on account-opening documents or account statements, and making disciplinary-related information directly available to investors through the Internet."[1] Pursuant to these recommendations and to enhance public awareness of the Program, NASD Regulation adopted Rule 2280.

NASD Rule 2280(a) requires NASD members that carry customer accounts to provide customers with the following items of information in writing not less than once every calendar year: (1) the NASD Regulation Program hotline number; (2) the NASD Regulation Web Site address; and (3) a statement regarding the availability to the customer of an investor brochure that includes information describing the Program. NASD members may include the required information on customer account statements or in another type of publication. Under NASD Rule 2280(b), members that do not carry customer accounts and do not hold customer funds or securities are exempt from the requirements of NASD Rule 2280(a) because the information required to be furnished under the rule will be provided by the customer's clearing or carrying broker.

The original effective date of Rule 2280 was September 10, 1997. On October 16, 1997, NASD Regulation filed an immediately effective proposed rule change with the SEC postponing the effective date until January 1, 1998, to provide members with sufficient time to comply with the new rule, which operates on a calendar year basis.[2]

Text Of New Rule

(Note: All rule language is new.)

2280. Investor Education and Protection

(a) Each member shall, with a frequency of not less than once every

calendar year, provide in writing to each customer the following items of information.

(1) NASD Regulation Public Disclosure Program Hotline Number

(2) NASD Regulation Web Site Address

(3) A statement as to the availability to the customer of an investor brochure that includes information describing the Public Disclosure Program

(b) Notwithstanding the requirement in paragraph (a) above, any member that does not carry customer accounts and does not hold customer funds or securities is exempt from the provisions of this rule.

Endnotes

[1] GAO, *NASD Telephone Hotline: Enhancements Could Help Investors Be Better Informed About Brokers' Disciplinary Records* (August 1996), at 18.

[2] 62 FR 55295 (October 23, 1997).

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NASD NOTICE TO MEMBERS 97-79

NASD Regulation Requests Comment On Proposed Amendment To Rule Governing Clearing Agreements; **Comment Period Expires December 1, 1997**

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ☐ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
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- ☐ Variable Contracts

Executive Summary

At its September 1997 meeting, the NASD Regulation, Inc., Board of Directors (Board) approved a proposed amendment to the National Association of Securities Dealers, Inc. (NASD®) rule governing clearing agreements (Rule 3230) in response to problems that occurred recently with certain failed introducing firms. The problems that the amendment is designed to address relate to the lack of a regulatory early warning of trouble at the introducing firms, gaps in the introducing firms' supervisory procedures, and potential risks associated with introducing firm check writing privileges. The proposed amendment would: (1) establish standards for the disposition of written customer complaints about member introducing firms relating to their functions and responsibilities under the clearing agreements received by their clearing firms; (2) govern how exception reports are made available to introducing firms and retained by clearing firms; and (3) permit introducing firms to write checks on their clearing firm's account.

Questions regarding this *Request For Comment* may be directed to Elliott R. Curzon, Assistant General Counsel, Office of General Counsel, NASD Regulation℠, at (202) 728-8451, or Robert J. Smith, Senior Attorney, Office of General Counsel, NASD Regulation, at (202) 728-8176.

Request For Comment

NASD Regulation encourages all members and interested parties to respond to the issues raised in this *Notice*. Comments should be mailed to:

Joan Conley
Office of the Corporate Secretary
NASD Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006-1500;

or e-mailed to:
pubcom@nasd.com

Comments must be received **by December 1, 1997**. Before becoming effective, any rule change developed as a result of the comments received must be adopted by the NASD Regulation, Inc., Board of Directors, may be reviewed by the NASD Board of Governors, and must be approved by the SEC.

We have filed this proposed rule change with the SEC and anticipate that, by the time of publication of this *Notice*, the SEC will have published the rule filing for comment. Because we anticipate the SEC comment period to run, in part, concurrently with the NASD comment period, we are limiting our comment period to December 1, 1997. Notice of publication of the rule change in the *Federal Register* will be provided on the NASD Regulation Web Site, and members may at that time direct their comments to the SEC.

NASD Regulation Request for Comment 97-79

Executive Summary

At its September 1997 meeting, the NASD Regulation, Inc., Board of Directors (Board) approved a proposed amendment to the National Association of Securities Dealers, Inc. (NASD®) rule governing clearing agreements (Rule 3230) in response to problems that occurred recently with certain failed introducing firms. The problems that the amendment is designed to address relate to the lack of a regulatory early warning of trouble at the introducing firms, gaps in the introducing firms' supervisory procedures, and potential risks associated with introducing firm check writing privileges. The proposed amendment would: (1) establish standards for the disposition of written customer complaints about member introducing firms relating to their functions and responsibilities under the clearing agreements received by their clearing firms; (2) govern how exception reports are made available to introducing firms and retained by clearing firms; and (3) permit introducing firms to write checks on their clearing firm's account. The proposed amendment has been submitted to the Securities and Exchange Commission (SEC) for approval.[1]

However, in connection with approving the proposed amendment, the Board directed the staff to publish the proposed amendment for the information of the membership and to advise the membership that the rule proposal has been filed with the SEC. The text of the proposed amendment follows this *Notice*.

Questions regarding this *Request For Comment* may be directed to Elliott R. Curzon, Assistant General Counsel, Office of General Counsel, NASD Regulation℠, at (202) 728-8451, or Robert J. Smith, Senior Attorney, Office of General Counsel, NASD Regulation, at (202) 728-8176.

Background

Recent concerns about questionable sales practices and potentially fraudulent activity by certain introducing firms, and the handling of customer complaints about those firms by their clearing firms, caused the staffs of NASD Regulation and the New York Stock Exchange (NYSE) to examine the relationship between clearing firms and their client introducing firms. The examination resulted in proposals to amend NASD and NYSE rules relating to the content and approval of clearing agreements to specify requirements for handling customer complaints, for providing, requesting and retaining exception reports, and for issuing checks.

The NYSE's proposal to amend its Rule 382 has been filed with the SEC and published for comment by the SEC in the *Federal Register*.[2] The NASD's proposal to amend Rule 3230 (discussed below) is consistent with the current NYSE proposal to amend NYSE Rule 382 and achieves the regulatory goals identified by the SEC, the NASD, the NYSE and the Securities Industry Association (SIA) without unduly burdening the clearing firms.

While the Board of Directors of NASD Regulation approved the proposed rule in recognition of the importance of maintaining consistency with the NYSE's proposal, the Board expressed strong concerns regarding the proposal, including those relating to two particular issues. First, the Board expressed concern that the proposed rules not change or be interpreted as changing the fundamental nature of the relationship between introducing and clearing firms, or otherwise affect rights, responsibilities or liabilities of the introducing or clearing firm under law or contract. Other than to establish limited requirements to enable the introducing member to carry out its responsibilities under its clearing

or carrying agreement with the clearing member, the proposals are not intended to change the fundamental nature of the relationship between introducing and clearing firms, or otherwise affect any existing rights, responsibilities or liabilities under law or contract.

Second, the Board expressed concern that the requirement that the customer be notified by the clearing firm that he or she has the right to transfer his or her account to another firm may unfairly single out a particular category of complaints, create an unfair implication that each such complaint would warrant the customer's transferring his or her account, or otherwise operate inappropriately to distinguish this class of complaints from others. The NASD is specifically soliciting comments on these and other issues, as discussed more fully below.

Description Of Proposed Rule Change

Customer Complaints. It is generally the practice of clearing firms to forward to introducing firms customer complaints they receive relating to matters that are the responsibility of the introducing firm. Under NASD Rule 3070, a member is required to report to the NASD any written customer complaint against it involving allegations of theft, misappropriation of funds or securities, or forgery. Recently, however, there have been instances where introducing firms may not have complied in a timely manner with the requirements of Rule 3070 when their clearing firms forwarded customer complaints to them, thus delaying receipt of these reports by the NASD. Since there is no mechanism other than Rule 3070 designed to provide this information to NASD Regulation, such late reporting may undermine the purpose of Rule 3070, which is to provide NASD Regulation with early warning indicators to generate a regulatory response to problems. In addition, receipt by clearing firms of large numbers of complaints regarding introducing firms may be indicative of sales practice problems requiring prompt regulatory attention.

To address this concern, proposed new paragraph (b) states that when a clearing firm receives a customer complaint about an introducing firm relating to the functions and responsibilities of the introducing firm, the clearing firm must forward the complaint to the introducing firm and send a copy of the complaint to the introducing firm's Designated Examining Authority (DEA). The requirement may provide an early warning to the DEA of potential problems at introducing firms. The proposed amendment also provides that the clearing agreement must expressly direct and authorize the clearing firm to forward the complaint to the introducing firm and send a copy of the complaint to the introducing firm's DEA.

The requirement that the complaints be forwarded to the appropriate DEA is intended to provide notice to the DEAs of the types of complaints that are being received and to provide information that may be useful for examining or investigating particular conduct. It is not intended, however, to result in an investigation of each complaint that is received by the DEA.

In addition, the proposed rule provides that the clearing firm must notify the customer in writing that the complaint was received, and was forwarded to the introducing firm and to the introducing firm's DEA. This requirement will serve to alert the customer that the complaint has been received and forwarded to the appropriate entity (the introducing firm) for a response, and that the introducing firm's regulator has also been made aware of the customer's complaint. This written notice to the customer must also contain a statement that reads substantially as follows: "Please be aware that you retain the right, at your discretion, to transfer your account to another broker/dealer of your choice."

Exception Reports. All NASD member firms are required under NASD and federal regulations to establish, maintain and enforce supervisory systems and procedures that are designed to address all areas of a member's business. A key aspect of these supervisory procedures is exception and other compliance reports that a member creates to help meet these supervisory responsibilities. In a fully disclosed clearing arrangement, the clearing member generally provides exception reports to assist the introducing member in carrying out its supervisory obligations. In addition, officers and managers of introducing members should be notified of the reports and information available to them in meeting their supervisory and monitoring obligations. Paragraph (c) of the proposed amendment addresses these issues.

Proposed new paragraph (c)(1) requires the clearing firm to provide its introducing firm, both at the commencement of the introducing/clearing arrangement and annually thereafter, a list or description of all exception or other reports which it offers to introducing firms to assist the introducing firm in supervising its activities, monitoring its accounts and carrying out its functions and responsibilities under the clearing agreement.

Even though the language of the proposed amendment requires the clearing firm to provide the introducing firm with a list or description of reports that it will provide, the staff

recognizes that some clearing firms do not create such reports, but rather provide data and data formatting software to their introducing clients that allow the introducing firms to prepare their own reports. The proposal would permit compliance with this provision in instances where clearing firms inform their introducing firms about available data and data formatting so the introducing firms can determine which reports to create in order to meet their supervisory and monitoring needs.

Paragraph(c)(2) requires the clearing firm to retain, as part of its books and records, copies of any reports requested or provided to the introducing firm. The provision permits a clearing firm to meet the requirement if it retains the data that was used to prepare the report, but only if the clearing member, at the request of the DEA, can recreate the report or provide the data and data formatting that was used to prepare the report. Similarly, if the clearing firm provided data and data formatting to the introducing firm, the clearing firm could provide that same data and data formatting to the DEA to fulfill this requirement.

Paragraph (c)(3) requires the clearing member, immediately after entering into the clearing agreement, to notify the introducing member's chief executive and compliance officers of the reports that it offers to the introducing member, and the reports requested by or supplied to the introducing firm. The clearing member must provide this notice each year thereafter as of June 30, to be provided no later than July 31 of the following year.[3]

Finally, paragraph (c)(4) requires the clearing member, at the request of the introducing member's DEA, to provide to the DEA reports that were offered to the introducing member, but which the introducing member did not request. As with the record retention provision in paragraph (c)(2), this requirement may be met if the clearing member retains the data from which the original report was produced, and then either recreates the report or provides the data and data formatting that was used to prepare the report.

Check Writing. Under proposed new Paragraph (d), the clearing agreement may permit the introducing firm to issue checks to the introducing firm's customers that are drawn on the clearing member's account upon written representation from the introducing firm that it has established, and will maintain and enforce, supervisory procedures with respect to the issuance of negotiable instruments. This rule is intended to protect customers by clearly establishing that the clearing member will be the maker or drawer of such instruments and, therefore, liable for any mistakes or fraud by the introducing firm in the making or drawing of the check. This provision is intended to establish that clearing firms are liable to the introducing firm's customer if the introducing firm misuses the authority, thereby protecting the customer with the clearing member's funds.

Solicitation Of Comments

The rule proposals of the NASD and the NYSE may raise important issues for both clearing and introducing member firms. In addition to any other issues that members may wish to address, NASD Regulation specifically solicits comment on the following questions.

General

Will the respective obligations imposed on clearing and introducing firms by the proposal help introducing firms and regulators better address sales practice problems? To what extent would they permit such problems to be addressed in a more timely way? To what extent would they act to deter sales practice abuses?

To what extent would the proposal discourage members from agreeing to enter into new clearing relationships, or to renew existing ones, or affect the degree of care employed when entering into such a relationship? Would the result that is identified be positive or negative for the markets overall?

Customer Complaints

How quickly are customer complaints that are directed to clearing members and that concern introducing firms or their associated persons forwarded to introducing firms? What proportion of these complaints concerns matters identified in NASD Rule 3070(a)(2), *i.e.*, allegations of theft, misappropriation of funds or securities, or forgery? What other types of complaints typically are received?

Why, in general, are complaint letters addressed to clearing firms rather than introducing firms, when they concern conduct of the introducing firms? Please address the extent to which this occurs because of confusion by customers over the relative responsibilities of the firms, or for other reasons, *e.g.*, the failure to receive a response from the introducing firm.

Should the requirements of the proposed rule regarding customer complaints apply equally to complaints against a clearing firm sent by a customer to an introducing firm with whom the clearing firm has a clearing agreement?

Presently, copies of customer complaints received by securities firms are not required to be forwarded to the SEC or any self-regulatory organization. To the extent that this

requirement is imposed, does it make sense to distinguish letters concerning introducing firms, or their associated persons addressed to clearing firms, from other types of customer complaints?

Does the requirement that, upon the clearing firm's receipt of a customer complaint, the customer be notified by the clearing firm that he or she has the right to transfer his or her account to another firm, serve a useful purpose, unfairly single out a particular category of complaints, or otherwise operate inappropriately? Does it create an unfair implication that each such complaint would warrant the customer's transferring his or her account, or otherwise unfairly tarnish the introducing firm? To the extent that this type of information is useful to investors, does it make sense to provide this notice only in the circumstances identified?

Exception Reports

What compliance or cost burdens would result from the requirement that clearing firms retain copies of exception reports or data that is provided to introducing firms? To what extent is this data now stored, and for how long?

What are the relative costs and benefits of the requirements for annual reports to the executive officers of introducing firms as to the exception reports that were offered and supplied, and for reports to the DEAs as to reports that the introducing firm did not request?

Request For Comment

NASD Regulation encourages all members and interested parties to respond to the issues raised in this *Notice*. Comments should be mailed to:

Joan Conley
Office of the Corporate Secretary
NASD Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006-1500;

or e-mailed to:
pubcom@nasd.com

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We have filed this proposed rule change with the SEC and anticipate that, by the time of publication of this *Notice*, the SEC will have published the rule filing for comment. Because we anticipate the SEC comment period to run, in part, concurrently with the NASD comment period, we are limiting our comment period to December 1, 1997. Notice of publication of the rule change in the *Federal Register* will be provided on the NASD Regulation Web Site, and members may at that time direct their comments to the SEC.

Text of Proposed Amendment To Rule 3230 Of The NASD Conduct Rules

(Note: New text is underlined; deletions are bracketed.)

3230. Clearing Agreements

(a) All clearing or carrying agreements entered into by a member, except where any party to the agreement is also subject to a comparable rule of a national securities exchange, shall specify the respective functions and responsibilities of each party to the agreement and shall, at a minimum, specify the responsibility of each party with respect to each of the following matters:

(1) opening, approving and monitoring customer accounts;

(2) extension of credit;

(3) maintenance of books and records;

(4) receipt and delivery of funds and securities;

(5) safeguarding of funds and securities;

(6) confirmations and statements;

(7) acceptance of orders and execution of transactions;

(8) whether, for purposes of the Commission's financial responsibility rules adopted under the Act, and the Securities Investor Protection Act, as amended, and regulations adopted thereunder, customers are customers of the clearing member; and

(9) the requirement to provide customer notification under paragraph [(d)] (g) of this Rule.

(b)(1) In order for the introducing member to carry out its functions and responsibilities under the agreement, each clearing member must forward promptly any written customer complaint received by the clearing member regarding the introducing member or its associated persons relating to functions and responsibilities allocated to the introducing member under the agreement directly to: (A) the introducing member; and (B) the introducing member's examining authority designated under Section 17 of the Act ("DEA") (or, if none, to its appropriate regulatory agency or authority). The clearing or carrying agreement must specifically

direct and authorize the clearing member to do so.

(2) The clearing member must also notify the customer, in writing, that it has received the complaint, and that the complaint has been forwarded to the introducing member and to the introducing member's DEA (or, if none, to its appropriate regulatory agency or authority). This written notice to the customer must also contain a statement that reads substantially as follows: "Please be aware that you retain the right, at your discretion, to transfer your account to another broker/dealer of your choice."

(c)(1) A clearing member, when it enters into a clearing agreement, must immediately, and annually thereafter, provide the introducing member a list or description of all reports (exception and other types of reports) which it offers to the introducing member to assist the introducing member in supervising its activities, monitoring its customer accounts, and carrying out its functions and responsibilities under the clearing agreement.

(2) The clearing member must retain as part of its books and records required to be maintained under the Act and the Association's rules, copies of the reports requested by or provided to the introducing member. For purposes of this Rule, the clearing member will be in compliance with the requirements of this paragraph if it retains the data from which the original report was produced, provided, the clearing member can, at the request of the DEA, either (1) recreate the report; or (2) provide the data and the data formatting that was used to prepare the report.

(3) Each year, no later than July 31, the clearing member must notify in writing the introducing member's chief executive and compliance officers of the reports offered to the introducing member and the reports requested by or supplied to the introducing member during the previous year ending June 30. The clearing member must also provide a copy of the notice to the introducing member's DEA.

(4) The clearing member must provide, at the request of the introducing member's DEA, any reports (or, if the reports are not available, information or data from which the reports could have been prepared) that were offered to the introducing member but which the introducing member did not request.

(d) The clearing or carrying agreement may permit the introducing member to issue negotiable instruments directly to the introducing member's customers using instruments for which the clearing member is the maker or drawer. The clearing member may not grant the introducing member the authority to issue negotiable instruments until the introducing member has notified the clearing member in writing that it has established, and will maintain and enforce, supervisory procedures with respect to the issuance of such instruments.

[(b)] (e) Whenever a clearing member designated to the Association for oversight pursuant to Section 17 of the Act, or a rule of the Commission adopted thereunder, amends any of its clearing or carrying agreements with respect to any item enumerated in subparagraphs (a)(1) through (a)(9) or enters into a new clearing or carrying agreement with an introducing member, the clearing member shall submit the agreement to the Association for review and approval.

[(c)] (f) Whenever an introducing member designated to the Association for oversight pursuant to Section 17 of the Act, or a rule of the Commission adopted thereunder, amends its clearing or carrying agreement with a clearing member designated to another self-regulatory organization for oversight with respect to any item enumerated in subparagraphs (a)(1) through (a)(9) enters into a new clearing agreement with another clearing member, the introducing member shall submit the agreement to its local Association district office for review.

[(d)] (g) Each customer whose account is introduced on a fully disclosed basis shall be notified in writing upon the opening of his account of the existence of the clearing or carrying agreement.

Endnotes

[1] *See* File No. SR-NASD-97-76 (October 14, 1997).

[2] *See* File No. SR-NYSE-97-25 (September 12, 1997); Securities Exchange Act Release No. 39200 (October 3, 1997); 62 FR 53369 (October 14, 1997).

[3] The clearing member must also provide a copy of the notice to the introducing firm's DEA. This provision is designed to make the responsible principals of the introducing firm aware of the reports and dates available from the clearing firm to assist the introducing firm in meeting supervisory and other functions and responsibilities under the clearing agreement, and to alert the DEA.

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NASD NOTICE TO MEMBERS 97-80

SEC Approves Amendments To Syndicate Short Covering Requirements And Other Related Amendments; Effective Immediately

Suggested Routing

- ☐ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ■ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ☐ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ☐ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ■ Syndicate
- ☐ Systems
- ■ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

On October 3, 1997, the Securities and Exchange Commission (SEC) approved, on an accelerated basis, amendments to National Association of Securities Dealers, Inc. (NASD®) Rules 2710, 4624, and 6540 that replace the requirement that members provide the NASD with information on the amount of the syndicate short position with a requirement that members maintain this information in their files.[1] In addition, the amendments clarify that members are required to request an Underwriting Activity Report (UAR) with respect to a security that is considered "actively-traded" under Rule 101 of SEC Regulation M and excludes all exchange-listed securities from the obligation to request a UAR. Finally, the amendments clarify that members are required to submit pricing information with respect to any security that is considered "actively-traded" under Rule 101, regardless of whether listed on a national securities exchange. The amendments are immediately effective. The text of the amendments is attached to this *Notice*.

Questions regarding this *Notice* may be directed to Suzanne E. Rothwell, Chief Counsel, Corporate Financing, NASD Regulation, Inc., and Richard J. Fortwengler, Associate Director, Corporate Financing, NASD Regulation℠, at (202) 974-2700.

Background And Description Of Amendments

On April 1, 1997, NASD rules designed to facilitate compliance with the SEC's Regulation M became effective.[2] Rule 104 of Regulation M requires members acting as managing underwriters to notify the appropriate regulator of the market for the security in distribution of a member's intention to engage in syndicate short covering transactions. To allow NASD members to comply with their notification obligations under Rule 104, the NASD adopted Rule 4624 of The Nasdaq Stock Market℠ and Rule 6540 of the OTC Bulletin Board® Service to require that members provide the requisite notification to the NASD, but also to require that members include the amount of the syndicate short position on the Regulation M Trading Notification. This latter information is not required to be provided under SEC Regulation M.

Members of the industry have expressed concern regarding the ability of member firms to provide accurate data on the amount of a syndicate short position at the time the Regulation M Trading Notification is required. In order to address the concerns of the industry, Rule 4624 of The Nasdaq Stock Market and Rule 6540 of the OTC Bulletin Board Service have been amended to delete the current requirement to provide immediate information on the amount of syndicate short positions. In its place, Rule 2710 has been amended to establish a new requirement in subparagraph (b)(13) that, no later than 30 days after the effective date of the offering, the managing underwriter shall retain information, as required by the Corporate Financing Department of NASD Regulation, on the amount of the syndicate short position and that such information be retained in the same manner as the underwriter's syndicate covering transaction records under SEC Rule 17a-2.

Rule 17a-2 requires that a managing underwriter separately maintain information on stabilizing transactions and syndicate covering transactions. It is anticipated that the managing underwriter will maintain with its records of syndicate covering transactions, as required by Rule 17a-2, a record of the amount of the syndicate short position. We intend

to require that the information to be retained by the managing underwriter consist of whether the syndicate short position was no greater than the over-allotment option, or whether a naked short position was less than 1 percent, between 1 percent and 5 percent, between 5 percent and 10 percent, or over 10 percent of the offering size. The rule change to Rule 2710 includes a sunset provision to eliminate the requirement to retain information on the amount of short positions at the conclusion of the study of syndicate short covering practices, but no later than January 1, 2000.

In addition, Subparagraph (b)(11) of Rule 2710 has been amended to conform its rule language to that of Subparagraph (b)(12) and to the NASD's original intent regarding the scope of that provision. This change clarifies that the managing underwriter is required to request a UAR with respect to a distribution of a security that is considered an "actively-traded" security under SEC Rule 101.[3] Currently, the language of Subparagraph (b)(11) is misleading in that it only imposes this requirement with respect to securities that are "subject to SEC Rule 101."

Moreover, subparagraph (b)(11) of Rule 2710 has been amended to exclude exchange-listed securities from the requirement that managing underwriters obtain a UAR. The managing underwriter of an offering of exchange-listed securities will, nonetheless, continue to be responsible under subparagraph (b)(12) to advise the Market Regulation Department of information regarding the pricing and termination of the offering. Conforming amendments are made to subparagraph (b)(12) in light of this proposed rule change to subparagraph (b)(11). Finally, subparagraph (b)(12) is also revised to clarify that the managing underwriter of any offering of securities considered "actively-traded" under SEC Rule 101, must also advise the Market Regulation Department of information on pricing and termination.

The amendments are effective as of the date of SEC approval.

Text Of Amendments

(Note: New text is underlined; deletions are bracketed.)

2710. Corporate Financing Rule—Underwriting Terms And Arrangements

(a) No change.

(b) Filing Requirements

(1) through (10) No change.

(11) Request for Underwriting Activity Report

Notwithstanding the availability of an exemption from filing under subparagraph (b)(7) of this Rule, a member acting as a manager (or in a similar capacity) of a distribution of a publicly traded subject security or reference security that is subject to SEC Rule 101 or an "actively-traded" security under SEC Rule 101 (except for a security listed on a national securities exchange) shall submit a request to the Corporate Financing Department for an Underwriting Activity Report with respect to the subject and/or reference security in order to facilitate compliance with SEC Rules 101, 103, or 104, and other distribution-related Rules of the Association. The request shall be submitted at the time a registration statement or similar offering document is filed with the Department, the SEC, or other regulatory agency or, if not filed with any regulatory agency, at least two (2) business days prior to the commencement of the restricted period under SEC Rule 101. The request shall include a copy of the registration statement or similar offering document (if not previously submitted pursuant to subparagraph (b)(5) of this Rule). If no member is acting as managing underwriter of such distribution, each member that is a distribution participant or an affiliated purchaser shall submit a request for an Underwriting Activity Report, unless another member has assumed responsibility for compliance with this subparagraph. For purposes of subparagraphs (b)(11) and (12), SEC Rules 100, 101, 103, and 104 are rules of the Commission adopted under Regulation M and the following terms shall have the meanings as defined in SEC Rule 100: "distribution," "distribution participant," "reference security," "restricted period," and "subject security."

(12) Submission of Pricing Information

A member acting as a manager (or in a similar capacity) of a distribution [subject to subparagraph (b)(11)] of securities that are listed on a national securities exchange and considered a subject security or reference security that is subject to SEC Rule 101 or an "actively-traded" security under SEC Rule 101 or a distribution of any other securities that are considered "actively-traded" under SEC Rule 101 shall provide written notice to the Market Regulation Department of NASD Regulation, Inc., no later than the close of business the day the offering terminates, that includes the date and time of the pricing of the offering, the offering price, and the time the offering terminated, which notice may be submitted on the Underwriting Activity Report.

(13) Submission of Information on Syndicate Covering Transactions

A member acting as a manager (or in a similar capacity) of a distribution of a publicly traded subject security or

reference security that is subject to SEC Rule 101 or an "actively-traded" security under SEC Rule 101 shall, no later than thirty (30) days after the effective date of the offering, maintain information as required by the Corporate Financing Department of NASD Regulation, Inc. on the amount of the syndicate short position in a manner consistent with SEC Rule 17a-2.*

(c) and (d) No change.

4000. The Nasdaq Stock Market

4624. Penalty Bids and Syndicate Covering Transactions

(a) A market maker acting as a manager (or in a similar capacity) of a distribution of a Nasdaq security that is a subject or reference security under SEC Rule 101 shall provide written notice to the Corporate Financing Department of NASD Regulation, Inc. of its intention to impose a penalty bid on syndicate members or to conduct syndicate covering transactions pursuant to SEC Rule 104 prior to imposing the penalty bid or engaging in the first syndicate covering transaction. A market maker that intends to impose a penalty bid on syndicate members may request that its quotation be identified as a penalty bid on Nasdaq pursuant to paragraph (c) below.

(b) The notice required by paragraph (a) shall include:

(1) the identity of the security and its Nasdaq symbol; and

(2) the date the member is intending to impose the penalty bid and/or conduct syndicate covering transaction[; and

(3) the amount of the syndicate short position, in the case of syndicate covering transactions].

(c) Notwithstanding paragraph (a), a market maker may request that its quotation be identified as a penalty bid on Nasdaq [display] by providing notice to Nasdaq Market Operations, which notice shall include the date and time that the penalty bid identifier should be entered on Nasdaq and, if not in writing, shall be confirmed in writing no later than the close of business the day the penalty bid identifier is entered on Nasdaq.

(d) The written notice required by [paragraphs (a) and (c) of] this Rule may be submitted on the Underwriting Activity Report [by including the information required by subparagraphs (b)(1) and (b)(2) or paragraph (c)].

6500. OTC Bulletin Board Service

6540. Requirements Applicable to Market Makers

(a) and (b) - No change.

(1) Permissible Quotation Entries

(A) - (C) - No change.

(D) Any member that intends to be a distribution participant in a distribution of securities subject to SEC Rule 101, or is an affiliated purchaser in such distribution, and is entering quotations in an OTCBB-eligible security that is the subject security or reference security of such distribution shall, unless another member has assumed responsibility for compliance with this paragraph:

(i) No change

(ii) No change

(iii) provide written notice to the Corporate Financing Department of NASD Regulation, Inc. of its intention to impose a penalty bid or to conduct syndicate covering transactions pursuant to SEC Rule 104 prior to imposing the penalty bid or engaging in the first syndicate covering transaction. Such notice shall include information as to the date the penalty bid or first syndicate covering transaction will occur [and the amount of the syndicate short position]; and

(iv) No change

(E) The written notice required by subparagraphs (b)(1)(D)(I), (iii) and (iv) of this rule may be submitted on the Underwriting Activity Report provided by the Corporate Financing Department of NASD Regulation, Inc. [by including the information required by those subparagraphs].

(F) No change.

(2) through (4) No change.

Footnote To Rule Language

* This rule will expire no later than January 1, 2000.

Endnotes

[1] Securities Exchange Act Release No. 39197 (October 3, 1997).

[2] Securities Act Release No. 38360 (March 4, 1997), and amended Securities Act Release No. 38399 (March 14, 1997).

[3] An "actively-traded" security is a subject or reference security with a value of average daily trading volume of at least $1 million, which is issued by an issuer whose common equity securities have a public float of at least $150 million.

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NASD NOTICE TO MEMBERS 97-81

NASD Regulation Requests Comment On Proposed Amendments Relating To Compensation For Sale Of Public Offerings Of Direct Participation Programs; **Comment Period Expires January 9, 1998**

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ■ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ☐ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ■ Syndicate
- ☐ Systems
- ☐ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

In the following document, NASD Regulation, Inc. (NASD Regulation℠) requests comment on proposed amendments to National Association of Securities Dealers, Inc. (NASD®) Rule 2810 that would modify the compensation that members are permitted to receive in connection with the sale of public offerings of direct participation program (DPP) securities. The proposed amendments would: (1) lower the front-end maximum permissible compensation from 10 percent to 8 percent; (2) permit a member to receive an annual investor service fee of .20 percent, with maximum front-end compensation of 7.5 percent; (3) permit a member to receive a "trail commission," in addition to the service fee, for each one percentage point give-up from front-end compensation of 7.5 percent; and (4) lower the maximum organization and offering expense guideline for large offerings.

Questions concerning this *Request For Comment* should be directed to Charles L. Bennett, Director, Corporate Financing, NASD Regulation; Suzanne E. Rothwell, Chief Counsel, Corporate Financing, NASD Regulation; or Carl R. Sperapani, Assistant Director, Corporate Financing, NASD Regulation, at (202) 974-2700.

Request For Comment

NASD Regulation encourages all members and interested parties to respond to the issues raised in this *Notice*. Comments should be mailed to:

Joan Conley
Office of the Corporate Secretary
NASD Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006-1500;

or e-mailed to:
pubcom@nasd.com

Comments must be received **by January 9, 1998**. Before becoming effective, any rule change developed as a result of the comments received must be adopted by the NASD Regulation, Inc., Board of Directors, may be reviewed by the NASD Board of Governors, and must be approved by the SEC.

NASD Regulation Request for Comment 97-81

Executive Summary

NASD Regulation, Inc. (NASD Regulation℠) requests comment on proposed amendments to National Association of Securities Dealers, Inc. (NASD®) Rule 2810 (DPP Rule or Rule) that would modify the compensation that members are permitted to receive in connection with the sale of public offerings of direct participation program (DPP) securities. The proposed amendments would: (1) lower the front-end maximum permissible compensation from 10 percent to 8 percent; (2) permit a member to receive an annual investor service fee of .20 percent, with maximum front-end compensation of 7.5 percent; (3) permit a member to receive a "trail commission," in addition to the service fee, for each one percentage point give-up from front-end compensation of 7.5 percent; and (4) lower the maximum organization and offering expense guideline for large offerings.

Questions concerning this *Request For Comment* should be directed to Charles L. Bennett, Director, Corporate Financing, NASD Regulation; Suzanne E. Rothwell, Chief Counsel, Corporate Financing, NASD Regulation; or Carl R. Sperapani, Assistant Director, Corporate Financing, NASD Regulation, at (202) 974-2700.

Background

Current NASD Rules

Rule 2810 sets out the NASD's regulation of the underwriting terms and arrangements of public offerings of DPP securities. The Rule currently permits members to receive underwriting compensation for participating in the distribution of a public DPP offering of up to 10 percent of the offering proceeds received, with an additional .5 percent permitted for reimbursement of bona fide due diligence expenses. The Rule also restricts total organization and offering (O&O) expenses for any program sponsored by a member or its affiliate to no more than 15 percent of offering proceeds (or 4.5 percent additional O&O). "Compensation" is broadly defined to include all items of compensation paid directly or indirectly from whatever source to underwriters, broker/dealers and their affiliates. Moreover, the current rule also includes a provision prohibiting the receipt of compensation by members of an indeterminate nature, unless the structure of the indeterminate compensation satisfies certain conditions.[1]

The Tully Report

In May 1994, an industry committee chaired by Merrill Lynch Chairman Daniel P. Tully (the Committee) was formed at the request of Securities and Exchange Commission (SEC) Chairman Arthur Levitt to address concerns regarding conflicts of interest in the brokerage industry. The Committee's mandates were to review industry compensation practices for registered representatives (RRs) and branch managers, identify actual and perceived conflicts of interest for RRs and branch managers, and identify the "best practices" used in the industry to eliminate, reduce or mitigate such conflicts. The Committee issued its report on April 10, 1995 (Tully Report). Among some of the "best practices" identified, the Tully Report recommended that:

- Compensation policies should be designed to align the interest of all three parties to the relationship—the client, the RR, and the brokerage firm—and to encourage long-term relationships among them.

- Member policies should encourage representatives to understand their client's objectives, and to educate the clients about markets and risks.[2]

Generally, the Tully Report's findings and conclusions reflected a growing concern that the securities industry should more closely align the interests of brokerage firms and RRs to those of their customers and should encourage long-term relationships between firms and RRs and their customers.

Discussion

Response To The Tully Report

NASD Regulation believes that the current compensation structure for the sale of DPPs in Rule 2810 should be amended to better align the interests of the investor, the salesperson, and the member as recommended by the Tully Report. DPPs are a long-term, illiquid security product in which investors need continuing information on the performance of their investment. The current compensation structure in the DPP Rule does not encourage members or their RRs to provide continuing information to their customers regarding the program over its life, nor does it promote members' continued review of the program's activities on behalf of its customers. Importantly, NASD Regulation also believes that amending the current compensation structure will also align the interests of the general partner or sponsor with those of the investor—although the Tully Report does not focus on this relationship.

Finally, NASD Regulation is concerned that the current compensation structure that assumes the member will obtain its compensation at the time of sale does not properly focus the member and the member's RRs on whether the quality of the investment will provide continuing returns to investors, thus creating an impression on the part of investors that the broker/dealer is significantly rewarded for the sale of DPP products regardless of the subsequent performance of the program. It was, therefore, determined that the compensation structure should be revised to align the interests of the member and the RR with those of the customer on the performance of the program recommended by the member.[3]

Description Of Proposed Amendments

Base Fee

Under the current guideline in the DPP Rule, members and their RRs are permitted to receive compensation from any source for the sale of DPPs that does not exceed 10 percent of gross offering proceeds (base fee), plus .5 percent of gross offering proceeds, to reimburse the member for its costs related to mandatory due diligence.[4] In light of current practices where most programs do not pay members more than 8 percent in front-end commissions, NASD Regulation is proposing to reduce the base compensation from 10 percent to a maximum of 8 percent, while retaining the .5 percent guideline for due diligence. The decrease in the base fee will increase the amount of investors' capital contribution invested in assets acquired by the program.

Service Fee

In order to encourage members and their RRs to provide continuing information to customers regarding DPP securities and promote members' review of program activities, NASD Regulation is proposing to amend Rule 2810 to give members the alternative to trade off one-half of 1 percent from the 8 percent base fee to receive *annually* a service fee of 20 basis points for providing "investor relations" services to their customers (service fee). This alternative fee structure would be comprised of a 7.5 percent maximum base fee, plus a maximum of .5 percent for due diligence, plus an additional maximum .20 percent of gross offering proceeds sold by the member.

Although the *amount* of the fee is determined as a percentage of gross offering proceeds, the *source* of the payment of the fee is either the program's annual cash available for distribution (*i.e.*, total program cash flow except for amounts held for restoration or reserves) or fees that are paid by the program to the general partner. If the service fee is paid out of annual cash available for distribution, the service fee would be pro-rated against the investor's adjusted capital contribution (investor's original investment, minus cash distributions from sale and refinancing of assets). This has the effect of decreasing the member's payout as the assets of the program are liquidated and sales proceeds are distributed to investors. Finally, to ensure that both the general partner and investors contribute proportionately to the member's service fee, the definition of "cash available for distribution" has been drafted to require that the service fee be deducted from the "program's total funds provided from operations." However, the proposal does not apply the pro-ration requirement in the event that the service fee is paid entirely out of general partner fees.[5]

In order to receive the service fee, the member must enter into a written agreement with the program which obligates the member to: (1) provide services to its customers so long as the member receives the annual service fee; and (2) respond to customers' requests for copies of reports and statements of account and to customers' questions regarding the periodic reports and performance of the program. The written agreement must also require that the general partner or sponsor of the program: (1) respond to inquiries by the member regarding the operation of the program; and (2) distribute annually

to limited partners, no later than four months after the end of the program's fiscal year, a report on the operation of the program containing audited financial reports for at least a one-year period. NASD Regulation believes that this provision is key to the ability of the member to perform its services and will more closely align the interests of the general partner with those of the member and its customer.

Trail Fee

In order to encourage members to share in their customers' investment risk, the proposed amendments would permit a member to negotiate with the general partner to receive a "trail fee" in return for an additional give-up of front-end compensation from the 7.5 percent limitation, but only if the member is also receiving a service fee for providing services to its customers. The trail fee proposal is structured differently for "appreciating asset" and "depleting asset" programs.[6]

In each case, the trail commission is proposed to allow members to receive annually a specified percentage of program cash flows in exchange for a one percentage point give-up from the 7.5 percent limitation. This structure results in a payment that will vary annually, depending on the amount of program cash flows, in order to demonstrate that the member is risking current compensation against the receipt of future compensation—thereby more clearly aligning the interests of the member with those of its customers. Thus, if there is insufficient cash flow for payment of the member's trail fee in any year, the program does not accrue an obligation to pay the fee in the next year.[7]

In addition, the payment of the trail fee is subject to different subordinations, depending on whether the fee is calculated on the program cash flow from operations or from the sale and refinancing of assets. These subordinations are intended to more clearly align the interests of broker/dealers with those of their customers in recommending programs that the member believes will perform well. However, the subordination requirements only apply if the fee is paid from annual cash available for distribution from the program. Payment of the trail fee from general partner fees is not subject to any subordination.

Appreciating Asset Programs

With respect to appreciating asset programs, members would be permitted to receive, for each one percentage point deducted from front-end compensation of 7.5 percent, 1.75 percent of "annual cash distributions from operations" and from "net proceeds remaining from the sale or refinancing of assets," as well as .5 percent for due diligence and a .20 percent service fee. The term "annual cash distributions from operations" essentially refers to the program's operational cash flows, as distinguished from cash provided from sale and refinancing of assets. If the trail fee calculated on annual cash distributions from operations is paid from annual cash available for distribution, then the member's fee is subordinated to a cumulative annual non-compounded return of at least 6 percent on limited partner adjusted capital contribution. The payment of the trail fee calculated on sale and refinancing of assets, if paid from annual cash available for distribution, would be subject to the limited partners receiving at least 100 percent of capital contribution plus a cumulative annual non-compounded return of at least 6 percent on limited partner adjusted capital contribution. No subordination applies, as set forth above, if the fee is entirely paid from general partner fees.

Depleting Asset Programs

With respect to depleting asset programs, the structure is similar to that for appreciating asset programs, but uses different percentages because of the different amounts that generally flow to investors from the management of the asset versus the sale of the asset, and uses a different investor capital contribution concept. The proposal would permit members to receive, for each one percentage point deducted from front-end compensation of 7.5 percent, 1.5 percent of annual cash distributions from operations and of net proceeds remaining from the sale and refinancing of assets, as well as .5 percent for due diligence and a .20 percent service fee. If the trail fee calculated on annual cash distributions from operations is paid from annual cash available for distribution, then the member's fee is subordinated to a cumulative annual non-compounded return of at least 8 percent on limited partner "remaining capital contribution and preference." This term applies only in the case of depleting asset programs and means the investor's original capital contribution, less annual cash distributions from cash available for distribution but increased by the annual limited partner preferential return. If the fee calculated on net proceeds remaining from the sale and refinancing of assets is paid from annual cash available for distribution, this fee would be paid only after the limited partners receive at least 100 percent of capital contribution, plus a cumulative annual non-compounded return of at least 8 percent on limited partner remaining capital contribution and preference. No subordination applies, as set forth above, if the fee is entirely paid from general partner fees.

Organization And Offering Expenses

Currently, the guideline for O&O expenses for members affiliated with the issuer are limited to 15 percent, which is composed of a maximum 10 percent commission and .5 percent for due diligence, which leaves 4.5 percent for the additional expenses of the affiliated sponsor in structuring the program. Such expenses are required to be paid on an accountable basis. NASD Regulation is proposing that O&O expenses should be permitted at the current rate of 4.5 percent for smaller offerings to cover fixed, up-front expenses of an issuer, but decrease for larger offerings in order to ensure that additional investor capital was applied to the program. Based on anecdotal information as to the amount of fixed expenses for program offerings, it appears that the break-even level occurs in offerings between $30 to $50 million, representing O&O expenses of $1.35 to $2.25 million under the current guideline.

Therefore, NASD Regulation is proposing that the current 4.5 percent guideline continue to apply to offerings with proceeds up to $50 million; that the next $50 million dollars in offering proceeds be subject to a 4 percent guideline; and offering proceeds above $100 million be subject to a 3.5 percent guideline. In addition, the introductory language of the provision is proposed to be amended to reflect that the affiliated issuer's O&O expenses may only be reimbursed by the program on an accountable basis.

Solicitation Of Comments With Respect To Other Securities Products

Comments are requested as to whether the compensation structure proposed for the sale of public offerings of DPPs, or any parts of the proposed compensation structure, should be considered as a permissible structure in the case of any other securities product. In particular, sales of public offerings of real estate investment trust securities (REITs), although not within the definition of DPP in Rule 2810, are currently subject to the 10 percent compensation guideline in Rule 2810. Comment is requested as to whether members' compensation for the sale of REITs should be subject to the proposed new DPP compensation structure since REITs are required by Internal Revenue Service regulations to distribute their income to investors. Alternatively, commenters should address whether REITs should be subject to the compensation guidelines for corporate securities applied pursuant to NASD Rule 2710, or if the current 10 percent guideline continues to be justified for REIT offerings. It is anticipated that the compensation guidelines for corporate securities will generally result in lower compensation for the sale of REIT offerings than is currently permitted under the 10 percent guideline contained in Rule 2810.

Request For Comment

NASD Regulation encourages all members and interested parties to respond to the issues raised in this *Notice*. Comments should be mailed to:

Joan Conley
Office of the Corporate Secretary
NASD Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006-1500;

or e-mailed to:
pubcom@nasd.com

Comments must be received **by January 9, 1998**. Before becoming effective, any rule change developed as a result of the comments received must be adopted by the NASD Regulation, Inc., Board of Directors, may be reviewed by the NASD Board of Governors, and must be approved by the SEC.

Text Of Proposed Amendments to Rule 2810

(Note: New text is underlined; deletions are bracketed.)

Rule 2810. Direct Participation Programs

(a) Definitions

For the purposes of this Rule, the following terms shall have the stated meanings:

( ) Adjusted capital contribution—original capital contribution reduced by cash distributions from net proceeds of the sale and refinancing of assets.

( ) Capital contribution—the gross amount of investment in a program.

( ) Cash distributions from operations—the portion of cash distributions paid from funds provided by operations, excluding funds provided from net proceeds of the sale and refinancing of assets.

(2) Cash available for distribution—[cash flow less amount set aside for restoration or creation of reserves.] the program's total funds provided from operations (including net proceeds from the sale and refinancing of assets) reduced by amounts set aside for restoration or creation of reserves.

(3) [Cash flow—cash funds provided from operations, including lease payments on net leases from builders and sellers, without deduction for depreciation, but after deducting cash funds used to pay all other expenses, debt payments, capital improvements and replacements.]

( ) Remaining capital contribution and preference—original capital contribution reduced by annual cash distributions from cash available for distribution and increased by the annual limited partner preferential return.

(b) Requirements

(4) Organization and Offering Expenses

(A) No member or person associated with a member shall underwrite or participate in a public offering of a direct participation program if the organization and offering expenses are not fair and reasonable, taking into consideration all relevant factors.

(B) In determining the fairness and reasonableness of organization and offering expenses for purposes of subparagraph (A) hereof, the arrangements shall be presumed to be unfair and unreasonable if:

(i) the total amount of all items of compensation from whatever source payable to underwriters, broker/dealers, or affiliates thereof, which are deemed to be in connection with or related to the distribution of the public offering, exceeds [currently effective compensation guidelines for direct participation programs published by the Association;*]:

a. 8 percent of the offering proceeds received ("front-end compensation"), plus 0.5 percent for reimbursement of bona fide due diligence expenses; or

b. 7.5 percent of front-end compensation, plus 0.5 percent for reimbursement of bona fide due diligence expenses, plus an annual service fee of 0.20 percent of offering proceeds sold by the member (which 0.20 percent is either paid out of annual cash available for distribution and prorated against the limited partner's adjusted capital contribution or paid out of general partner fees), if the member enters into a written agreement with the program which requires that:

1. the member provide services to its customers that are investors in the program so long as the member may receive the annual service fee compensation, including responding to customers' requests for reports and statements of account, and responding to customers' questions regarding the periodic reports and performance of the program; and

2. the general partner or sponsor of the program respond to inquiries by the member regarding the operation of the program and distribute annually to limited partners, no later than four months after the end of the program's fiscal year, a report on the operation of the program containing audited financial reports for at least a one-year period; and

c. for each 1.00 percentage point deducted from front-end compensation of 7.5 percent, a member that provides continuing services under subparagraph (4)(B)(i)b. may receive an amount (which amount must be paid currently either out of annual cash available for distribution and subject to the following subordinations or out of general partner fees and not subject to the following subordinations) that is equal to:

1. Real Estate, Cable TV, and Other Appreciating Asset Programs

A. 1.75 percent of annual cash distributions from operations, subordinated to a cumulative annual non-compounded return of at least 6 percent on limited partner adjusted capital contribution; and

B. 1.75 percent of cash distributions from net proceeds remaining from the sale and refinancing of assets after limited partners have received at least 100 percent of capital contribution plus a cumulative annual non-compounded return of at least 6 percent on limited partner adjusted capital contribution; or

2. Oil and Gas, Equipment Leasing, and Other Depleting Asset Programs

A. 1.50 percent of annual cash distributions from operations subordinated to a cumulative annual non-compounded return of at least 8 percent of limited partner remaining capital contribution and preference;

B. 1.50 percent of cash distributions from net proceeds remaining from the sale and refinancing of assets after limited partners have received at least 100 percent of capital contribution plus a cumulative annual non-compounded return of at least 8 percent on limited partner remaining capital contribution and preference;

(ii) organization and offering expenses paid by a program on an accountable basis in which a member or an affiliate of a member is a sponsor exceeds the following percent of offering proceeds received in addition to front-end compensation received under paragraph (b)(4)(B)(i) [currently effective guidelines for such expenses published by the Association;**]:

a. 4.5 percent on the first $50 million of offerings proceeds;

b. 4.0 percent on the second $50 million of offering proceeds; or

c. 3.5 percent on offering proceeds that exceed $100 million.

(iii) any compensation in connection with an offering is to be paid to underwriters, broker/dealers, or affiliates thereof out of the proceeds of the offering prior to the release of such proceeds from escrow, provided,

however, that any such payment from sources other than proceeds of the offering shall be made only on the basis of bona fide transactions;

(iv) commissions or other compensation are to be paid or awarded either directly or indirectly, to any person engaged by a potential investor for investment advice as an inducement to such advisor to advise the purchaser of interests in a particular program, unless such person is a registered broker/dealer or a person associated with such a broker/dealer; or

(v) except as permitted under paragraph (b)(4)(B)(i), the program provides for compensation of an indeterminate nature to be paid to members or persons associated with members for sales of program units, or for services of any kind rendered in connection with or related to the distribution thereof, including, but not necessarily limited to, the following: a percentage of the management fee, a profit sharing arrangement, brokerage commissions, and overriding royalty interest, a net profits interest, a percentage of revenues, a reversionary interest, a working interest, a security or right to acquire a security having an indeterminate value, or other similar incentive items; provided, however, that an arrangement which provides for continuing compensation to a member or person associated with a member in connection with a public offering shall not be presumed to be unfair and unreasonable if all of the following conditions are satisfied:

a. the continuing compensation is to be received only after each investor in the program has received cash distributions from the program aggregating an amount equal to his cash investment plus a six percent cumulative annual return on his adjusted investment;

b. the continuing compensation is to be calculated as a percentage of program cash distributions;

c. the amount of continuing compensation does not exceed three percent for each one percentage point that the total of all compensation pursuant to subparagraph (B)(i) received at the time of the offering and at the time any installment payment is made fall below nine percent; provided, however, that in no event shall the amount of continuing compensation exceed 12 percent of program cash distributions; and

d. if any portion of the continuing compensation is to be derived from the limited partners' interest in the program cash distributions, the percentage of the continuing compensation shall be no greater than the percentage of program cash distributions to which limited partners are entitled at the time of the payment.

Footnotes To Rule Language

* [A guideline for underwriting compensation of ten percent of proceeds received, plus a maximum of 0.5% for reimbursement of bona fide due diligence expenses, was published in Notice to Members 82-51 (October 19, 1982).]

** [A guideline for organization and offering expenses of 15 percent of proceeds received was published in Notice to Members 82-51 (October 19, 1982).]

Endnotes

[1] Rule 2810 also includes a provision prohibiting the receipt of compensation by members of an indeterminate nature, unless the arrangement is structured to permit members to receive compensation of an indeterminate nature that is no more than 3 percent of program cash distributions for each 1 percent of front-end cash commissions below 9 percent that the member gives up; provided that in no event shall the amount of continuing compensation exceed 12 percent of program cash distributions. This provision is not proposed to be deleted.

[2] *See Report of the Committee on Compensation Practices*, April 10, 1995, pp. 12-13. Other recommended "best practices" included prohibiting sales contests or permitting such contests only if based on broad measures. The NASD previously adopted amendments to the DPP Rule that prohibit non-cash sales contests for the sale of DPPs.

[3] *See also Notice to Members 97-50* (August 1997) requesting comment on the regulation of payment and receipt of cash compensation incentives for the sale and distribution of investment company and variable contract securities.

[4] Members generally receive the entire 10 percent fee in front-end compensation, paid at the time of the offering of securities. However, members are also permitted to receive an interest in back-end cash flow of the program, so long as the aggregate of all compensation paid does exceed the 10 percent guideline. There are several public programs structured in this fashion.

[5] Permissible arrangements under this provision include payment of the member's service fee: (1) solely from annual cash available for distribution, subject to the pro-ration requirement; (2) solely from general partner fees; or (3) a combination of these two sources.

[6] Appreciating asset programs are those, like real estate and cable TV, where it is anticipated that the program asset will increase in value. While there are returns to investors that occur from the program's operations, it is the eventual sale of the asset that provides the major returns to the investor. Depleting asset programs are those, like oil and gas and equipment leasing, where the program's operations deplete the value of the asset. The major returns to investors occur on a continuing basis as the asset is used, and the sale of the asset recovers only its residual or salvage value. It is anticipated that the staff will issue interpretations from time to time as to whether a particular type of program is considered an appreciating or depleting asset pro-

gram in order to provide guidance to the membership as to which trail fee structure should be followed under Rule 2810.

[7] The rule language requires that the trail fee be paid "currently" in order to prevent accrual of the fee obligation. In comparison, the service fee is a mandatory annual payment of a smaller amount that does not vary annually, as the fee is received for ongoing services provided by the member to its customers.

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NASD NOTICE TO MEMBERS 97-82

SEC Approves Amendments To Conduct Rules 2710 And 2720 Regarding Mergers, Acquisitions, And Exchange Offers; Effective December 15, 1997

Suggested Routing

- ☐ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ■ Corporate Finance
- ☐ Government Securities
- ■ Institutional
- ☐ Insurance
- ☐ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ☐ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ■ Syndicate
- ☐ Systems
- ☐ Trading
- ■ Training
- ☐ Variable Contracts

Executive Summary

On October 29, 1997, the Securities and Exchange Commission (SEC) approved amendments that clarify the application of Rules 2710 and 2720 of the National Association of Securities Dealers, Inc. (NASD®) Conduct Rules to mergers, acquisitions, exchange offers, and similar transactions, and establish limitations on certain "tail fee" arrangements.[1] The amendments are effective December 15, 1997, with respect to transactions that have not commenced as of that date.

Questions regarding this *Notice* may be directed to Suzanne E. Rothwell, Chief Counsel, Corporate Financing, NASD Regulation, Inc., and Richard J. Fortwengler, Associate Director, Corporate Financing, NASD Regulation℠, at (202) 974-2700.

Background

Rule 2710 of the NASD Conduct Rules (Corporate Financing Rule) requires that members file with the Corporate Financing Department of NASD Regulation proposed public offerings of securities for review of the proposed underwriting terms and arrangements, which terms and arrangements must comply with that rule. Rule 2720 of the Conduct Rules (Conflicts Rule) establishes standards in addition to those in Rule 2710 to address the conflicts of interest that occur in connection with a public offering of the securities of a member, the parent of a member, an affiliate of a member, or other issuer with whom the member has a conflict of interest. For an offering to be subject to filing under the Corporate Financing and Conflicts Rules, a member must be considered to be "participating" in the offering and the offering must be one that is subject to the filing requirements.[2]

The Corporate Financing and Conflict Rules apply to most "public offerings" of securities, which is defined in Rule 2720(b)(14) to include, among other things, "offerings made pursuant to a merger or acquisition," but neither rule currently identifies the types of mergers and acquisitions subject to filing and compliance with those rules. NASD Regulation has, therefore, amended Rules 2710 and 2720 to clarify the application of the requirements of the Corporate Financing and Conflicts Rules to exchange offers, mergers and acquisitions, and similar corporate reorganizations, and to make other related amendments. In view of the increasing amount of merger and acquisition activity, NASD Regulation believes that these amendments eliminate confusion regarding their application to such transactions.

Review Procedures For Exchange Offers, Mergers, Acquisitions, And Similar Transactions

With respect to the time-sensitive nature of many exchange offers, mergers, acquisitions, and similar corporate reorganizations that are subject to filing as a result of SEC approval of amendments to Rules 2710 and 2720, NASD Regulation previously announced in *Notice to Members 95-73* (September 1995) a policy to expedite the review of such offerings by the Corporate Financing Department. In general, it is anticipated that a comment letter will be issued by the Corporate Financing Department within 48 hours of receipt of the filing of the documents related to such a transaction, so long as the documentation and related information submitted meet the requirements set forth in subparagraphs (b)(5) and (6) of Rule 2710 and the appropriate filing fee is included.

Description Of Amendments

Summary Of Amendments To Filing Requirements

NASD Regulation has adopted amendments to the Corporate Financing and Conflicts Rules to limit the application of the rules to narrow situations where pre-offering review under the Corporate Financing Rule or the application of the Conflicts Rule is believed necessary to protect investors. Thus, in general, the amendments require that an exchange offer be filed with the Corporate Financing Department for review only when a member is participating in solicitation activities related to an offer that involves certain unlisted securities or securities that are exempt from registration with the SEC. However, filing of an exchange offer (where a member is participating in distributing activities), that would otherwise not be subject to filing, is required if the offering is subject to the Conflicts Rule because the offering is of securities of a member or its parent, or the offer will result in the direct or indirect public ownership of a member. In addition, exchange offers, merger and acquisition transactions, and other similar corporate reorganizations are subject to the Conflicts Rule, and required to be filed for review, if there is an issuance of securities that results in the direct or indirect public ownership of a member.

Amendments To Filing Requirements Of Rule 2710

Paragraph (b)(9) of Rule 2710 provides clarification of certain types of public offerings required to be filed with the Corporate Financing Department of NASD Regulation for review. Paragraph (b)(9) has been amended to add new subparagraph (H) to require the filing of exchange offers exempt from registration under Sections 3(a)(4), 3(a)(9), and 3(a)(11) of the Securities Act of 1933 (Securities Act) where the member engages in active solicitation, and the filing of exchange offers registered with the SEC if a member acts a dealer-manager.[3] Active solicitation occurs when a member directly solicits or contacts security holders, acts as dealer-manager, performs tasks that are performed by investor relations firms (*i.e.*, contacts security holders to determine the action they intend to take), contacts security holders to determine whether they have received the offering materials, answers unsolicited contacts, and participates in meetings with security holders or their advisors before or after an exchange offer begins.[4] In contrast, active solicitation does not encompass the delivery of a "fairness opinion," advice as to the structure and terms of the exchange offer, assistance in the preparation of the offering documents to be sent to security holders, nor any other functions that do not involve direct solicitation or direct contact with security holders.[5]

With respect to exchange offers registered with the SEC on Forms S-4 or F-4, filing is expressly limited to those distributions where the member is engaged by the company to act as dealer-manager and solicit consents on behalf of the company to the proposed reorganization, and to otherwise facilitate the exchange of securities. In such exchange offers, the member generally acts as a financial advisor to help structure the transaction and will receive a fee, as well as distribution-related compensation, for services rendered.

To the extent an exchange offer exempt under Sections 3(a)(4), 3(a)(9) and 3(a)(11) of the Securities Act or registered with the SEC does not fall within the filing requirement in new subparagraph (b)(9)(H) because the member is not engaging in solicitation activities or is not acting as dealer-manager, respectively, the exchange offer is considered exempt from compliance with the Corporate Financing and Conflicts Rules because the member is not considered to be "participating in the offering."

However, NASD Regulation has also adopted new subparagraph (b)(7)(F) to exempt from filing exchange offers where the securities to be issued or the securities of the company to be acquired are designated as a Nasdaq National Market security or listed on the New York Stock Exchange (NYSE) or American Stock Exchange (AMEX) or where the company issuing securities qualifies to register securities on SEC Registration Forms S-3, F-3 or F-10. It is believed that the listing standards of the three markets requiring independent directors on the Board of Directors will ensure that the independent directors of the acquirer or target will evaluate the offer and that sufficient information will be distributed to shareholders and to the markets, so that investors can make a decision regarding whether to sell or hold the securities they hold or will receive.

The exemption for companies qualified to register securities on SEC registration Forms S-3, F-3, or F-10 applies to those companies that meet the standards for the Forms in subparagraphs (C)(i) and (ii) of paragraph (b)(7) of Rule 2710, in order to restrict the exemption to domestic companies that meet the standards for Forms S-3 and F-3 prior to October 21, 1992, and to Canadian-incorporated foreign private issuers that meet the standards for Form F-10 approved in Securities Exchange Act (Act) Release No. 29354 (June 21, 1991).[6] This provision requires, in general, that a domestic company have a three-year history as a public reporting company and be in compliance with the current year's periodic reporting requirements of the Act

(with respect to the timely filing of form 10-Qs and 10-Ks). In addition, the minimum required market value of a company's common stock must be as follows: Form S-3, $150 million (or $100 million market value of voting stock and three million shares annual trading volume); and Form F-3, $300 million held worldwide. For Form F-10, Canadian private issuers must have (CN) $360 aggregate value of voting stock and a public float of (CN) $754 million.

Paragraph (b)(7) of the Corporate Financing Rule, which includes the two filing exemptions for exchange offers discussed above, lists those public offerings not required to be filed for review with the Corporate Financing Department. However, the underwriting terms and arrangements of such exempt offerings must be in compliance with the requirements of Rule 2710 or Rule 2810, as applicable. Moreover, any offering exempt from filing under paragraph (b)(7) must nonetheless be filed if the offering is subject to Rule 2720, the Conflicts Rule, and is subject to review by the Corporate Financing Department for compliance with Rules 2710 and 2720.[7]

Paragraph (b)(9) of the Corporate Financing Rule has also been amended to add new subparagraph (I) to require the filing of any exchange offer, merger or acquisition transaction, and similar corporate reorganization that involves an issuance of securities that results in the direct or indirect public ownership of a member. This latter filing requirement, therefore, only requires the filing of exchange offers, mergers, acquisitions, and corporate reorganizations involving an offering of securities of a member or its parent or that results in the public ownership of the member or its parent. Such offerings would be subject to compliance with Rules 2710 and 2720.[8] The NASD has long held the view that pre-offering review is vital to protect investors when the member and the issuer are in a control relationship that is addressed through the application of Rule 2720. The NASD has previously clarified in *Notice to Members 88-100* (December 1988) that mergers or acquisitions involving an issuer and a member or its parent that result in the direct or indirect public ownership of a member are subject to compliance with Rule 2720, regardless of whether the merger or acquisition occurs subsequent to the issuer's initial public offering.[9]

Paragraph (b)(8) of Rule 2710 lists those offerings that, although within the definition of "public offering," are exempted from compliance with Rules 2710 and 2720. NASD Regulation has added new subparagraphs (I) and (J) to paragraph (b)(8) to provide an exemption from filing and compliance with Rules 2710 and 2720 for:

1. spin-off and reverse spin-off transactions involving a subsidiary or affiliate of the issuer, where the securities are issued as a dividend or distribution to current shareholders; and

2. securities registered with the SEC in connection with a merger or similar form of business combination, except if the offering would be filed under subparagraph (b)(9)(I), described above, because it involves a transaction that results in the direct or indirect public ownership of a member.

Spin-off transactions to existing security holders as a dividend or other distribution generally do not involve an investment decision by shareholders and, consequently, any member acting as a financial advisor to the parent company is not generally involved in any public solicitation in connection with the transaction.[10] Merger transactions and similar business combinations registered with the SEC generally only involve a member in providing financial advice to the Board of Directors of the acquirer or target, that may include an obligation that the member issue a fairness opinion regarding the acquisition price.

Amendments To Compensation Arrangements Under Rule 2710

In addition, NASD Regulation has added new subparagraph (c)(6)(B)(v) to Rule 2710 to provide that it is an unreasonable term and arrangement for a member to receive a right to a "tail fee" arrangement that has a duration of more than two years from the date the member's services are terminated, in the event an offering is not completed and the issuer subsequently consummates a similar transaction. Such arrangements are currently only granted by a company to a member in connection with an exchange offer transaction. It is believed that the real benefit derived by a company that grants a "tail fee" arrangement is the creativity of the strategic advice given by the member for the particular transaction that may include, among other things, assisting the company in defining objectives, performing valuation analyses, formulating restructuring alternatives, and structuring the offering. In particular, in the case of an exchange offer, a member providing financial advice will generally have provided considerable ongoing financial advisory services to the company.

The new "tail fee" prohibition also permits a member to demonstrate on the basis of information satisfactory to the NASD that an arrangement of more than two years is not unfair or unreasonable under the circumstances. The ability of the staff of the Corporate Financing Department to interpret the provision to permit such an arrangement is intended to be used only where the member can demonstrate that the creativity of the

strategic advice provided by the member has a potential benefit to the company for more than two years.

In the case of exchange offers exempt from filing but subject to compliance with the rule under subparagraph (b)(7)(F), where the "tail fee" arrangement is proposed to have a duration of longer than two years, a member is required to request an opinion of the staff as to whether the arrangement is permissible under the rule. In the case of any other offering exempt from filing under subparagraph (b)(7), a member is required to request an opinion of the staff as to whether it has "no objections" as to any proposed "tail fee" arrangement.

As set forth above, although "tail fee" arrangements are currently granted only in connection with exchange offers, the provision is written to regulate such an arrangement in connection with any type of public offering subject to compliance with the Corporate Financing Rule. Where a "tail fee" arrangement is proposed in connection with public offerings that are not exchange offers, NASD Regulation staff will consider whether such an arrangement is justified by the services provided by the member to the issuer. Where the member does not appear to have provided the type of substantial structuring and/or advisory services to the issuer similar to those that are described above, other than those services traditionally provided in connection with a distribution of a public offering, a proposed "tail fee" arrangement will be considered to be unfair and unreasonable on the basis that the arrangement would violate Rule 2110 (the NASD's basic ethical rule) and Rule 2430 since the member is proposing to be paid for services that the member has not provided to the issuer. This position is consistent with subparagraph (c)(5)(B)(iv) of Rule 2710, which prohibits a member from receiving compensation in connection with an offering of securities that is not completed, except for compensation received in connection with a transaction (*i.e.*, a merger transaction) that occurs in lieu of the proposed offering as a result of the member's efforts and the reimbursement of the member's reasonable out-of-pocket accountable expenses.

In addition, NASD Regulation has considered whether other types of fees and expense reimbursement arrangements typically negotiated for and received in connection with exchange offers subject to compliance with Rule 2710, are inconsistent with or prohibited by subparagraphs (c)(6)(B)(iii) and (iv) of the Corporate Financing Rule. Subparagraph (c)(6)(B)(iii) of Rule 2710 currently prohibits as unfair and unreasonable any payment of commissions or reimbursement of expenses directly or indirectly to the underwriter and related persons prior to commencement of the public sale of the securities being offered, with certain limited exceptions. As set forth above, subparagraph (c)(6)(B)(iv) of Rule 2710 currently prohibits as unfair and unreasonable the payment of any compensation by an issuer to a member, or person associated with a member, in connection with an offering of securities which is not completed according to the terms of agreement between the issuer and underwriter, except those payments negotiated and paid in connection with a transaction that occurs in lieu of the proposed offering as a result of the efforts of the underwriter and related persons and provided, however, that the reimbursement of out-of-pocket accountable expenses actually incurred by the member, or person associated with a member, is not presumed to be unfair or unreasonable under normal circumstances.

NASD Regulation has determined that it is not inconsistent with the Corporate Financing Rule for a member acting as financial advisor in an exchange offering to receive a "time and efforts" or similar fee for the services it renders in connection with an exchange offer that is not completed, where the member does not receive the agreed-upon success fee. In addition, it is deemed not inconsistent with the Corporate Financing Rule for a member to receive reimbursement of certain expenses, including, but not limited to, travel costs, document production, and legal fees of the financial advisor, whether or not the transaction is consummated. In *Notice to Members 95-73* (September 1995), which published the original version of the proposed rule change for comment, the NASD stated that these and similar types of reimbursement arrangements in exchange offers are not prohibited by the Corporate Financing Rule because such arrangements are not viewed as directly connected to the issuance of securities.

Amendments To Rule 2720

NASD Regulation has amended the Conflicts Rule to conform the scope section of the Rule to the amendments to the filing requirements of Rule 2710 and to clarify the responsibilities of a qualified independent underwriter in an exchange offer subject to compliance with Rule 2720. Paragraph (a) of Rule 2720 has been amended to add new subparagraph (3) to provide that in the case of an exchange offer, merger and acquisition transaction, or similar corporate reorganization, compliance with Rule 2720 is required only if the offering comes within subparagraph (b)(9)(H) of Rule 2710, where the issuance of securities is by a member or the parent of a member, or if the offering comes within subparagraph (b)(9)(I). As set forth above, proposed subparagraph (b)(9)(H) would require the filing of exchange offers exempt under Sections 3(a)(4), 3(a)(9), and

3(a)(11) of the Securities Act if the member's participation involves active solicitation activities, and the filing of exchange offers registered with the SEC if the member is acting as dealer-manager. Thus, the exemption from filing for such exchange offers provided by proposed subparagraph (b)(7)(F), where the securities are designated as a Nasdaq National market security or listed on the NYSE or AMEX, or the issuer qualifies to register securities on Forms S-3, F-3, or F-10, is not available if the exchange offer is by a member or parent of a member.[11] As further set forth above, proposed subparagraph (b)(9)(I) would require the filing of any exchange offer, merger and acquisition transaction, or similar corporate reorganization involving an issuance of securities that results in the direct or indirect public ownership of a member.[12]

NASD Regulation also has amended Rule 2720 to clarify the obligations of a qualified independent underwriter[13] that would be required by subparagraph (c)(3) of Rule 2720 to perform due diligence with respect to the offering document and provide a recommendation with respect to the exchange value of an exchange offer, merger and acquisition transaction, or similar corporate reorganization. Currently, the Conflict Rule requires that the price at which an equity issue or the yield at which a debt issue is to be distributed to the public be established at a price no higher or yield no lower than that recommended by a qualified independent underwriter (who shall also participate in the preparation of the registration statement and shall exercise the usual standards of "due diligence" in respect thereto). NASD Regulation has amended subparagraph (c)(3)(A) by adding a new exception to state that in any exchange offer, merger and acquisition transaction, or corporate reorganization subject to Rule 2720, the provision which requires that the price or yield of the securities be established based on the recommendation of a qualified independent underwriter shall not apply and, instead, the exchange value of the securities being offered in the transaction shall not be less than that recommended by a qualified independent underwriter. Thus, the proposed new provision would clarify that the obligation of the qualified independent underwriter is to ensure that the recipient of the exchange offer, which is the party intended to be protected by the participation of a qualified independent underwriter, shall not receive fewer of the securities being issued in exchange for each security held by the recipient than is recommended by the qualified independent underwriter.

Finally, in order to make clear that the exemptions in subparagraph (b)(8) of Rule 2710 (that includes exemptions for offerings of securities issued in a spin-off or in a merger registered with the SEC) are also exempt from Rule 2720, paragraph (o) of Rule 2720 is proposed to be amended to reference the exemptions from Rule 2720 that are provided in subparagraph (b)(8) of Rule 2710.

Implementation Of The Amendments

NASD Regulation has considered the impact of these amendments on pending transactions that would be required to be filed with the Corporate Financing Department for review as a result of the application of Rule 2710 or Rule 2720, or would be subject to compliance with Rule 2710 even though exempt from filing. In order to provide sufficient time for members to bring their arrangements into compliance, the amendments are applicable to proposed exchange offers, mergers, acquisitions, and similar transactions that have not commenced as of December 15, 1997. Therefore, if subject to filing under Rule 2710 or Rule 2720, such transactions are required to be filed for review with the Corporate Financing Department. Further, such transactions, although exempt from filing under subparagraph (b)(7) of Rule 2710, will be required to be made in compliance with the restrictions on "tail fee" arrangements and other provisions of the Corporate Financing Rule.

The new restrictions on "tail fee" arrangements are not, however, applicable to any outstanding "tail fee" arrangement for an exchange offer, merger, acquisition, or similar transaction that has commenced prior to effectiveness of these amendments on December 15, 1997.

Text Of Amendments

(Note: New text is underlined; deletions are bracketed.)

Rule 2710. Corporate Financing Rule—Underwriting Terms and Arrangements

(b) Filing Requirements

(7) Offerings Exempt from Filing

Notwithstanding the provisions of subparagraph (1) above, documents and information related to the following public offerings need not be filed with the Association for review, unless subject to the provisions of Rule 2720. However, it shall be deemed a violation of this Rule or Rule 2810, for a member to participate in any way in such public offerings if the underwriting or other arrangements in connection with the offering are not in compliance with this Rule or Rule 2810, as applicable:

(A) - (C) - No change.

(D) securities offered pursuant to a redemption standby "firm commitment" underwriting arrangement reg-

istered with the Securities and Exchange Commission on Forms S-3, F-3 or F-10 (only with respect to Canadian issuers); [and]

(E) financing instrument-backed securities which are rated by a nationally recognized statistical rating organization in one of its four (4) highest generic rating categories; and

(F) exchange offers of securities where:

(i) the securities to be issued or the securities of the company being acquired are listed on The Nasdaq National Market, the New York Stock Exchange, or American Stock Exchange; or

(ii) the company issuing securities qualifies to register securities with the Commission on registration statement Forms S-3, F-3, or F-10, pursuant to the standards for those Forms as set forth in subparagraphs (C)(i) and (ii) of this paragraph.

(8) Exempt Offerings

Notwithstanding the provisions of subparagraph (1) above, the following offerings are exempt from this Rule, Rule 2720, and Rule 2810. Documents and information relating to the following offerings need not be filed for review:

(A) - (F) - No change.

(G) tender offers made pursuant to Regulation 14D adopted under the Securities Exchange Act of 1934, as amended; [and]

(H) securities issued pursuant to a competitively bid underwriting arrangement meeting the requirements of the Public Utility Holding Company Act of 1935, as amended[.];

(I) securities of a subsidiary or other affiliate distributed by a company in a spin-off or reverse spin-off or similar transaction to its existing security-holders exclusively as a dividend or other distribution; and

(J) securities registered with the Commission in connection with a merger or acquisition transaction or other similar business combination, except for offerings required to be filed pursuant to subparagraph (9)(I) below.

(9) Offerings Required to be Filed

Documents and information relating to all other public offerings including, but not limited to, the following must be filed with the NASD for review:

(A) - (F) - No change.

(G) securities offered pursuant to Regulation A or Regulation B adopted under the Securities Act of 1933, as amended; [and]

(H) exchange offers that are exempt from registration with the Commission under Sections 3(a)(4), 3(a)(9), 3(a)(11) of the Securities Act of 1933 (if a member's participation involves active solicitation activities) or registered with the Commission (if a member is acting as dealer-manager) (collectively "exchange offers"), except for exchange offers exempt from filing pursuant to subparagraph (7)(F) above that are not subject to filing by subparagraph (9)(I) below;

(I) any exchange offer, merger and acquisition transaction, or other similar corporate reorganization involving an issuance of securities that results in the direct or indirect public ownership of the member; and

(J) any offerings of a similar nature that are not exempt under paragraphs (7) or (8) above.

(c) Underwriting Compensation and Arrangements

(6) Unreasonable Terms and Arrangements

(A) No member or person associated with a member shall participate in any manner in a public offering of securities after any arrangement proposed in connection with the public offering, or the terms and conditions relating thereto, has been determined to be unfair or unreasonable pursuant to this Rule or inconsistent with any By-Law or any Rule or regulation of the NASD.

(B) Without limiting the foregoing, the following terms and arrangements, when proposed in connection with the distribution of a public offering of securities, shall be unfair and unreasonable:

(v) any "tail fee" arrangement granted to the underwriter and related persons that has a duration of more than two (2) years from the date the member's services are terminated, in the event that the offering is not completed in accordance with the agreement between the issuer and the underwriter and the issuer subsequently consummates a similar transaction, except that a member may demonstrate on the basis of information satisfactory to the Association that an arrangement of more than two (2) years is not unfair or unreasonable under the circumstances.

Subparagraphs (v) - (xiii) are renumbered (vi) - (xiv).

Rule 2720. Distribution of Securities of Members and Affiliates—Conflicts of Interest

(a) General

(1) No member or person associated with a member shall participate in the distribution of a public offering of

debt or equity securities issued or to be issued by the member, the parent of the member, or an affiliate of the member and no member or parent of a member shall issue securities except in accordance with this Schedule.

(2) No member or person associated with a member shall participate in the distribution of a public offering of debt or equity securities issued or to be issued by a company if the member and/or its associated persons, parent or affiliates have a conflict of interest with the company, as defined herein, except in accordance with this Schedule.

(3) In the case of an exchange offer, merger and acquisition transaction, or similar corporate reorganization, this Rule shall only apply if the offering is described in:

(a) Rule 2710(b)(9)(H) and the issuance of securities is by a member or the parent of a member; or

(b) Rule 2710(b)(9)(I).

(c) Participation in Distribution of Securities of Member or Affiliate

(1) and (2) - No change.

(3) If a member proposes to underwrite, participate as a member of the underwriting syndicate or selling group, or otherwise assist in the distribution of a public offering of its own or an affiliate's securities, or of securities of a company with which it or its associated persons, parent or affiliates have a conflict of interest, one or more of the following three criteria shall be met:

(A) the price at which an equity issue or the yield at which a debt issue is to be distributed to the public is established at a price no higher or yield no lower than that recommended by a qualified independent underwriter which shall also participate in the preparation of the registration statement and the prospectus, offering circular, or similar document and which shall exercise the usual standards of "due diligence" in respect thereto; provided, however, that:

(i) an offering of securities by a member which has not been actively engaged in the investment banking or securities business, in its present form or as a predecessor broker/dealer, for at least the five years immediately preceding the filing of the registration statement shall be managed by a qualified independent underwriter; and

(ii) the provision of this paragraph which requires that the price or yield of the securities be established based on the recommendation of a qualified independent underwriter shall not apply to an offering of equity or debt securities if:

a. the securities (except for the securities of a broker/dealer or its parent) are issued in an exchange offer or other transaction relating to a recapitalization or restructuring of a company; and

b. the member that is affiliated with the issuer or with which the member or its associated persons, parent or affiliates have a conflict of interest is not obligated to and does not provide a recommendation with respect to the price, yield, or exchange value of the transaction; or

(iii) in any exchange offer, merger and acquisition transaction, or similar corporate reorganization subject to this Rule under subparagraph (a)(3) above, the provision of this paragraph which requires that the price or yield of the securities be established based on the recommendation of a qualified independent underwriter shall not apply and, instead, the exchange value of the securities being offered in the transaction shall not be less than that recommended by a qualified independent underwriter; or

(B) and (C) - No change.

(o) Predominance of Rule 2720

If the provisions of this Rule are inconsistent with any other provisions of the Association's By-Laws or Rules, or of any interpretation thereof, the provisions of this Rule shall prevail, except to the extent that subparagraph (b)(8) of Rule 2710 provides an exemption from this Rule for certain offerings.

Endnotes

Securities Exchange Act Release No. 39284 (October 29, 1997).

[1] Paragraph (a)(5) of Rule 2710 defines "participation or participating in a public offering" to include participation in the preparation of the offering or other documents, participation in the distribution of the offering on an underwritten, non-underwritten, or any other basis, furnishing of customer and/or broker lists for solicitation, or participation in any advisory or consulting capacity to the issuer related to the offering, but not the preparation of an appraisal in a savings and loan conversion or a bank offering, or the preparation of a fairness opinion pursuant to SEC Rule 13e-3.

[2] The term "exchange offer" refers to transactions where one security is issued in exchange for another security of the issuer or another entity, and is distinguished from mergers, acquisitions and other corporate reorganizations (except if accomplished through an exchange offer).

[3] Activities by a broker/dealer that would not come within the concept of "soliciting" for purposes of Section 3(a)(9) may nonetheless come within the concept of "solicitation" for purposes of the requirement to file an offering with NASD Regulation for review under Rules 2710 and 2720. *See* applicable SEC

no-action letters on Section 3(a)(9). Further, the application of the filing requirements of Rule 2710 does not depend upon whether remuneration is paid to the member. Thus, regardless of whether a member is paid for soliciting the exchange, an exchange offer would be subject to filing if the member engages in solicitation activities as described in this *Notice*.

[5] The NASD is not extending the filing requirement to other public exchange offers exempt from registration because such offerings are either subject to the oversight of a bankruptcy court or of another Federal review authority, such as the Comptroller of the Currency or the Federal Deposit Insurance Corporation. *See* Sections 3(a)(5), (6), (10), and (12) of the Securities Act.

[6] *See Notice to Members 93-88* (December 1993), which includes a copy of Forms S-3 and F-3 as those forms existed prior to October 21, 1992, and Form F-10 as approved by the SEC on June 21, 1991.

[7] *See* description below of proposed rule change to Rule 2720. *See also* footnote 8 *supra*.

[8] Paragraph (n) of Rule 2720 provides that all offerings of securities included within the scope of that rule are also subject to the provisions of Rule 2710, even though an exemption from *filing* may be available under Rule 2720.

[9] In that *Notice*, the NASD expressed its special concerns regarding the merger of blank check companies in the penny stock market with privately held holding companies of members, indirectly creating a publicly held NASD member without having to comply with Rule 2720.

[10] It should be noted, however, that when a spin-off is followed by a traditional public offering by the spun-off company to raise capital, the company's initial public offering would be subject to the Corporate Financing Rule's filing requirements and to compliance with Rule 2720. The same analysis would require the filing of any public offering to raise capital that follows a merger, acquisition, exchange offer or other corporate reorganization that would be exempt from filing under Rule 2710 or exempt from compliance with Rules 2710 and 2720. In the latter case, the offering may nonetheless fall within another exemption from filing, such as the filing exemptions provided by subparagraphs (b)(7)(A), (C), or (D) of Rule 2710.

[11] *See* footnote 6 *infra*.

[12] This filing requirement is consistent with the position announced in *Notice to Members 88-100* (December 1988) and paragraph (i) of Rule 2720 which states: ". . . if an issuer proposes to engage in any offering which results in the public ownership of a member . . . the offering shall be subject to the provisions of this Rule to the same extent as if the transaction had occurred prior to the filing of the offering."

[13] A member must meet a number of requirements in order to be a qualified independent underwriter under subparagraph (b)(15) of Rule 2720, including the requirement that the member "has agreed in acting as a qualified independent underwriter to undertake the legal responsibilities and liabilities of an underwriter under the Securities Act of 1933, specifically including those inherent in Section 11 thereof." Participation of a qualified independent underwriter is not required by Rule 2720 if the offering is of equity securities that meet the test of having a "bona fide independent market" or is of debt that is rated investment grade.

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NASD NOTICE TO MEMBERS 97-83

Exemption From SEC Rule 15c2-11 For Certain Securities Delisted From Nasdaq

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ☐ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ■ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ☐ Syndicate
- ■ Systems
- ■ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

In light of the recent approval of the new and increased listing standards for The Nasdaq Stock Market℠ (Nasdaq®), the Securities and Exchange Commission (SEC) has again provided an exemption from the filing requirements of SEC Rule 15c2-11 for certain securities that could be delisted as a result.[1] The exemption will permit broker/dealers to immediately publish quotations in the OTC Bulletin Board® (or any other quotation medium including National Quotation Bureau Pink Sheets) for those securities that are delisted from Nasdaq for failure to comply with the new initial listing and maintenance requirements. This *Notice* outlines the exemption and explains the procedures to be followed.

Questions concerning this *Notice* may be directed to Andrew S. Margolin, Senior Attorney, The Nasdaq Stock Market, Inc., at (202) 728-8869. Members seeking the exemption should contact Market Operations at (203) 375-9609, as discussed below.

Background

On August 22, 1997, the SEC approved a proposed rule change to revise the initial listing and maintenance criteria for The Nasdaq Stock Market.[2] The proposed rule change strengthens both the quantitative and qualitative standards for issuers listing on Nasdaq by: (1) eliminating the alternative to the $1 minimum bid price requirement; (2) extending corporate governance standards to issuers listed on the Nasdaq SmallCap Market℠; (3) increasing the quantitative standards for both the SmallCap Market and Nasdaq National Market®; and (4) implementing a "peer review" requirement for auditors of Nasdaq-listed companies.

The new standards apply retroactively to issuers applying for initial listing on Nasdaq after the March 3, 1997, filing of the rule change. Those issuers will have until November 20, 1997, to meet the new initial listing criteria. In addition, effective February 23, 1998, all issuers on Nasdaq will have to comply with the new maintenance criteria. As a result of the new and increased standards, it is expected that a number of companies listed on the Nasdaq National Market and SmallCap Market may be unable to comply and, thus, may eventually be subject to delisting in accordance with National Association of Securities Dealers, Inc. (NASD®) rules and procedures of Nasdaq.[3]

Nasdaq believes it is extremely important that issuers and their shareholders are not unduly disadvantaged in the event that any particular security is delisted for failure to comply with the new initial listing and maintenance standards. NASD member firms may continue to quote in the OTC Bulletin Board a security that is ultimately delisted as a result of a failure to meet the revised listing standards. In this context, the OTC Bulletin Board provides a viable and meaningful alternative ensuring continued liquidity and transparency in the market for a security after it is delisted.

To facilitate a smooth transition of a delisted security into the OTC Bulletin Board, however, Nasdaq obtained an exemption to Exchange Act Rule 15c2-11 to permit market makers who have been quoting the security while listed on Nasdaq, to continue quoting the security in the OTC Bulletin Board without interruption immediately following delisting. Rule 15c2-11 would otherwise require a broker/dealer to compile and review specified information about the issuer and the security before the firm publishes a quotation, and to demonstrate compliance with Rule 15c2-11 by submitting a Form

211 to the NASD pursuant to NASD Rule 6740 at least three business days before the quotation is published. Hence, a delay of several days would occur between the effectiveness of a Nasdaq delisting and the initiation of quotations for that security in the OTC Bulletin Board or another quotation medium.[4] Immediate inclusion in the OTC Bulletin Board continues to be consistent with the views of the SEC and is again necessary to implement the revised listing standards recently adopted by Nasdaq.

Conditions Of The Exemption

The exemption is available regardless of when any issuer is ultimately delisted under the new standards, provided that all of the following conditions are satisfied:

(1) the security's delisting from Nasdaq must be attributable solely to non-compliance with Nasdaq's initial listing or maintenance standards, as revised by the approval of the proposed rule change contained in Exchange Act Release No. 38961[5];

(2) the security must have been quoted continuously in Nasdaq during the 30 calendar days preceding its delisting from Nasdaq, exclusive of any trading halt not exceeding one day to permit the dissemination of material news concerning the security's issuer;

(3) the issuer must not be in bankruptcy;

(4) the issuer must be current in all of its periodic reporting requirements pursuant to Section 13(a) or 15(d) of the Exchange Act;

(5) a broker/dealer relying upon this exemption must have been a market maker registered with Nasdaq in the security being delisted during the 30-day period preceding the delisting; and

(6) the exemption extends only to classes of securities listed on Nasdaq.[6]

The foregoing conditions effectively limit the requested exemption to the securities of companies that are not in bankruptcy, that are complying with the SEC's financial disclosure requirements, and that would have remained eligible for listing on Nasdaq under the former standards. If these conditions cannot be satisfied, the security's transfer to a quotation medium such as the OTC Bulletin Board will be conditioned on full compliance with Rule 15c2-11 and NASD Rule 6740.

Procedures For The Exemption

The announcement of a delisting of a particular security is made no earlier than the close of trading on the last day it is authorized for quotation on Nasdaq. A market maker seeking this exemption must be registered in the OTC Bulletin Board for the security **no later than the next trading day**. Market makers **cannot** register on-line in the OTC Bulletin Board for this exemption and must contact Nasdaq Market Operations. For those securities eligible for the exemption, Market Operations will attempt, where possible, to notify those market makers registered in the delisted security to provide them the opportunity to be registered on a timely basis. The responsibility to seek registration in the OTC Bulletin Board pursuant to this exemption, however, remains with the market maker. Market Operations can be reached at (203) 375-9609.

Endnotes

[1] *See* letter from Nancy J. Sanow, Assistant Director, Securities and Exchange Commission, to Robert E. Aber, Vice President and General Counsel, Nasdaq, dated October 23, 1997. This exemption is similar to one obtained when the Nasdaq listing standards were last revised in 1991. *See* letter from Jonathan G. Katz, Secretary, Securities and Exchange Commission, to T. Grant Callery, Vice President and Deputy General Counsel, National Association of Securities Dealers, Inc., dated February 28, 1992.

[2] *See* Exchange Act Release No. 38961 (August 22, 1997) 62 FR 45895 (August 29, 1997).

[3] NASD Rule 9700 Series governs the Nasdaq delisting process and sets forth the procedures by which an issuer may appeal a delisting decision.

[4] It should be noted that the effective date of a security's delisting from the Nasdaq market is not announced by Nasdaq until after the close of trading on the last day that the security is quoted in Nasdaq.

[5] *See* Exchange Act Release No. 38961 (August 22, 1997), 62 FR 45895 (August 29, 1997).

[6] Thus, if an issuer had one class of securities listed on Nasdaq, and another class of securities traded over the counter but not on Nasdaq, only the delisted Nasdaq security would qualify for the exemption.

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NASD NOTICE TO MEMBERS 97-84

Christmas Day And New Year's Day: Trade Date–Settlement Date Schedule

Suggested Routing

- ☐ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ■ Internal Audit
- ■ Legal & Compliance
- ■ Municipal
- ☐ Mutual Fund
- ■ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ■ Syndicate
- ■ Systems
- ■ Trading
- ☐ Training
- ☐ Variable Contracts

Christmas Day And New Year's Day: Trade Date-Settlement Date Schedule

The Nasdaq Stock Market℠ and the securities exchanges will be closed on Thursday, December 25, 1997, in observance of Christmas Day, and Thursday, January 1, 1998, in observance of New Year's Day. "Regular way" transactions made on the business days noted below will be subject to the following schedule:

Trade Date	Settlement Date	Reg. T Date*
Dec. 19	Dec. 24	Dec. 29
22	26	30
23	29	31
24	30	Jan. 2, 1998
25	Markets Closed	—
26	31	5
29	Jan. 2, 1998	6
30	5	7
31	6	8
Jan. 1, 1998	Markets Closed	—
2	7	9

Brokers, dealers, and municipal securities dealers should use the foregoing settlement dates for purposes of clearing and settling transactions pursuant to the National Association of Securities Dealers, Inc. (NASD®) Uniform Practice Code and Municipal Securities Rulemaking Board Rule G-12 on Uniform Practice.

Questions regarding the application of those settlement dates to a particular situation may be directed to the NASD Uniform Practice Department at (203) 375-9609.

*Pursuant to Sections 220.8(b)(1) and (4) of Regulation T of the Federal Reserve Board, a broker/dealer must promptly cancel or otherwise liquidate a customer purchase transaction in a cash account if full payment is not received within five business days of the date of purchase or, pursuant to Section 220.8(d)(1), make application to extend the time period specified. The date by which members must take such action is shown in the column titled "Reg. T Date."

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NASD NOTICE TO MEMBERS 97-85

Fixed Income Pricing System Additions, Changes, And Deletions As Of October 24, 1997

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ■ Corporate Finance
- ☐ Government Securities
- ■ Institutional
- ☐ Insurance
- ☐ Internal Audit
- ■ Legal & Compliance
- ■ Municipal
- ☐ Mutual Fund
- ■ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ☐ Syndicate
- ■ Systems
- ■ Trading
- ☐ Training
- ☐ Variable Contracts

As of October 24, 1997, the following bonds were added to the Fixed Income Pricing System℠ (FIPS℠).

Symbol	Name	Coupon	Maturity
FRC.GC	First Republic Bancorp Inc.	7.750	09/15/12
IPX.GA	Interpool Capital Trust	9.875	02/15/27
CPSS.GB	Consumer Portfolio Services	10.50	01/15/04
GBCB.GA	GBC Bancorp	8.375	08/01/07
BEC.GA	Beckman Instruments Inc.	7.050	06/01/26
TOK.GA	Tokheim Corp	11.500	08/01/06
HCN.GA	Health Care Reit Inc.	7.570	04/15/00
HCN.GB	Health Care Reit Inc.	7.890	04/15/02
HCN.GC	Health Care Reit Inc.	8.090	04/15/04
MCCC.GB	McCrory Corp	7.500	05/15/94
MCCC.GC	McCrory Corp	7.625	12/15/97
MCCC.GD	McCrory Corp	7.750	09/15/95
PNPH.GA	First Nationwide Parent Hldgs Ltd	10.625	04/15/03
MTXC.GA	Matrix Capital Corp	11.500	09/30/04
AME.GA	Ametek Inc.	9.750	03/15/04
DIGO.GB	Di Giorgio Corp	10.000	06/15/07
NXLK.GA	Nextlink Communications Inc.	9.625	10/01/07
COHO.GA	Coho Energy Inc.	8.875	10/15/07
KBH.GD	Kaufman & Broad Home Corp	7.750	10/15/04
NTK.GD	Nortek Inc.	9.250	03/15/07
PENT.GA	Pen-Tab	10.875	02/01/07

As of October 24, 1997, the following bonds were deleted from FIPS.

Symbol	Name	Coupon	Maturity
IVCC.GA	Ivac Corp	9.250	12/01/02
DIGO.GB	Di Giorgio Corp	10.000	06/15/07
CMS.GA	CMS Energy Corp	9.500	10/01/97
RYR.GA	Rymer Foods Inc.	11.000	12/15/00
HRRA.GB	Harrahs Operating Inc.	10.875	04/15/02
MORT.GD	Marriott Corp	9.875	11/01/97
RCL.GA	Royal Caribean Cruises Ltd.	11.375	05/15/02
BUS.GA	Greyhound Line Inc.	10.000	07/31/01
SRV.GA	Service Corporation Inc.	10.000	08/15/00
COT.GB	ColTec Industries Inc.	10.245	04/01/02
OI.GB	Owens Ill Inc.	10.250	04/01/99
OI.GD	Owens Ill Inc.	10.500	06/15/02
ZOS.GB	Zapata Corp	10.250	03/15/97
MGG.GA	MGM Grand Hotel Fin Corp	11.750	05/01/99
MGG.GB	MGM Grand Hotel Fin Corp	12.000	05/01/02
ENRG.GA	Dekalb Energy Co	10.000	04/15/98
SUFD.GA	Super Rite Foods Inc.	10.625	04/01/02
TLLP.GA	Toll Corp	10.500	03/15/02
GRDH.GB	Great Dane Hlds Inc.	12.750	08/01/01
MXM.GB	Maxxam Inc.	14.000	05/20/00
MOIL.GB	Marathon Oil Co	8.500	11/01/06
WOL.GA	Wainoco Oil Co	10.750	10/01/98
CCVS.GB	Continental Cablevision Inc.	10.625	06/15/02

All bonds listed above are subject to trade-reporting requirements. Questions pertaining to FIPS trade-reporting rules should be directed to Stephen Simmes, NASD Regulation℠ Market Regulation, at (301) 590-6451.

Any questions regarding the FIPS master file should be directed to Cheryl Glowacki, Nasdaq® Market Operations, at (203) 385-6310.

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DISCIPLINARY ACTIONS

Disciplinary Actions Reported For November

NASD Regulation, Inc. (NASD Regulation℠) has taken disciplinary actions against the following firms and individuals for violations of National Association of Securities Dealers, Inc. (NASD®) rules; federal securities laws, rules, and regulations; and the rules of the Municipal Securities Rulemaking Board. Unless otherwise indicated, suspensions will begin with the opening of business on Monday, November 17, 1997. The information relating to matters contained in this *Notice* is current as of the end of October 24.

Firms Expelled, Individuals Sanctioned

Cressida Capital, Inc. a/k/a Norfolk Securities Corp. (New York, New York) and **Ian Richard Hosang (Registered Principal, Brooklyn, New York)** were fined $50,000, jointly and severally. In addition, the firm was expelled from NASD membership and Hosang was barred from association with any NASD member in any capacity. The sanctions were based on findings that the firm, acting through Hosang, permitted registered persons at the firm to continue to perform duties as registered persons at such times as they had not complied with the regulatory and firm elements of the Securities Industry Continuing Education Program. Furthermore, the firm, acting through Hosang, failed to delegate responsibility for compliance with the regulatory element and failed to maintain written procedures for compliance with the regulatory and firm elements. In addition, the firm, acting through Hosang, failed to maintain written supervisory procedures that would mandate an annual needs analysis, a written training plan, and an implementation plan, and failed to maintain books and records in compliance with the firm element of the continuing education rules. Hosang also failed to respond to an NASD request to appear for an on-the-record interview.

Euro-Atlantic Securities Inc. (Boca Raton, Florida), David P. Melillo (Registered Principal, Pinellas Park, Florida), Robert E. Hines (Registered Representative, Brooklyn, New York), Charles M. Francis (Registered Representative, Staten Island, New York), and **Peter J. Matera, Jr. (Registered Representative, Brooklyn, New York)**. Melillo submitted an Offer of Settlement pursuant to which he was fined $100,000 and barred from association with any NASD member in any capacity, with the right to reapply after two years only as a registered representative. In a separate decision, the firm was fined $200,000, required to disgorge $1,762,409 to its customers, and expelled from membership in the NASD. Francis was fined $5,000, suspended from association with any NASD member in any capacity for 30 days, required to pay $2,017.55 in restitution to customers, and required to requalify by exam as a general securities representative. Matera was fined $5,000, suspended from association with any NASD member in any capacity for 30 days, required to pay $5,437.50 in restitution to customers, and required to requalify by exam as a general securities representative. Hines was fined $50,000, barred from association with any NASD member in any capacity, and required to pay $39,984.50 in restitution to customers.

Without admitting or denying the allegations, Melillo consented to the described sanctions and to the entry of findings that the firm, acting through Melillo, used manipulative, deceptive or other fraudulent devices in connection with the sale of warrants, and dominated and controlled both the wholesale and retail markets for a security such that there was no independent, competitive market in

the security. The findings also stated that the firm, acting through Melillo, charged fraudulently excessive mark-ups to retail customers in principal transactions, with mark-ups ranging from 5.26 to 63.16 percent over the prevailing market price. Francis, Matera, and Hines engaged in unfair pricing regarding the sale of warrants to public customers in that the gross commissions they earned on the sales of warrants ranged from 15 to 32 percent of their customers' total investment and they failed to question the fairness of the prices being charged to the firm's retail customers. The NASD also determined that Melillo failed to supervise his member firm's salesman adequately.

Firm Fined, Individual Sanctioned

Dominion Capital Corporation (Dallas, Texas) and **Douglas Woodrow Powell (Registered Principal, Dallas, Texas)** submitted a Letter of Acceptance, Waiver and Consent pursuant to which they were fined $35,000, jointly and severally, and Powell was suspended from association with any NASD member in any principal capacity for five business days. Without admitting or denying the allegations, the respondents consented to the described sanctions and to the entry of findings that the firm, acting through Powell, failed to comply with Securities and Exchange Commission (SEC) Rules 17a-3 and 17a-4 in that its books and records were either inaccurate, incomplete, or not maintained. The findings also stated that the firm, acting through Powell, failed to maintain and enforce adequate written supervisory procedures and failed to maintain adequate procedures regarding its compliance with the Securities Industry Continuing Education Program. The findings also stated that the firm, acting through Powell, failed to submit quarterly statistical data regarding customer complaints, effected a series of transactions in equity securities, and failed to comply with SEC Rule 10b-10 in confirming each transaction to its customers in that the firm failed to disclose over $12,500 in mark-ups and mark-downs.

Firm and Individual Fined

The Exchange, Inc. (Austin, Texas) and **Christian Paul Garces (Registered Representative, Austin, Texas)** submitted a Letter of Acceptance, Waiver and Consent pursuant to which they were fined $17,500, jointly and severally. Without admitting or denying the allegations, the respondents consented to the described sanction and to the entry of findings that the firm, acting through Garces, conducted a securities business while failing to maintain its minimum required net capital. The findings also stated that the firm, acting through Garces, failed to register five employees as representatives and failed to require these individuals to pass the required qualifications exams while allowing them to conduct activities requiring registration. Furthermore, the NASD determined that the firm, acting through Garces, failed to maintain the physical security of Small Order Execution System℠ (SOES℠) equipment to prevent the unauthorized entry of information into SOES. The NASD also found that the firm failed to identify nine transactions input to the Automated Confirmation Transaction Service℠ (ACT℠) as short sales.

Firm Fined

Furman Selz LLC (New York, New York) submitted a Letter of Acceptance, Waiver and Consent pursuant to which the firm was fined $12,500. Without admitting or denying the allegations, the firm consented to the described sanction and to the entry of findings that it failed to report the order entry firm in 61 transactions to ACT and failed to designate transactions in Nasdaq National Market securities as late to ACT. The findings also stated that the firm failed to accept or decline a transaction within 20 minutes after execution, to preserve a memorandum of a brokerage order for a period of not less than three years, and to preserve the memoranda of each member-to-member limit order received by the firm. Furthermore, the NASD determined that the firm failed to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with the applicable securities laws and regulations regarding trade reporting, limit orders, best execution, and use of SOES.

Individuals Barred or Suspended

Thomas A. Arpante (Registered Representative, Holden, Massachusetts) was fined $70,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Arpante failed to respond to NASD requests for information. Arpante also forged documents in transactions with customers.

John Brett Ballon (Registered Representative, Malibu, California) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $60,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Ballon consented to the described sanctions and to the entry of findings that he churned a public customer's account by recommending and executing 91 purchase and sale transactions for the customer's account without having reasonable grounds for believing that such recommendations were suitable in view of the frequency of the recommended transactions and the customer's financial situation, objectives, cir-

cumstances, and needs. The findings also stated that Ballon effected unauthorized transactions in a customer's account and failed to respond to NASD requests to appear for an on-the-record interview.

Daniel Grady Bayer (Registered Representative, Kansas City, Missouri) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $62,425 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Bayer consented to the described sanctions and to the entry of findings that he received $20,485 from public customers for investment purposes, failed to apply the funds as directed by the customers, and instead misused and converted the funds to his own use and benefit without the customers' knowledge or consent.

Jere L. Beasley, Jr. (Registered Representative, Montgomery, Alabama) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $8,100, suspended from association with any NASD member in any capacity for one week, and required to requalify by exam as a general securities representative. Without admitting or denying the allegations, Beasley consented to the described sanctions and to the entry of findings that he executed unauthorized transactions in the accounts of public customers without their knowledge or consent.

Kevin J. Brafford (Registered Representative, Tempe, Arizona) submitted an Offer of Settlement pursuant to which he was fined $30,000, barred from association with any NASD member in any capacity, and required to reimburse his member firm $4,000. Without admitting or denying the allegations, Brafford consented to the described sanctions and to the entry of findings that he accepted funds totaling $4,000 from a public customer by representing that such funds were payments for the preparation of a financial plan and failed either to provide such a plan or return the funds. The findings also stated that Brafford failed to respond to NASD requests for information.

Scott I. Brown (Registered Representative, Hallandale, Florida) was fined $7,500, suspended from association with any NASD member in any capacity for 10 business days and thereafter until he qualifies by exam as a general securities representative, and ordered to disgorge $1,498.62 to public customers. The sanctions were based on findings that Brown executed purchase and sale transactions in the securities accounts of public customers without their knowledge or consent.

Clyde Joseph Bruff (Registered Principal, Oakland, California) was barred from association with any NASD member in any capacity. The National Business Conduct Committee (NBCC) affirmed the sanction following appeal of a San Francisco District Business Conduct Committee (DBCC) decision. The sanction was based on findings that Bruff exercised effective control over the account of a public customer and recommended to her the purchase and sale of securities that were unsuitable for the customer in view of the size and frequency of the transactions and her other securities holdings, financial situation, and needs.

Bruff has appealed this action to the SEC and the sanctions, other than the bar, are not in effect pending consideration of the appeal.

Frank J. Casillo (Registered Principal, Farmingdale, New York) submitted an Offer of Settlement pursuant to which he was fined $10,000 and suspended from association with any NASD member in a principal capacity for 30 days. Without admitting or denying the allegations, Casillo consented to the described sanctions and to the entry of findings that he failed to implement, maintain, and enforce adequate supervisory procedures in connection with directing brokers during an initial public offering.

Vita Marie Colangelo (Registered Representative, Cherry Hill, New Jersey) submitted an Offer of Settlement pursuant to which she was fined $5,000, suspended from association with any NASD member in any capacity for 18 months, and ordered to requalify by exam. Without admitting or denying the allegations, Colangelo consented to the described sanctions and to the entry of findings that she established three fictitious accounts at her member firm for public customers, completed purchase applications, and prepared a fictitious check on behalf of a customer without their prior knowledge, authorization or consent.

Paul Dennett Crawford (Registered Representative, Minneapolis, Minnesota) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was suspended from association with any NASD member in any capacity for two years and required to requalify by exam as a general securities representative. Without admitting or denying the allegations, Crawford consented to the described sanctions and to the entry of findings that he participated in private securities transactions without giving prior written notice to, and receiving written approval from, his member firm.

My Ngoc Dang (Registered Representative, Alameda, California) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $10,000 and

barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Dang consented to the described sanctions and to the entry of findings that he failed to notify his current member firm of the existence of accounts with other member firms and failed to advise the other firms that he was associated with his current member firm. The findings also stated that Dang signed memoranda stating that he did not have a securities account with any brokerage firm, despite the existence of his member firm accounts.

Harold Lee Deavours (Registered Representative, Kingwood, Texas) submitted an Offer of Settlement pursuant to which he was fined $165,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Deavours consented to the described sanctions and to the entry of findings that he engaged in outside business activities and failed to provide prompt written notice to his member firm of such activities. The findings also stated that Deavours made false, fictitious, and misleading representations to his member firm and failed to respond to NASD requests for information.

Randall J. DeMatteo (Registered Representative, Bridgeport, Connecticut) was fined $27,500 and barred from association with any NASD member in any capacity. The sanctions were based on findings that DeMatteo failed to respond to NASD requests for information. DeMatteo also engaged in private securities transactions and failed to receive authorization from his member firm to engage in such activities.

Dennis John DeYoung (Registered Principal, Northridge, California) submitted an Offer of Settlement pursuant to which he was fined $8,500, suspended from association with any NASD member in any capacity for 31 days, ordered to disgorge $22,815, and required to requalify by exam. Without admitting or denying the allegations, DeYoung consented to the described sanctions and to the entry of findings that he participated in private securities transactions and outside business activities while failing to provide prior written notice to his member firm of his participation in such activities. The findings also stated that DeYoung made false, fictitious, and misleading representations to his member firm.

Joseph Marc DiLeo (Registered Representative, Davis, California) was fined $40,000 and suspended from association with any NASD member in any capacity for 30 days. The sanctions were based on findings that DiLeo signed customer names to documents and submitted them to his member firm.

Ann Marie Doty (Registered Principal, Marina Del Rey, California) submitted a Letter of Acceptance, Waiver and Consent pursuant to which she was suspended from association with any NASD member in any registered capacity for 60 days and required to requalify by exam before acting in any capacity requiring registration as a registered options principal. Without admitting or denying the allegations, Doty consented to the described sanctions and to the entry of findings that, while taking the registered options principal qualification exam, Doty was found to be in possession of notes relating to the subject matter of the exam.

Glenn A. Dove (Registered Representative, Sunset Beach, California) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was suspended from association with any NASD member in any capacity for 15 business days and ordered to requalify by exam as a general securities representative. Without admitting or denying the allegations, Dove consented to the described sanctions and to the entry of findings that he effected various purchases and sales in securities in the account of public customers without the knowledge or consent of the customers.

James E. Dunniway, Sr. (Registered Principal, Newark, California) was fined $74,105 and barred from association with any NASD member in any capacity. The NBCC affirmed the sanctions following appeal of a San Francisco DBCC decision. The sanctions were based on findings that Dunniway engaged in excessive trading in a customer's account and engaged in a deceptive and fraudulent scheme to generate commissions.

Leonard Sterling Dyer (Registered Representative, Teaneck, New Jersey) was fined $25,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Dyer received $416 from a public customer intended for the purchase of an insurance policy and gave the customer a receipt indicating the full payment of the premium. However, Dyer never opened a policy and converted the funds to his own use. Dyer also failed to respond to NASD requests for information.

Jeff Alan Einfalt (Registered Representative, Lincoln, Nebraska) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $8,013, suspended from association with any NASD member in any capacity for 10 business days, and required to requalify by exam. Without admitting or denying the allegations, Einfalt consented to the described sanctions and to the entry of findings that he shared in an account with a public customer at a member firm without obtaining prior

written authorization from the member firm carrying the account. The findings also stated that Einfalt recommended to a public customer a series of securities transactions that were excessive in size and frequency in light of the customer's liquid net worth and investment objective of capital appreciation. Furthermore, the NASD determined that Einfalt recommended that public customers take out a loan collateralized by a certificate of deposit for the purpose of opening an account at his member firm and purchasing securities, and recommended that a customer take an advance from a margin account to fund a loan to a public customer to meet a margin call on the customer's account.

Amr I. Elgindy (Registered Principal, Colleyville, Texas) submitted an Offer of Settlement pursuant to which he was fined $30,000, suspended from association with any NASD member in any principal capacity for one year, suspended from association with any NASD member in any capacity for 30 days, and required to produce a copy of his member firm's implemented written supervisory procedures specifically with respect to overseeing his activities to deter and detect a recurrence of the conduct alleged in the complaint. Without admitting or denying the allegations, Elgindy consented to the described sanctions and to the entry of findings that he caused his member firm to execute 108 orders through SOES for the firm's account. The findings also stated that Elgindy caused his member firm to enter nonbona fide orders through the SelectNet℠ System for the firm's account that were either timed out or canceled by Elgindy before they could be executed. Furthermore, the NASD found that Elgindy caused trades reported to ACT to be canceled by failing to acknowledge or confirm such trades. The NASD also determined that Elgindy failed to ensure that his member firm establish, maintain, and enforce supervisory procedures that would have enabled the firm to deter and detect the above conduct.

Nicholas Mark Ellis (Registered Principal, Irvine, California) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $20,000 and suspended from association with any NASD member as a general securities principal for two years. Without admitting or denying the allegations, Ellis consented to the described sanctions and to the entry of finding that a member firm, acting through Ellis, conducted a general securities business but failed to designate a limited financial and operations principal. The findings also stated that a member firm, acting through Ellis, executed options and municipal transactions but failed to have and designate a registered options principal and municipal securities principal.

Ellis' suspension began September 5, 1997 and will conclude September 5, 1999.

Douglas A. Glaser (Registered Representative, Evergreen, Colorado) was fined $30,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Glaser failed to disclose a felony charge on a Form U-4 and failed to respond to NASD requests for information.

Michael Edgar Goldstein (Registered Representative, Los Angeles, California), Jeffrey B. Goodman (Registered Representative, Calabasas, California), Jason Scott Neu (Registered Representative, Santa Monica, California), William Reininger (Registered Representative, Agoura, California), and **Joseph Patrick Hannan (Associated Person, Los Angeles, California).** Goldstein and Goodman were each fined $5,000, suspended from association with any NASD member in any capacity for six months, and ordered to requalify by exam as a general securities representative. Neu was fined $20,000 and barred from association with any NASD member in any capacity and Reininger was fined $5,000, suspended from association with any NASD member in any capacity for six months, and ordered to requalify by exam as a limited representative for direct participation programs. Hannan was fined $1,000 and suspended from association with any NASD member in any capacity for six months. The NBCC imposed the sanctions following appeal of a Los Angeles DBCC decision. The sanctions were based on findings that Goldstein, Goodman, Neu, Reininger, and Hannan failed to respond timely or fully to NASD requests for information.

Hannan has appealed this action to the SEC and his sanctions are not in effect pending consideration of his appeal.

Christopher William Griffin (Registered Representative, New York, New York) was fined $20,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Griffin failed to respond to NASD requests for information.

Steven A. Hall (Registered Representative, Scarborough, Maine) was fined $70,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Hall failed to respond to NASD requests for information. Hall also engaged in private securities transactions and failed to receive authorization from his member firm to engage in such activities.

Scott W. Lindquist (Registered Representative, Carlsbad, California) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $5,000 and suspended from association with any NASD member in any capacity for 30 business days. Without admitting or denying the allegations, Lindquist consented to the described sanctions and to the entry of findings that he signed customers' names on various new account applications and transfer forms to expedite the processing of transactions in 10 new customer accounts without the customers' prior knowledge or authorization.

Jonathan Matthew Lorenz (Registered Representative, Lubbock, Texas) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Lorenz consented to the described sanction and to the entry of findings that he signed the names of public customers on insurance and insurance-related forms, submitted the forms to his member firm, and represented that the signatures on the forms were genuine when, in fact, they were not.

Steven Wayne Martin (Registered Representative, Whitehouse, Texas) was fined $22,000, suspended from association with any NASD member in any capacity for 18 months, and ordered to requalify by exam. The sanctions were based on findings that Martin failed to timely respond to NASD requests for information. Martin also submitted to his member firm an annual compliance checklist form that contained false and misleading responses to questions.

Theodore Anthony Matagrano (Registered Representative, Ridgewood, New York) was fined $20,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Matagrano failed to respond to NASD requests for information.

Frank Anthony Monreal (Registered Representative, Moreno Valley, California) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $379,755 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Monreal consented to the described sanctions and to the entry of findings that he converted $13,436.66 from a public customer by instructing the customer to endorse a proceeds liquidation check intended for deposit in the customer's account, and effectively converted those funds to the use of his girlfriend without the customer's knowledge or consent. The findings also stated that Monreal converted $62,514.38 from a public customer's account by opening a joint mutual fund account with the customer away from his member firm without the customer's knowledge or consent, and thereafter transferring funds from the account to an account he controlled.

Mark Lynn Mortensen (Registered Representative, Fairfax, Minnesota) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $35,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Mortensen consented to the described sanctions and to the entry of findings that he forged customer signatures on insurance product forms without the customers' knowledge or consent. The findings also stated that Mortensen prepared, forged signatures, and submitted life insurance applications and exchange request forms for two customers without their knowledge or consent for the purpose of receiving $6,584 in commissions.

Stephanie Ann Murray (Registered Representative, Trenton, New Jersey) was barred from association with any NASD member in any capacity. The sanction was based on findings that Murray, while taking the Series 7 exam, had in her possession notes relating to the subject matter of the exam.

Harvey F. Neustadt (Registered Representative, Easton, Maryland) was fined $1,500,000, barred from association with any NASD member in any capacity, and required to pay $306,494.32 plus interest in restitution. The sanctions were based on findings that Neustadt converted $326,494.32 from public customers and failed to respond to NASD requests for information.

Allen B. Olander (Registered Representative, Lancaster, California) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $5,000 and suspended from association with any NASD member in any capacity for five business days. Without admitting or denying the allegations, Olander consented to the described sanctions and to the entry of findings that he participated in private securities transactions, but failed to provide prior written notification to his member firm.

Bryan James O'Leary (Registered Principal, Dallas, Texas) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $8,500 and suspended from association with any NASD member in any capacity for 10 business days. Without admitting or denying the allegations, O'Leary consented to the described sanctions and to the entry of findings that, while serving as a general securities principal, he failed to supervise the activities of an indi-

vidual adequately in that he failed to ensure that the individual was properly registered with the NASD prior to conducting a securities business.

Salvatore Piazza (Associated Person, Milburn, New Jersey) was fined $20,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Piazza failed to respond to NASD requests to appear for an on-the-record interview.

James Alfred Pierce (Registered Representative, Holbrook, New York) submitted an Offer of Settlement pursuant to which he was fined $20,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Pierce consented to the described sanctions and to the entry of findings that he failed to respond to NASD requests to appear for an on-the-record interview.

Gene Albert Riedinger (Registered Representative, Bismarck, North Dakota) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $20,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Riedinger consented to the described sanctions and to the entry of findings that he failed to respond to NASD requests for information.

Nancy Roebuck (Associated Person, New York, New York) was fined $20,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Roebuck failed to respond to NASD requests to appear for an on-the-record interview.

Blake M. Russ (Registered Representative, Boca Raton, Florida), Dean C. Verrigni (Registered Representative, Wappingers Falls, New York), and **Gary H. Hrycyk (Registered Representative, New York, New York)** submitted Offers of Settlement pursuant to which Russ was fined $18,000 and barred from association with any NASD member in any capacity and Verrigni was fined $29,000 and barred from association with any NASD member in any capacity. Hrycyk was fined $13,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, the respondents consented to the described sanctions and to the entry of findings that they engaged in manipulative, deceptive, or other fraudulent activities in connection with the purchase or sale of securities.

Marc T. Schaufler (Registered Representative, New Milford, Connecticut) was fined $20,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Schaufler failed to respond to NASD requests for information.

Gary Allen Sebbert (Registered Representative, Muscatine, Iowa) submitted an Offer of Settlement pursuant to which he was fined $10,000 and suspended from association with any NASD member in any capacity for one year. Without admitting or denying the allegations, Sebbert consented to the described sanctions and to the entry of findings that he affixed customer signatures on insurance and/or securities product forms without the customers' knowledge or consent.

Sebbert's suspension began January 31, 1996 and concluded January 31, 1997.

Delos G. Smith, III (Registered Representative, Richmond, Virginia) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $20,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Smith consented to the described sanctions and to the entry of findings that he failed to respond to an NASD request to appear for an on-the-record interview.

Thomas G. Streich (Registered Representative, Apple Valley, Minnesota) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $288,714 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Streich consented to the described sanctions and to the entry of findings that he submitted false address change forms, requested loans against traditional and/or variable life and annuity contracts, received and endorsed loan proceeds checks made payable to the customers, and converted $57,742.84 in customer funds to his own use and benefit.

Larry Dean Vandervoort (Registered Representative, Omaha, Nebraska) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $5,000 and suspended from association with any NASD member in any capacity for 10 days. Without admitting or denying the allegations, Vandervoort consented to the described sanctions and to the entry of findings that he recommended and placed orders for the purchase and sale of securities in the individual retirement accounts of public customers without having a reasonable basis for believing the transactions were suitable for the customers based upon the frequency of these transactions and the customers' investment objectives and financial situations.

Jerry Jewel Waller (Registered Representative, Pasadena, Texas) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $5,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Waller consented to the described sanctions and to the entry of findings that he exercised control over traveler's checks that were owned by an affiliate of his member firm and made unauthorized use of them.

Richard Wayne Wells, Sr. (Registered Representative, Rockwall, Texas) submitted an Offer of Settlement pursuant to which he was fined $20,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Wells consented to the described sanctions and to the entry of findings that he failed to respond to NASD requests for information.

Russell Leroy Whittaker (Registered Representative, Coalville, Utah) was fined $50,000, barred from association with any NASD member in any capacity, and ordered to pay restitution to a customer. The sanctions were based on findings that Whittaker borrowed $10,000 from a public customer and, in connection with his solicitation of the loan, used a signature guarantee stamp from a former employer to create the false appearance that his signature on the promissory note was guaranteed by a corporate entity when in fact he knew no such guarantee existed. Furthermore, Whittaker was aware of and failed to disclose that he contravened the written supervisory procedures of his member firm that prohibited registered representatives from borrowing money from the firm's clients. Moreover, Whittaker failed to disclose his prior defaults on certain loans, failed to disclose that the signature stamp was not valid, and failed to repay the loan.

Individuals Fined

Anthony C. Nuzzo (Registered Representative, Venice, California) was fined $25,000 and required to requalify by exam as a representative. The sanctions were based on findings that Nuzzo recommended and effected for the account of a public customer purchase and sale transactions in shares of investment companies without having reasonable grounds for believing that such recommendations were suitable for the customer in light of her financial situation and needs, the inappropriate nature of investment company shares for use as a short-term trading vehicle, and the frequency and costs of the transactions.

William Leslie Walters (Registered Representative, Highlands Ranch, Colorado) submitted an Offer of Settlement pursuant to which he was fined $14,409 and required to requalify by exam. Without admitting or denying the allegations, Walters consented to the described sanctions and to the entry of findings that he effected transactions in the accounts of public customers without first obtaining the authorization of the customers. The findings also stated that Walters misrepresented the value of securities in a customer's account.

Decisions Issued

The following decisions have been issued by the DBCC and have been appealed to the NBCC as of October 31, 1997. The findings and sanctions imposed in the decision may be increased, decreased, modified, or reversed by the NBCC. Initial decisions whose time for appeal has not yet expired will be reported in the next *Notice to Members*.

Ralph A. Bafo (Registered Representative, Tonawanda, New York) was fined $20,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Bafo failed to respond to NASD requests for information.

Bafo has appealed this action to the NBCC and the sanctions are not in effect pending consideration of the appeal.

Daniel C. Boss (Registered Representative, Mendon, New York) was fined $215,000, barred from association with any NASD member in any capacity, and required to pay $39,100 in restitution to a customer. The sanctions were based on findings that Boss received $40,000 from a public customer for the purchase of unspecified investments he recommended and, without the customer's knowledge or consent, did not use the funds for the intended purpose, but for some purpose other than for the benefit of the customers. Boss also failed to respond to NASD requests for information.

Boss has appealed this action to the NBCC and the sanctions are not in effect pending consideration of the appeal.

Complaints Filed

The following complaints were issued by the NASD. Issuance of a disciplinary complaint represents the initiation of a formal proceeding by the NASD in which findings as to the allegations in the complaint have not been made, and does not represent a decision as to any of the allegations contained in the complaint. Because these complaints are unadjudicated, you may wish to contact the respondents before drawing any conclusions regarding the allegations in the complaint.

Lexington Capital Corporation (formerly Emme Corp. d/b/a Marlowe & Company) (Hauppauge, NY); Alan Michael Berkun (Registered Principal, East Rockaway, NY); and **Maurice Dana Wise (Registered Principal, Hauppauge, NY)** were named as respondents in an NASD complaint alleging that the firm, acting through Berkun and Wise, engaged in a variety of improper practices which both defrauded the investing public and impeded regulatory scrutiny. Specifically, the complaint alleges, among other things, that the firm, acting through Berkun: (i) allowed a statutorily disqualified individual to be an associated person of the firm without receiving the proper regulatory approvals; (ii) filed a false Uniform Application for Securities Industry Registration or Transfer (Form U-4) and MC-400 application with the NASD; (iii) paid a commission to a non-member firm and failed to report to the NASD that it had conducted business with a firm owned by a person subject to a statutory disqualification; (iv) effected hundreds of sales of penny stocks to more than 100 customers while failing to make both the appropriate suitability determinations and disclosures required by the penny stock rules; (v) violated the firm's restriction agreement with the NASD; (vi) improperly sold unregistered securities to the investing public; (vii) charged its customers fraudulently excessive markups in connection with sales of securities which amounted to more than $100,000 in illicit profits to the firm; and (viii) failed to disclose to its customers that the firm was acting as principal in connection with the unregistered securities transactions and the amount of remuneration received by the firm in connection with these transactions.

Additionally, the complaint charged that Berkun and Wise falsified the firm's books and records to conceal the fact that an unregistered representative was soliciting and effecting trades with the public while not properly registered with the NASD and several states. The complaint further charged that the firm, Berkun, and Wise failed to establish, maintain and enforce a system to supervise the activities of the firm's registered representatives and associated persons reasonably designed to achieve compliance with applicable securities laws and regulations and the applicable NASD rules.

Janice D. Russo (Registered Representative, Los Angeles, California) was named as a respondent in an NASD complaint alleging that she effected unauthorized transactions in the account of a public customer. The complaint alleges Russo effected four transactions, totaling approximately $24,439, that were contrary to the public customer's instructions and without the customer's knowledge or consent.

Kenji Saski (Registered Representative, Tokyo, Japan) was named as a respondent in an NASD complaint alleging that he made fraudulent misrepresentations and omissions regarding execution and compensation information. Saski's actions resulted in overcharges to two customers and secret profits of approximately $267,000.

Merrill W. Sywenki (Registered Representative, Lehighton, Pennsylvania) was named as a respondent in an NASD complaint alleging that he engaged in a continuing fraudulent and deceptive scheme whereby he obtained funds from public customers for the purchase of securities, did not apply those funds to the purchase of securities for the customers, retained and utilized the funds for his personal purposes, furnished false documents to the customers to deceive them into believing securities had been purchased on their behalf, and made further false representations to the customers to conceal his own actions.

Firms Suspended

The following firms were suspended from membership in the NASD for failure to comply with formal written requests to submit financial information to the NASD. The actions were based on the provisions of NASD Rule 8210 and Article VII, Section 2 of the NASD By-Laws. The date the suspensions commenced is listed after the entry. If the firm has complied with the requests for information, the listing also includes the date the suspension concluded.

Del Mar Financial Services, Inc., Del Mar, California (October 1, 1997)

Kensington Wells, Inc., Brooklyn, New York (October 1, 1997)

Sabel Management, Inc., Livonia, Michigan (October 1, 1997)

Firm Suspended Pursuant To NASD Rule 9622 For Failure To Pay Arbitration Award

Dickinson & Co., Des Moines, Iowa

Individuals Whose Registrations Were Revoked For Failure To Pay Fines, Costs, And/Or Provide Proof Of Restitution In Connection With Violations

Francis W. Gillet, III, Monkton, Maryland

Robert A. Grunburg, Marina del Rey, California

William N. Herred, Santa Barbara, California

Timothy M. Smith, Arlington Heights, Illinois

NASD Regulation Issues Complaint Against Hampton Capital Management Corp., CEO, and Employee for Denying Inspection

NASD Regulation announced that it has issued a complaint against Hampton Capital Management Corp.; its Chief Executive Officer and President, Marquis B. Quetant; and a Hampton employee, Rhett McIntosh, for failing to cooperate with an NASD Regulation investigation and for intentionally providing false information to NASD Regulation.

The complaint results from a September 25, 1997, unannounced on-site inspection of Hampton Capital's New York City branch office when NASD Regulation examiners from the New York District Office were denied access to Hampton's office. Simultaneously, additional NASD Regulation examiners conducted an on-site inspection at Hampton's main office in Stamford, Connecticut, and were admitted.

All NASD-registered firms are required to give NASD Regulation examiners immediate and unimpaired access to the firm's books and records. Refusing regulators access is a serious issue.

The filing of an NASD Regulation complaint represents the initiation of a formal proceeding. At this time, the allegations have not been proven and no decision has been made. Under NASD Regulation rules, the firm can file a response to these charges and request a hearing before an NASD Regulation panel.

NASD Regulation Fines Mayer & Schweitzer $200,000 For Failure To Provide Best Execution As Well As Record-Keeping And Supervisory Violations

NASD Regulation announced that Mayer & Schweitzer, Inc., was fined $200,000 after settling charges that the firm failed to get its customers the best executions possible on five separate occasions from December 1995 through June 1996.

In the settlement, Mayer & Schweitzer neither admitted nor denied allegations that it failed to provide the best execution possible because it did not transmit member-to-member customer limit orders for securities the firm did not make a market in to another market maker that could have filled the orders. While Mayer & Schweitzer intended to forward the orders, its faulty procedures prevented the orders from being transmitted.

A customer limit order, whether originating from a public customer or another market maker on behalf of a customer, is an order to buy or sell a stock at a price specified by the customer. NASD Regulation's best execution rule requires that brokerage firms make every effort possible to obtain the most favorable price available for every security purchased or sold on behalf of a customer.

These violations were investigated by NASD Regulation's Market Regulation Department, and were based on the receipt of five separate customer complaints.

NASD Regulation also found that the firm failed to establish, maintain, and enforce written supervisory procedures to prevent these violations. Additionally, NASD Regulation found that Mayer & Schweitzer failed to maintain records of the time and manner in which the firm sent customer limit orders to other market makers for execution.

Previously, on March 20, 1996, Mayer & Schweitzer entered into a separate settlement, without admitting or denying allegations of best execution and record-keeping violations. The firm was fined $75,000 as a result.

Based in Jersey City, New Jersey, Mayer & Schweitzer is a brokerage firm that currently employs approximately 193 registered representatives in offices in Jersey City and Piscataway, New Jersey; Dania, Florida; Chicago, Illinois; and Denver, Colorado.

NASD Regulation Brings Sales Practice Charges Against 33 Former Stratton Oakmont Principals and Brokers

NASD Regulation announced that it has filed disciplinary charges against 33 former principals, brokers, and employees of the now defunct Long Island brokerage firm of Stratton Oakmont, Inc. The firm was expelled from the NASD in December 1996 because it posed "an ongoing risk to the investing public."

The complaint, which alleges a wide range of serious sales practice violations by 33 individuals, is one of the largest complaints of its type ever brought by NASD Regulation and results from a continuing investigation into Stratton Oakmont's operations. The complaint alleges that 33 individuals, who were based at Stratton Oakmont's headquarters in Lake Success, New York, engaged in a number of fraudulent sales practices and other misconduct from 1993 through 1996. NASD Regulation also alleges that, in many instances, Stratton Oakmont used prepared scripts (six of which are part of the complaint) as part of their aggressive

telemarketing efforts to sell speculative securities.

The complaint identifies at least 70 specific customers who were allegedly victimized through fraudulent practices including: unauthorized trading; baseless or improper price predictions; inadequate or inaccurate risk disclosure; churning and excessive trading; sale of unsuitable investments to risk-averse customers; advising customers to disregard information in prospectuses; falsely promising to limit losses to a specific amount; claiming access to inside information; making false statements regarding specific securities and issuers; making improper comparisons to other stocks; tying the purchase of initial public offerings to a commitment to buy stock in the aftermarket; guaranteeing customers against loss; promising to make up losses with new trades; refusing to execute or aggressively discouraging orders to sell stocks; use of false and misleading scripts; supervision failures; falsifying account documentation; failing to appear for testimony before the NASD; and lying during testimony.

The complaint names the following principals:

Daniel M. Porush, President and principal owner

Michael J. Albino, Director of Supervision

Andrew T. Greene, Executive Vice President and Director of Corporate Finance

Howard S. Gelfand
Jordan Shamah

Named brokers include:

Chad J. Beanland
Eric Blumen
Ira A. Boshnack
Stephen G. Buxton
Andrew S. Friedman
Dean S. Friedman
Kenneth J. Fuina
Daniel J. Gallagher
James W. Garofalo Jr.
Paul J. Greco
David S. Heredia
Robert W. Koch II
Thomas A. Niemczyk
George Patsis
Michael J. Raskin
Frank Riccuiti Jr.
Richard L. Ringel
Robert J. Rosato
Peter T. Rubenstein
Lawrence T. Smith
Robert F. Smith
Edward C. Sparacio
Michael A. Taliercio
Joseph Teseo
Peter T. Tsadilas
Bonnie C. Vandenberg
April Wiener

The complaint names the following research analyst:

Clifford B. Olshaker

Prior to its expulsion by NASD Regulation, Stratton Oakmont and its principals were repeatedly fined, censured and, in some cases, barred by federal and state securities regulators. Since June 1989, the firm and its principals have been the subject of numerous NASD Regulation disciplinary actions, including fines, censures, suspensions, and bars. In recent years, the SEC and a number of state securities regulators around the nation have also sanctioned both Stratton Oakmont and its principals. In early 1994, the SEC settled an enforcement action against Stratton Oakmont and its President, Daniel M. Porush, after alleging that the firm engaged in securities fraud through its "boiler room" sales operation. By late 1994, the SEC had charged Stratton Oakmont with violating the settlement agreement and obtained a permanent injunction against the firm requiring future compliance. At the time of its expulsion in December 1996, the firm had been barred by a number of state regulators.

Stratton Oakmont is currently being liquidated in accordance with the Securities Investors Protection Act (SIPC) of 1970.

The filing of an NASD Regulation complaint represents the initiation of a formal proceeding. At this time, the allegations have not been proven and no decision has been made. Under NASD Regulation rules, the respondents can file a response to these charges and request a hearing before an NASD Regulation disciplinary panel. Possible sanctions include a fine, suspension, or bar from the securities industry.

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FOR YOUR INFORMATION

New Customer Support Hotline Number

Those member firms that are enjoying the benefits of the National Association of Securities Dealers, Inc. (NASD®) Member Compliance Support System, Training Analysis and Planning Tool, Version 2.0 (MCSS), will soon benefit from enhanced customer service.

Please note that, as of November 3, 1997, technical questions regarding the MCSS application will be answered by the NASD Regulation, Inc., Customer Support Hotline, at (800) 321-NASD (6273).

This number is for technical support calls only. Questions related to Continuing Education requirements should be directed to the NASD Regulation℠ Membership Department, at (301) 590-6500.

After November 3, 1997, please discontinue using the current technical support hotline number (800-305-7132).

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SPECIAL NASD NOTICE TO MEMBERS 97-86

Nominees For NASD Board Of Governors

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ☐ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ☐ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ☐ Syndicate
- ☐ Systems
- ☐ Trading
- ☐ Training
- ☐ Variable Contracts

National Association of Securities Dealers, Inc.
Notice Of Nominees

The Annual Meeting of Members of the National Association of Securities Dealers, Inc. (NASD®) will be held on or about January 15, 1998. A notice of meeting, including the precise date, time and location of the Annual Meeting, will follow on or about December 15, 1997.

Pursuant to Section 10 of Article VII of the By-Laws of the NASD, a person who has not been so nominated for election to the Board of Governors may be included on the ballot for the election of Governors if (a) within 30 days of the date of this *Notice* such person presents to the Secretary of the NASD petitions in support of such nomination duly executed by at least 3 percent of the members of the NASD, and (b) the Secretary certifies that such petitions have been duly executed by the Executive Representatives of the requisite number of members of the NASD and the person being nominated satisfies the classification of the governorship to be filled based on the information provided by the person as is reasonably necessary for the Secretary to make the certification.

Questions regarding this *Notice* may be directed to:

Joan C. Conley
Corporate Secretary
National Association of Securities Dealers, Inc.
1735 K Street, N.W.
Washington, D.C. 20006-1500
(202) 728-8381

The following persons (see attached profiles) have been nominated by the National Nominating Committee[1] to serve on the Board of Governors of the NASD for a term of no more than three years or until their successors are duly elected and qualified:

INDUSTRY

Name	Term
E. David Coolidge, III Chief Executive Officer William Blair & Company, L.L.C.	1998-1999
James Dimon President, COO and Director of Travelers Group Chairman & CEO of Smith Barney Inc.	1998-1999
Jon S. Corzine Chairman & CEO Goldman, Sachs & Co.	1998-2000
Kenneth J. Wessels Chief Executive Officer Wessels, Arnold & Henderson, L.L.C.	1998-2000
Herbert M. Allison, Jr. President & COO Merrill Lynch & Co., Inc.	1998-2001
Frank E. Baxter Chairman, President & CEO Jefferies Group & Co., Inc.	1998-2001
Donald B. Marron Chairman & CEO PaineWebber Group, Inc.	1998-2001
Todd A. Robinson Chairman & CEO Linsco/Private Ledger Corporation	1998-2001

NON-INDUSTRY

Bridget A. Macaskill President & CEO Oppenheimer Funds, Inc.	1998-1999
James F. Rothenberg President and Director Capital Research & Management Company	1998-1999
Arvind Sodhani (Issuer Nominee) Vice President & Treasurer Intel Corporation	1998-2000

Name	Term
Michael W. Brown (Issuer Nominee) Retired Chief Financial Officer Microsoft Corporation	1998-2001
Harry P. Kamen (Insurance Affiliated Nominee) Chairman & CEO Metropolitan Life Insurance Co.	1998-2001
James S. Riepe (Investment Co. Nominee) Vice Chairman T. Rowe Price Associates, Inc.	1998-2001
Howard Schultz (Issuer Nominee) Chairman & CEO Starbucks Coffee Company	1998-2001
PUBLIC	
Elaine L. Chao Distinguished Fellow The Heritage Foundation	1998-1999
Donald J. Kirk Executive-in-Residence Columbia University	1998-1999
John D. Markese President American Assoc. of Individual Investors	1998-1999
Nancy Kassebaum Baker Former United States Senator	1998-2000
Robert R. Glauber Adjunct Lecturer Kennedy School, Harvard University	1998-2000
Philip R. Lochner, Jr. Senior Vice President Time Warner, Inc.	1998-2000
Paul H. O'Neill Chairman & CEO ALCOA	1998-2001

National Association of Securities Dealers, Inc.

Profiles Of Board Nominees

Nominees For Industry Governors

Herbert M. Allison, Jr. is President and Chief Operating Officer of Merrill Lynch & Co., Inc. Mr. Allison began his career with Merrill Lynch in 1971 and was elected President and Chief Operating Officer of the firm in January 1997. Mr. Allison holds a B.A. in Philosophy from Yale and an M.B.A. from Stanford.

Frank E. Baxter is Chairman, President and Chief Executive Officer of Jefferies & Co., Inc. Mr. Baxter joined Jefferies & Co. in 1974 and was elected Chairman, President and Chief Executive Officer of the firm in 1990. Mr. Baxter is a Director of the Securities Industries Association. Mr. Baxter holds a B.A. from the University of California, Berkeley.

E. David Coolidge, III is Chief Executive Officer of William Blair & Company, L.L.C. Mr. Coolidge joined William Blair & Company in 1969 and was elected Chief Executive Officer of the firm in 1995. Mr. Coolidge currently serves on the Board of the Pittway Corporation, the Kellogg Graduate School of Management at Northwestern University, the University of Chicago, the Rush-Presbyterian-St. Luke's Medical Center, the Rush North Shore Medical Center, and the Better Government Association. Mr. Coolidge holds a B.A. from Williams College and an M.B.A. from the Harvard Graduate School of Business. Mr. Coolidge currently serves on the NASD, Inc., Board of Governors and is a member of the NASD, Inc., Audit Committee.

Jon S. Corzine is Chairman and Chief Executive Officer of Goldman, Sachs & Co. Mr. Corzine joined Goldman Sachs in 1975 and was appointed Chairman and Chief Executive Officer of the firm in 1994. Mr. Corzine currently serves as a member of the Federal Reserve Bank of New York's International Capital Markets Advisory Committee, the Public Securities Association, the Board of Trustees of the University of Chicago, and the Institute for International Economics. In March of 1997, Mr. Corzine was appointed Co-Chair of the Presidential Commission to Study Capital Budgeting. Mr. Corzine holds a B.A. from the University of Illinois and an M.B.A. from the University of Chicago. Mr. Corzine currently serves on the NASD, Inc., Board of Governors.

James (Jamie) Dimon is President, Chief Operating Officer and Director of Travelers Group, and Chairman and Chief Executive Officer of Smith Barney Inc. Mr. Dimon joined the firm in 1986. He was appointed President of Travelers Group in 1991 and became Chief Operating Officer in 1993. He was named Chairman and Chief Executive Officer of Smith Barney in 1996. Mr. Dimon is on the Board of Trustees of New York University Medical Center, the Board of Directors of the Center on Addiction and Substance Abuse, and the Board of Directors of Tricon Global Restaurants, Inc. Mr. Dimon holds a B.A. from Tufts University and an M.B.A. from Harvard University Graduate School of Business. He currently serves on the NASD, Inc., Board of Governors and is Chairman of the NASD, Inc., Management Compensation Committee.

Donald B. Marron is Chairman and Chief Executive Officer of PaineWebber Group, Inc. Mr. Marron joined PaineWebber in 1977 as President. He was elected Chief Executive Officer in 1980 and Chairman of the Board in 1981. Mr. Marron currently serves as a private sector Co-Chair on the National Commission on Retirement Policy; is Vice Chairman and former President of The Museum of Modern Art; serves on the boards of the Memorial Sloan Kettering Cancer Center and the Dana Foundation; and is a member of the Governor's International Business Development Council. Mr. Marron is a co-founder and former chairman of DRI and a member of the Council on Foreign Relations.

Todd A. Robinson is Chairman and CEO of Linsco/Private Ledger Corporation (LPL Financial Services). Mr. Robinson became CEO of Linsco Financial Group in 1985 and merged it with Private Ledger Corp. in 1989, creating Linsco/Private Ledger Corporation. Mr. Robinson holds a B.A. from Bates College. He was Chairman of the NASD District 11 Business Conduct Committee, an original member of the Securities Industry Task Force on Continuing Education, and serves on numerous industry committees. Mr. Robinson was elected Chairman of the NASD Regulation, Inc., Board of Directors in 1997 and serves as Chairman of the Executive Committee and the Independent Dealers/Insurance Affiliate Committee.

Kenneth J. Wessels is Chief Executive Officer of Wessels, Arnold and Henderson. Mr. Wessels co-founded the firm in 1986. Mr. Wessels is a former chairman and member of the NASD, Inc., Board of Governors (1990). He holds a B.A. in Business Administration from the University of Missouri. Mr. Wessels currently serves as a member of The Nasdaq Stock Market, Inc., Board of Directors and Executive Committee.

Nominees For Non-Industry Governors

Michael W. Brown is the Retired Chief Financial Officer of Microsoft Corporation. Mr. Brown was appointed Chief Financial Officer of Microsoft Corporation in 1994, having joined the firm as Treasurer in 1989. Prior to that time, Mr. Brown spent 18 years with the public accounting firm of Deloitte and Touche. Mr. Brown currently serves as a Director of Wang Laboratories, Kurzweil Educational Systems, Citrix Systems, Administaff, Inc., and a Trustee of the Financial Executive Research Foundation. He is a member of the Center for Strategic and International Studies, the Financial Executives Institute, the American Institute of Certified Public Accountants, and the University of Washington School of Business Administration Advisory Board. Mr. Brown holds a B.A. in Economics from the University of Washington. Mr. Brown currently serves as Chairman of The Nasdaq Stock Market, Inc., Board of Directors and Executive Committee.

Harry P. Kamen is Chairman of the Board and Chief Executive Officer of Metropolitan Life Insurance Co. Mr. Kamen has served as Chairman and Chief Executive Officer of Metropolitan Life Insurance Company since 1993, having joined the organization in 1959. Mr. Kamen serves as a Director of the following business corporation Boards: Banco Santander (Spain), Bethlehem Steel Corp., Pfizer, Inc., The New England Life Insurance Co., and New England Investment Companies. Mr. Kamen holds an A.B. from the University of Pennsylvania and an LL.B. from Harvard University Law School.

Bridget A. Macaskill is President and Chief Executive Officer of Oppenheimer Funds, Inc. Ms. Macaskill was named President of the Oppenheimer Funds, Inc., in 1991 and Chief Executive Officer in 1995, having joined the firm in 1983. Ms. Macaskill serves on the Oppenheimer Funds, Inc., Board of Directors and Executive Committee, and the boards of the Oppenheimer funds. She is also a member of the Board of Directors of Hillsdown Holdings. Ms. Macaskill holds an undergraduate degree from Edinburgh University in Scotland, and pursued post-graduate work at Edinburgh College of Commerce. Ms. Macaskill is currently a member of The Nasdaq Stock Market, Inc., Board of Directors and Finance Committee.

James S. Riepe is Vice Chairman of the Board of Directors of T. Rowe Price Associates, Inc., and serves as Director/Officer of all the T. Rowe Price mutual funds. Mr. Riepe has been in the investment management business since 1969, and joined T. Rowe Price in 1982. He is a former Chairman of the Board of Governors of the Investment Company Institute and currently a member of its Executive Committee. He holds a B.S. and an M.B.A. from the University of Pennsylvania's Wharton School. Mr. Riepe currently serves on the NASD Regulation, Inc., Board of Directors and the following NASD Regulation, Inc., Committees: Executive, Finance and Investment Companies (Chair).

James F. Rothenberg is President and Director of Capital Research and Management Company. Mr. Rothenberg assumed the position of President and Director of Capital Research and Management Company in 1994, having joined the company in 1970. Mr. Rothenberg serves on the Boards of the Huntington Memorial Hospital, KCET (Public Television for Southern and Central California), and the Westridge School. Mr. Rothenberg holds a B.A. in English from Harvard College and an M.B.A. from Harvard Graduate School of Business. He currently serves on The Nasdaq Stock Market, Inc., Board of Directors and The Nasdaq Stock Market, Inc., Finance Committee.

Howard Schultz is Chairman and Chief Executive Officer of Starbucks Coffee Company. Mr. Schultz joined Starbucks Coffee Company in 1982. He serves on the Board of Directors of a number of emerging growth companies. Mr. Schultz holds a B.S. from Northern Michigan University.

Arvind Sodhani is Vice President and Treasurer of Intel Corporation. Mr. Sodhani was elected Vice President of Intel Corporation in 1990, having joined the corporation in 1981. Mr. Sodhani holds a B.S. and M.S. from the University of London, and an M.B.A. from the University of Michigan. Mr. Sodhani currently serves as a member of The Nasdaq Stock Market, Inc., Board of Directors and Finance Committee.

Nominees For Public Governors

Nancy Kassebaum Baker is a former United States Senator. Mrs. Baker served in the United States Senate from December 1978 to January 1997, chairing the Labor and Human Resource Committee, the Foreign Relations Committee's Subcommittee on African Affairs, and the Commerce Committee's Subcommittee on Aviation. Mrs. Baker currently serves on the Robert Wood Johnson Foundation, the Ewing Kauffman Foundation, the NCAA Foundation, and the Kaiser Family Foundation. Mrs. Baker holds a bachelor's degree from the University of Kansas in Political Science and a master's degree in Political History from the University of Michigan. Mrs. Baker currently serves on the NASD, Inc., Board of Governors.

Elaine L. Chao was appointed a Distinguished Fellow at The Heritage Foundation in 1996. Prior to this, she was President and Chief Executive Officer of the United Way of America, Director of the Peace Corps, and Deputy Secretary of the U.S. Department of Transportation. She was also Vice President, Syndications, at Bank America Capital Markets Group. Ms. Chao is currently a Director of Dole Food Company, Inc., Vencor, Inc., and Protective Life Corporation. Ms. Chao holds an A.B. from Mt. Holyoke College and an M.B.A. from Harvard University Business School. Ms. Chao currently serves on the NASD, Inc., Board of Governors and Audit Committee.

Robert R. Glauber is an Adjunct Lecturer at the Center for Business and Government, Kennedy School, Harvard University. Mr. Glauber joined the Kennedy School faculty in 1992, after serving as Undersecretary of the U.S. Treasury for Finance from 1989-1992. Previously, he was a professor at the Harvard Business School for 25 years. Mr. Glauber served as Executive Director of the task force (Brady Commission) appointed by President Reagan to study the 1987 stock market crash. Mr. Glauber is Chairman of The Measurisk Group, a risk advisory and software development firm. He serves as a Director of the Dreyfus Group of mutual funds, Mid-Ocean Reinsurance Co., Ltd., Cooke & Bieler, Inc., the Federal Reserve Bank of Boston, and the Investment Company Institute. Mr. Glauber holds a B.A. from Harvard College in Economics and a doctorate in Finance from Harvard Business School. He currently serves as Vice Chairman of the NASD Regulation, Inc., Board of Directors and on the following NASD Regulation, Inc., Committees: Executive, Finance and Investment Companies.

Donald J. Kirk is Executive-in-Residence at Columbia University, Graduate School of Business. Mr. Kirk became a Professor of Accounting at Columbia University in 1987 and served in that capacity until 1995 when he became an Executive-in-Residence at the school. Mr. Kirk served as a member of the Financial Accounting Standards Board from 1973 to 1987, serving as Chairman from 1978 to 1987. Mr. Kirk currently serves as a Director of General Re Corporation, as a Trustee of the Fidelity Group of Mutual Funds, and is a member of the Public Oversight Board of the American Institute of CPAs. Mr. Kirk holds a B.A. from Yale University and an M.B.A. from New York University. Mr. Kirk currently serves on the NASD, Inc., Board of Governors and is Chairman of the NASD, Inc., Audit Committee.

Philip R. Lochner, Jr. is Senior Vice President of Time Warner, Inc. Mr. Lochner became General Counsel in 1988, departed for an 18-month tenure as a Commissioner of the Securities and Exchange Commission, and was elected Senior Vice President of Time Warner, Inc., in 1991. Mr. Lochner serves as a Director on several non-profit organizations and advisory councils. Mr. Lochner holds a B.A. and LL.B. from Yale University, and a Ph.D. from Stanford University. Mr. Lochner was a Fulbright Fellow, having studied at the University of London from 1967 to 1968. Mr. Lochner currently serves on the NASD Regulation, Inc., Board of Directors and Executive Committee.

John D. Markese is President of the American Association of Individual Investors. Mr. Markese holds a doctorate in Finance from the University of Illinois. Mr. Markese currently serves on The Nasdaq Stock Market, Inc., Board of Directors.

Paul H. O'Neill is Chairman and Chief Executive Officer of ALCOA. Mr. O'Neill joined ALCOA in 1987 as Chairman and Chief Executive Officer. Prior to joining ALCOA, Mr. O'Neill was President of International Paper Company, having joined that firm as Vice President, Planning, in 1977. Mr. O'Neill serves on several Boards and Advisory Groups, including the RAND Corporation, the Institute for International Economics, Lucent Technologies, Council for Excellence, and the Gerald R. Ford Foundation. Mr. O'Neill holds a B.A. in Economics from Fresno State College and an M.A. in Public Administration from Indiana University.

Endnotes

[1] NASD National Nominating Committee—Committee Chair: Daniel P. Tully, Merrill Lynch & Co. Members: John W. Bachmann, Edward D. Jones & Co., Thomas Hale Boggs, Jr., Patton Boggs, L.L.P., John S. Chalsty, Donaldson, Lufkin & Jenrette, Inc., Alfred E. Osborne, Jr., UCLA, Bert C. Roberts, Jr., MCI Communications Corporation.

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NASD NOTICE TO MEMBERS 97-87

Treasury Updates List Of Specially Designated Persons And Entities

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ■ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ■ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ☐ Syndicate
- ☐ Systems
- ■ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

As requested by the Department of Treasury (Treasury), the National Association of Securities Dealers, Inc. (NASD®) provides members with information from the Office of Foreign Assets Control (OFAC) about persons and entities identified as "Specially Designated Nationals and Blocked[1] Persons." On September 9, 1997, OFAC updated its master list, adding one blocked person and one blocked entity who have been determined to act for or on behalf of, or to be owned or controlled by, the Government of Libya. In addition, two individuals were removed from the list.

Background

The U.S. government mandates that all financial institutions located in the United States, overseas branches of these institutions and, in certain instances, overseas subsidiaries of the institutions comply with OFAC regulations governing economic sanctions and embargo programs regarding the accounts and other assets of countries identified as threats to national security by the President of the United States. This always involves accounts and assets of the sanctioned countries' governments, and may also involve the accounts and assets of individual nationals of the sanctioned countries. Also, these regulations prohibit unlicensed trade and financial transactions with such countries.

Under these regulations, financial institutions must block identified assets and accounts when such property is located in the United States, is held by U.S. individuals or entities, or comes into the possession or control of U.S. individuals or entities. The definition of assets and property is very broad and covers direct, indirect, present, future, and contingent interests. In addition, Treasury identifies certain individuals and entities located worldwide that are acting on behalf of sanctioned governments, and that must be treated as if they are part of the sanctioned governments.

OFAC may impose criminal or civil penalties for violations of these regulations. Criminal violations may result in corporate fines of up to $500,000 and personal fines of up to $250,000 and 10 years in jail; civil penalties of up to $11,000 per violation may also be imposed. To ensure compliance, OFAC enlists the cooperation of various regulatory organizations and recently asked the NASD to remind its members about these regulations.

Foreign Assets Control Regulations

OFAC currently administers sanctions and embargo programs against Libya, Iran, Iraq, the Federal Republic of Yugoslavia (Serbia and Montenegro), Serb-controlled areas of Bosnia and Herzegovina, Bosnian Serb military and civilian leaders, North Korea, and Cuba. In addition, OFAC prohibits certain exports to the UNITA faction in Angola and prohibits transactions with terrorists threatening to disrupt the Middle East peace process.

Broker/dealers cannot deal in securities issued from these target countries and governments and must block or freeze accounts, assets, and obligations of blocked entities and individuals when this property is in their possession or control.

According to OFAC, broker/dealers need to establish internal compliance programs to monitor these regulations. OFAC urges broker/dealers to review their existing customer accounts and the securities in their custody to ensure that any accounts or securities blocked by existing sanctions are being treated properly. Broker/dealers also should review

any other securities that may represent obligations of, or ownership interests in, entities owned or controlled by blocked commercial or government entities identified by OFAC.

Broker/dealers must report blockings within 10 days by fax to OFAC's Compliance Division at (202) 622-1657. Firms are prohibited from making debits to blocked customer accounts, although credits are authorized. Blocked securities may not be paid, withdrawn, transferred (even by book transfer), endorsed, guaranteed, or otherwise dealt in.

OFAC has issued general licenses authorizing continued trading on the national securities exchanges on behalf of blocked Cuban and North Korean customer accounts under conditions preserving the blocking of resulting assets and proceeds. Secondary market trading with respect to certain Yugoslav debt securities issued pursuant to the "New Financing Agreement" of September 20, 1988, is also authorized; however, certain restrictions and reporting requirements apply.

List Of Sanctioned Governments And Individuals

Whenever there is an update to its regulations, an addition or removal of a specifically designated national, or any other pertinent announcement, OFAC makes the information available electronically on the U.S. Council on International Banking's INTERCOM Bulletin Board in New York and the International Banking Operations Association's Bulletin Board in Miami. The information also is immediately uploaded onto Treasury's Electronic Library (TEL) on the FedWorld Bulletin Board network and is available through several other government services provided free of charge to the general public.

In addition, members can use the NASD Regulation, Inc., Web site (*www.nasdr.com*) to link to OFAC's list of individuals and companies subject to economic or trade sanctions. OFAC's Web site contains additional information that may be helpful to members and may be accessed directly (*www.ustreas.gov/treasury/services/fac/fac.html*). Members may also refer to *NASD Notices to Members 97-35, 97-4, 96-23,* and *95-97*.

NASD members are urged to review their procedures to ensure compliance with OFAC regulations.

Questions concerning this *Notice* may be directed to OFAC, at (202) 622-2490.

Endnote

[1] Blocking, which also may be called freezing, is a form of controlling assets under U.S. jurisdiction. While title to blocked property remains with the designated country or national, the exercise of the powers and privileges normally associated with ownership is prohibited without authorization from OFAC. Blocking immediately imposes an across-the-board prohibition against transfers or transactions of any kind with respect to the property.

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NASD NOTICE TO MEMBERS 97-88

SEC Approves Amendment To Three Quote Rule Granting Staff Exemptive Authority; Effective Immediately

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ■ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ■ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ☐ Syndicate
- ☐ Systems
- ■ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

On October 22, 1997, the Securities and Exchange Commission (SEC or Commission) approved an NASD Regulation, Inc. (NASD Regulation℠) proposed amendment to National Association of Securities Dealers, Inc. (NASD®) Rule 2320 (Three Quote Rule) that provides the staff of NASD Regulation's Office of General Counsel authority to grant exemptions, under certain circumstances, from the provisions of the Three Quote Rule (SEC Rel. No. 34-39266).

Questions concerning this *Notice* may be directed to David A. Spotts, Senior Attorney, Office of General Counsel, NASD Regulation, at (202) 728-8071.

Background

NASD Rule 2320(g) (the Three Quote Rule or Rule) originally was adopted on May 2, 1988,[1] as an amendment to the NASD's best execution interpretation ("Interpretation of the Board of Governors—Execution of Retail Transactions in the Over-the-Counter Market") under Article III, Section 1 of the NASD's Rules of Fair Practice (currently NASD Rules).[2] The amendment expanded a member's best execution obligation to customers by setting forth additional requirements for customer transactions in non-Nasdaq securities. In particular, the amendment requires members that execute transactions in non-Nasdaq securities on behalf of customers to contact a minimum of three dealers (or all dealers if three or less) and obtain quotations in determining the best inter-dealer market. Under the best execution interpretation, each member is generally required to use reasonable diligence to ascertain the best inter-dealer market for a security, and to buy or sell in that market so that the resultant price to the customer is as favorable as possible under prevailing market conditions.[3]

The Three Quote Rule was adopted in connection with the NASD's efforts to develop a nationwide automated market surveillance program for non-Nasdaq, over-the-counter securities (commonly referred to as "pink sheet" stocks). Concurrent with these activities, the NASD proposed and the Commission approved new Schedule H to the NASD's By-Laws, which established an electronic system of mandatory price and volume reporting for the over-the-counter non-Nasdaq securities.[4] The Three Quote Rule was designed to create a standard to help assure that members would fulfill their best execution responsibilities to customers in non-Nasdaq securities, especially transactions involving relatively illiquid securities with non-transparent prices.

Application Of The Three Quote Rule

Some members who are active dealers in the non-Nasdaq market have questioned the value of the Three Quote Rule in various situations in which it is claimed that adherence to the requirement may not assure the satisfaction of the best execution obligation and, in fact, may hinder satisfaction of the obligation because of the time delays involved in contacting and collecting quotations from three separate dealers. In particular, questions have been raised about the application of the Three Quote Rule to the execution of customer transactions in securities that are traded on certain foreign exchanges, but not U.S. exchanges. Because the Three Quote Rule applies to transactions in all non-Nasdaq securities,[5] which are defined to exclude securities traded only on a "national securities exchange," the rule by its terms applies to transactions effected on any foreign exchange.[6] For example, where a member firm's customer places an agency order to buy or sell a foreign

security listed on a foreign exchange, the Three Quote Rule would require that the member broker/dealer contact at least three dealers and obtain quotations prior to executing the agency trade.[7] In some circumstances, it is argued, the exchange market may constitute the best market for the securities that are listed on that market, and the time delay involved in contacting three dealers in advance of a customer transaction could hinder obtaining the best execution for the customer.

NASD Regulation believes that general exemptive authority under the Rule may be appropriate to provide some flexibility to respond to changing market conditions and particular fact situations. NASD Regulation has not yet determined, however, whether any particular class of transactions should be exempted. Considerations in determining whether to grant an exemptive request could include: (1) the number of firms publishing firm quotations and the period of time during which such quotations were published; (2) the size of the customer order in relation to the minimum size of the market makers' quotations; (3) the transaction volume of the security in question; and (4) the number of dealers publishing quotations through an electronic quotation medium in comparison to dealers in the security that do not publish such quotes.

The nature of particular classes of customers may be another factor in determining whether an exemption is appropriate. In some circumstances, for example, an institutional customer may prefer not to inform or broadcast to other intermediaries or market professionals of its particular intent to buy or sell a particular non-Nasdaq security. Under these circumstances, when a member broker/dealer contacts three other dealers in collecting quotations, as required by the Rule, in certain markets this activity may trigger or invite additional market activity by the parties contacted or others that may affect the market price of the subject security.

Procedures In Exercising Exemptive Authority

It is important to note that the grant of an exemption to the Three Quote Rule will not limit members' best execution obligation. The staff expects that the range of circumstances in which exemptions may be granted will be limited to those circumstances in which it can be shown that the Three Quote Rule would in fact hinder a member's best execution obligation, and that approval of exemption requests generally would be infrequent.

The Office of the General Counsel of NASD Regulation will be responsible for strict compliance with discharging this exemptive authority. Member broker/dealers are instructed to submit all requests for exemptions to the Office of General Counsel, NASD Regulation, and will be required to limit the requests to actual contemplated transactions or situations. The staff will not provide exemptions in response to hypothetical situations or transactions. The request should be detailed and include all relevant information necessary for the staff to reach a determination on the request. If a particular exemption involves a particular class of transactions or class of customers that may be relevant to other member broker/dealers, the staff will also publish such results to the membership through a *Notice to Members* or similar publication or broadcast. Staff determinations will be subject to review by the National Business Conduct Committee.

Endnotes

[1] *See* SEC Rel. No. 34-25637 (May 2, 1988).

[2] The Best Execution Interpretation in Article III, Section 1 of the NASD's Rules of Fair Practice was converted to rule form into new NASD Rule 2320 in connection with the NASD's Manual revision project. *See* SEC Rel. No. 34-36698 (January 11, 1996).

[3] *See* NASD Rule 2320(a).

[4] New Schedule H of the By-Laws required NASD members executing principal transactions in non-Nasdaq securities to report price and volume data for the days on which their sales or purchases exceeded 50,000 shares or $10,000. In 1993, member obligations under Schedule H were modified or eliminated as a result of the NASD adopting real-time reporting of transactions for non-Nasdaq securities. *See* SEC Rel. No. 34-32647 (July 16, 1993).

[5] "Non-Nasdaq security" is defined in NASD Rule 6710 as: "any equity security that is neither included in the Nasdaq Stock Market nor traded on any national securities exchange..."

[6] The term "national securities exchange" is not defined in NASD rules, but the requirements to qualify are set forth in Sections 6(a) and 19(a) of the Securities Exchange Act of 1934.

[7] If a transaction is subject to the Three Quote Rule (NASD Rule 2320(g), then for books and records purposes, NASD Rule 3110(b)(2) requires that "a person associated with a member shall indicate on the memorandum for each transaction in a non-Nasdaq security ... the name of each dealer contacted and the quotation received to determine the best interdealer market."

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NASD NOTICE TO MEMBERS 97-89

SEC Approves Bank Broker/Dealer Rule; Effective February 15, 1998

Suggested Routing

- ■ Senior Management
- ■ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ■ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ■ Mutual Fund
- ■ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ☐ Syndicate
- ☐ Systems
- ☐ Trading
- ■ Training
- ☐ Variable Contracts

Executive Summary

On November 4, 1997, in Release No. 34-39294, the Securities and Exchange Commission (SEC or Commission) approved new National Association of Securities Dealers, Inc. (NASD®) Rule 2350, which specifies requirements applicable to broker/dealers operating on the premises of financial institutions (Bank Broker/Dealer Rule or Rule).[1] The new Rule will be effective on February 15, 1998. This *Notice* contains questions and answers to assist members in complying with the new Rule. The text of the new Rule and the *Federal Register* version of the SEC Release are attached.

Questions concerning this *Notice* should be directed to R. Clark Hooper, Senior Vice President, Office of Disclosure and Investor Protection, NASD Regulation, Inc., at (202) 728-8325, or Mary N. Revell, Associate General Counsel, Office of General Counsel, NASD Regulation℠, at (202) 728-8203. Questions concerning the SEC's approval order should be directed to the SEC's Office of Interpretations and Guidance, at (202) 942-0069.

Background

The NASD initially published the Bank Broker/Dealer Rule for member comment in *NASD Notice to Members 94-94*. The proposed Rule was revised substantially in response to the 284 comment letters that were received. The proposed Bank Broker/Dealer Rule was filed for approval with the SEC on December 28, 1995 (original proposal or original proposed Bank Broker/Dealer Rule).[2]

The SEC published notice of the proposed Bank Broker/Dealer Rule and three amendments to the Rule in the *Federal Register* in March, 1996 (March *Federal Register* Release).[3] The SEC received 98 comment letters on the original proposal. About one-third of the comment letters expressed support for the proposal. While a few commenters supported the proposal as published, most were generally supportive of the proposal's goals but suggested modifications to the proposed Rule. More than half of the commenters opposed some or all of the provisions of the original proposal.

Amendment No. 4, which was filed with the SEC on March 24, 1997, responded to these comments and substantially revised the original proposal. Among other things, Amendment No. 4: (1) deleted the provision restricting the use and release of confidential financial information; (2) deleted the provision governing compensation of unregistered persons; and (3) revised the provisions regarding setting and communications with the public.[4] *See Notice to Members 97-26* for a complete description of the revisions.

Amendment No. 5 to the Bank Broker/Dealer Rule was submitted to the SEC on July 17, 1997.[5] The purpose of this amendment was to respond to the 11 public comments received by the SEC in response to publication in the *Federal Register* of Amendment No. 4. Several technical changes were made to the Rule language to make the Rule clearer, less ambiguous, and more in accord with the standards set forth in the 1994 Interagency Statement on Retail Sales of Nondeposit Investment Products issued by the banking regulators.

The text of the new Rule is set forth below. For a complete description of the new Rule, members should review in detail the attached *Federal Register* version of the SEC Release.

Questions And Answers

Included below are questions and answers to provide guidance to members on compliance with the new Bank Broker/Dealer Rule.

Applicability

Question #1: The Rule applies only to "broker/dealer services conducted by members on the premises of financial institutions where retail deposits are taken." What financial institutions are encompassed by the Rule? What is meant by "the premises of a financial institution where retail deposits are taken" within the meaning of paragraph (a) of the Rule?

Answer: Paragraph (b)(1) of the Rule defines a "financial institution" as a federal or state-chartered bank, a savings and loan association, a savings bank, a credit union, and the required service corporations of such institutions. The phrase "premises ... where retail deposits are taken" generally means an area of a financial institution where the public (or members, in the case of a credit union) can access the deposit services of the institution. It does not, however, include areas of a financial institution that are physically separate from the retail deposit-taking area, *e.g.*, a broker/dealer operating in separate office space on another floor or in another part of the same building (even if the building is owned or primarily occupied by the financial institution) and having no physical presence on the premises of the financial institution where retail deposits are taken or office space that is not generally accessible to the public without an appointment, such as a location where trust or private banking services are provided. An area may be considered physically separate even though entry through a common building lobby or an exterior entrance is permitted.

Question #2: What type of presence is required to be deemed to be conducting broker/dealer services on the premises of the financial institution?

Answer: The Rule applies only where broker/dealer services are conducted either in person, over the telephone, or through any other electronic medium, on the premises of a financial institution where retail deposits are taken, by a broker/dealer that has a physical presence on those premises. Thus, for example, the Rule would apply in the following situations:

• a broker/dealer opens an account for a customer when both are present on the premises of a financial institution;

• a financial institution customer places a telephone call from outside the premises to a broker/dealer located on the premises;

• a customer calls a broker/dealer from a telephone at a broker/dealer's desk located on the premises or from a telephone dedicated to or identified as for use only to contact the broker/dealer; or the broker/dealer is aware that the customer is contacting the broker/dealer via telephone or other electronic medium on the premises of a financial institution where retail deposits are taken.

The Rule would not apply, however, when a customer located on the premises of a financial institution calls a broker/dealer located off the premises from a telephone located in the financial institution that is not dedicated to the broker/dealer (*i.e.*, a regular pay phone), and the broker/dealer is not aware that the customer is calling from the premises of a financial institution.

Question #3: If a member has many branch offices, some of which are located on the premises, and some of which are not, does the Rule apply to all of the firm's branches?

Answer: No; the Rule applies only to broker/dealer services conducted on the premises of a financial institution where retail deposits are taken. Therefore, the Rule would apply only to those branch offices that meet this description and only to accounts opened at those branches.

Setting

Question #4: Paragraph (c)(1) of the Rule requires that sales of non-deposit products should be conducted in a physically distinct location wherever practical. What does that mean with respect to (a) kiosks and (b) Automated Teller Machine (ATM) screens?

Answer: The Rule recognizes that sales of non-deposit products should be conducted in a physically distinct location wherever practical. In all situations, including those where a physically distinct location is not practical, the location must be identified in a manner that clearly distinguishes the broker/dealer services from the activities of the financial institution, and the member's name must be clearly displayed in the area in which the member conducts its broker/dealer services. Indeed, when a member is unable to achieve ideal physical distinction between member activities and the financial institution's retail deposit-taking area, the member must pay particular attention to signage in order to eliminate customer confusion and misidentification.

The Rule imposes the same standards on broker/dealers as are imposed on financial institutions by the Interagency Statement on Retail Sales of Nondeposit Investment Products issued by the banking regulators on February 15, 1994 (Interagency Statement). In particular, in regard to setting, the Interagency Statement imposes the following requirements:

> Selling or recommending nondeposit investment products on the premises of a depository institu-

tion may give the impression that the products are FDIC-insured or are obligations of the depository institution. To minimize customer confusion with deposit products, sales or recommendations of nondeposit investment products on the premises of a depository institution should be conducted in a physical location distinct from the area where retail deposits are taken. Signs or other means should be used to distinguish the investment sales area from the retail deposit-taking area of the institution. However, in the limited situation where physical considerations prevent sales of nondeposit products from being conducted in a distinct area, the institution has a heightened responsibility to ensure appropriate measures are in place to minimize customer confusion.

The NASD intends to work closely with the banking regulators to ensure that NASD interpretations and requirements applicable to broker/dealers conducting business on the premises of a financial institution are consistent with interpretations and requirements applied to financial institutions by banking regulators, and will issue interpretations or propose rule amendments to notify members of any changes.

(a) *Kiosks*. Kiosks or windows operated by a single person in a public place, such as a supermarket, require very special attention to avoid confusion to the public. The difficulties of operating such settings may be resolved if the member exercises exceptional caution and adopts specific operational and signage controls designed to avoid customer confusion and to distinguish the member's operations from those of the financial institution. Additional training and supervision of personnel at kiosks may be necessary and appropriate to make sure that customer confusion does not occur.

(b) *ATM machines*. Paragraph (c)(1) of the Rule requires that the location where the member operates must be identified in a manner that clearly distinguishes the member's services from the activities of the financial institution. While the Rule does not specifically address services provided by computer terminal or ATM, this requirement may be satisfied by displaying the member's name on the first ATM screen after the "investment or securities brokerage" option is chosen by the customer, and, when the customer first enters the "pages" that involve the member's services, by displaying on the screen the disclosures required by paragraph (c)(3)(A) or (c)(4)(C) of the Rule.

Question #5: May the member use directional signs in the deposit-taking area to help customers find the location where broker/dealer services are provided?

Answer: There is no prohibition against directional signs regarding broker/dealer services in the deposit-taking area, so long as the signage meets the other requirements of the Rule and other NASD rules requiring accurate information that is not misleading under the circumstances in which it is used. The member should discuss with the bank where directional signage should be placed. If necessary, the bank could consult with the appropriate federal banking regulator regarding location and content.

Question #6: May a member enter into an arrangement with a financial institution whereby a teller can accept customer deposits into a brokerage account of the member?

Answer: No. Such an arrangement would violate the requirement that the member's broker/dealer services be conducted in a physical location distinct from the area in which the financial institution's retail deposits are taken. The member may want to address this issue in its agreement with the financial institution, which could contain a provision requiring the financial institution to instruct its tellers to direct customers who want to make such a deposit to the member's location on the premises. A member may enter into an arrangement with a financial institution, however, in which cash deposited into a bank account is automatically swept into a money market fund or a brokerage account.

Customer Disclosure And Written Acknowledgment

Question #7: A member is required by paragraph (c)(3)(B) of the Rule to make reasonable efforts to obtain from each customer, during the account opening process, a written acknowledgment of the required disclosures. What is the meaning of "during the account opening process"?

Answer: The account opening process commences at the time of the first contact between the member and the customer. Written documentation may be sent to the customer by the member after the account is opened. Even in the case of accounts opened in person, a customer may wish to bring the disclosure document home for a careful reading. During this process, the member should make reasonable efforts to obtain the acknowledgment.

Question #8: What constitutes reasonable efforts to obtain the required acknowledgment?

Answer: Because some customers may be reluctant to provide the written acknowledgment at the time the account is opened (or, indeed, at any time), the Rule does not mandate that

the acknowledgment be obtained; the Rule does, however, require that the member make reasonable efforts to obtain it. Reasonable efforts should include contacting the customer by telephone, mail, or electronic means to encourage the customer to return the written acknowledgment of disclosures. If such efforts are unsuccessful, the member is not required to close the account. (Compare approach in connection with obtaining suitability information under NASD Rules 2310(b) and 3110, where the member is required to make reasonable efforts to obtain a customer's information and is not required to close the account if the information is not obtained.)

In the order approving the Rule, the SEC specifically addressed this issue. In particular, the Commission stated the following:

> The disclosures required by the rule, and the written acknowledgment of disclosures obtained pursuant to the rule, are intended to assist investors in making investment decisions based on a better understanding of the distinctions between insured deposits and uninsured securities products. Although the rule requires only that members "make reasonable efforts" to obtain written customer acknowledgment of the required disclosures in the account opening process, the Commission expects members to obtain such written acknowledgment in all but rare circumstances (e.g. when a customer refuses to sign the acknowledgment). It is anticipated that, as is the case today, many firms will provide these disclosures in the new account opening form which, when signed by the customer, constitutes written acknowledgment. The Commission believes that in the rare circumstances where acknowledgment is not obtained, heightened supervisory procedures would be necessary. Reasonable supervisory procedures would include procedures for the registered representative receiving approval from the member's compliance department prior to opening the account, and documenting that the customer has refused to sign the written acknowledgment of such disclosure.

We have confirmed with SEC staff our understanding of the meaning of this language. To the extent the approval order imposes an obligation beyond the requirement in the Rule to make reasonable efforts to obtain written acknowledgment of the required disclosures, the obligation must be enforced as a general failure to establish and maintain supervisory procedures that are designed to achieve compliance with applicable securities laws and NASD rules, including the Bank Broker/Dealer Rule, under NASD Rule 3010, rather than as a violation of the Bank Broker/Dealer Rule. Examinations wherein member compliance with the Bank Broker/Dealer Rule are reviewed will be conducted, and consideration of potential disciplinary action will be undertaken, consistent with this understanding.

Question #9: What constitutes a written acknowledgment of the required disclosures?

Answer: It can be substantially identical to the statement described in the Interagency Statement: a statement, signed by the customer, obtained during the account opening process, acknowledging that the customer has received and understands the disclosure. It does not have to be set forth in a separate document, with a separate signature, but can, for example, be included in the member's account opening documentation as long as the disclosure is conspicuous and near the signature line.

Communications With The Public

Question #10: Paragraph (c)(4)(A) requires all member confirmations and account statements to indicate clearly that the broker/dealer services are provided by the member. Would a member be required to provide this disclosure to customers for accounts opened off the premises of a financial institution where retail deposits are taken?

Answer: No. Paragraph (c)(4)(A) does not apply to customer confirmations or customer statements reflecting transactions in customer accounts opened off the financial institution's premises where retail deposits are taken. If broker/dealer services are conducted by members on the premises of a financial institution where retail deposits are taken, as clarified in answers to Questions #1 and #2, then indication that the investment banking or securities business is provided by the member broker/dealer must be prominently indicated on the face of the customer confirmation and on the face of the customer statement. There is no prescribed language, format or type size, but an investor should be able to clearly view the information on the documents.

Notifications Of Terminations

Question #11: Paragraph (c)(5) requires a member to provide prompt notification to the financial institution of the termination for cause of any of its associated persons who are employed by the financial institution. How may this notification be provided?

Answer: A copy of Form U-5 may be used for the notice of termination.

Text Of New Rule

(Note: all language is new.)

2350. Broker/Dealer Conduct on the Premises of Financial Institutions

(a) Applicability

This section shall apply exclusively to those broker/dealer services conducted by members on the premises of a financial institution where retail deposits are taken. This section does not alter or abrogate members' obligations to comply with other applicable NASD rules, regulations, and requirements, nor those of other regulatory authorities that may govern members operating on the premises of financial institutions.

(b) Definitions

(1) For purposes of this section, the term "financial institution" shall mean federal and state-chartered banks, savings and loan associations, savings banks, credit unions, and the service corporations of such institutions required by law.

(2) "Networking arrangement" and "brokerage affiliate arrangement" shall mean a contractual or other arrangement between a member and a financial institution pursuant to which the member conducts broker/dealer services for customers of the financial institution and the general public on the premises of such financial institution where retail deposits are taken.

(3) "Affiliate" shall mean a company that controls, is controlled by, or is under common control with a member as defined in Rule 2720.

(4) "Broker/dealer services" shall mean the investment banking or securities business as defined in paragraph (o) of Article I of the By-Laws.

(c) Standards for Member Conduct

No member shall conduct broker/dealer services on the premises of a financial institution where retail deposits are taken unless the member complies initially and continuously with the following requirements:

(1) Setting

Wherever practical, the member's broker/dealer services shall be conducted in a physical location distinct from the area in which the financial institution's retail deposits are taken. In all situations, members shall identify the member's broker/dealer services in a manner that is clearly distinguished from the financial institution's retail deposit-taking activities. The member's name shall be clearly displayed in the area in which the member conducts its broker/dealer services.

(2) Networking and Brokerage Affiliate Agreements

Networking and brokerage affiliate arrangements between a member and a financial institution must be governed by a written agreement that sets forth the responsibilities of the parties and the compensation arrangements. The member must ensure that the agreement stipulates that supervisory personnel of the member and representatives of the Securities and Exchange Commission and the Association will be permitted access to the financial institution's premises where the member conducts broker/dealer services in order to inspect the books and records and other relevant information maintained by the member with respect to its broker/dealer services.

(3) Customer Disclosure and Written Acknowledgment

At or prior to the time that a customer account is opened by a member on the premises of a financial institution where retail deposits are taken, the member shall:

(A) disclose, orally and in writing, that the securities products purchased or sold in a transaction with the member:

(i) are not insured by the Federal Deposit Insurance Corporation ("FDIC");

(ii) are not deposits or other obligations of the financial institution and are not guaranteed by the financial institution; and

(iii) are subject to investment risks, including possible loss of the principal invested; and

(B) make reasonable efforts to obtain from each customer during the account opening process a written acknowledgment of the disclosures required by paragraph (c)(3)(A).

(4) Communications with the Public

(A) All member confirmations and account statements must indicate clearly that the broker/dealer services are provided by the member.

(B) Advertisements and sales literature that announce the location of a financial institution where broker/dealer services are provided by the member or that are distributed by the member on the premises of a financial institution must disclose that securities products: are not insured by the FDIC; are not deposits or other obligations of the financial institution and are not guaranteed by the financial institution; and are subject to investment risks, including

possible loss of the principal invested. The shorter, logo format described in paragraph (c)(4)(C) may be used to provide these disclosures.

(C) The following shorter, logo format disclosures may be used by members in advertisements and sales literature, including material published, or designed for use, in radio or television broadcasts, Automated Teller Machine ("ATM") screens, billboards, signs, posters, and brochures, to comply with the requirements of paragraph (c)(4)(B), provided that such disclosures are displayed in a conspicuous manner:

• Not FDIC Insured

• No Bank Guarantee

• May Lose Value

(D) As long as the omission of the disclosures required by paragraph (c)(4)(B) would not cause the advertisement or sales literature to be misleading in light of the context in which the material is presented, such disclosures are not required with respect to messages contained in:

• radio broadcasts of 30 seconds or less;

• electronic signs, including billboard-type signs that are electronic, time, and temperature signs and ticker tape signs, but excluding messages contained in such media as television, on-line computer services, or ATMs; and

• signs, such as banners and posters, when used only as location indicators.

(5) Notifications of Terminations

The member must promptly notify the financial institution if any associated person of the member who is employed by the financial institution is terminated for cause by the member.

Endnotes

[1] *See* Release No. 34-39294 (November 4, 1997), 62 F.R. 60542 (November 10, 1997) (SEC Release).

[2] *See* File No. SR-NASD-95-63; *NASD Notice to Members 96-3* (January 1996).

[3] *See* Release No. 34-36980 (March 15, 1996), 61 F.R. 11913 (March 22, 1996).

[4] *See* Release No. 34-38506 (April 14, 1997), 62 F.R. 19378 (April 21, 1997), requesting comments by May 12, 1997.

[5] *See* letter from Mary N. Revell, Assistant General Counsel, NASD Regulation, to Belinda Blaine, Associate Director, SEC, dated July 17, 1997.

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NASD NOTICE TO MEMBERS 97-90

SOES Tier-Size Levels Set To Change January 1, 1998

Suggested Routing

- ☐ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ■ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ☐ Syndicate
- ■ Systems
- ■ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

Effective January 1, 1998, tier sizes for 544 Nasdaq National Market® securities will be revised in accordance with National Association of Securities Dealers, Inc. (NASD®) Rule 4710(g).

For more information, please contact Nasdaq® Market Operations at (203) 378-0284.

Description

Under Rule 4710, the maximum Small Order Execution System℠ (SOES℠) order size for a Nasdaq National Market security is 1,000, 500, or 200 shares depending on the trading characteristics of the security. The Nasdaq Workstation II™ indicates the maximum SOES order size for each Nasdaq National Market security in its bid/offer quotation display. The indicator "NM10," "NM5," or "NM2" is displayed to the right of the security name, corresponding to a maximum SOES order size of 1,000, 500, or 200 shares, respectively.

The criteria for establishing SOES tier sizes are as follows:

• A 1,000-share tier size was applied to those Nasdaq National Market securities that had an average daily non-block volume of 3,000 shares or more a day, a bid price that was less than or equal to $100, and three or more market makers.

• A 500-share tier size was applied to those Nasdaq National Market securities that had an average daily non-block volume of 1,000 shares or more a day, a bid price that was less than or equal to $150, and two or more market makers.

• A 200-share tier size was applied to those Nasdaq National Market securities that had an average daily non-block volume of less than 1,000 shares a day, a bid price that was less than or equal to $250, and two or more market makers.

In accordance with Rule 4710, Nasdaq periodically reviews the SOES tier size applicable to each Nasdaq National Market security to determine if the trading characteristics of the issue have changed so as to warrant a tier-size adjustment. Such a review was conducted using data as of September 30, 1997, pursuant to the aforementioned standards. The SOES tier-size changes called for by this review are being implemented with three exceptions.

• First, issues were not permitted to move more than one tier-size level. For example, if an issue was previously categorized in the 1,000-share tier, it would not be permitted to move to the 200-share tier, even if the formula calculated that such a move was warranted. The issue could move only one level to the 500-share tier as a result of any single review. In adopting this policy, the NASD was attempting to maintain adequate public investor access to the market for issues in which the tier-size level decreased and to help ensure the ongoing participation of market makers in SOES for issues in which the tier-size level increased.

• Second, for securities priced below $1 where the reranking called for a reduction in tier size, the tier size was not reduced.

• Third, for the top 50 Nasdaq securities based on market capitalization, the SOES tier sizes were not reduced regardless of whether the reranking called for a tier-size reduction.

In addition, with respect to initial public offerings (IPOs), the SOES tier-size reranking procedures provide that a security must first be traded on Nasdaq for at least 45 days before it is eligible to be reclassified.

Thus, IPOs listed on Nasdaq within the 45 days prior to September 30, 1997, were not subjected to the SOES tier-size review.

Following is a listing of the 544 Nasdaq National Market issues that will require an SOES tier-level change on January 1, 1998.

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Nasdaq National Market SOES Tier-Size Changes

All Issues In Alphabetical Order By Security Name
(Effective January 1, 1998)

Symbol	Security Name	Old Tier Level	New Tier Level
A			
AANB	ABIGAIL ADAMS NATL	1000	500
AASIZ	ADVANCED AERO WT B	500	1000
ABFSP	ARKANSAS BEST CV P	1000	500
ABSC	AURORA BIOSCIENCE	200	500
ACCL	ACCELGRAPHICS INC	500	1000
ACLE	ACCEL INTL CP	500	1000
ACRN	ACORN PRODUCTS INC	200	500
ACSC	ADVANCED COMM SYST	200	500
ADLI	AMER DENTAL TECHS	500	1000
ADVNZ	ADVANTA CP DEP SH	1000	500
AEHR	AEHR TEST SYSTEMS	200	500
AFED	AFSALA BANCORP INC	500	1000
AFSC	ANCHOR FIN CORP	200	500
AHLS	A H L SERVCES INC	500	1000
ALGI	AMER LOCKER GROUP	200	500
ALLE	ALLEGIANT BCP INC	500	1000
ALLS	ALLSTAR SYSTEMS IN	200	500
ALRS	ALARIS MEDICAL INC	200	500
AMBC	AMER BNCP OHIO	200	500
AMBK	A M B A N C CP	500	1000
AMCE	AMER CLAIMS EVALUA	500	1000
AMGD	AMER VANGUARD CP	500	1000
AMIE	AMBASSADORS INTL I	500	1000
AMPI	AMPLICON INC	200	500
AMTD	AMERITRADE HLDG A	500	1000
AMZN	AMAZON.COM INC	500	1000
ANAT	AMER NATL INS CO	1000	500
ANCOW	ANACOMP INC WTS	500	200
APEX	APEX PC SOLUTIONS	500	1000
ARIAW	ARIAD PHARM INC WT	1000	500
ARMXF	ARAMEX INTL LTD	500	1000
ARSC	ARIS CORPORATION	200	500
ARTW	ART S WAY MFG CO I	500	1000
ASAM	ASAHI/AMERICA INC	1000	500
ASBI	AMERIANA BANCORP	500	1000
ASBP	A S B FINANCIAL CP	500	1000
ASCT	ASCENT PEDIATRCS	200	500
ASIS	ASI SOLUTIONS INC	500	1000
ATEN	AT ENTERTAINMENT I	200	500
ATHM	AT HOME CORPORATIO	200	500
ATLPA	ATL PRODUCTS CL A	500	1000
AVII	ANTIVIRALS INC	200	500
AVIIW	ANTIVIRALS INC WTS	200	500
AVTR	AVATAR HLDGS INC	1000	500
B			
BACU	BACOU USA INC	1000	500
BANCP	BBC CAPITAL TR I P	500	1000
BCBF	B C B FIN SVCS CP	500	1000
BCORY	BIACORE INTL AB AD	1000	500
BEAS	B E A SYSTEMS INC	500	1000
BEEF	WESTERN BEEF INC	1000	500
BEXP	BRIGHAM EXPLORATIO	500	1000
BFOH	BANCFIRST OHIO CP	1000	500
BGAS	BERKSHIRE GAS CO	500	1000
BGLVW	BALLY'S GRAND WTS	200	500
BGSS	B G S SYSTEMS INC	1000	500
BIGX	EXCELSIOR-HENDERSO	200	500
BINX	BIONX IMPLANTS INC	500	1000
BKCT	BANCORP CONN INC	1000	500
BKUNZ	BANKUNITED CAP II	200	500
BLCI	BROOKDALE LIVING	500	1000
BMCCP	BANDO MCGLOC PFD A	200	500
BNBCP	B N B CAP TR PFD	200	500
BNHNA	BENIHANA INC A	500	1000
BORAY	BORAL LTD ADS	200	500
BOTX	BONTEX INC	200	500
BREL	BIORELIANCE CORP	200	500
BRZS	BRAZOS SPORTSWEAR	500	200
BTBTY	B T SHIP SPONSOR A	500	200
BTRN	BIOTRANSPLANT INC	200	500
BUCK	BUCKHEAD AMERICA C	500	1000

Symbol	Security Name	Old Tier Level	New Tier Level
C			
CAII	CAPITAL ASSOC	500	1000
CAIR	CORSAIR COMMUNICAT	200	500
CANX	CANNON EXPRESS INC	500	200
CAPS	CAPITAL SAV BNCP I	1000	500
CARY	CAREY INTL INC	200	500
CASH	FIRST MIDWST FIN I	500	1000
CBIV	COMMUNITY BANCSHAR	200	500
CBLI	CHESAPEAKE BIOLOGI	200	500
CBMD	COLUMBIA BANCORP M	500	1000
CBSAP	COASTAL BANC PFD A	500	200
CBSL	COMPLETE BUSINESS	500	1000
CCOW	CAPITAL CP OF WEST	500	1000
CDIR	CONCEPTS DIRECT IN	200	500
CDIS	CAL DIVE INTL INC	200	500
CDRD	C D RADIO INC	500	1000
CDWN	COLONIAL DOWNS CL	500	1000
CENI	CONESTOGA ENTRPR I	1000	500
CFAM	CORPORATEFAMILY SO	200	500
CFBC	COMMUNITY FIRST BN	200	500
CFCI	C F C INTL INC	1000	500
CFIC	COMMUNITY FIN CP	500	1000
CFINP	CONSUMERS FIN CP P	500	200
CHKRW	CHECKERS DRIVE-IN	200	500
CHNL	CHANNELL COML CORP	1000	500
CINS	CIRCLE INCOME SHAR	500	1000
CLBK	COMMERCIAL BANKSHR	1000	500
CLTDF	COMPUTALOG LTD	200	500
CMDAW	CAM DESIGNS INC WT	200	500
CMED	COLORADO MEDTECH I	500	1000
CMPX	C M P MEDIA CL A	200	500
CMRN	CAMERON FINANCIAL	1000	500
CNBA	CHESTER BANCORP IN	500	1000
CNBF	C N B FINANCIAL CP	200	500
CNCX	CONCENTRIC NETWORK	200	500
CNGL	CONTL NATURAL GAS	200	500
CNTBY	CANTAB PHARM PLC A	200	500
COBI	COBANCORP INC	1000	500
COOP	COOPERATIVE BKSHS	500	1000
COSC	COSMETIC CENTER CL	500	1000
COVB	COVEST BANCSHARES	500	1000
CRDM	CARDIMA INC	200	500
CRESY	CRESUD SACIF ADR	500	1000
CRZO	CARRIZO OIL & GAS	200	500
CSBI	CENTURY SOUTH BKS	500	1000
CSTR	COINSTAR INC	200	500
CTBP	COAST BANCORP	200	500
CTEN	CENTENNIAL HLTHCR	200	500
CTIC	CELL THERAPEUTICS	500	1000
CUIS	CUISINE SOLUTIONS	1000	500
CVSN	CHROMAVISN MED SYS	200	500
D			
DAHX	DECRANE AIRCRAFT	500	1000
DENHY	DENISON INTL ADR	200	500
DLTK	DELTEK SYSTEMS INC	500	1000
DNCC	DUNN COMPUTER CORP	500	1000
DNFCP	D & N CAP CORP PFD	200	500
DOCDF	DOCDATA NV	500	1000
DOMZ	DOMINGUEZ SVCS CP	200	500
DRYR	DREYERS GRAND ICE	1000	500
DSGIF	D S G INTL LTD ORD	1000	500
DSIT	D S I TOYS INC	200	500
DTMC	D T M CORP	500	1000
DTPI	DIAMOND TECH PTNRS	500	1000
E			
EACO	E A ENGRG SCI TECH	500	1000
ECSI	ENDOCARDIAL SOLUTI	500	1000
EDAPY	EDAP TMS SA ADR	200	500
EEFT	EURONET SVCS INC	500	1000
EFBI	ENTERPRISE FED BNC	500	1000
EGEO	EAGLE GEOPHYSICAL	200	500
EGHT	8 X 8 INC	200	500
EGLB	EAGLE BANCGROUP IN	500	1000
EIRE	EMERALD ISLE BANCO	500	1000
ELET	ELLETT BROTHERS IN	1000	500
ELRWF	ELRON ELEC INDS WT	200	500
ELSE	ELECTRO SENSORS IN	200	500
EMKR	EMCORE CORP	500	1000
EMSI	EFFECTIVE MGMT SYS	500	1000
ENEX	ENEX RESOURCE CP	500	1000
ENMC	ENCORE MEDICAL COR	500	1000
ENMCW	ENCORE MEDICAL CP	500	1000
ENTS	PHYSICIANS SPECIAL	500	1000
EPEX	EDGE PETROLEUM CP	500	1000
EPMD	EP MEDSYSTEMS INC	500	1000
ESCP	ELECTROSCOPE INC	500	1000
ESPRY	ESPRIT TELECOM ADR	500	1000
ESSF	E S S E F CP	500	1000
ETCIA	ELECTRONIC TELECOM	500	1000
EVSNF	ELBIT VISION SYSTE	500	1000
EXAC	EXACTECH INC	500	1000

Symbol	Security Name	Old Tier Level	New Tier Level
F			
FAIL	FAILURE GP INC (TH	1000	500
FAMCK	FEDERAL AGRIC MORT	1000	500
FARM	FARMER BROTHERS	500	200
FAVS	FIRST AVIATION SVC	500	1000
FBCI	FIDELITY BANCORP D	500	1000
FBHC	FORT BEND HLDG COR	200	500
FBNC	FIRST BANCP TROY N	200	500
FBNKP	FIRST BKS CUM PFD	500	200
FBNW	FIRSTBANK CORP	200	500
FBSI	FIRST BANCSHARES I	500	200
FFHH	FSF FINANCIAL CP	500	1000
FFSW	FIRSTFEDERAL FINL	1000	500
FGII	FRIEDE GOLDMAN INT	200	500
FIFS	FIRST INV FIN SVC	500	1000
FKFS	FIRST KEYSTONE FIN	500	1000
FLAG	F L A G FINANCIAL	1000	500
FLGS	FLAGSTAR BANCORP	500	1000
FLYAF	C H C HELICO CL A	200	500
FMSB	FIRST MUTUAL SVGS	500	1000
FMST	FINISHMASTER INC	500	200
FOBC	FED ONE BANCORP IN	500	1000
FORR	FORRESTER RESRCH	1000	500
FPBN	F P BANCORP INC	500	1000
FRGB	FIRST REGIONAL BNC	500	1000
FRME	FIRST MERCHANTS CP	500	1000
FSBI	FIDELITY BANCORP I	200	500
FSBIP	FB CAPITAL TR PFD	500	200
FSBT	FIRST STATE CP	500	200
FSCR	FEDERAL SCREW WORK	200	500
FSFH	FIRST SIERRA FIN	500	1000
FSNJ	BAYONNE BANCSHARES	500	1000
FSPG	FIRST HOME BNCP IN	500	200
FSPT	FIRSTSPARTAN FIN C	200	500
FSRVF	FIRSTSERVICE CP VT	500	1000
FTCG	FIRST COLONIAL GP	200	500
FUSC	FIRST UNITED BNCP	200	500
FVNB	FIRST VICTORIA NAT	500	200
FWRX	FIELDWORKS INC	500	1000
G			
GALTF	GALILEO TECH LTD	200	500
GBBK	GREATER BAY BANCOR	500	1000
GBTVP	GRANITE BRDCT CP P	500	200
GCABY	GEN CABLE PLC ADR	1000	500
GCOM	GLOBECOMM SYS INC	200	500
GCTI	GENESYS TELECOMM L	200	500
GFLS	GREATER COMMUNITY	200	500
GFLSP	GCB CAP TRUST PFD	200	500
GFNL	GRANITE FINANCIAL	500	1000
GIFI	GULF ISLAND FAB	500	1000
GIGA	GIGA TRONICS INC	500	1000
GLTB	GOLETA NATL BANK	200	500
GMRK	GULFMARK OFFSHORE	500	1000
GNCNF	GORAN CAPITAL INC	500	1000
GNWR	GENESEE & WYOMING	500	1000
GOSB	GSB FINANCIAL CORP	200	500
GPSI	GREAT PLAINS SFTWA	200	500
GSLA	G S FINANCIAL CP	500	1000
GSLC	GUARANTY FIN CP	500	1000
GTRC	GUITAR CENTER INC	500	1000
GZEA	G Z A GEOENVIRON	1000	500
H			
HAHN	HAHN AUTOMOTIVE	200	500
HAKI	HALL KINION ASSOC	200	500
HBCI	HERITAGE BANCORP I	500	1000
HBIX	HAGLER BAILLY INC	200	500
HCBB	HCB BANCSHARES INC	500	1000
HCRC	HALLWOOD CONS RES	200	500
HCRI	HEALTHCARE RECOV	200	500
HDVS	H. D. VEST INC	500	1000
HELIE	HELISYS INC	500	1000
HFFB	HARRODSBURG FIRST	200	500
HFFC	H F FINANCIAL CP	500	1000
HMCI	HOMECORP INC	200	500
HMII	H M I INDUSTRIES I	500	1000
HMLK	HEMLOCK FED FIN CO	500	1000
HPFC	HIGH POINT FINL CO	500	1000
HPWR	HEALTH POWER INC	500	1000
HRBF	HARBOR FED BNCP IN	1000	500
HSKA	HESKA CORPORATION	200	500
HTCO	HICKORY TECH CP	200	500
HTEI	H T E INC	200	500
HUDS	HUDSON HOTELS CP	500	1000
HYDEA	HYDE ATHLETIC INDS	1000	500
HYSQ	HYSEQ INC	200	500
HZWV	HORIZON BNCP INC	500	1000
I			
IATA	IAT MULTIMEDIA	500	1000
IBCPP	INDEP BK CP CUM PF	500	200
ICGX	ICG COMMUNICATION	500	1000
ICIQ	INTL COMPUTEX INC	500	1000
IDEA	INNOVASIVE DEVICES	1000	500
IHIIL	INDUSTRIAL HLDG WT	500	1000
IITCF	I I T C HLDGS LTD	200	500

Symbol	Security Name	Old Tier Level	New Tier Level
IKOS	I K O S SYSTEMS	1000	500
ILABY	INSTRUMENTATION AD	500	1000
ILDCY	ISRAEL DEVEL LTD A	500	200
ILXO	I L E X ONCOLOGY I	500	1000
IMAA	INFORMATION MGMT	200	500
IMGXW	NETWORK IMAGING WT	1000	500
INDBP	INDEP CAP TR I PFD	200	500
INLD	INLAND CASINO CP	500	1000
INTT	INTEST CORPORATION	200	500
INVA	INNOVA CORP	200	500
IONAY	IONA TECHS ADR	500	1000
IPSW	IPSWICH SAV BK	500	1000
IQST	INTELLIQUEST INFO	1000	500
IRIDF	IRIDIUM WORLD COMM	200	500
ISER	INNOSERV TECH INC	500	1000
ITIC	INVESTORS TITLE CO	500	1000
IWLC	IWL COMMUNICATIONS	200	500
J			
JEFFP	J B I CAPITAL TR P	500	200
JLMI	J L M INDS INC	200	500
JLNY	JENNA LANE INC	500	1000
JLNYW	JENNA LANE INC WT	500	1000
JRJR	800-JR CIGAR INC	200	500
JSBA	JEFFERSON SAV BNCP	500	1000
JTFX	JETFAX INC	200	500
K			
KLLM	K L L M TRANSPORT	1000	500
KOSP	KOS PHARMACEUTCL	500	1000
KPSQ	KAPSON SNR QUARTER	500	1000
KREG	KOLL REAL ESTATE G	200	500
KTEL	K-TEL INTL INC	500	1000
KTIC	KAYNAR TECHS INC	500	1000
KWIC	KENNEDY-WILSON INT	500	200
L			
LABL	MULTI COLOR CP	500	1000
LACI	LATIN AMER CASINOS	500	1000
LAIX	LAMALIE ASSOCIATES	200	500
LARK	LANDMARK BSCHS INC	200	500
LBFC	LONG BEACH FIN CP	500	1000
LCLD	LACLEDE STEEL CO	500	1000
LEXI	LEXINGTON HLTHCARE	200	500
LEXIW	LEXINGTON HLTHCR W	200	500
LFCO	LIFE FINANCIAL COR	200	500
LFED	LEEDS FED SAV BANK	200	500
LGNDW	LIGAND PHARMA WTS	200	500
LHSG	L H S GROUP INC	500	1000
LIHRY	LIHIR GOLD LTD ADR	1000	500
LIND	LINDBERG CP	500	1000
LION	FIDELITY NATL CP	1000	500
LIQB	LIQUI BOX CP	1000	500
LKFNP	LAKELAND FINL TR P	200	500
LKST	LEUKOSITE INC	200	500
LOFSY	LONDON & OVERSEA A	200	500
LOGIY	LOGITECH INTL ADR	500	1000
LPWR	LASER POWER CORP	200	500
LSBI	LSB FINANCIAL CP	200	500
LZRCF	TLC THE LASER CTR	200	500
M			
MAHI	MONARCH AVALON INC	200	500
MARN	MARION CAP HLDGS I	500	1000
MARSA	MARSH SUPERMARKETS	1000	500
MASB	MASSBANK CP	500	1000
MASSY	MAS TECH LTD ADR	200	500
MBBC	MONTEREY BAY BANCO	500	1000
MBLF	M B L A FINL CORP	500	200
MCBS	MID CONT BCSHS INC	500	1000
MCSC	MIAMI COMPUTER SUP	500	1000
MDDS	MONARCH DENTAL CP	200	500
MEAD	MEADE INSTRUMENTS	500	1000
MELI	MELITA INTL CORP	200	500
MFLR	MAYFLOWER CO OP BK	500	200
MHCO	MOORE HANDLEY INC	200	500
MINT	MICRO-INTEGRATION	500	1000
MIZR	MIZAR INC	1000	500
MMAN	MINUTEMAN INTL INC	200	500
MMGC	MEGO MORTGAGE CP	500	1000
MODA	MODACAD INC	500	1000
MPTBS	MERIDIAN PT RLTY T	500	1000
MRCF	MARTIN COLOR-FI IN	500	1000
MRCM	MARCAM SOLUTIONS	200	500
MRET	MERIT HOLDING CP	1000	500
MRTN	MARTEN TRANSPORT L	200	500
MSDX	MASON-DIXON BCSHS	1000	500
MSDXP	MASON-DIX CAP TR P	200	500
MTIX	MICRO THERAPEUTICS	500	1000
MTLI	M T L INC	500	1000
MTSLF	M E R TELEMGT SOL	200	500
MUEL	MUELLER PAUL CO	500	200
MVBI	MISSISSIPPI VALLEY	1000	500
MVII	MARK VII INC	500	1000

Symbol	Security Name	Old Tier Level	New Tier Level
MVSN	MACROVISION CORP	500	1000
MXBIF	MFC BANCORP LTD	500	1000
N			
NACT	NACT TELECOMM INC	500	1000
NBSC	NEW BRUNSWICK SCI	500	1000
NBSI	NORTH BSCHS INC	200	500
NCEN	NEW CENTURY FINANC	200	500
NECSY	NETCOM SYSTEMS ADR	1000	500
NEIB	NORTHEAST IND BNCP	1000	500
NEON	NEW ERA OF NTWKS I	200	500
NERIF	NEWSTAR RESOURCES	200	500
NERXW	NEORX CP WTS	500	200
NEWH	NEW HORIZONS WORLD	1000	500
NEXR	NEXAR TECHS INC	500	1000
NHCI	NATL HOME CENTERS	500	1000
NHPI	N H P INC	1000	500
NMCOF	NAMIBIAN MINERALS	500	1000
NMGC	NEOMAGIC CORP	500	1000
NMTXW	NOVAMETRIX WTS A	500	1000
NMTXZ	NOVAMETRIX WTS B	200	500
NORPF	NORD PACIFIC LTD	200	500
NPBCP	NPB CAPITAL TR PFD	200	500
NRGG	NRG GENERATING U.S	500	1000
NRTI	NOONEY REALTY TRUS	200	500
NSAI	N S A INTL INC	500	1000
NSBC	NEWSOUTH BANCORP I	500	1000
NSPK	NETSPEAK CORP	200	500
NTWK	NETWORK LONG DIST	500	1000
NVLDF	NOVEL DENIM HLDGS	200	500
NWSS	NETWORK SIX INC	500	1000
O			
OAIC	OCWEN ASSET INV	500	1000
OCLR	OCULAR SCIENCES IN	200	500
OCOM	OBJECTIVE COMMUN I	500	1000
OGGI	OLD GUARD GROUP IN	500	1000
OGLE	OGLEBAY NORTON CO	500	1000
OKSB	SOUTHWEST BNCP INC	500	1000
OKSBP	SOUTHWEST BNCP PFD	500	200
OLCWF	OLICOM A/S WTS	200	500
OLGR	OILGEAR CO	200	500
OMQP	OMNIQUIP INTL INC	500	1000
OMTL	OMTOOL LTD	200	500
ONSL	ONSALE INC	500	1000
OPTLF	OPTISYSTEMS SOLUTI	200	500
OPTWF	OPTISYSTEMS SOL WT	200	500
ORFR	ORBIT/FR INC	200	500
OROA	OROAMERICA INC	1000	500
OSBC	OLD SECOND BNCP IN	200	500
OSKY	MAHASKA INV CO	500	1000
OVRL	OVERLAND DATA INC	500	1000
OXGNW	OXIGENE INC WTS	1000	500
OZRK	BANK OF THE OZARKS	200	500
P			
PABN	PACIFIC CAP BNCP	500	200
PALX	PALEX INC	500	1000
PAMX	PANCHO S MEXICAN I	500	1000
PBKBP	PEOPLES CAP TR PFD	200	500
PEAKF	PEAK INTL LTD S3	200	500
PEEK	PEEKSKILL FIN CP	500	1000
PEGS	PEGASUS SYSTEMS IN	200	500
PERM	PERMANENT BNCP INC	1000	500
PFACP	PRO-FAC COOP PFD A	1000	500
PFBIP	PFBI CAP TR PFD	200	500
PFDC	PEOPLES BANCORP	200	500
PGEN	PROGENITOR INC	200	500
PGENW	PROGENITOR INC WTS	200	500
PHFC	PITTSBURGH HOME FI	500	1000
PHSB	PEOPLES HOME SVGS	200	500
PHSYP	PACIFICARE CV PFD	500	200
PLEN	PLENUM PUBLISHING	500	1000
PMCO	PROMEDCO MGMT CO	500	1000
PMFG	PEERLESS MFG CO	500	1000
PMFI	PERPETUAL MIDWEST	500	1000
PPOD	PEAPOD INC	200	500
PRGN	PEREGRINE SYSTEMS	500	1000
PSNRY	P T PASIFIK SATL A	500	1000
PSWT	PSW TECHNOLOGIES I	200	500
PTUS	PERITUS SOFTWARE S	200	500
PVSA	PARKVALE FINL CP	500	1000
PWCC	POINT WEST CAP CP	500	200
PXXI	PROPHET 21 INC	500	1000
Q			
QADI	Q A D INC	200	500
QMDC	QUADRAMED CP	500	1000
QWST	QWEST COMMUN INTL	200	500
R			
RACN	RACING CHAMPIONS C	200	500
RARB	RARITAN BANCORP IN	200	500
RBCO	RYAN BECK CO INC	1000	500
RBOT	COMPUTER MOTION IN	200	500

Symbol	Security Name	Old Tier Level	New Tier Level
RBPAA	ROYAL BSCHS OF PA	1000	500
REPBP	RBI CAP TR I PFD	200	500
RESR	RESEARCH INC	1000	500
REXI	RESOURCE AMER CL A	1000	500
RFMD	RF MICRO DEVICES	200	500
RGCO	ROANOKE GAS CO	200	500
RIMS	ROBOCOM SYSTEMS IN	200	500
RITTF	RIT TECHNOLOGIES L	200	500
RLCO	REALCO INC	500	1000
RLLYW	RALLY'S HAMBURGER	500	1000
RMBS	RAMBUS INC	500	1000
RPCLF	REVENUE PROP LTD	200	500
RTST	RIGHT START INC	1000	500
RWDT	RWD TECHS INC	200	500
RWTIW	REDWOOD TRUST WTS	500	200
RYAAY	RYANAIR HLDGS ADR	200	500
S			
SAGE	SAGEBRUSH INC	500	1000
SBGA	SUMMIT BANK CORP	200	500
SBIBP	STERLING CAP TR PF	200	500
SBIT	SUMMIT BCSHS INC T	500	1000
SCHI	SIMIONE CENTRAL HL	200	500
SCHR	SCHERER HEALTHCARE	500	1000
SDIX	STRATEGIC DIAGNOST	500	1000
SENEA	SENECA FOODS CP A	200	500
SFED	S F S BANCORP INC	500	1000
SFNCP	SIMMONS FIRST CAP	200	500
SFSI	SEARCH FIN SVCS	500	1000
SFSIP	SEARCH FIN SVCS PF	500	1000
SFXBW	SFX BROADCAST WTS	200	500
SGNS	SIGNATURE INNS INC	200	500
SGVB	S G V BANCORP INC	500	1000
SHSE	SUMMIT HOLDING SE	200	500
SHUF	SCHUFF STEEL COMPA	200	500
SILVZ	SUNSHINE MINING WT	500	1000
SJNB	S J N B FINANCIAL	500	1000
SLHO	S L H CORPORATION	200	500
SMCX	SPECIAL METALS CP	500	1000
SOMR	SOMERSET GP INC TH	500	200
SPAN	SPAN AMERICA MED S	500	1000
SPCH	SPORT CHALET INC	500	1000
SPNI	SPINNAKER INDS INC	500	200
SPNIA	SPINNAKER IND CL A	500	200
SPPR	SUPERTEL HOSPITALI	500	1000
SPRX	SPECTRX INC	200	500
STCR	STARCRAFT CORP	500	1000
STDM	STORAGE DIMENSIONS	500	1000
STER	STERIGENICS INTL	200	500
STFF	STAFF LEASING INC	200	500
STIZ	SCIENTIFIC TECH IN	500	1000
STRC	STERILE RECOVERIES	500	1000
STRX	STAR TELECOMM INC	200	500
STSAO	STERLING CAP TR PF	200	500
SUMI	SUMITOMO BANK CA	500	1000
SVECF	SCANVEC CO 1990 LT	200	500
SVIN	SCHEID VINEYARDS I	200	500
SWSHW	SWISHER INTL WTS	1000	500
SXTN	SAXTON INCORPORATI	200	500
SYCM	SYSCOMM INTL CORP	200	500
SYNT	SYNTEL INC	200	500
T			
TACX	THE A CONSULTING T	200	500
TCCO	TECHNICAL COMMUN C	500	1000
TCICP	TCI COMMUN PFD A	1000	500
TCII	T C I INTL INC	500	1000
TCIX	TOTAL CONTAINMENT	200	500
TCPS	TOTAL CONTROL PROD	500	1000
TDFX	3DFX INTERACTIVE I	200	500
TDHC	THERMADYNE HLDGS C	1000	500
TENT	TOTAL ENTMT REST C	200	500
TGRP	TELEGROUP INC	200	500
THRNY	THORN PLC ADR	200	500
TIBB	TIB FINANCIAL CORP	200	500
TMPL	TEMPLATE SOFTWARE	500	1000
TMSTA	THOMASTON MILLS A	500	200
TPMI	PERSONNEL MGMT INC	500	1000
TRBR	TRAILER BRIDGE INC	200	500
TRGI	TRIDENT ROWAN GROU	500	1000
TRGIW	TRIDENT ROWAN GRP	500	1000
TRNI	TRANS INDS INC	500	1000
TRVL	TRAVEL SVCS INTL I	200	500
TSFW	T S I INTL SOFTWAR	200	500
TSND	TRANSCEND THERAPEU	200	500
TTRRW	TRACOR INC WTS A	500	200
TWRI	TRENDWEST RESORTS	200	500
U			
UBMT	UNITED FINANCIAL C	1000	500
UBSC	UNION BKSHS LTD	500	1000
UFCS	UNITED FIRE CASUAL	1000	500
UNDG	UNIDIGITAL INC	200	500
UNIQ	UNIQUE CASUAL REST	200	500
UPCPO	UNION PLANTERS PFD	500	200
USPH	U S PHYSICAL THERA	500	1000
UTVI	UNITED TELEVISION	1000	500

Symbol	Security Name	Old Tier Level	New Tier Level
V			
VALN	VALLEN CP	1000	500
VALU	VALUE LINE INC	1000	500
VDIM	V D I MEDIA	500	1000
VESC	VESTCOM INTL INC	200	500
VGCOW	VIRGINIA GAS WTS	200	500
VISNZ	SIGHT RESOURCE CP	1000	500
VMRXW	VIMRX PHARM WTS IN	200	500
VMTI	VISTA MEDICAL TECH	200	500
VNGI	VALLEY NATL GASES	500	1000
VSEC	V S E CP	500	200
VSTN	VISTANA INC	500	1000
W			
WAVR	WAVERLY INC	1000	500
WBKC	WESTBANK CORP	500	1000
WCOMP	WORLDCOM DEP SHS	500	200
WCRXY	WARNER CHILCOTT AD	200	500
WCSTF	WESCAST INDS INC A	1000	500
WEBC	WESTERN BANCORP	200	500
WHEL	WHEELS SPORTS GROU	500	1000
WHELW	WHEELS SPORTS GR W	500	1000
WLSN	WILSONS LEATHER	200	500
WLSNW	WILSONS LEATHER WT	200	500
WOSI	WORLD OF SCIENCE I	200	500
WTFC	WINTRUST FIN CORP	500	1000
WWIN	WASTE INDUSTRIES I	200	500
WYNT	WYANT CORP	200	500
X			
XOMD	XOMED SURG PRODS I	1000	500
Y			
YRKG	YORK GRP INC THE	500	1000
Z			
ZING	ZING TECHS INC	500	1000
ZNDTY	ZINDART LTD ADR	500	1000
ZNRG	ZYDECO ENERGY INC	500	1000
ZNRGW	ZYDECO ENERGY WTS	500	1000
ZOMX	ZOMAX OPTICAL MEDI	500	1000
ZONA	ZONAGEN INC	500	1000
ZSEV	Z SEVEN FUND INC T	200	500

NASD NOTICE TO MEMBERS 97-91

NASD Reminds Members Of Obligations Under Free-Riding And Withholding Interpretation

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ■ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ■ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ☐ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ■ Syndicate
- ☐ Systems
- ☐ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

NASD Regulation, Inc., reminds members of their obligations under the Free-Riding and Withholding Interpretation (IM-2110-1) with respect to venture capitalists and the cancellation safe harbor provisions. This information was previously provided to members through Compliance Desk in a Member Alert dated November 21, 1997.

Questions concerning this *Notice* should be directed to Gary L. Goldsholle, Senior Attorney, Office of General Counsel, NASD Regulation℠, at (202) 728-8104.

Background

Venture Capital Investors

NASD Regulation is reminding members of their obligations under the Free-Riding and Withholding Interpretation, IM-2110-1 (Interpretation), with respect to allocations of hot issues to venture capitalists. Paragraph (b)(4) of the Interpretation restricts sales of hot issues to certain persons affiliated with "a bank, savings and loan institution, insurance company, investment company, investment advisory firm or any other institutional type account (including, but not limited to, hedge funds, investment partnerships, investment corporations, or investment clubs)."[1] A venture capitalist falls within the scope of paragraph (b)(4) when he or she is a senior officer of an "institutional type account" or otherwise is a person who may influence or whose activities directly or indirectly involve or are related to the function of buying or selling securities of an "institutional type account." This type of account includes, among others, investment partnerships and investment corporations, which are frequently used by venture capitalists. Members should ensure, therefore, that sales of hot issues to venture capitalists who are restricted under the Interpretation are made consistent with the Interpretation.

Persons restricted under paragraph (b)(4) are generally referred to as conditionally restricted persons. As such, they may purchase hot issues from a member only if the member is "prepared to demonstrate that the securities were sold to such persons in accordance with their normal investment practice, that the aggregate of the securities so sold is insubstantial and not disproportionate in amount as compared to sales to members of the public and that the amount sold to any one of such persons is insubstantial in amount."[2]

In 1994, the Securities and Exchange Commission (SEC) approved amendments to the Interpretation which, among other things, included an exemption for venture capital investors who meet certain enumerated criteria. The venture capital provisions of paragraph (h) of the Interpretation are not a general exemptive provision for venture capital investors. In fact, these narrow exemptive provisions were adopted because, under most circumstances, members otherwise would be prohibited from selling hot issues to venture capitalists. The venture capital investor provisions included in paragraph (h) of the Interpretation allow venture capital investors to purchase a hot issue security to maintain their percentage ownership interest in an entity, notwithstanding that such venture capital investor may be restricted under the Interpretation.

Cancellation Safe Harbor

NASD Regulation is also reminding members of the scope of the cancellation safe harbor provisions of paragraph (a)(3). Specifically, paragraph (a)(3) provides that it shall not be "a violation of the interpretation if a member which makes an allocation

to a restricted person or account of an offering that trades at a premium in the secondary market, cancels the trade for such restricted person or account, prior to the end of the first business day following the date on which secondary market trading commences and reallocates such security at the public offering price to a non-restricted person or account."[3] The SEC order adopting the cancellation safe harbor[4] and the related *NASD Notice to Members*[5] both stated that the cancellation provisions were intended to remedy concerns caused by inadvertent violations of the Interpretation that are corrected by the member making the distribution. Thus, paragraph (a)(3) permits members to allocate securities to restricted persons and subsequently reallocate such hot issue securities to other accounts within the time limits prescribed by the safe harbor only to the extent that such reallocation is to remedy an inadvertent violation of the Interpretation.[6]

Endnotes

[1] IM-2110-1(b)(4).

[2] IM-2110-1(b)(5).

[3] IM-2110-1(a)(3).

[4] 59 F. R. 64455, 64458 (December 14, 1994).

[5] *NASD Notice to Members 95-7* (February 1995).

[6] This sentence has been modified from the Member Alert dated November 21, 1997, to more clearly define the scope of paragraph (a)(3).

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NASD NOTICE TO MEMBERS 97-92

NASD Regulation Requests Comment On Proposal To Discontinue Complimentary Hard Copy Distribution Of *Notices To Members* And *Regulatory & Compliance Alert;* **Comment Period Expires January 31, 1998**

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ☐ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ☐ Syndicate
- ☐ Systems
- ☐ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

NASD Regulation, Inc., is soliciting member comment on a proposal to discontinue after January 1, 1999, complimentary hard copy distribution of *NASD Notices to Members* and *NASD Regulatory & Compliance Alert*, which are currently available for free on the NASD Regulation℠ Web Site (*www.nasdr.com*). Members that elect not to use the Web Site versions of these publications would have the option of subscribing to hard copy versions.

Questions concerning this *Request for Comment* should be directed to Jay Cummings, Internet & Investor Education, NASD Regulation, at (301) 590-6070.

Request For Comment

NASD Regulation encourages all members and interested parties to respond to this *Notice*. Comments should be mailed to:

Joan C. Conley
Office of the Corporate Secretary
NASD Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006-1500

or e-mailed to:
pubcom@nasd.com.

Note: Members and interested parties may provide their comments through the NASD Regulation Web Site's "Request For Comments" Web page.

Comments must be received **by January 31, 1998.**

NASD Regulation Request for Comment 97-92

Executive Summary

NASD Regulation, Inc., is soliciting member comment on a proposal to discontinue after January 1, 1999, complimentary hard copy distribution of *NASD Notices to Members* and *NASD Regulatory & Compliance Alert*, which are currently available for free on the NASD Regulation℠ Web Site (*www.nasdr.com*). Members that elect not to use the Web Site versions of these publications would have the option of subscribing to hard copy versions.

Questions concerning this *Request for Comment* should be directed to Jay Cummings, Internet & Investor Education, NASD Regulation, at (301) 590-6070.

Background

NASD Regulation established a Web Site (*www.nasdr.com*) that has been operating since August 1996. A significant effort is being made to provide meaningful content for the benefit of member firms and the investing public. Development of the Internet technology presents an alternative method to distribute information of interest to industry participants.

This year, National Association of Securities Dealers, Inc. (NASD®) Chairman Frank Zarb instituted a "Reinvesting For Our Future" Program. Objectives of the Reinvesting Program include achieving significant cost savings while providing the same level of service, and passing on costs more fairly by charging users for those services that they actually want and use.

One proposal submitted as part of this program was that NASD Regulation discontinue complimentary hard copy distribution of *NASD Notices to Members* and *NASD Regulatory & Compliance Alert*, which currently may be viewed, downloaded, and printed for free via the NASD Regulation Web Site. Members that elect not to use Web Site versions of these publications would have the option of subscribing to hard copy versions. This proposal would allow NASD Regulation to reduce its expenses and pass on costs more fairly by charging only those members that choose to subscribe to a hard copy of these publications.

Complimentary hard copy distribution of *NASD Notices to Members* and *NASD Regulatory & Compliance Alert* would cease on January 1, 1999. Between July 1, 1998 and December 31, 1998, subscribers and others who currently receive free hard copies of these publications would be notified through a letter and through advertisements in the publications: (1) of their availability on the Internet, (2) of the impending charge for hard copy delivery, and (3) of how to obtain a subscription and how much it will cost.

The January 1, 1999, implementation date was selected to coincide with another technology proposal currently under consideration by the NASD. On December 11, 1997, the NASD Board of Governors will consider amendments to the NASD By-Laws that would require each executive representative, beginning not later than January 1, 1999, to maintain an Internet electronic mail account for communication with the NASD and to update firm contact information via the NASD Regulation Web Site. If the NASD Board approves the amendment, it will be submitted to the membership for a vote. NASD Regulation believes that it is sensible to link the implementation dates of these two proposals so that members that currently do not have an electronic mail account and Internet access can arrange to obtain them at the same time and have a reasonable time to do so.

Request For Comment
NASD Regulation encourages all members and interested parties to respond to this *Notice*. Comments should be mailed to:

Joan C. Conley
Office of the Corporate Secretary
NASD Regulation, Inc.
1735 K Street, N.W.
Washington, D.C. 20006-1500

or e-mailed to:
pubcom@nasd.com.

Note: Members and interested parties may provide their comments through the NASD Regulation Web Site's "Request For Comments" Web page.

Comments must be received **by January 31, 1998.**

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NASD NOTICE TO MEMBERS 97-93

Trade Date–Settlement Date Schedule For 1998

Suggested Routing

- ☐ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ■ Internal Audit
- ■ Legal & Compliance
- ■ Municipal
- ☐ Mutual Fund
- ■ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ■ Syndicate
- ■ Systems
- ■ Trading
- ☐ Training
- ☐ Variable Contracts

Martin Luther King, Jr., Day: Trade Date-Settlement Date Schedule

The Nasdaq Stock Market℠ and the securities exchanges will be closed on Monday, January 19, 1998, in observance of Martin Luther King, Jr., Day. "Regular way" transactions made on the business days noted below will be subject to the following schedule:

Trade Date	Settlement Date	Reg. T Date*
Jan. 12	Jan. 15	Jan. 20
13	16	21
14	20	22
15	21	23
16	22	26
19	Markets Closed	—
20	23	27

Presidents' Day: Trade Date-Settlement Date Schedule

The Nasdaq Stock Market and the securities exchanges will be closed on Monday, February 16, 1998, in observance of Presidents' Day. "Regular way" transactions made on the business days noted below will be subject to the following schedule:

Trade Date	Settlement Date	Reg. T Date*
Feb. 9	Feb. 12	Feb. 17
10	13	18
11	17	19
12	18	20
13	19	23
16	Markets Closed	—
17	20	24

Good Friday: Trade Date-Settlement Date Schedule

The Nasdaq Stock Market and the securities exchanges will be closed on Good Friday, April 10, 1998. "Regular way" transactions made on the business days noted below will be subject to the following schedule:

Trade Date	Settlement Date	Reg. T Date*
April 2	April 7	April 9
3	8	13
6	9	14
7	13	15
8	14	16
9	15	17
10	Markets Closed	—
13	16	20

Memorial Day: Trade Date-Settlement Date Schedule

The Nasdaq Stock Market and the securities exchanges will be closed on Monday, May 25, 1998, in observance of Memorial Day. "Regular way" transactions made on the business days noted below will be subject to the following schedule:

Trade Date	Settlement Date	Reg. T Date*
May 18	May 21	May 26
19	22	27
20	26	28
21	27	29
22	28	June 1
25	Markets Closed	—
26	29	2

Independence Day: Trade Date-Settlement Date Schedule

The Nasdaq Stock Market and the securities exchanges will be closed on Friday, July 3, 1998, in observance of Independence Day. "Regular way" transactions made on the business days noted below will be subject to the following schedule:

Trade Date	Settlement Date	Reg. T Date*
June 26	July 1	July 6
29	2	7
30	6	8
July 1	7	9
2	8	10
3	Markets Closed	—
6	9	13

Labor Day: Trade Date-Settlement Date Schedule

The Nasdaq Stock Market and the securities exchanges will be closed on Monday, September 7, 1998, in observance of Labor Day. "Regular way" transactions made on the business days noted below will be subject to the following schedule:

Trade Date	Settlement Date	Reg. T Date*
Aug. 31	Sept. 3	Sept. 8
Sept. 1	4	9
2	8	10
3	9	11
4	10	14
7	Markets Closed	—
8	11	15

Columbus Day: Trade Date-Settlement Date Schedule

The schedule of trade dates-settlement dates below reflects the observance by the financial community of Columbus Day, Monday, October 12, 1998. On this day, The Nasdaq Stock Market and the securities exchanges will be open for trading. However, it will not be a settlement date because many of the nation's banking institutions will be closed.

Trade Date	Settlement Date	Reg. T Date*
Oct. 2	Oct. 7	Oct. 9
5	8	12
6	9	13
7	13	14
8	14	15
9	15	16
12	15	19
13	16	20

Note: October 12, 1998, is considered a business day for receiving customers' payments under Regulation T of the Federal Reserve Board.

Transactions made on Monday, October 12, will be combined with transactions made on the previous business day, October 9, for settlement on October 15. Securities will not be quoted ex-dividend, and settlements, marks to the market, reclamations, and buy-ins and sell-outs, as provided in the Uniform Practice Code, will not be made and/or exercised on October 12.

Veterans' Day And Thanksgiving Day: Trade Date-Settlement Date Schedule

The schedule of trade dates-settlement dates below reflects the observance by the financial community of Veterans' Day, Wednesday, November 11, 1998, and Thanksgiving Day, Thursday, November 26, 1998. On Wednesday, November 11, The Nasdaq Stock Market and the securities exchanges will be open for trading. However, it will not be a settlement date because many of the nation's banking institutions will be closed in observance of Veterans' Day. All securities markets will be closed on Thursday, November 26, in observance of Thanksgiving Day.

Trade Date	Settlement Date	Reg. T Date*
Nov. 4	Nov. 9	Nov. 11
5	10	12
6	12	13
9	13	16
10	16	17
11	16	18
12	17	19
19	24	27
20	25	30
23	27	Dec. 1
24	30	2
25	Dec. 1	3
26	Markets Closed	—
27	2	4

Note: November 11, 1998, is considered a business day for receiving customers' payments under Regulation T of the Federal Reserve Board.

Transactions made on November 11 will be combined with transactions made on the previous business day, November 10, for settlement on November 16. Securities will not be quoted ex-dividend, and settlements, marks to the market, reclamations, and buy-ins and sell-outs, as provided in the Uniform Practice Code, will not be made and/or exercised on November 11.

Christmas Day And New Year's Day: Trade Date-Settlement Date Schedule

The Nasdaq Stock Market and the securities exchanges will be closed on Friday, December 25, 1998, in observance of Christmas Day, and Friday, January 1, 1999, in observance of New Year's Day. "Regular way" transactions made on the business days noted below will be subject to the following schedule:

Trade Date	Settlement Date	Reg. T Date*
Dec. 17	Dec. 22	Dec. 24
18	23	28
21	24	29
22	28	30
23	29	31
24	30	Jan. 4, 1999
25	Markets Closed	—
28	31	5
29	Jan. 4, 1999	6
30	5	7
31	6	8
Jan. 1, 1999	Markets Closed	—
4	7	11

Brokers, dealers, and municipal securities dealers should use the foregoing settlement dates for purposes of clearing and settling transactions pursuant to the National Association of Securities Dealers, Inc. (NASD®) Uniform Practice Code and Municipal Securities Rulemaking Board Rule G-12 on Uniform Practice.

Questions regarding the application of those settlement dates to a particular situation may be directed to the NASD Uniform Practice Department at (203) 375-9609.

*Pursuant to Sections 220.8(b)(1) and (4) of Regulation T of the Federal Reserve Board, a broker/dealer must promptly cancel or otherwise liquidate a customer purchase transaction in a cash account if full payment is not received within five business days of the date of purchase or, pursuant to Section 220.8(d)(1), make application to extend the time period specified. The date by which members must take such action is shown in the column titled "Reg. T Date."

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NASD NOTICE TO MEMBERS 97-94

NASD 1998 Holiday Schedule

Suggested Routing

- ☐ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ■ Internal Audit
- ■ Legal & Compliance
- ■ Municipal
- ☐ Mutual Fund
- ■ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ■ Syndicate
- ■ Systems
- ■ Trading
- ☐ Training
- ☐ Variable Contracts

The National Association of Securities Dealers, Inc. (NASD®) will observe the following holiday schedule for 1998:

January 1	New Year's Day
January 19	Martin Luther King Jr.'s Birthday (Observed)
February 16	Presidents' Day
April 10	Good Friday
May 25	Memorial Day
July 3	Independence Day (Observed)
September 7	Labor Day
November 26	Thanksgiving Day
December 25	Christmas Day

Questions regarding this holiday schedule may be directed to NASD Human Resources, at (301) 590-6821.

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NASD NOTICE TO MEMBERS 97-95

Fixed Income Pricing System Additions, Changes, And Deletions As Of November 21, 1997

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ■ Corporate Finance
- ☐ Government Securities
- ■ Institutional
- ☐ Insurance
- ☐ Internal Audit
- ■ Legal & Compliance
- ■ Municipal
- ☐ Mutual Fund
- ■ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ☐ Syndicate
- ■ Systems
- ■ Trading
- ☐ Training
- ☐ Variable Contracts

As of November 21, 1997, the following bonds were added to the Fixed Income Pricing System℠ (FIPS℠).

Symbol	Name	Coupon	Maturity
ELRT.GA	Eldorado Resorts LLC	10.500	08/15/06
GTAR.GA	Globalstar L.P./Cap Corp	11.375	02/15/04
GTAR.GB	Globalstar L.P./Cap Corp	11.250	06/15/04
TPLP.GB	Tanger Properties LP	7.875	10/24/04
LODG.GA	Sholodge, Inc.	9.550	09/01/07
SFC.GA	Southern Pacific Funding Corp	11.500	11/01/04
HMTT.GA	HMT Technology Corp	5.750	01/15/04
IACA.GA	InterMedia Capital Partners IV	11.250	08/01/06
KSAC.GD	Kaiser Aluminum & Chemical Corp	10.875	10/15/06
KPLA.GA	Key Plasctics Inc.	10.250	03/15/07
MBN.GA	MBNA Capital I	8.278	12/01/26
MBN.GA	MBNA Capital I	6.518	02/01/27
ICF.GB	IFC Kaier International Inc.	13.000	12/31/03
PAGE.GD	Paging Network Inc.	10.000	10/15/08
MCLD.GA	McLeodUSA Inc	10.500	03/01/07
PRWL.GC	PriCellular Wirless Corp.	10.750	11/01/04
ICEL.GB	Intercel Inc	12.000	02/01/06
KZME.GA	Katz Media Corp	10.500	01/15/07
FALC.GA	Falcon Building Products Inc	9.500	06/15/07
FALC.GB	Falcon Building Products Inc	10.500	06/15/07
SPPB.GA	Specialty Paperboard Inc	9.375	10/15/06
CGF.GA	Carr-Gottstein Foods Inc	12.000	11/15/05
NTLI.GA	NTL Inc	10.000	02/15/07
PTEL.GA	Powertel Inc	11.125	06/01/07
BFPT.GB	Brooks Fiber Properties Inc	10.875	03/01/06
BFPT.GC	Brooks Fiber Properties Inc	10.000	06/01/07
GTRC.GA	Guitar Center Management Co Inc	11.000	07/01/06
UTB.GA	U.S. Timberlands Financial Corp	9.625	11/15/07
CTYA.GH	Century Communication Corp	8.375	11/15/17

As of November 21, 1997, the following bonds were deleted from FIPS.

Symbol	Name	Coupon	Maturity
TRTX.GA	Transtexas Gas Corp	10.500	09/01/00
WAX.GA	Waxman Industries Inc	13.750	06/01/99
KFIN.GA	K&F Industries Inc	13.750	08/01/01
VON.GA	Von-Cos Inc	9.625	04/01/02
FBR.GA	First Brands Corp	9.125	04/01/99
KCC.GA	K-III Communications Corp	10.625	05/01/02
GNLN	GAGeneral Nutrition Inc	11.375	03/01/00
BORN.GB	Borden Inc	9.875	11/01/97
DEC.GB	Digital Equipment	7.000	11/15/97

As of November 21, 1997, changes were made to the symbols of the following FIPS bonds:

New Symbol	Old Symbol	Name	Coupon	Maturity
CE.GD	CLEC.GB	Calenergy Co	7.630	10/15/07
FEN.GA	FGAS.GA	Forcenergy Inc	9.500	11/01/06
FEN.GB	FGAS.GB	Forcenergy Inc	8.500	02/15/07
STN.GB	STCI.GB	Station Casinos Inc	9.625	06/01/03
STN.GD	STCI.GD	Station Casinos Inc.	9.750	04/15/07
PHO.GA	PTEL.GA	People's Telephone Co Inc	12.250	07/15/02

All bonds listed above are subject to trade-reporting requirements. Questions pertaining to FIPS trade-reporting rules should be directed to Stephen Simmes, NASD Regulation℠ Market Regulation, at (301) 590-6451.

Any questions regarding the FIPS master file should be directed to Cheryl Glowacki, Nasdaq® Market Operations, at (203) 385-6310.

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DISCIPLINARY ACTIONS

Disciplinary Actions Reported For December

NASD Regulation, Inc. (NASD Regulation℠) has taken disciplinary actions against the following firms and individuals for violations of National Association of Securities Dealers, Inc. (NASD®) rules; federal securities laws, rules, and regulations; and the rules of the Municipal Securities Rulemaking Board. Unless otherwise indicated, suspensions will begin with the opening of business on Monday, December 15, 1997. The information relating to matters contained in this *Notice* is current as of the end of November 21.

Firms Fined, Individuals Sanctioned

Aspen Capital (Denver, Colorado) and **Stephen B. Carlson (Registered Principal, Denver, Colorado)** were fined $10,000, jointly and severally, and Carlson was barred from association with any NASD member in any capacity. The National Business Conduct Committee (NBCC) imposed the sanctions following appeal of a Denver District Business Conduct Committee (DBCC) decision. The sanctions were based on findings that Carlson, acting for himself and on behalf of the firm, attempted to obtain stock at below market prices by means of threats, intimidation and coercion.

Carlson has appealed this action to the Securities and Exchange Commission (SEC) and the sanctions, other than the bar, are not in effect pending consideration of the appeal.

Firms And Individuals Fined

L. H. Friend, Weinress, Frankson & Presson, Inc. (Irvine, California) and **Larry H. Friend (Registered Principal, Newport Beach, California)** submitted an Offer of Settlement pursuant to which they were fined $30,000, jointly and severally. Without admitting or denying the allegations, the respondents consented to the described sanction and to the entry of findings that the firm did not possess the account documentation required by the NASD's Free-Riding and Withholding Interpretation to demonstrate that 23 accounts were not restricted from purchasing shares in an initial public offering. The findings also stated that Friend failed to establish, implement, and enforce reasonable supervisory procedures designed to prevent the above violations.

Firms Fined

Dean Witter Reynolds, Inc. (New York, New York) submitted a Letter of Acceptance, Waiver and Consent pursuant to which the firm was fined $13,000. Without admitting or denying the allegations, the firm consented to the described sanction and to the entry of findings that it failed to designate as late to the Automated Confirmation Transaction Service℠ (ACT℠) transactions in listed and Nasdaq® securities. The NASD also found that the firm failed to report to ACT the correct price of transactions in listed securities, failed to time stamp the time of execution on order tickets, and failed to contemporaneously execute shares of customer limit orders after it bought shares of stock for its own market-making account. Furthermore, the NASD determined that the firm failed to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with the applicable securities laws and regulations regarding trade reporting and the limit order protection interpretation.

Gerard, Klauer, Mattison & Co., Inc. (New York, New York) submitted a Letter of Acceptance, Waiver and Consent pursuant to which the firm was fined $15,000. Without admitting or denying the allegations, the firm consented to the described sanction and to the entry of findings

that it failed to report to ACT the contra side executing broker in transactions in eligible securities and failed to accept or decline a transaction in an eligible security within 20 minutes after execution. The findings also stated that the firm reported to ACT the incorrect symbol indicating whether one transaction in an eligible security was as principal or agent, and failed to show on memoranda of broker orders the terms and condition of each such order or instructions and any modification or cancellation thereof, the account for which entered, the time of the entry, the price at which executed and, to the extent feasible, time of execution or cancellation. Furthermore, the NASD determined that the firm failed to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with the applicable securities laws and regulations regarding trade reporting and record keeping.

Oppenheimer & Co., Inc. (New York, New York) submitted a Letter of Acceptance, Waiver and Consent pursuant to which the firm was fined $14,000. Without admitting or denying the allegations, the firm consented to the described sanction and to the entry of findings that it designated as late to ACT 25 block transactions in Nasdaq National Market® securities, and failed to provide written notification disclosing to its customer that the price at which each such transaction took place was at an average price. The findings also stated that the firm failed to indicate on order tickets the terms, conditions, or instructions of each such order, and failed to contemporaneously execute customer limit orders after it traded each such subject security for its own market-making account at a price that would satisfy each such customer limit order. Furthermore, the NASD found that the firm failed to establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with the applicable securities laws and regulations regarding trade reporting, the limit order protection interpretation, and record keeping.

Individuals Barred Or Suspended

Michael Ray Anderson (Registered Representative, Ambia, Indiana) submitted an Offer of Settlement pursuant to which he was fined $226,000, barred from association with any NASD member in any capacity, and required to pay $9,046 in restitution. Without admitting or denying the allegations, Anderson consented to the described sanctions and to the entry of findings that, in connection with the purchase and sale of securities in the form of variable annuity life insurance products, he received $124,400 from public customers. The NASD determined that contrary to the customers' instructions, and without their knowledge or consent, Anderson retained $44,440 for some purpose other than the benefit of the customers. The findings also stated that Anderson submitted to his member firm five disbursement request forms that caused a total of $849 to be disbursed from insurance policies owned by a public customer and used the funds to make premium payments on a variable annuity life insurance product that the customer had requested to be canceled, all without the customer's knowledge or consent.

Edward Azrilyan (Registered Representative, Cedarhurst, New York) was fined $20,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Azrilyan failed to respond to NASD requests for information.

Michael J. Baker (Registered Representative, Beverly Hills, California) submitted an Offer of Settlement pursuant to which he was fined $100,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Baker consented to the described sanctions and to the entry of findings that he effected unauthorized purchases of securities in the accounts of public customers. The findings also stated that Baker exercised discretion in the accounts of public customers without having a signed discretionary agreement giving him such authorization. Furthermore, the NASD found that Baker established a fictitious securities account in the name of public customers, used a customer's address, social security number, and telephone number, and purchased shares of common stock without the knowledge or authorization of the customers.

Jimmy Berkovich (Registered Representative, Brooklyn, New York) was fined $10,000 and suspended from association with any NASD member in any registered capacity for one year. The sanctions were based on findings that Berkovich failed to timely respond to NASD requests for information.

Phillip J. Booth (Registered Representative, Floyds Knobs, Indiana) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $200,000, barred from association with any NASD member in any capacity, and ordered to pay $40,000 in restitution to a member firm. Without admitting or denying the allegations, Booth consented to the described sanctions and to the entry of findings that he received from a public customer a $40,000 check by misrepresenting to the customer that the funds were to be used to purchase an annuity for the customer. The NASD found that Booth failed and neglected to purchase the annuity, and instead converted the funds to his own use and benefit by endorsing the check and

depositing it into his personal bank account, without the customer's knowledge or consent.

Aron Oleg Bronstein (Registered Principal, Brooklyn, New York) submitted an Offer of Settlement pursuant to which he was fined $5,000 and suspended from association with any NASD member in any capacity for 30 days. Without admitting or denying the allegations, Bronstein consented to the described sanctions and to the entry of findings that he submitted orders for purchases of stock for fictitious customer accounts.

Daniel Lee Cheloha (Registered Representative, Omaha, Nebraska) was fined $20,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Cheloha failed to respond to NASD requests for information.

Gerald Arthur Christensen (Registered Representative, Sterling Heights, Michigan) submitted an Offer of Settlement pursuant to which he was fined $5,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Christensen consented to the described sanctions and to the entry of findings that he participated in the offer and sale of securities to public customers on a private basis and in connection therewith, failed and neglected to provide written notice to, and receive written authorization from, his member firm to engage in such activities.

John S. Claudino (Registered Representative, Brooklyn, New York) submitted an Offer of Settlement pursuant to which he was fined $10,000, suspended from association with any NASD member in any capacity for 30 days, and required to requalify by exam as a general securities representative. Without admitting or denying the allegations, Claudino consented to the described sanctions and to the entry of findings that he executed unauthorized purchase and sale transactions in the account of a public customer without the knowledge or consent of the customer. The findings also stated that Claudino failed to respond timely to NASD requests for information.

Peter M. Delseni (Registered Representative, Brooklyn, New York) was fined $50,000, barred from association with any NASD member in any capacity, and required to pay $9,626.05 in restitution to his customers. The sanctions were based on findings that Delseni received commissions on sales of securities to retail customers that were excessive and unfair.

Weidi Feng (Registered Representative, Elmhurst, New York) was fined $20,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Feng, while taking the Series 7 exam, had in his possession notes that contained information relevant to the exam. Feng also failed to respond to NASD requests to appear for on-the-record interviews.

Randall Scott Ferman (Registered Representative, Flanders, New Jersey) submitted an Offer of Settlement pursuant to which he was suspended from association with any NASD member in any capacity for 20 business days and ordered to requalify by exam as a general securities representative. Without admitting or denying the allegations, Ferman consented to the described sanctions and to the entry of findings that he recommended and executed transactions in the account of a public customer without having a reasonable basis for believing that such recommendations were suitable for the customer or for believing that opening and maintaining a margin account was suitable for the customer based on the customer's financial situation, needs, investment objectives, and investment experience. The findings also stated that Randall made misrepresentations to a public customer in connection with a loan he had requested for the customer. Furthermore, the NASD determined that Ferman engaged in outside business activities without notifying his member firm of the true nature of his activities.

Eddie Samuel Freeman, II (Registered Principal, St. Louis, Missouri) submitted an Offer of Settlement pursuant to which he was fined $33,641.35, barred from association with any NASD member in any capacity, and ordered to pay $6,728.27 plus interest in restitution. Without admitting or denying the allegations, Freeman consented to the described sanctions and to the entry of findings that he issued checks totaling $6,728.27 from his member firm's bank account made payable to himself, deposited the checks into his personal account, and utilized the proceeds from the checks for his own use and benefit without the knowledge or consent of his member firm. The findings also stated that he improperly used the proceeds from short sales of securities to pay for the purchase of warrants to cover the short sales. In addition, the NASD found that Freeman failed to respond to NASD requests for information.

Herbert G. Frey (Registered Principal, Cincinnati, Ohio) was suspended from association with any NASD member in any capacity for 180 days. The SEC affirmed the sanction following appeal of a March 1997 NBCC decision. The sanctions were based on findings that Frey failed to pay an arbitration award.

Terry W. Hamilton (Registered Representative, Milwaukee, Wisconsin) submitted an Offer of Settlement pursuant to which he was fined $25,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Hamilton consented to the described sanctions and to the entry of findings that he obtained $111.48 from a public customer with instructions to use the funds to pay for a life insurance policy. The NASD determined that Hamilton failed to follow the customer's instructions and used the funds for some purpose other than for the benefit of the customer. The findings also stated that Hamilton failed to respond to NASD requests for information.

Vicci Delores Havens (Registered Representative, Modesto, California) was fined $21,500, barred from association with any NASD member in any capacity, and ordered to pay $1,292.77 in restitution to a customer. The sanctions were based on findings that Havens forged a public customer's name to account documents and a check, submitted the documents to her member firm, and effected an unauthorized trade in the customer's account. Havens also deposited a $1,292.77 check made payable to a public customer to her personal bank account and used the proceeds for her own use.

Steven Herbert Johansen (Registered Representative, Bolingbrook, Illinois) was fined $100,000 and barred from association with any NASD member in any capacity. The NBCC affirmed the sanctions following appeal of a Chicago DBCC decision. The sanctions were based on findings that Johansen fraudulently interpositioned collateralized mortgage obligations to evade inventory limits set by his member firm and to generate greater trading profits. Johansen has appealed this action to the SEC and the sanctions, other than the bar, are not in effect pending consideration of the appeal.

Jeffrey Ward Jones (Registered Principal, Guilderland, New York) was fined $100,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Jones conducted unauthorized and excessive trading in public customer accounts and effected transactions without written discretionary authority from the customers. In addition, Jones effected customer transactions while not properly registered and failed to respond to NASD requests to appear for an on-the-record interview.

Marty Ross Jones (Registered Representative, Richfield, Minnesota) was fined $30,000, barred from association with any NASD member in any capacity, suspended from association with any NASD member in any capacity for two years, and required to requalify by exam. The sanctions were based on findings that Jones received checks totaling $4,602.38 representing the cash surrendered from life insurance policies of public customers and, without the knowledge or consent of the customers, endorsed and deposited the checks into his personal bank account and misused the funds. Jones also failed to respond to NASD requests for information.

Jeffrey Dean Lee (Registered Principal, Wichita, Kansas) was fined $20,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Lee failed to respond to NASD requests for information.

Nicholas Liapunov (Registered Representative, Ridgefield, Connecticut) submitted a Letter of Acceptance, Waiver and Consent pursuant to which he was fined $5,000, suspended from association with any NASD member in any capacity, and required to requalify by exam in all capacities. Without admitting or denying the allegations, Liapunov consented to the described sanctions and to the entry of findings that he forged a public customer's signature on a disbursement request form without the customer's knowledge, authorization or consent.

Daniel Gerard Mullen (Registered Representative, Chicago, Illinois) submitted an Offer of Settlement pursuant to which he was fined $6,000 and suspended from association with any NASD member in any capacity for 10 business days. Without admitting or denying the allegations, Mullen consented to the described sanctions and to the entry of findings that he purchased and sold securities for the account of a public customer without the customer's knowledge or consent and in the absence of written or oral authorization from the customer to exercise discretion in the account.

Jeffrey A. Neal (Registered Representative, Gallipolis, Ohio) was fined $70,000, barred from association with any NASD member in any capacity, and ordered to pay $10,049.67 in restitution to a member firm. The sanctions were based on findings that Neal submitted disbursement request forms purportedly signed by public customers, causing the firm to issue checks totaling $10,049.67, payable to the customers. Neal did not provide these checks or the checks' proceeds to the customers and retained the funds for his own use and benefit, without the customers' knowledge, consent, or authorization. Neal also failed to respond to NASD requests for information.

Carlton D. Oakley (Registered Representative, Buffalo, New York) was fined $50,000, barred

from association with any NASD member in any capacity, and ordered to pay $5,969.46 in restitution to a member firm. The sanctions were based on findings that Oakley received a $5,969.46 check from a public customer intended for the purchase of securities and, without the customer's knowledge or consent, used the funds for some purpose other than for the benefit of the customer. Oakley also failed to respond to NASD requests for information.

Boris Poleschuk (Registered Representative, Brooklyn, New York) submitted an Offer of Settlement pursuant to which he was suspended from association with any NASD member in any capacity for one year and will be subject to special supervision for two years. Without admitting or denying the allegations, Poleschuk consented to the described sanctions and to the entry of findings that he made material misrepresentations and omissions to his customers concerning a stock. The findings also stated that Poleschuk effected unauthorized transactions in his customers' accounts.

Robert A. Quiel (Registered Principal, Bermuda Dunes, California) was fined $12,500, suspended from association with any NASD member in any capacity for 30 days, and required to requalify by exam as a general securities principal and general securities representative. The SEC affirmed the sanctions following appeal of an October 1996 NBCC decision. The sanctions were based on findings that Quiel effected principal retail transactions with customers involving securities at prices that were unfair and excessive, with markups ranging from 8 to 40 percent above the prevailing market price. Quiel also failed to respond completely to NASD requests for information.

Steven James Reimer (Registered Representative, Vancouver, Washington) submitted an Offer of Settlement pursuant to which he was fined $15,000 and suspended from association with any NASD member in any capacity for three months. Without admitting or denying the allegations, Reimer consented to the described sanctions and to the entry of findings that a member firm, acting through Reimer, sold shares of common stock to investors by intentionally or recklessly employing devices intended to defraud these investors and omitted to state material facts necessary to make the statements made in the private placement memorandum not misleading.

James Michael Russell (Registered Representative, San Antonio, Texas) was fined $25,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Russell engaged in outside business activities even though he had not provided prompt written notice of such to his member firm. Russell also failed to respond to NASD requests to appear for an on-the-record interview.

William H. Scherrer (Registered Representative, Burlington, Wisconsin) submitted an Offer of Settlement pursuant to which he was fined $5,000 and suspended from association with any NASD member in any capacity for 10 business days. Without admitting or denying the allegations, Scherrer consented to the described sanctions and to the entry of findings that he signed the names of public customers to life insurance takeover request forms without the knowledge or consent of the customers.

Robert E. Staley (Registered Representative, Maumelle, Arkansas) submitted an Offer of Settlement pursuant to which he was fined $5,000, suspended from association with any NASD member in any capacity for six months, and required to requalify by exam as a general securities representative. Without admitting or denying the allegations, Staley consented to the described sanctions and to the entry of findings that he recommended and engaged in the purchase transaction of a limited partnership in the joint account of public customers without having reasonable grounds for believing that such recommendation and resultant transaction was suitable for the customers on the basis of their financial situation, investment objectives, and needs. The findings also stated that Staley borrowed $1,500 from a public customer knowing that he did not have the ability to repay the loan.

Barry R. Strauss (Registered Representative, Tempe, Arizona) and **Robert S. Tryon (Registered Representative, Mesa, Arizona)** submitted an Offer of Settlement pursuant to which Strauss was fined $20,000 and barred from association with any NASD member in any capacity. Tryon was fined $10,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, the respondents consented to the described sanctions and to the entry of findings that Strauss and Tryon engaged in outside business activities for compensation without providing prompt written notice of such activities to their member firm. The findings also stated that Strauss represented to the public that he was offering securities but failed to identify his member firm as the broker/dealer that he was associated with for purposes of securities transactions. Furthermore, the NASD found that Strauss provided inaccurate information in response to an NASD request for information.

Margaret L. Talbot (Registered Representative, Oneonta, New York) submitted a Letter of Acceptance, Waiver and Consent pursuant to which she was fined $50,000 and barred from association with any NASD member in any capacity. Without admitting or denying the allegations, Talbot consented to the described sanctions and to the entry of findings that she accepted from a public customer a $10,000 check intended for investment into a variable annuity. The NASD found that Talbot deposited the check into her personal bank account and converted the proceeds to her own use and benefit.

Randall H. Taylor (Registered Representative, Basking Ridge, New Jersey) and **Paul C. Mazzanobile (Registered Representative, Haworth, New Jersey)** submitted an Offer of Settlement pursuant to which Taylor was fined $50,000, suspended from association with any NASD member in any capacity for 30 days, and suspended from association with any NASD member in a principal capacity for 60 days. Mazzanobile was fined $7,500 and suspended from association with any NASD member in any capacity for 15 days. Without admitting or denying the allegations, the respondents consented to the described sanctions and to the entry of findings that Taylor and Mazzanobile engaged in a pattern and practice of attempting to mark the open of the market for securities.

Ronald Howard Tjarks (Registered Representative, Hastings, Nebraska) was fined $340,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Tjarks affixed a customer's signature on annuity withdrawal forms and withdrawal checks totaling $94,000 without the knowledge or consent of the customer. In addition, Tjarks deposited withdrawal checks totaling $54,000 into his personal bank account and converted the funds to his own use and benefit without the knowledge or consent of the customers. Tjarks also failed to respond to NASD requests for information.

Bruce M. Vitrano (Registered Representative, Blasdell, New York) was fined $30,000, barred from association with any NASD member in any capacity, and required to pay $1,979.56 in restitution to a member firm. The sanctions were based on findings that Vitrano received from a public customer $1,979.56 to be used to fund a variable life insurance policy. Vitrano did not apply any of the funds as intended by the customer and used the funds for his own use and benefit. Vitrano also failed to respond to NASD requests for information.

Individuals Fined

Charles R. Snyder (Registered Principal, South Glastonbury, Connecticut) submitted an Offer of Settlement pursuant to which he was fined $25,000. Without admitting or denying the allegations, Snyder consented to the described sanction and to the entry of findings that he engaged in private securities transactions outside the regular course or scope of his employment with his member firm without giving written notice to his member firm describing in detail the proposed transaction, his proposed role therein, and whether he received or was to receive selling compensation in connection with the transaction.

Decisions Issued

The following decisions have been issued by the DBCC and have been appealed to the NBCC as of November 28, 1997. The findings and sanctions imposed in the decision may be increased, decreased, modified, or reversed by the NBCC. Initial decisions whose time for appeal has not yet expired will be reported in the next *Notice to Members*.

Westhagen & Westhagen, Inc. (Ripon, Wisconsin) and **Eric P. Westhagen (Registered Principal, Ripon, Wisconsin)** were fined $10,000, jointly and severally, and Westhagen was barred from association with any NASD member in any principal or supervisory capacity. The sanctions were based on findings that the firm, acting through Westhagen, failed to promptly amend and file with the NASD a Form BD to reflect a delinquent tax warrant, failed to maintain a general ledger, checkbook, bank statements, canceled checks, bank reconciliations, and copies of the firm's Form BD. In addition, the firm, acting through Westhagen, prepared inaccurate trail balances and net capital computations, and filed inaccurate FOCUS Part I and IIA reports with the NASD. The firm, acting through Westhagen, also failed to fully respond to NASD requests for information.

The firm and Westhagen have appealed this action to the NBCC and the sanctions are not in effect pending consideration of the appeal.

Lawrence P. Bruno, Jr. (Registered Representative, Brooklyn, New York) was fined $25,000, barred from association with any NASD member in any capacity, and ordered to disgorge $678,067 to the NASD. The sanctions were based on findings that Bruno arranged to have an impostor take the Series 7 exam on his behalf.

Bruno has appealed this action to the NBCC and the sanctions are not in effect pending consideration of the appeal.

Michael B. Jawitz (Registered Representative, Washington, D.C.) was fined $50,000 and suspended from association with any NASD member in any capacity for one year and suspended thereafter as an equity trader until he takes and passes the Series 7 exam. The sanctions were based on findings that Jawitz engaged in manipulative, deceptive, and fraudulent conduct by intentionally and recklessly entering fictitious limit orders into his member firm's order execution system that led to non-bona fide transactions. Furthermore, Jawitz caused his member firm's order execution system to fail to automatically execute customer limit orders. Jawitz also intentionally and recklessly published or circulated reports of purchase and sale transactions when he knew that such transactions were non-bona fide.

Jawitz has appealed this action to the NBCC and the sanctions are not in effect pending consideration of the appeal.

Bernadette Jones (Registered Representative, Pomona, California) was fined $3,500, suspended from association with any NASD member in any capacity for six months, ordered to requalify by exam as a general securities representative, and ordered to pay $2,516.56 in restitution to a member firm. The sanctions were based on findings that Jones received $6,000 from a public customer for the purpose of purchasing a life insurance policy. Jones submitted the insurance application with a money order for $1,483.44 to her member firm and misused the remainder of the funds for her personal expenses. In addition, Jones submitted to her member firm a Form U-4 that contained false and misleading information.

This action has been called for review by the NBCC and the sanctions are not in effect pending consideration of the appeal.

Douglas John Mangan (Registered Representative, Massapequa, New York) was fined $120,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Mangan created a false and inaccurate customer securities account statement and caused his member firm's records to falsely indicate the customer's address without the knowledge, consent or authorization of the customer. Mangan also failed to respond to NASD requests to appear for an on-the-record interview.

Mangan has appealed this action to the NBCC and the sanctions are not in effect pending consideration of the appeal.

Nancy Hoff Martin (Registered Principal, Tustin, California) was fined $20,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Martin allowed two unregistered persons to use her account executive number to engage in the securities business, and failed to maintain or enforce procedures designed to prevent associated individuals from effecting securities transactions without being properly registered.

Martin has appealed this action to the NBCC and the sanctions are not in effect pending consideration of the appeal.

James Basil Peters (Registered Representative, Oxnard, California) was fined $3,500 and suspended from association with any NASD member in any capacity for 30 days. The sanctions were based on findings that Peters signed a bank branch manager's name to documents in an attempt to improperly obtain commissions.

Peters has appealed this action to the NBCC and the sanctions are not in effect pending consideration of the appeal.

Eric Slane (Registered Representative, Seattle, Washington) was fined $10,000 and barred from association with any NASD member in any capacity. The sanctions were based on findings that Slane filed an inaccurate Form U-4 and submitted the form to his member firm to be forwarded to the NASD.

Slane has appealed this action to the NBCC and the sanctions are not in effect pending consideration of the appeal.

Complaints Filed

The following complaints were issued by the NASD. Issuance of a disciplinary complaint represents the initiation of a formal proceeding by the NASD in which findings as to the allegations in the complaint have not been made, and does not represent a decision as to any of the allegations contained in the complaint. Because these complaints are unadjudicated, you may wish to contact the respondents before drawing any conclusions regarding the allegations in the complaint.

James E. Catsos, Jr., (Registered Representative, Aventura, Florida) was named as a respondent in an NASD complaint alleging that he executed an unauthorized purchase transaction in the account of a public customer, without the customer's knowledge or consent.

Paul W. Feeny (Registered Representative, Bayside, New York) was named as a respondent in an NASD complaint alleging he made material misrepresentations and omitted to disclose material information about securities in which he was soliciting transactions and that he made predic-

tions concerning the future price of securities without having a reasonable basis in connection with the securities transactions. Feeny is also alleged to have effected two unauthorized transactions, failed to follow public customer instructions to sell securities, and induced a transaction by guaranteeing the customer against loss.

Steven L. Fritz (Registered Representative, Oklahoma City, Oklahoma) was named as a respondent in an NASD complaint alleging he effected approximately 243 unauthorized withdrawals and/or transfers involving an estimated $1,785,749 from the accounts of at least seven public customers, and converted approximately $598,428 of these funds to his own use and benefit, without the public customers' knowledge or consent, by forging certain customers' signatures to Letters of Authorization, preparing and sending false account statements to the affected customers, and making false and misleading statements in an effort to conceal these activities. Further, Fritz is alleged to have failed and neglected to respond to NASD requests for information.

Christopher E. Jann (Registered Representative, Centerreach, New York) was named as a respondent in an NASD complaint alleging he made material misrepresentations and omitted to disclose material information about securities in which he was soliciting transactions and that he made predictions concerning the future price of securities without having a reasonable basis in connection with securities transactions.

Lawrence Knapp (Registered Representative, Lakewood, Colorado) was named as a respondent in an NASD complaint alleging he received approximately $12,000 from a public customer intended for investment, and instead deposited the funds into a bank account he controlled and used the funds for his own benefit. Knapp is also alleged to have failed to respond to NASD requests for information.

Frank Rocky Mazzei (Registered Representative, College Park, Maryland) was named as a respondent in an NASD complaint alleging that he excessively traded and made unsuitable recommendations in two accounts of a public customer. The complaint alleges that the excessive trading Mazzei engaged in with these accounts resulted in annual turnover rates of 16.79 and 8.32, and that the losses sustained in the accounts amounted to 50 percent of the customer's total initial equity. Furthermore, Mazzei is alleged to have misrepresented the nature and meaning of an activity letter sent to the customer by his member firm. In addition, the complaint alleges that although the activity letter specifically inquired, among other things, as to whether the customer was aware of the frequency of trading in his accounts, as well as the profits and losses sustained in his accounts, Mazzei told the customer that the letter was simply a form that required the customer's signature in order to continue in the investment program Mazzei was purportedly administering in the customer's accounts.

Firms Expelled For Failure To Pay Fines, Costs And/Or Provide Proof Of Restitution In Connection With Violations

Investors Associates, Inc., Hackensack, New Jersey

Securities Planners, Inc. (n/k/a Buttonwood Securities, Inc.), New York, New York

Taj Global Equities, Inc., Tampa, Florida

Firms Suspended

The following firms were suspended from membership in the NASD for failure to comply with formal written requests to submit financial information to the NASD. The actions were based on the provisions of NASD Rule 8210 and Article VII, Section 2 of the NASD By-Laws. The date the suspensions commenced is listed after the entry. If the firm has complied with the requests for information, the listing also includes the date the suspension concluded.

First International Capital, Ltd., Hamilton, Bermuda (November 12, 1997)

S. D. Cohen & Co., Inc., New York, New York, (November 5, 1997)

Firm Suspended Pursuant To NASD Rule 9622 For Failure To Pay Arbitration Award

Sovereign Equity (n/k/a Tuscany Equity Management Corporation)

Suspension Lifted

The NASD has lifted the suspension from membership on the date shown for the following firm because it has complied with formal written requests to submit financial information.

Del Mar Financial Services, Incorporated, Del Mar, California (October 28, 1997)

Individuals Whose Registrations Were Revoked For Failure To Pay Fines, Costs, And/Or Provide Proof Of Restitution In Connection With Violations

Mark M. Furman, Pompano Beach, Florida

Eugene Flaksman, Brooklyn, New York

Michael Y. Garber, Brooklyn, New York

Alex V. Gincherman, Brooklyn, New York

Monica A. Kimpling, Fridley, Minnesota

Jeane A. Kunkel, Minneapolis, Minnesota

Kevin M. Murphy, Gig Horbor, Washington

Mark S. Savage, Plymouth, Minnesota

Individual Whose Registration Was Canceled/Suspended Pursuant To NASD Rule 9622 For Failure To Pay Arbitration Award

Frank Jeremick Rosso, Juno Beach, Florida

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FOR YOUR INFORMATION

Clarification Of *Special Notice To Members 97-55*

In August 1997, the National Association of Securities Dealers, Inc. (NASD®) published *Special Notice to Members 97-55* entitled "New Membership Application Rules, New Code of Procedure and Other New Disciplinary Rules," which described, among other things, the new Code of Procedure and when such Rules would apply to a disciplinary proceeding. *Special Notice to Members 97-55* provided in paragraph **c)**:

> **c) Appeals, Reviews.** The Rule 9300 Series of the new Code will apply to any appeal, call for review, or review of a decision rendered under new Rule 9268 and new Rule 9269 if the decision is: (a) served on a Respondent on or after August 7, 1997, and (b) appealed, called for review, or reviewed. By doing so, all of the new appellate and review procedural enhancements, with one exception, will apply to a completed "trial-level" proceeding that is appealed, subject to a call for review, or review on or after the effective date of the new Code. The one exception is the right of the Department of Enforcement to appeal or cross-appeal a case, which will not apply. This provision in the new Rule 9300 Series will not apply to any disciplinary proceeding unless the disciplinary proceeding is based upon a complaint authorized on or after August 7, 1997.

The NASD intended that the new Code of Procedure, with the exception noted above regarding the Department of Enforcement's right to appeal or cross-appeal, would apply to any appeal or review of a "trial-level" decision served on or after August 7, 1997, so that Respondents would receive the benefits of the procedural enhancements as soon as the new Rules became effective. To clarify that such appeals and reviews shall proceed under the new Code of Procedure, the first sentence of paragraph c) should read:

> The Rule 9300 Series of the new Code will apply to any appeal, call for review, or review of a decision if the decision is: (a) served on a Respondent on or after August 7, 1997, and (b) appealed, called for review, or reviewed.

Revisions to the original sentence are noted below:

> The Rule 9300 Series of the new Code will apply to any appeal, call for review, or review of a decision ~~rendered under new Rule 9268 and new Rule 9269~~ if the decision is: (a) served on a Respondent on or after August 7, 1997, and (b) appealed, called for review, or reviewed.

Questions may be directed to Sharon Zackula, Assistant General Counsel, Office of General Counsel, NASD Regulation, Inc., at (202) 728-8985 or Katherine Malfa, Chief Counsel, Department of Enforcement, NASD Regulation℠, at (202) 974-2853.

Testing & Continuing Education Communication With Members

Since NASD Regulation's testing and continuing education program delivery began its transition to the Sylvan Technology Center Network, some processes and/or procedures have changed. In an effort to inform NASD Regulation member firms and candidates of changes, along with future events, Testing & Continuing Education will begin publishing information, including an updated Sylvan Technology Center location list, through the following mediums:

- *Regulatory & Compliance Alert*
- *CRD/PD Bulletin* (formerly *Membership On Your Side*)
- NASDR Web Site

Look for the first Testing & Continuing Education communication to appear in the December issue of the *Regulatory & Compliance Alert*.

For comments, questions or suggestions about topics that you may wish to have covered in upcoming issues, contact:

Linda Christensen
Phone: (610) 627-0377
FAX: (610) 627-0383
E-mail: *christel@nasd.com*

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SPECIAL NASD NOTICE TO MEMBERS 97-96

Member Requirement: NASD Members Must Complete Year 2000 Compliance Survey

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ☐ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ■ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ■ Syndicate
- ■ Systems
- ■ Technology
- ■ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

As the year 2000 approaches, organizations throughout the world are facing the formidable challenge of ensuring that their own computer systems, and other computer systems they depend upon, will continue to operate successfully when processing data/information with dates after December 31, 1999. This applies both to information technology systems used to conduct a securities business and general business support systems (*e.g.*, telephone, power, elevator). This challenge is particularly acute in the securities industry, due to its heavy reliance on information technology.

In response to this challenge, this *Notice* reiterates the responsibility of each and every member of the National Association of Securities Dealers, Inc. (NASD®) to analyze the readiness of its own computer systems, as well as other computer systems that each member relies upon. The NASD has been working in conjunction with other regulators and the securities industry to address these challenges, and has put forward several communications about this very important Year 2000 issue.[1]

To ensure that members are on a course to make their systems and applications Year 2000 compliant, NASD Regulation, Inc., requires all members to return a completed "Year 2000 Compliance Survey" to NASD Regulation℠ no later than **January 31, 1998**. Member firms that have returned a completed "Year 2000 Survey" to the New York Stock Exchange are exempt from this requirement at this time.

Questions or comments regarding the survey should be directed to Adam Levine, Compliance Department, NASD Regulation, at (202) 728-8901; or Paul Voketaitis, Compliance Department, NASD Regulation, at (202) 728-8843. Questions regarding the NASD's Year 2000 Program should be directed to Lyn Kelly, Year 2000 Program Director, at (301) 590-6342.

Background

The Year 2000 problem, simply stated, is that computers typically have been programmed to use a two-digit number to represent the year for any date. Since dates are essential to many automated functions, it is absolutely critical for each and every member firm to act now to assess its information technology environment and make necessary changes to ensure that automated processes with date-sensitive components will correctly identify "00" as the year 2000, rather than 1900, when processing dates on and after January 1, 2000.

Member firms have the responsibility to determine the readiness of their internal computer systems, and other computer systems that they rely upon, for the Year 2000 challenge. In particular, members that use automated programs to satisfy their regulatory and compliance responsibilities must ensure that those systems are able to function successfully with dates after December 31, 1999. As stated in *Notice to Members 97-16*, "…computer failures related to Y2K problems generally will be considered neither a defense to violations of firms' regulatory or compliance responsibilities nor a mitigation of sanctions for such violations." Further background information on the Year 2000 problem and associated activities and publications are available on both the NASD Regulation Web Site, *www.nasdr.com* (go to "Members Check Here," and select the topic "Year 2000"); and the NASD Web Site, *www.nasd.com*, under the "News" area. The Securities Industry Association (SIA) also has a Year 2000 Web site (*www.sia.com*), and for a comprehensive look at Year 2000 information, visit *www.year2000.com*.

NASD Regulation is working with other regulators and the securities industry to make sure that the Year 2000 challenge is met and that investor protection and market integrity are not jeopardized. This effort includes an initiative by NASD Regulation (in cooperation with other regulators) to ascertain whether members are taking appropriate steps to make certain that the automated systems they rely upon to meet their regulatory, market participant, and investor protection obligations are Year 2000 compliant. This is being accomplished, in part, by including a special Year 2000 section in all cycle examinations. NASD Regulation examiners will use your survey response in the examinations process.

Members are strongly encouraged to develop and implement an action plan to address any system changes required to achieve Year 2000 compliance. Also, members should contact vendors of the software and hardware products they use to ensure they are addressing the Year 2000 challenge. Introducing firms, in particular, are strongly encouraged to not only look at their own systems, but also to obtain written assurances from all service providers, including their clearing firms, that the software and hardware products they use are being reviewed for Year 2000 compliance. It is highly recommended that each firm accomplish all system changes by the end of 1998, so that 1999 can be used for monitoring the operations of all converted systems and performing quality assurance and interface tests with other organizations.

Survey

As the next step in its Year 2000 initiative, NASD Regulation requires NASD members' written responses to the enclosed survey no later than **January 31, 1998**. Members must complete the survey and return it to the address indicated on the form. Furthermore, NASD Regulation requires an original (not mechanically generated) signature from the member firm's Chief Executive Officer in the designated space. Member firms that have returned a completed "Year 2000 Survey" to the New York Stock Exchange are not required to complete the NASD Regulation survey at this time.

If members need an additional copy of the NASD Regulation survey, it will be posted on both the NASD Regulation and NASD Web Sites. To download the survey, go to either Web Site's Year 2000 section or to the *Notices to Members* Web Pages. (Note: Members will **not** be able to fill out this survey on-line; members must use the enclosed survey form or print out the Web Site version of the survey and mail it in hard-copy format to the NASD Regulation Year 2000 Program Office identified on the survey.)

Further Steps

There will be additional steps taken with respect to Year 2000 by NASD Regulation. We plan, for example, to require that members certify to NASD Regulation later in 1998 the status of their Year 2000 compliance program and its readiness for testing. Subsequently, NASD Regulation also plans to require that each member certify that its systems have been remediated and other necessary steps have been taken to address systems compliance for Year 2000.

Testing

Both NASD Regulation and The Nasdaq Stock Market, Inc., have established test centers available to member firms to test those systems that interact with NASD systems (point-to-point testing). Testing will be available in July 1998. Details regarding test schedules will be distributed at the January 1998 SIA Year 2000 Conference and will also be available via the NASD Regulation and NASD Web Sites. NASD Regulation will also issue another *Notice to Members* regarding Year 2000 in the near future.

The securities industry, coordinated by the SIA, is planning for industry-wide testing from August 1998 to December 1999. This testing is intended to allow firms and other market participants to perform integrated, industry-wide testing.

Endnote

[1] In order to coordinate and address Year 2000 efforts and issues, the NASD communicates regularly with its members and the securities industry. *See* the *NASD Regulatory & Compliance Alert* (September 1997); *NASD Notices to Members*—"For Your Information" section (July 1996); *NASD Notice to Members 97-16* (March 1997); and Nasdaq's *Subscriber Bulletin* (June 1997). Also, in May 1997, Nasdaq Trading and Market Services began including Year 2000 as a topic at its quarterly vendor focus groups. And, there are Year 2000 Web Pages on both the NASD Web Site (*www.nasd.com*) and the NASD Regulation Web Site (*www.nasdr.com*).

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SPECIAL NASD NOTICE TO MEMBERS 97-97

Mail Vote—NASD Solicits Member Vote On Amendments To NASD By-Laws To Require Members To Update Information Electronically And Maintain Electronic Mail Accounts; And For Other Purposes; **Last Voting Date: January 30, 1998**

Suggested Routing

- ■ Senior Management
- ☐ Advertising
- ☐ Continuing Education
- ☐ Corporate Finance
- ☐ Executive Representatives
- ☐ Government Securities
- ☐ Institutional
- ☐ Insurance
- ☐ Internal Audit
- ■ Legal & Compliance
- ☐ Municipal
- ☐ Mutual Fund
- ☐ Operations
- ☐ Options
- ☐ Registered Representatives
- ☐ Registration
- ☐ Research
- ☐ Syndicate
- ☐ Systems
- ☐ Trading
- ☐ Training
- ☐ Variable Contracts

Executive Summary

The National Association of Securities Dealers, Inc. (NASD® or Association) invites members to vote to approve amendments to the NASD By-Laws to require executive representatives of members to update firm contact information electronically, to maintain electronic mail accounts, and for other purposes. The last voting date is January 30, 1998. The text of the proposed amendments follows this *Notice*.

Questions concerning this *Notice* may be directed to T. Grant Callery, Senior Vice President and General Counsel, NASD, at (202) 728-8285.

Background

Amendment To Article IV, Section 3

On August 5, 1997, the Membership Committee recommended the adoption of an amendment to the NASD By-Laws to require each executive representative, beginning not later than January 1, 1999, to maintain an Internet electronic mail account for communication with the NASD and to update firm contact information via the NASD Regulation Web Site. The NASD Regulation Board approved the recommendation at its September 23, 1997 meeting. The NASD Board approved the amendment at its December 11, 1997 meeting.

The NASD must have current and accurate records of the names of members' executive representatives and other individuals who hold positions of significant responsibility within member firms. This information is used by the Corporate Secretary for member balloting, by Member Regulation for compliance purposes, and by Corporate Communications in identifying key individuals for use in target mailings. The current method for acquiring this information is through the filing of an NASD form entitled "NASD Member Firm Contact Questionnaire" (NMFCQ).

The data requested on the NMFCQ is not required on any other form filing (*e.g.*, Form BD or U-4). The data is available in the Central Registration Depository (CRD℠), but in a text form that renders it nearly impossible to interface to another system. Thus, members are required to file the NMFCQ with the CRD, where the information is data captured into the Member Profile System, an adjunct to the existing CRD system. The data is then viewable throughout the organization via the Member Profile System and is interfaced to regulatory and finance systems as well as the existing corporate mailing system for use in distributing publications, reports, voting ballots, and mail.

A new procedure for collecting NMFCQ information in the future is necessary for two reasons. First, the CRD Redesign effort does not include rebuilding this function, so another alternative is required. Second, members are rarely updating these filings. Because the information solicited via the form is very important to support the NASD's business, the NASD must have a more efficient means for firms to update this information, thereby encouraging them to do so more regularly.

The proposed By-Law change will improve the data collection process by requiring a firm to access its NMFCQ via the NASD Regulation Web Site and update it on a periodic basis. (A firm would be able to access only its own NMFCQ; the information would be password-protected to prevent any public access.) The information then would be interfaced to the internal NASD Regulation systems requiring this set of data. Further, the By-Law also

would require each member to maintain an Internet e-mail address on behalf of its executive representative. This e-mail address would be used proactively to send messages reminding the firm to review and update its contact information.

There are other reasons the staff is interested in member Internet access and e-mail. Once established, it opens up many options for timely communications with our members and associated cost savings. It also can assist members with timely internal distribution of NASD information, notices, and publications. Other potential initiatives include eliminating or reducing printed publications, sending more timely announcements and notices, and providing value-added services to members.

The NASD is proposing a one-year transition period to accommodate small firms that may not currently have Internet access or electronic mail accounts.

Technical Amendment To Article VII, Section 9(b)

The NASD also proposes a technical amendment to Article VII, Section 9(b). In *Special Notice to Members 97-75*, the NASD proposed a comprehensive revision to its By-Laws to provide for a more streamlined corporate structure. The membership approved these changes on November 13, 1997, and the SEC approved them on November 14, 1997. *See* Securities Exchange Act Release No. 39326 (Nov. 14, 1997), 62 F.R. 62385 (Nov. 21, 1997).[1] Article VII, Section 9(b) contained a typographical error that provided that the number of Industry committee members on the National Nominating Committee should equal or exceed the number of Non-Industry committee members. The terms "Industry" and "Non-Industry" were transposed. The Section should provide that the number of Non-Industry committee members should equal or exceed the number of Industry committee members. The National Nominating Committee is required to be composed in such a manner by the Undertakings agreed to by the NASD on August 8, 1996.[2]

Endnotes

[1] In Securities Exchange Act Release 39470 (December 19, 1997), the SEC approved moving the effective date of these changes from the first NASD Board meeting in January 1998 to the conclusion of the annual meeting, currently scheduled for January 15, 1998.

[2] Securities Exchange Act Release No. 37538 (August 8, 1996) (SEC Order Instituting Public Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions, In the Matter of National Association of Securities Dealers, Inc., Administrative Proceeding File No. 3-9056).

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EXHIBIT A

NASD BY-LAWS*

(Note: new text is underlined; deletions are bracketed.)

Article IV

Executive Representative

Sec. 3. Each member shall appoint and certify to the Secretary of the NASD one "executive representative" who shall represent, vote, and act for the member in all the affairs of the NASD, except that other executives of a member may also hold office in the NASD, serve on the Board or committees appointed under Article IX, Section 1 or otherwise take part in the affairs of the NASD. A member may change its executive representative upon giving notice thereof via electronic process or such other process the NASD may prescribe to the Secretary, or may, when necessary, appoint, by notice via electronic process to the Secretary, a substitute for its executive representative. An executive representative of a member or a substitute shall be a member of senior management and registered principal of the member. Not later than January 1, 1999, each executive representative shall maintain an Internet electronic mail account for communication with the NASD and shall update firm contact information via the NASD Regulation Web Site or such other means as prescribed by the NASD.

Article VII

Board of Governors

Sec. 9. (b) The National Nominating Committee shall consist of no fewer than six and no more than nine members. The number of [Industry] Non-Industry committee members shall equal or exceed the number of [Non-Industry] Industry committee members. If the National Nominating Committee consists of six members, at least two shall be Public committee members. If the National Nominating Committee consists of seven or more members, at least three shall be Public committee members. No officer or employee of the Association shall serve as a member of the National Nominating Committee in any voting or non-voting capacity. No more than three of the National Nominating Committee members and no more than two of the Industry committee members shall be current members of the NASD Board.

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* As approved in Securities Exchange Act Release No. 39326 (November 14, 1997), 62 F.R. 62385 (November 21, 1997).

Special Notices to Members are published on an accelerated basis and distributed independently of monthly *Notice to Members* newsletters. Numerical sequencing may thus appear to contain gaps during a given monthly publication cycle. Such temporary gaps reflect a priority in the production process and will disappear at the conclusion of monthly electronic posting and print distribution.

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NASD *Notices to Members* (December 1996 to current) are also available on the Internet at *www.nasdr.com*.