[Release No. 34–37888; File No. SR–NASD–96–34]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Filing of Injunctive Relief Actions Under the Code of Arbitration Procedure

October 29, 1996.

Purusant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on September 12, 1996, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The NASD is proposing to amend Rule 10335 of the Code of Arbitration Procedure (''Code'')[2] to clarify that parties are required to expedite any proceeding covered by Rule 10335 where a court has issued temporary injunctive relief and that failure to expedite a proceeding under Rule 10335 will constitute a failure to arbitrate in violation of the NASD's rules. Below is the text of the proposed rule change. The text of the proposed rule is below. Proposed new language is in italic; proposed deletions are in brackets.

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Code of Arbitration Procedure

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Rule 10335 Injunctions

In industry or clearing disputes required to be submitted to arbitration pursuant to Section 8, parties to the arbitration may seek injunctive relief either within the arbitration process or from a court of competent jurisdiction. Within the arbitration process, parties may seek either an ''interim injunction'' from a single arbitrator or a permanent injunction from a full arbitration panel. From a court of competent jurisdiction, parties may seek a temporary injunction. A party seeking temporary injunctive relief from a court with respect to an industry or clearing dispute required to be submitted to arbitration pursuant to Rule 10201 shall simultaneously file *with the Department* a claim for permanent relief *under this Code* with respect to the same dispute [with the Director in the manner specified under the Code]*; provided however, that if an existing agreement between the parties permits the dispute to be arbitrated in another arbitration forum, the dispute may be filed in such other forum only if the other forum will expedite the proceedings on the dispute and the party seeking temporary injunctive relief requests and agrees to expedite the proceedings on the dispute in such other forum, unless the parties to the dispute agree in writing to waive this requirement.* This Rule 10335 contains procedures for obtaining an interim injunction. Paragraph (g) of this Rule relates to the effect of court-imposed injunctions on arbitration proceedings. If any injunction is sought as part of the final award, such request should be made in the remedies portion of the Statement of Claim, pursuant to Rule 10315(a).

II. Self-Regulatory Organization's Statement of the Purpose of and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The NASD has recently become aware of certain forum shopping practices that have developed since the codification of the injunctive relief provisions in Rule 10335 of the Code. Since Rule 10335 became effective on January 3, 1996, it has been invoked in over seventy (70) proceedings and has resulted in expedited resolution of some of those cases.[2] One of the most important provisions of Rule 10335 is the requirement that a party seeking injunctive relief in court must simultaneously file an arbitration action under the Code. The effect of the requirement is to bring the dispute under the Code and Rule 10335 relating to expedited proceedings. This provision prevents the party initiating the action from benefitting from any delayed resolution of a dispute that proceeds according to the normal arbitration schedule specified in the Code, where such delayed resolution may effectively preclude the arbitration of the dispute.[3]

The NASD Regulation, Inc.'s (''NASDR'') Office of Dispute Resolution has noted, however, that with respect to member-employee disputes, some firms seeking court injunctions are filing their arbitration proceedings with another self-regulatory organization (''SRO'') because either: (1) The agreement between member firms and employers in the Form U–4 permits them to arbitrate in the arbitration forum of any SRO with which the employee (and, therefore, the member) is registered; or (2) the member has a separate employment agreement with the employee that permits the arbitration of a dispute in another forum. The arbitration rules of other SROs do no universally provide for expedited arbitration proceedings, although such SROs may expedite a proceeding upon the request of both parties. Therefore, a case filed with another SRO may proceed according to the normal arbitration schedule specified in the rules of such SRO and the party having sought injunctive relief in court, unless it agrees to expedited proceedings, may gain an unfair advantage.

As noted above, the provision in the preamble of Rule 10335 requiring the party seeking an injunction in court to file simultaneously an arbitration proceeding under the Code was intended to prevent the filing of an arbitration under the regular rules as a delaying tactic in the ultimate resolution of a dispute after obtaining court-ordered injunctive relief. The NASD believes, therefore, that the practice of filing an arbitration claim with another SRO and not seeking expedited proceedings defeats the intent

[1] 15 U.S.C. 78s(b)(1).

[2] Formerly Section 47 of the Code of Arbitration Procedure.

[2] Disputes that arise under this provision are usually member-to-member raiding cases where one member hires a high producing registered representative away from another member.

[3] In a ''raiding'' case the former employer seeking to enforce a non-compete clause in the employment contract will typically seek a preliminary injunction that prevents the former employee from contacting clients that the former employer contends belongs to it until the dispute is finally resolved in arbitration. Because the typical arbitration case lasts approximately 11 months, the effect of the preliminary injunction is to prevent the former employee from contacting clients for at least one year. In such a case, if the dispute is ultimately resolved in favor of the registered representative there is little or no effective remedy for the delay; the opportunity to contact clients immediately after the registered representatives moves to the new firm is lost, along with the likelihood of retaining existing clients.

of Rule 10335—that is, to expedite the arbitration of matters eligible for arbitration between or among members and associated persons.

To give effect to the Rule's intent the NASD notes that under Articles III and IV of the By-Laws, members and associated persons agree to comply with all the provisions of the Association's rules. Rule 10201 of the Code of Arbitration Procedure expressly provides that disputes between or among members and associated persons must be arbitrated at the instance of any member or associated party to the dispute.

Under the Resolution of the NASD Board of Governors concerning the failure to act under the provisions of the Code of Arbitration Procedure, a member's failure to submit a dispute to arbitration may be deemed a violation of the NASD's Rules of Fair Practice. Because the failure to abide by the requirements of Rule 10335 can negate the ability to arbitrate disputes effectively, the NASD believes that the failure of a member or associated person to comply with the requirements of Rule 10335 and seek expedited resolution of a dispute should be considered to be a failure to submit to arbitration under the Code. If the Commission approves the proposed rule change, the NASD will announce to its membership upon the approval that failure to file a claim for permanent relief in compliance with Rule 10335 will constitute a failure to submit to arbitration, subjecting the member or associated person to disciplinary action.

Finally, the NASD is proposing to amend Rule 10335 to clarify that if a party to a dispute required to be submitted to arbitration seeks an injunction in court it must simultaneously file an arbitration claim *with the NASD* under the *NASD's Code*. The NASD is also proposing to amend rule 10335 to provide that if an existing agreement between the parties permits the dispute to be arbitrated in another forum, the dispute may be filed with the other forum only if the other forum will expedite the proceedings and the party seeking the injunction requests and agrees to expedite the proceedings. This provision is intended to recognize the contractual provisions that may permit the parties to arbitrate in another forum; the NASD does not intend to force the parties into the NASD's forum. The provision does intend to place the burden of expediting the proceedings on the party seeking injunctive relief, just as Rule 10335 places the burden on that party.

(2) Statutory Basis

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act[4] in that the proposed rule change will facilitate the arbitration process by clarifying the provisions requiring expedited proceedings in intra-industry disputes and emphasizes that the intent of the rule is to expedite such proceedings.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. The Commission requests that, in addition to any general comments concerning whether the proposed rule change is consistent with Section 15A(b)(6) of the Act, commenters specifically address the following issues:

1. The United States Supreme Court has stated that arbitration represents an appropriate form of dispute resolution, ''so long as the prospective litigant effectively may vindicate [his or her] * * * cause of action in the arbitral forum. * * *''[5] The NASD has suggested that the proposed rule change is necessary to provide fair arbitration proceedings. The Commission invites comment on whether parties temporarily enjoined by a court are effectively precluded from vindicating their rights in arbitration if they are not afforded expedited proceedings.

2. If the proposed rule change is adopted, it may affect the operation of arbitration fora sponsored by other SROs. For example, the New York Stock Exchange, Inc. currently offers expedited proceedings to parties in its arbitration forum, but it does not require that they accept them. Would coordinated SRO rulemaking be preferable to this NASD action? If so, should the Commission encourage other SROs to submit similar proposed rule changes?

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by November 26, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3(a)(12).[6]

Margaret H. McFarland,

Deputy Secretary.

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[4] 15 U.S.C. 78*o*–3.

[5] *See Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1991).

[6] 17 CFR 200.30–3(a)(12)

[Release No. 34–37894; File No. SR–NYSE–96–31]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Permanent Approval of Expiration Day Auxiliary Closing Procedures Pilot Program

October 30, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934