

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-38545; File No. SR-NASD-97-28]

Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change by the National Association of Securities Dealers, Inc. ("NASD") to Proposed Changes in the By-Laws of the NASD, NASD Regulation, Inc., The Nasdaq Stock Market, Inc., the Plan of Allocation and Delegation of Functions by the NASD to Subsidiaries, Membership Application Procedures, Disciplinary Proceedings, Other Proceedings, and Other Conforming Changes

April 24, 1997.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ notice is hereby given that on April 18, 1997,² the National Association of Securities Dealers, Inc. ("NASD") 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 self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The NASD is filing a proposed rule change to: (1) The By-Laws of the NASD; (2) the By-Laws of NASD Regulation, Inc. ("NASD Regulation"); (3) the By-Laws of The Nasdaq Stock Market, Inc. ("Nasdaq"); (4) the Plan of Allocation and Delegation of Functions By NASD to Subsidiaries ("Delegation Plan"); (5) Rule 0120; (6) Rule IM-2210-4; (7) the Rule 1010 Series; (8) the Rule 8000 Series; and (9) the Rule 9000 Series.³

Attached as Exhibit 1 is the text of the proposed rule change. In (1) the By-Laws of the NASD; (2) the By-Laws of NASD Regulation; (3) the By-Laws of Nasdaq; (4) the Delegation Plan; (5) Rule 0120; (6) Rule IM-2210-4; and (7) the

Rule 8000 Series, proposed new language is italicized; proposed deletions are in brackets. In the Rule 1010 Series and the Rule 9000 Series, the extensive nature of the proposed changes reduces the usefulness of a line-by-line analysis comparing the proposed new language with the proposed deleted language. If the proposed Rule 1010 Series and the proposed Rule 9000 Series are adopted, the Association proposes to rescind in full the current Rule 1010 Series and the current Rule 9000 Series, except the Rule 9700 Series and the Rule 9800 Series. The current Rule 9700 Series will remain in effect for a short period while Nasdaq seeks approval by the Commission to amend such rules, including their renumbering as Rule 4000 Series provisions.⁴

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 self-regulatory organization 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 self-regulatory organization 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

a. Introduction

The Association is proposing a comprehensive rule change to address three primary issues—how an entity or person becomes a member of the Association ("membership proceedings"); how the Association may discipline a member or a person associated with a member for misconduct; and, how NASD and NASD Regulation nominations and elections for certain board and committee positions are conducted. The proposed changes in the Association's membership proceedings are set forth in the proposed Rule 1010 Series. The proposed changes to the Association's array of proceedings to discipline a

member or a person associated with a member are set forth in the proposed Rule 9000 Series. The proposed changes to the election procedures are set forth in the proposed NASD By-Laws, Article VII, and proposed NASD Regulation By-Laws, Articles VI and VIII.

Both the proposed Rule 1010 Series and the proposed Rule 9000 Series will effect many changes to the procedures now used. The proposed Rule 1010 Series provides that NASD Regulation staff, rather than a District Committee,⁵ will make an initial decision on an application for membership. An Applicant may appeal a staff decision to the National Business Conduct Committee.⁶ The National Business Conduct Committee decision is subject to discretionary review by both the NASD Regulation Board and the NASD Board.⁷ The proposed rule change also sets forth a more detailed and comprehensive list of the documents and information that must be submitted with a membership application and sets forth more detailed, comprehensive, and objective standards to be used to determine whether an applicant should be admitted to membership. The proposed rule change also provides more procedural rights to applicants to ensure that applications are processed expeditiously, including limitations on the time within which the Association must issue membership decisions.

In the proposed Rule 9000 Series, definitions and certain rules of general applicability are set forth in the proposed Rule 9100 Series. Ordinary disciplinary proceedings are addressed in the proposed Rule 9200 Series, and appeals of these decisions are addressed in the proposed Rule 9300 Series.

⁵Terms that are defined in the proposed rule filing are capitalized in this discussion (e.g., the term "District Committee" means a district committee elected pursuant to Article VIII of the NASD Regulation By-Laws). (Proposed NASD Regulation By-Laws, Art. I(j).)

⁶The term "National Business Conduct Committee" means the committee of the Board of Directors of NASD Regulation that may be authorized and directed to act for the Board of Directors of NASD Regulation in a manner consistent with the By-Laws of NASD Regulation, the Rules of the Association, and the Delegation Plan with respect to (1) An appeal or review of a disciplinary proceeding; (2) a statutory disqualification decision; (3) a review of a membership proceeding; (4) a review of an offer of settlement, a letter of acceptance, waiver, and consent, and a minor rule violation plan letter; (5) the exercise of exemptive authority; and (6) such other proceedings or actions authorized by the Rules of the Association. (Proposed NASD Regulation By-Laws, Article IV, Section 4.14(h) and Proposed Rule 0120(m).)

⁷The term "NASD Board" means the Board of Governors of the NASD. (Proposed Rule 9120(r).) The term "NASD Regulation Board" means the Board of Directors of NASD Regulation. (Proposed Rule 9120(s).)

¹ 15 U.S.C. 78s(b)(1).

² On April 23, 1997, the Association filed a technical amendment to the proposed rule change. See letter from Alden S. Adkins, General Counsel, NASD Regulation, Inc. to Katherine A. England, Assistant Director, Division of Market Regulation, Commission ("Amendment No. 1").

³ Because the proposed rule change includes a number of amendments to the corporate documents of the NASD, NASD Regulation and Nasdaq, as well as numerous proposed rules, the three corporations collectively will be referred to as the "Association" for the purpose of this rule filing.

⁴ The proposed Rule 9500 Series will supersede the Rule 9600 Series. As part of the deletion of the current Rule 9600 Series, the current Rule 9630 Series (Expedited Remedial Proceedings) will be deleted. At a later date, however, the Association will propose a different approach for an expedited remedial proceeding.

In the proposed Rule 9100 Series, a number of procedural enhancements have been added to such Rules. These enhancements include requirements for notice and service, a detailed rule prohibiting *ex parte* communications generally, a rule requiring that adjudicatory and prosecutorial-like functions remain separated, and a rule allowing the removal of counsel for misconduct during a proceeding.

In the proposed Rule 9200 Series, there are significant changes proposed in the way a disciplinary proceeding is investigated, a complaint is brought, and a decision is made. A disciplinary proceeding will be investigated by the staff of NASD Regulation, the complaint will be brought by the Department of Enforcement⁸ rather than a District Committee or the Market Regulation Committee,⁹ and the matter will be heard and decided by a Hearing Panel,¹⁰ the chair of which is a Hearing Officer, a professional independent staff member of the Association.¹¹ The other

⁸The Commission notes that the NASD Regulation Board and the NASD Board will each have the authority to direct the Department of Enforcement to issue a complaint. (Proposed Rule 9211(b).)

⁹The term "Market Regulation Committee" means the committee of NASD Regulation designated to consider the federal securities laws and the rules and regulations adopted thereunder and various Rules of the Association and policies relating to:

- (1) the quotations of securities;
- (2) the execution of transactions;
- (3) the reporting of transactions; and

(4) trading practices, including rules prohibiting manipulation and insider trading, and those Rules designated as Trading Rules (Rule 3300 Series), the Nasdaq Stock Market Rules (Rule 4000 Series), other Nasdaq and NASD Market Rules (Rule 5000 Series), NASD Systems and Programs Rules (Rule 6000 Series), and Charges for Services and Equipment Rules (Rule 7000 Series). (Proposed Rule 9120(q).)

The Market Regulation Committee was formerly the Market Surveillance Committee of the NASD. As part of the reorganization, the committee was renamed the Market Regulation Committee. Pursuant to a resolution of the NASD Regulation Board dated May 8, 1996, NASD Regulation acknowledged responsibility for the Market Regulation Committee as a committee of NASD Regulation.

¹⁰A "Hearing Panel" is a decisional body issuing the "trial-level" decision in a disciplinary proceeding. It is composed of a Hearing Officer (as defined below) and two persons from the securities industry. They are referred to as "Panelists" (as defined below). (Proposed Rules 9120(o), 9231 and 9232.)

In some cases, an "Extended Hearing Panel," rather than a "Hearing Panel," will be the decisional body that issues the "trial-level" decision. (Proposed Rules 9120(i) and 9231(c).)

¹¹The term "Hearing Officer" means an employee of NASD Regulation who is an attorney and who is appointed by the Chief Hearing Officer to act in an adjudicative role and fulfill various adjudicative responsibilities and duties described in the Rule 9200 Series regarding disciplinary proceedings brought against members and associated person. (Proposed Rule 9120(n).) The term "Chief Hearing

Officer" means the Hearing Officer designated by the President of NASD Regulation to manage the Office of Hearing Officers, or his or her delegate. (Proposed Rule 9120(b).)

two persons, defined as Panelists, who will constitute the Hearing Panel (or, in certain cases, an Extended Hearing Panel), are current members of a District Committee, or current or former members of the securities industry who have served on a disciplinary hearing panel, the National Business Conduct Committee, or one of the corporate boards.¹² In some cases, one of the two Panelists may be a current or former member of the Market Regulation Committee.¹³ There are significant changes in the rights of Respondents to obtain evidence and for all Parties to resolve issues in pre-hearing conferences and by motion in order to streamline the hearing.¹⁴

Although that portion of the Rule 9300 Series concerning appeals and reviews has undergone significant changes, the appellate or review proceeding retains many of its former characteristics. Changes include the

Officer" means the Hearing Officer designated by the President of NASD Regulation to manage the Office of Hearing Officers, or his or her delegate. (Proposed Rule 9120(b).)

¹²In pertinent part, the term "Panelist" means a member of a Hearing Panel or an Extended Hearing Panel who is not a Hearing Officer. (Proposed Rule 9120(t).) A Panelist who serves on a Hearing Panel shall be associated with a member of the Association and shall be: "(A) a current member of a District Committee; (B) a person who previously served on a disciplinary hearing panel; (C) a former member of the National Business Conduct Committee; (D) a person who previously served on a disciplinary subcommittee of the National Business Conduct Committee, including a Subcommittee, an Extended Proceeding Committee, or their predecessor subcommittees; or, (E) a person who previously was a Director, a member of the Nasdaq Board of Directors, or a Governor, but does not sit currently on any of the boards." (Proposed Rule 9231(b)(1) (A)-(E).) The group of persons eligible to serve as Panelists on an Extended Hearing Panel is substantially the same group, but also includes certain persons retired from the securities industry. (Proposed Rule 9231(c)(1) (A) through (E).)

However, if the complaint alleges at least one cause of action involving a violation of a statute or a rule over which the Market Regulation Committee has jurisdiction, the Chief Hearing Officer may select as a Panelist a current member of the Market Regulation Committee or a former member of the Market Regulation Committee who previously served on a disciplinary hearing panel. (Proposed Rule 9231(b)(2).) See also Proposed Rule 9231(c)(2), providing for a Market Regulation Committee Panelists to serve on an Extended Hearing Panel, which is substantially similar to proposed Rule 9231(b)(2).

¹³See *supra* note 9.

¹⁴Although a number of procedural enhancements are proposed to the Rule 9000 Series, the NASD explicitly recognizes that a Party may appear *pro se*. The Chief Hearing Officer and all other Hearing Officers are trained to apply the Rule 9000 Series flexibly to permit a Party to appear *pro se* without suffering a disadvantage due to a failure to follow all aspects of a procedural rule. Nevertheless, all Parties are expected to comply with all of the Rules. Those who do not, and request flexible treatment from a Hearing Officer, must establish that the requesting Party made a good faith effort to comply with the rule or rules in question.

right of the Department of Enforcement of NASD Regulation to appeal a case and the right of a Party to cross-appeal.

Several other types of proceedings, which in general are more expedited than the ordinary disciplinary proceedings described above, are set forth in the proposed Rule 9400 Series and the proposed Rule 9500 Series.¹⁵ These proceedings currently are described in the Rule 9500 Series and the Rule 9600 Series.

In addition, in order to present the Commission a unified body of rules, the Association is proposing changes to various corporate documents and Rules of the Association to conform them to the proposed Rule 1010 Series and proposed Rule 9000 Series. Thus, proposed rule changes are also submitted for the By-Laws of the NASD, NASD Regulation, and Nasdaq; the Delegation Plan; Rule 0120; Rule 0121; proposed Rule IM-2210-4; and the Rule 8000 Series.

The following is a comprehensive list of the parts of the proposed rule change:

1. Proposed changes to the By-Laws of the NASD, NASD Regulation, and Nasdaq;
2. Proposed changes to the Delegation Plan;
3. Proposed changes to Rule 0120 and Rule 0121;
4. Proposed Rule IM-2210-4;
5. Proposed changes to the Rule 1010 Series;
6. Proposed changes to the Rule 8000 Series; and
7. Proposed changes to the Rule 9000 Series.

(i) *Background for Proposed Changes to Membership Application Procedures and Rules Providing Procedures for Disciplinary Proceedings and Other Proceedings*

The Association's request for the proposed changes to disciplinary proceedings instituted against members and their associated persons and other proceedings in the Rule 9000 Series follows a series of events that compelled the Association to undertake a review of the entire Rule 9000 Series. At the same time, the Association was requested to

¹⁵The proposed Rule 9400 Series and the Rule 9500 Series proceedings, for which the Association seeks temporary approval, are: (1) Proceedings for regulating the activities of a member experiencing financial or operational difficulties; (2) proceedings for approving or disapproving a change in business operations that will result in a change in exemptive status under SEC Rule 15c3-3; (3) proceedings for summary suspension of a member or persons associated with a member; (4) proceedings for the non-summary suspension, cancellation, or bar of a member or a person; and (5) proceedings for obtaining relief from the eligibility requirements of the NASD By-Laws and the Rules of the Association.

reexamine its membership application procedures.

On September 15, 1995, the NASD Board of Governors received a report from The NASD Select Committee ("Select Committee"), which the NASD had commissioned in 1994. *The Report of The NASD Select Committee on Structure and Governance To The NASD Board of Governors*, dated September 15, 1995 ("Select Committee Report"), was the culmination of nine months of exhaustive review of the operations of the NASD, and contained several recommendations regarding NASD's enforcement program and its disciplinary proceedings.¹⁶

The NASD Board approved the implementation of many of the recommendations of the Select Committee, as proposed or in augmented form. As is relevant to this rule filing, the NASD Board made the following determinations:¹⁷

1. The Association would amend its disciplinary procedures to appoint a Hearing Officer to preside over every contested disciplinary proceeding. (In contrast, the Select Committee had recommended that such persons be appointed for some cases.)

2. The Hearing Officer would exercise a key role during a disciplinary hearing. These responsibilities would include administering pre-hearing matters, including most motions, resolving procedural and evidentiary matters in a pre-hearing context, overseeing the settlement and discovery process prior to the commencement of a hearing, and guarding against *ex parte* communications in all matters. During a hearing, a Hearing Officer would chair the Hearing Panel, vote on all matters, rule on procedural and other legal

matters, advise industry Panelists on relevant legal principles, and ensure the maintenance of an appropriate record. Following the hearing, the Hearing Officer would conduct legal research, review briefs, provide legal guidance to the volunteer Panelists, analyze the transcript and exhibits, and draft a decision.

3. The Office of Hearing Officers would be separate from the other departments and staff of NASD Regulation, accountable only to the President of NASD Regulation. In addition, the Office of Hearing Officers would be operated separately from the appellate and oversight staffs of NASD Regulation and NASD. In the start-up phase, all Hearing Officers would be in one location to ensure uniform training, on-site management, and their separation from "prosecutorial staff" located in various Association offices nationwide.

4. The NASD would adopt rules providing for the separation of functions so that persons working as "prosecutorial staff" in the Association would not participate in meetings with an Adjudicator regarding a proposed decision (without the other Party present) and eliminating the "prosecutorial staff's" current role as writer of the disciplinary decision. In addition, the Association would adopt a more formal, detailed rule prohibiting *ex parte* communications generally in disciplinary proceedings.

5. The Association's "prosecutorial staff" would have the right to appeal a case.

6. By rule, the Association would make available to respondents in a disciplinary proceeding non-privileged documents in the staff's possession that are directly relevant to the dispute and those that contain exculpatory evidence, and would be required to do so a "reasonable" time before a hearing, *i.e.*, more than five days before a hearing. Also, by rule, the Association would provide for a motions practice in a disciplinary proceeding and for sanctions for misconduct during the course of a disciplinary proceeding.

7. The Association would eliminate the burden on the National Business Conduct Committee by reducing the National Business Conduct Committee's review of uncontested settlement offers, acceptance, waiver, and consent letters and, for the purpose of determining whether to call a disciplinary proceeding for review subsequently, every disciplinary proceeding.

All of the above Board decisions have been addressed in this rule filing.

In addition, on August 8, 1996, the NASD and the Commission entered into a settlement ("SEC Settlement").¹⁸ Pursuant to the SEC Settlement, the NASD agreed to fourteen undertakings ("Undertakings"). Under the general terms of some of the Undertakings, the

NASD became committed to review comprehensively and amend the Rule 9000 Series and the Rule 1010 Series. This rule filing primarily addresses Undertakings 3 through 5 and, to a lesser extent, Undertakings 1 and 6.¹⁹ In the discussion following, the Association references those proposed rules that specifically incorporate the above proposed improvements and address the particular requirements of the Undertakings.

(ii) Other Sources

In addition to incorporating the requirements of the Undertakings, the

¹⁹ *Id.* Undertakings 1, 3, 4, 5, and 6 of the SEC Settlement require the Association:

1. To implement and maintain at least fifty percent independent public and non-industry membership in its Board of Governors, the Board(s) of Governors or Directors of all of its subsidiaries and affiliates that exercise or have delegated self-regulatory functions, and the following committees: the National Nominating Committee, the Trading/Quality of Markets Committee, the Arbitration Committee, the Market Surveillance Committee, the National Business Conduct Committee, the Management Compensation Committee, and all successors thereto.

3. To institute the participation of professional Hearing Officers (who shall be attorneys with appropriate experience and training) to preside over disciplinary proceedings.

4. To provide for the autonomy and independence of the regulatory staff of the NASD and its subsidiaries such that the staff, subject only to the supervision of the Board of Governors of the NASD and the Boards of Directors of NASDR and Nasdaq, and any successor thereto, (a) has sole discretion as to what matters to investigate and prosecute, (b) has sole discretion to handle regulatory matters such as approval of applications for membership and the conditions and limitations that may be placed thereon, (c) prepares rule proposals, rule interpretations and other policy matters with any consultations with interested NASD constituencies made in fair and evenhanded manner, and (d) is generally insulated from the commercial interests of its members and the Nasdaq market. Among other things, the District Business Conduct Committees and the Market Surveillance Committee shall not have any involvement in deciding whether or not to institute disciplinary proceedings, nor shall the District Committees, or any subcommittee thereof, have any involvement in the review or approval of applications for membership in the NASD. Subject to the foregoing, the regulatory staff of the NASDR engaged in the disciplinary process may, solely on their own initiative, inform themselves on matters of market or other securities industry expertise by consulting with representatives of member firms or committees of the NASD or its subsidiaries.

5. To promulgate and apply on a consistent basis uniform standards for regulatory and other access issues, such as admission to the NASD as a member firm, and conditions to becoming a market maker; and institute safeguards to ensure fair and evenhanded access to all services and facilities of the NASD.

6. To ensure the existence of a substantial, independent internal audit staff which reviews all aspects of the NASD (including the regulatory function, the disciplinary process and the Nasdaq stock market and its systems) and reports directly to an audit committee of the NASD Board of Governors which includes a majority of public and non-industry Governors and is chaired by a public Governor.

¹⁶ The Select Committee recommended, among other things, that NASD allocate additional personnel and resources to enforcement, establish an Office of Hearing Officers, and hire professional Hearing Officers to serve as the chair of certain but not all Hearing Panels in disciplinary proceedings. The Select Committee also recommended that the NASD adopt a rule to prohibit *ex parte* contacts between the disciplinary Hearing Panels and Parties or their attorneys, expand the documentary discovery rights of respondents in NASD disciplinary proceedings to furnish respondents, at a reasonable time in advance of the initial hearing, with all non-privileged materials in the NASD's possession (including exculpatory evidence) directly relevant to the dispute, and provide, by rule, for a motions practice, and the power of a disciplinary Hearing Panel to sanction Parties or their counsel for frivolous practice or contumacious conduct. The Select Committee also recommended that the workload of the National Business Conduct Committee be reduced so that the National Business Conduct Committee could focus upon national enforcement policy issues and ensure uniformity in NASD membership application procedures. Select Committee Report, pp. C-25 through 26, V-1 through V-46, R-20 through R-25.

¹⁷ "Select Committee on Structure and Governance—Staff Implementation Plan," discussed November, 1995 ("Implementation Plan"). Other recommendations, such as one relating to the augmentation of the Association's resources to improve the disciplinary process, have been separately addressed.

¹⁸ Securities Exchange Act Rel. No. 37538 (August 8, 1996), 62 S.E.C. Docket 1346, 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.

recommendations of the Select Committee, and the NASD Board determination in drafting the revisions to the proposed Rule 1010 Series, the proposed Rule 8000 Series, and the proposed Rule 9000 Series, the Association has looked to other sources for the proposed revisions. First, the Association reviewed and incorporated, where possible, provisions in the SEC Rules of Practice recently adopted by the Commission for Commission-initiated enforcement and disciplinary proceedings, and proceedings to review the disciplinary proceedings of self regulatory organizations.²⁰ Second, the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, also served as a source.²¹ Third, the Federal Rules of Civil Procedure ("F.R.C.P.") served as an important reference. Fourth, the Association looked to the model administrative rules of the Administrative Conference of the United States (Dec. 1993).²²

(iii) *Rescission of Most Current Rules*

1. *Rescission of Current Rules.* The Association is proposing that if the proposed Rule 1010 Series (Proposed Rules 1010 through 1019) and the proposed Rule 9000 Series (Proposed Rules 9000 through 9536) are adopted, the current Rule 1010 Series and the current Rule 9000 Series (except the Rule 9700 through the Rule 9800 Series) be rescinded in full.

2. *Exception for Nasdaq-Related Rules.* In a separate rule filing, Nasdaq will propose to incorporate proceedings relating to Nasdaq in the Rule 4000 Series. In the interim, however, the Association is requesting that the current Rule 9700 Series remain in place. When Nasdaq submits the rule filing amending the current Rule 9700 Series, Nasdaq will request that the current Rule 9700 Series be rescinded.

(iv) *Transition Provision*

1. *Disciplinary Procedures And Related Proposed Rule Changes.* The Association proposes that the proposed rules relating to disciplinary proceedings (those governed by the proposed Rule 9100 Series, the proposed Rule 9200 Series, and the proposed Rule 9300 Series) generally become effective 30 days after the date of the **Federal Register** publication

approving the new procedures, subject to the following schedule of transition.²³

The Association proposes that the transition for disciplinary proceedings follow the implementation adopted by the Commission when the Commission adopted the revised Rules of Practice.²⁴ First, the Association proposes that the current Code of Procedure will apply to a disciplinary proceeding for which the complaint is served prior to the date of the **Federal Register** publication approving the proposed Rule 9000 Series. Thus, such a disciplinary proceeding will be completed pursuant to the current Code of Procedure. Second, the Association proposes to make the new disciplinary procedures set forth in the proposed Rule 9100 Series through the proposed Rule 9300 Series apply to a disciplinary proceeding for which the complaint is served on or after the date of the **Federal Register** publication approving the proposed Code of Procedure but before the effective date, but only if, within 30 days of the effective date, each Respondent in the proceeding submits a request in writing to the Chief Hearing Officer that the proceedings be conducted under the proposed Code of Procedure, as adopted. If each Respondent fails to make such a request, the disciplinary proceeding will proceed under the current Code of Procedure, as discussed above.

The rationale for this proposal is as follows:

a. *Retroactive Application of the Revised Code Would Create Significant Management and Logistical Problems.* As of March 31, 1997, there were approximately 400 formal disciplinary proceedings pending at various stages in the disciplinary process. The Association believes that retroactive application of the revised Code and the assignment of Hearing Officers to these cases immediately would create a significant management and logistical problem for the Office of Hearing Officers.²⁵

Irrespective of their procedural posture, given the volume of cases that

would be pending as of the effective date of the proposed Rule 9000 Series, the Association believes that assigning these cases to the Hearing Officers would cause serious case management problems. The Association further believes that assigning the pre-existing cases, along with the cases filed in due course after the Rule 9000 Series' effective date, would hinder the ability of the Hearing Officers to properly dispatch their responsibilities and duties within the time limits set in the Rule 9000 Series. For example, various deadlines in the proposed Rule 9000 Series likely could not be met if the Hearing Officer program were required to assume a backlog of more than 400 cases.

b. *Retroactive Application Causes Problems in Proceedings.* The revised Rule 9000 Series represents a substantial change from the existing rules governing disciplinary proceedings, and the scope of the proposed changes militates against retroactive application of the Rule 9000 Series. For example, the proposed Rule 9000 Series contemplates certain pre-hearing procedures and motions that are not present in the existing rules. Also, in many of the previously-filed proceedings, the proposed Rule 9000 Series' time limitations for document disclosure and pre-hearing motions or procedures already will have passed. The difficulty is further exacerbated if procedural rulings that are not consistent with the new Rule 9000 Series already have been made.

Further, if Hearing Officers were not required to apply either the new or old rules to the cases filed prior the effective date of the new Rule 9000 Series, the Hearing Officers would be required to develop and apply rules on an *ad hoc* basis to address the specific issues raised in each individual case. Finally, the Association believes that fairness dictates that Respondents be given notice in advance of the filing of a complaint of all procedural rules that will govern the authorization and issuance of the complaint and the adjudicative process.

2. *Membership Application Procedures.* Unlike disciplinary procedures, where NASD Regulation staff determines when and if to initiate a proceeding, applicants for membership decide when and if to file an application for membership, request a modification of an existing membership agreement, or request approval of a change in ownership, control, or operations. For this reason, the Association believes that the transitional issues with respect to member admission proceedings are less

²⁰ SEC Rules of Practice, codified at 60 FR 32738 (June 23, 1995), 17 CFR 201.100 *et seq.*

²¹ 5 U.S.C. 551 *et seq.*

²² Model Adjudication Rules, Administrative Conference of the United States (Dec. 1993) ("MAR").

²³ As noted above, proposed changes to Rule 0120, Rule 0121, and the Rule 8000 Series, and proposed Rule IM-2210-4 would also be governed by this schedule of effectiveness and transition.

²⁴ See SEC Rules of Practice, *supra* note.

²⁵ Assuming that 50 percent of the 412 pending cases were to settle, involved defaults, or otherwise could be disposed of without the need for formal hearings, 206 active cases would be required to be assigned to six Hearing Officers who have been hired to date, a docket of 34 cases per Hearing Officer. Based on historical data and discussions with staff in district offices, the Association anticipates approximately 200 fully litigated cases per calendar year. These cases, of course, would need to be considered in addition to the pending cases.

complex and, therefore, it proposes that the new procedures apply to applications filed, modifications requested, or requests for approval of ownership or other changes initiated 30 days after the date of the **Federal Register** publication approving the new procedures. The 30 day period is intended to give applicants and staff the opportunity to make any final adjustments to the new procedures.

b. Proposed Changes to NASD, NASD Regulation, and NASDAQ By-Laws

The Association proposes to revise the By-Laws of the NASD, NASD Regulation, and Nasdaq to conform them to the Implementation Plan, the Undertakings, the Delegation Plan and the proposed changes to the Rules of the Association. Changes to punctuation and other minor, non-substantive changes are not described. The Association proposes to revise the NASD By-Laws in the following ways:

(i) *Proposed Changes to NASD By-Laws*²⁶

Article I. Definitions

The Association proposes several amendments to Article I, which sets forth definitions for the NASD By-Laws. First, amendments to several existing definitions and new defined terms are proposed, but only to reflect drafting conventions adopted as a result of the reorganization of the NASD into three legal entities or other drafting conventions. Those definitions are: "Board"; "branch office"; "day"; "dealer"; "Delegation Plan"; "member"; "municipal securities dealer"; "NASD"; "NASD Regulation"; "NASD Regulation Board"; "Nasdaq"; "Nasdaq Board"; and "person associated with a member" or "associated person of a member." (Proposed NASD By-Laws Article I (c), (d), (g), (h), (i), (q), (t), (u), (v), (w), (x), (y), and (cc).)

Second, the Association proposes to add the following definitions: "district"; "Industry Director"; "Industry Governor" or "Industry committee member"; "National Nominating Committee"; "Non-Industry Director"; "Non-Industry Governor" or "Non-Industry committee member"; "Public Director"; "Public Governor" or "Public committee member." (Proposed NASD By-Laws Article I (j), (n), (o), (z), (aa), (bb), (dd) and (ee).) All of these terms, except "district," are currently defined

or described in the Delegation Plan.²⁷ The Association proposes to add these definitions to the NASD By-Laws (and where applicable, to the NASD Regulation and Nasdaq By-Laws) because the Association proposes to move the related, substantive provisions of the Delegation Plan to the By-Laws of the appropriate corporate entity.

Third, the Association proposes to delete the definition "rules of the Corporation" (current Article I(v)) to avoid confusion with the more commonly used, but differently defined term, "Rules of the Association." The term "rules of the Corporation" currently is used to refer collectively to the NASD Certificate of Incorporation, the NASD By-Laws, and the Rules of the Association. Given the restructuring of the NASD into three legal entities, such a collective term for all of the corporate documents of the Association would not be useful. Thus, under the proposed rule change, where a particular provision must be consistent with a particular corporate document, that document is specified. Similarly, the Association also proposes to delete the definitions of "Boards" and "Corporations" and instead refer to each corporate entity specifically where intended (current Article I (d) and (i)).

Fourth, the Association proposes to amend the definition of the term "Rules of the Association" to conform it to proposed Rule 0120, which defines the term to include the numbered rules set forth in the NASD Manual beginning with the Rule 0100 Series, as adopted by the NASD Board of Governors pursuant to the NASD By-Laws.

Finally, the Association proposes to delete the cross-reference in the introductory sentence of Article I to the "rules of the Corporation." An appropriate cross-reference from the Rules of the Association to the NASD By-Laws is proposed in Rule 0121.

Article II. Offices

The Association proposes to add a new Article II that states the location of the registered corporate office of the NASD. This change makes the NASD By-Laws consistent with the NASD Regulation and Nasdaq By-Laws, which both include such a provision.

Article III. Qualifications of Members and Associated Persons

Current Article II, Qualifications of Members and Associated Persons, which addresses qualifications of members and associated persons, is renumbered as proposed Article III. The Association proposes to conform

Section 3, which addresses ineligibility of certain persons for membership or association, to the proposed Rule 9530 Series, which sets forth rules for the Association's eligibility proceedings. Specifically, the Association proposes to amend Section 3(d) to clarify that *members* may use eligibility proceedings to obtain relief from the Association's eligibility requirements, e.g., to resolve a statutory disqualification problem. As written, Section 3(d) could be read to suggest that a broker or dealer seeking admission to the Association could use such proceedings to obtain relief from eligibility requirements as a means of gaining admission to the Association. That is not the Association's practice or the provision's intent, and Section 3(d) is amended to remove this potential ambiguity.

The Association proposes to delete Section 3(d)(2), which addresses the status of members or persons engaged in eligibility proceedings, because that subject is addressed in the proposed Rule 9530 Series. (The Association seeks temporary approval of the proposed Rule 9400-9500 Rules Series, including the proposed Rule 9530 Series.) This change does not result in a substantive change in the Association's practice. Specifically, if a person is already associated with a member at the time a statutory disqualification is discovered, the person may remain associated with the member until final action is taken by the Association under the proposed Rule 9500 Series. If the person is a prospective employee, the person may not become associated with the member until the Association takes final action under the proposed Rule 9530 Series.

The Association proposes to add a new Section 3(g) to clarify that the Board may delegate its authority under Section 3 in a manner not inconsistent with the Delegation Plan.

Finally, the Association proposes to amend Section 4(h) to conform it to the Act.

Article IV. Membership

Current Article III, Membership, is renumbered as proposed Article IV. The Association proposes to conform Section 7 to changes in the proposed Rule 1010 Series, which sets forth procedures for membership applications and changes in a member's operations.

Article V. Registered Representatives and Associated Persons

Current Article IV, Registered Representatives and Associated Persons, is renumbered as proposed Article V.

²⁶ All changes proposed to the NASD By-Laws are changes to the NASD By-Laws temporarily approved by the Commission on November 15, 1996. See Securities Exchange Act Rel. No. 37956 (November 15, 1996), 61 FR 59265 (November 21, 1996).

²⁷ See Delegation Plan, I.A. and I.C.

Article VI. Dues, Assessments, and Other Charges

Current Article V, Dues, Assessments, and Other Charges, is renumbered as proposed Article VI. The Association proposes to add a new Section 5 that states that the NASD may delegate its authority regarding dues, assessments, and other charges in a manner not inconsistent with the Delegation Plan.

Article VII. Board of Governors

Current Article VI, Board of Governors, is renumbered as proposed Article VII. The Association proposes to amend Section 1(c) to clarify the Board's authority to delegate its powers. Specifically, the Association proposes to amend Section 1(c) to provide that to the fullest extent permitted by applicable law, the Restated Certificate of Incorporation, and the By-Laws, the NASD may delegate any power of the NASD or the Board to a committee appointed pursuant to proposed Article IX, Section 1, the NASD Regulation Board, the Nasdaq Board, or NASD staff in a manner not inconsistent with the Delegation Plan. The Association proposes to add parallel provisions to the NASD Regulation By-Laws (Proposed Article IV, Section 4.1) and the Nasdaq By-Laws (Proposed Article IV, Section 4.1).

The Association proposes to amend Section 2. Section 2 authorizes the Board to cancel or suspend the membership of a member or suspend the association of a person associated with a member for failure to provide requested information. The proposed amendment provides for reinstatement pursuant to the Rules of the Association. (Proposed Rule 8220.) The Association also proposes to delete the provision authorizing delegation to the Chief Executive Officer and replace it with a delegation provision consistent with other provisions set forth in the proposed NASD By-Laws. Specifically, the Association proposes that the Board be permitted to delegate its authority under this Section in a manner not inconsistent with the Delegation Plan and otherwise in accordance with the Rules of the Association.

The Association proposes to amend Section 4, which addresses the composition and qualifications of the Board, by adding provisions concerning the number of governors and the ratio of Industry, Non-Industry, and Public Governors that are currently set forth in the Delegation Plan.²⁸

The Association proposes to add a new Section 6, which addresses the

disqualification of a Board member. Proposed Section 6 requires a Governor to immediately resign or be automatically removed from office if the Board determines that: (a) The Governor no longer satisfies the classification (Industry, Non-Industry or Public Governor) for which the Governor was elected; (b) failure to remove the Governor would violate the compositional requirements of the Board set forth in proposed Section 4; and (c) the Governor has a remaining term of office of more than six months. Proposed Section 6 is intended to replace a provision currently in the Delegation Plan that provides for "automatic removal" if a Governor no longer satisfies the classification for which he or she was elected, without describing any process for such removal.²⁹ The Association proposes this rule change to avoid any potential for the Board to take an *ultra vires* action in the event that a Governor failed to notify the Board promptly of a change in his or her classification and continued to sit on the Board and cast votes before such removal took place.

Current Section 6, which addresses the filling of vacancies on the Board, is renumbered as proposed Section 7. The Association proposes to move the current provisions of the Delegation Plan that address the filling of vacancies to this Section and to provide further that if the remaining term of office of the governorship to be filled is more than one year, then the replacement Governor must stand for election in the next annual election.³⁰

Current Section 7, which describes nomination and election procedures, is expanded and renumbered as proposed Sections 9 through 14. Proposed Section 9 sets forth the powers of the National Nominating Committee. The National Nominating Committee nominates Industry, Non-Industry, and Public Governors for each vacant or new Governor position on the NASD Board and Industry, Non-Industry, and Public Directors for each vacant or new position on the NASD Regulation Board and the Nasdaq Board.³¹ Proposed Section 9 also includes and clarifies the compositional requirements for the National Nominating Committee, which are currently set forth in the Delegation Plan.³² Finally, Proposed Section 9 includes a new provision that requires the Secretary of the NASD to collect from each nominee for Governor and each nominee for Director of the NASD

Regulation Board or Nasdaq Board such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, or Public Governor or Director. The Association proposes that the Secretary certify to the National Nominating Committee each nominee's classification to ensure that the compositional requirements of each Board are met.

Proposed Section 10 largely parallels current Section 7(c) and adds provisions regarding contested elections currently located in the Delegation Plan. In addition to clarifying the procedures for a contested election, the Association also proposes to change the number of members that must sign a petition to support adding a candidate to the ballot for NASD Board elections. Currently, a person seeking to be added to a ballot must obtain the support of two percent of the members of the NASD. The Association proposes to increase the level to three percent of the members, one-half of which must have their principal place of business outside of the district where the person who wishes to contest the election is employed. As is currently the case, a petition may only be signed by a member's Executive Representative. Proposed Section 10 also transfers authority to certify the additional candidate from the National Nominating Committee to the Secretary. Because the Secretary maintains the records of Executive Representatives and, under the proposed rule change would be charged with reviewing information regarding the classification (Industry, Non-Industry, or Public) for each governorship, the Association believes that it would be more efficient for the Secretary to exercise this authority.

Proposed Sections 11 and 12 are new provisions that parallel new provisions added to the NASD Regulation and Nasdaq By-Laws. Proposed Section 11 prohibits the NASD, the Board, the National Nominating Committee, other committees, and NASD staff from taking any official position regarding a contested nomination or election under the proposed NASD or NASD Regulation By-Laws. Proposed Section 11 permits Board and committee members to communicate their views with respect to a candidate in a contested election only if the Board or committee member acts solely in his or individual capacity and disclaims any intention to communicate in any official capacity. Administrative support to the candidates in a contested NASD election is limited to two mailings; any other administrative support in any

²⁹ See Delegation Plan, I.C.5.b.

³⁰ See Delegation Plan, I.C.5.

³¹ See Delegation Plan, I.C.2.b.

³² See Delegation Plan, I.C.2.b.(1).

²⁸ See Delegation Plan, I.A. and I.C.

NASD or NASD Regulation contested election or nomination is prohibited.

Proposed Section 13 is largely parallel to current Section 7(a), with conforming amendments to proposed Sections 9 through 12.

Proposed Section 14 is a new procedure that requires each Governor to update the information submitted to the NASD Secretary under proposed Section 9(e) regarding his or her classification as an Industry, Non-Industry, or Public Governor at least annually and upon request of the Secretary and to report immediately to the Secretary any change in such classification. Parallel provisions are proposed for the NASD Regulation and Nasdaq By-Laws. These submissions and reports will help the Association ensure that the compositional requirements of the Board are maintained.

The Association proposes to amend current Section 8, which address meetings, quorums, and voting of the Board, to provide that a quorum shall consist of a majority of the Board, including not less than 50 percent of the Non-Industry Governors. This proposed change would ensure that Industry Governors alone could not constitute or dominate a quorum of the Board, and thereby thwart the balanced compositional requirements of the Board under proposed Section 4. Current Section 8 is not renumbered.

Article VIII. Officers, Agents, And Employees

Current Article VII, Officers, Agents, and Employees, is renumbered as proposed Article VIII. The Association proposes to amend Section 1 to require that the Board elect a Secretary. Under current Section 1, the Board is authorized, but not required, to do so. Given the number of responsibilities assigned to the Secretary under the proposed By-Laws and the Board's practice of always electing a person to such position, the Association proposes to require that a Secretary be elected.

The Association proposes to amend Section 3 to provide that agents and employees shall be under the supervision and control of the officers, unless the Board, by resolution, provides that an agent or employee shall be under the supervision and control of the Board. Generally, agents and employees are under the supervision and control of the officers, but the Board may wish in certain circumstances to retain control over an employee or agent, e.g., as in Section 4, when the Board determines that it wishes to retain counsel.

The Association proposes to move current Section 5, which provides for compensation of Board and committee members, to its own Article, proposed Article X, Compensation of Board and Committee Members.

The Association proposes to add new Sections 5, 6, and 7 to this Article to conform it to proposed Article 7 of the NASD Regulation By-Laws and proposed Article 6 of the Nasdaq By-Laws. Proposed Section 5 permits the Board to delegate the duties and powers of any officer to any other officer. Proposed Section 6 provides for the resignation and removal of officers. Proposed Section 7 permits the NASD to secure the fidelity of its officers, agents, and employees by bond or otherwise.

Article IX. Committees

Current Article VIII, Committees, which addresses the formation and powers of committees, is renumbered as proposed Article IX. The Association proposes to amend Section 1 to cross-reference proposed Article VII, Section 1(c), which limits the Board's authority to delegate its powers and authority.

The Association proposes to add a new Section 2, which is designed to help the Association maintain the compositional requirements of certain committees. Undertakings 1 and 6 under the SEC Settlement require certain committees³³ to have a particular balance of Industry, Non-Industry, and Public committee members. For committees consisting solely of one or more Governors or one or more Directors, the compositional requirements are set forth in the By-Laws of the appropriate corporation; for committees that have members other than Governors or Directors, the compositional requirements are set forth in the Delegation Plan.³⁴ To help ensure that compositional requirements are maintained for committees appointed by the NASD Board, proposed Section 2

³³ Undertaking 1 sets forth compositional requirements for "the National Nominating Committee, the Trading/Quality of Markets Committee, the Arbitration Committee, the Market Surveillance Committee, the National Business Conduct Committee, the Management Compensation Committee, and all successors thereto." Undertaking 6 sets forth compositional requirements for an audit committee. The current names of such committees are the National Nominating Committee, the Quality of Markets Committee, the National Arbitration and Mediation Committee, the Market Regulation Committee, the National Business Conduct Committee, the Management Compensation Committee, and the Audit Committee. See *supra* note 19.

³⁴ See Delegation Plan, I.C.2.b.(1), I.D.2., and I.E.2. The sole exception is the Management Compensation Committee, a committee of the NASD Board. The Management Compensation Committee's compositional requirements are set forth in the Delegation Plan.

authorizes the Secretary to collect from each prospective member of a committee that must be balanced such information as is reasonably necessary to serve as the basis for a determination of the prospective committee member's classification as an Industry, Non-Industry, or Public committee member. The Secretary must certify to the Board each prospective committee member's classification. Each committee member must update the information submitted at least annually and upon request of the Secretary of the NASD, and shall report immediately to the Secretary any change in such classification. Parallel provisions are set forth in proposed Article 4, Section 4.14(i) of the NASD Regulation By-Laws and proposed Article 4, Section 4.14(g) of the Nasdaq By-Laws.

Current Section 2, which addresses removal of a committee member, is renumbered as proposed Section 3 and amended to clarify that a committee member can only be removed by majority vote of the whole Board.

The Association proposes to add new sections to authorize the appointment of an Executive Committee and to require, in keeping with Undertaking 6, the appointment of an Audit Committee. Proposed Section 4 authorizes the NASD Board to appoint an Executive Committee. Proposed Section 4 requires the Chief Executive Officer of the NASD to be a member of the Executive Committee and requires that the remaining members reflect the balance of Industry and Non-Industry Governors on the Board. Proposed Section 5 contains the provisions relating to the Audit Committee currently found in the Delegation Plan.³⁵

Finally, the resolution concerning interpretations and explanations is deleted because the NASD Board intends to rescind it. The resolution no longer conforms to Association practice and is contrary to Undertaking 4.

Article X. Compensation of Board and Committee Members

As noted previously, current Article VII, Section 5, which addresses compensation of Board and committee members, is renumbered as proposed Article X, Compensation of Board and Committee Members.

Article XI. Rules

Current Article IX, Rules, which authorizes the NASD to adopt rules, is renumbered as proposed Article XI. No substantive change is proposed.

³⁵ See Delegation Plan, I.D.

Article XII. Disciplinary Proceedings

Current Article X, Disciplinary Proceedings, which authorizes disciplinary proceedings, is renumbered as proposed Article XII. No substantive change is proposed.

Article XIII. Powers of Board to Impose Sanctions

Current Article XI, Powers of Board to Prescribe Sanctions, which authorizes the Board to impose sanctions, is renumbered as proposed Article XIII. The Association proposes to amend Section 1(e) and add a new Section (2) to clarify that any delegation under the proposed Article must be in conformity with the Delegation Plan.

Article XIV. Uniform Practice Code

Current Article XII, Uniform Practice Code, which authorizes the Board to adopt a Uniform Practice Code, is renumbered as proposed Article XIV. The Association proposes to amend Section 2 to provide that the Board may delegate its authority with respect to administering the Code to the NASD Regulation Board and Nasdaq Board in accordance with the Delegation Plan.

Article XV. Limitation of Powers

Current Article XIII, Limitation of Powers, which sets forth limitations on the Board's powers, is renumbered as proposed Article XV. The Association proposes to rescind the resolution that follows current Article XIII, Section 2, which provides for the use of the NASD's name by members, and move the provisions of the resolution to proposed IM-2210-4.

The Association proposes to amend Section 4, which addresses conflicts of interest. The Association proposes to amend Section 4 by redesignating it as Section 4(a) and therein prohibiting any Governor or committee member from directly or indirectly participating in any adjudication of the interests of any party if the Governor or committee member has a conflict of interest or bias, or if circumstances otherwise exist where his or her fairness might reasonably be questioned. Proposed Section 4(a) further requires the Governor or committee member to recuse himself or herself or be disqualified in accordance with the Rules of the Association (e.g., Rule 9160). Current Section 4 simply references the Rules of the Association; current Rule 9131 provides for disqualification of the Governor or committee member if a matter substantially affects his or her interests or the interests of any person in whom he or she is directly or indirectly interested. For a more detailed

discussion of the conflict standard, see Part h, Section (xiii) of this rule filing.

In addition, the Association proposes to add a new Section 4(b) to address conflicts of interests in non-adjudicatory matters in a manner consistent with the By-Laws for the NASD Regulation Board and the Nasdaq Board. Proposed Section 4(b) provides that no contract or transaction between the NASD and a Governor or officer, or between the NASD and any other entity in which a Governor or officers is a director or officer, or has a financial interest, shall be void or voidable solely for this reason if: (i) The material facts pertaining to the Governor's or officer's relationship or interest and the contract or transaction are disclosed or are known to the Board or the committee, and the Board or committee in good faith authorizes the contract or transaction by the affirmative vote of a majority of the disinterested Governors; or (ii) the material facts are disclosed or become known to the Board or committee after the contract or transaction is entered into, and the Board or committee in good faith ratifies the contract or transaction by the affirmative vote of a majority of the disinterested Governors. Only disinterested Governors may be counted in determining the presence of a quorum at the portion of a meeting of the Board or of a committee that authorizes the contract or transaction.

Finally, Section 6, which limited the Association rulemaking authority over government securities activities, is deleted to conform the By-Laws to changes previously made to the Association's authority over the government securities activities of its members.

Article XVI. Procedure for Adopting Amendments to By-Laws

Current Article XIV, Procedure for Adopting Amendments to By-Laws, is renumbered as proposed Article XVI.

In proposed Article XVI, the Association proposes to provide more persons with the ability to propose an amendment to the NASD By-Laws. Currently, a Governor, a district committee, or 25 members may propose amendments to the By-Laws. Proposed Article XVI permits a committee appointed by the Board, the NASD Regulation Board of Directors, or the Nasdaq Board of Directors, by resolution, to propose amendments to the NASD By-Laws. In addition, proposed Article XVI permits the Chief Executive Officer of the NASD, the President of NASD Regulation, and the President of Nasdaq to propose amendments. The Association proposes to permit the NASD Regulation and

Nasdaq Boards to propose changes because much of their authority under the Delegation Plan derives from the NASD By-Laws. The Association proposes to authorize the most senior officer of each corporate entity to propose changes to further the purpose of Undertaking 4, which requires the Association to provide the staff with autonomy and independence in preparing rule proposals, many of which are authorized or affected by the NASD By-Laws. Finally, the Association proposes to delete authority for the district committees to propose changes to the NASD By-Laws because the Association believes that under the new corporate structure, proposals by the district committees should be presented to the NASD Regulation Board, which in turn should determine what proposals are presented to the NASD Board.

The Association files any change to the By-Laws or Certificates of Incorporation of the NASD, NASD Regulation, or Nasdaq that constitute a proposed rule change under the Act with the Commission.

Article XVII. Corporate Seal

Current Article XV, Corporate Seal, is renumbered as proposed Article XVII. There are no substantive changes to proposed Article XVII.

Article XVIII. Checks

Current Article XVI, Checks, is renumbered as proposed Article XVIII. There are no substantive changes to proposed Article XVIII.

Article XIX. Annual Financial Statement

Current Article XVII, Annual Financial Statement, is renumbered as proposed Article XIX. There are no substantive changes to proposed Article XIX.

(ii) Proposed Changes to NASD Regulation By-Laws

NASD Regulation proposes to amend the By-Laws of NASD Regulation as follows:

Description of Proposed Rule Change

NASD Regulation adopted its current By-Laws on July 19, 1996. These By-Laws were drafted to comply with the requirements of Delaware law and have not previously been filed with the Commission. The Association proposes to amend the NASD Regulation By-Laws in the manner described previously in the introduction to Section II. In addition, the Association proposes to explicitly recognize the NASD as the sole stockholder of NASD Regulation capital stock and add detailed

procedures for regional nominations and district elections. Significant changes to the NASD Regulation By-Laws are described below. Minor, non-substantive changes and changes to reflect drafting conventions are not described.

Article I. Definitions

First, a new Article I, entitled "Definitions," is proposed. Current Article I is renumbered as proposed Article II.

The Association proposes that the By-Laws for each corporate entity have a free-standing set of definitions.

Therefore, the Association proposes to add definitions for the following terms, which conform to the definitions in proposed Article I of the NASD By-Laws: "Delegation Plan"; "Executive Representative"; "Industry Director" or "Industry committee member"; "NASD Regulation"; "National Nominating Committee"; "Non-Industry Director" or "Non-Industry committee member"; and "Public Director" or "Public committee member." (Proposed Section 1.1 (h), (o), (q), (u), (v), (w), and (x).)

The Association proposes to include the following definitions only in the NASD Regulation By-Laws: "District Committee"; "District Director"; "District Nominating Committee"; "district office"; "Independent Agent"; and "Regional Nominating Committee." These terms relate to the election procedures set forth in proposed Article VI and VIII, and therefore are not used in the proposed NASD and Nasdaq By-Laws.

In addition, the Association proposes to add the following definitions for clarity and to conform to the drafting conventions adopted generally, but which do not result in any substantive change: "Board"; "day"; "Delaware law"; "Director"; "NASD"; "NASD member"; and "Rules of the Association" or "Rules." (Proposed Section 1.1 (b), (e), (g), (i), (r), (t), and (z).)

Article II. Offices

Current Article I, Offices, is renumbered as proposed Article II. Sections 1.1 and 1.2 are renumbered as Sections 2.1 and 2.2. There are no substantive changes in proposed Article II.

Article III. Meetings of Stockholders

Current Article II, Meetings of Stockholders, is renumbered as proposed Article III. Current Article II sets forth general provisions for meetings of stockholders consistent with Delaware law. In proposed Article III, in recognition of the fact that NASD

Regulation has only one stockholder, the NASD, the Association proposes to delete all of the general provisions regarding meetings of stockholders and retain only the provision on which NASD Regulation generally relies, namely obtaining the stockholder's written consent for any action that is required or permitted to be taken at a stockholder meeting. Thus, Sections 2.1 through 2.6 are deleted, and Section 2.7 is renumbered as 3.1.

Article IV. Board of Directors

Current Article III, Board of Directors, is renumbered as proposed Article IV. Sections 3.1 through 3.7 are renumbered as Section 4.1 through 4.7. Proposed Section 4.1 sets forth the general powers of the Board. The Association proposes to conform the Board's authority to delegate its powers to the delegation authority set forth in proposed Article VII, Section 1(c) of the NASD By-Laws, *i.e.*, to the fullest extent permitted by applicable law, the Restated Certificate of Incorporation, and the By-Laws, the Board may delegate any of its powers to a committee appointed under proposed Section 4.14 or to NASD Regulation staff in a manner not inconsistent with the Delegation Plan.

The Association proposes to amend Sections 4.2 and 4.3, Number of Directors and Qualifications, to set forth the compositional requirements and discussions of the classifications of Directors (Industry, Non-Industry, and Public Directors) of the Board currently found in the Delegation Plan. Proposed Section 4.3(b) is a new provision requiring the Board to elect a Chair and Vice Chair from among its members. Proposed Section 4.3(c) is a new provision requiring Directors to provide the Secretary of the NASD with updated information regarding the Director's classification at least annually and upon request and to report any change in the classification to the NASD Secretary immediately. This provision is parallel to proposed Article VII, Section 14 of the NASD By-Laws.

Proposed Section 4.4(a), which provides for the election of Directors, is amended to reflect the NASD's role as sole stockholder. Proposed Section 4.4(b) describes briefly the roles of the National Nominating Committee and the Regional Nominating Committee in the election of NASD Regulation Directors. As described in proposed Article VII, Section 9 of the NASD By-Laws, the National Nominating Committee is appointed by the NASD Board to nominate Governors for the NASD Board and Directors for the NASD Regulation and Nasdaq Boards. NASD Regulation also has a distinctive

nominating process for those Industry Directors who represent a particular region. The regional nominating process culminates in the presentation of a candidate to the National Nominating Committee, which, as the final decision maker for all nominations, may accept or reject such candidate. The NASD Board, in turn, may elect or reject the candidates nominated by the National Nominating Committee. The regional nominating process is described in proposed Article VI of the NASD Regulation By-Laws.

Proposed Section 4.5 includes new provisions specifying how the terms of office of Director shall expire so that, in general, one-third of the Board is elected each year.

Proposed Section 4.7 clarifies that a Director may be removed from office only by a majority vote of the NASD Board.

Proposed Section 4.8, Disqualification, and Proposed Section 4.9, Filling of Vacancies, are new. Current Sections 3.8 through 3.11 (Quorum and Voting, Regulation, Meetings, Notice of Meetings, respectively) are renumbered as proposed Sections 4.10 through 4.13. Current Section 3.12, Conflicts of Interest, is renumbered as proposed Section 4.15. Current Section 3.13, Committees of the Board of Directors, is renumbered as proposed Section 4.14 and retitled "Committees." Current Section 3.12, Action Without Meeting, is renumbered as proposed Section 4.16.

Proposed Sections 4.8, 4.9, 4.10, and 4.15, which set forth provisions for disqualification, filling of vacancies, quorums and conflicts of interest, are designed to parallel proposed Article VII, Sections 6 through 8, and proposed Article XV, Section 4 of the NASD By-Laws.³⁶

There are no substantive changes in proposed Section 4.11, Regulation; proposed Section 4.12, Meetings; or proposed Section 4.16, Action Without Meeting.

In proposed Section 4.13, the Association proposes to increase the amount of time required for mail notice of a meeting from two to seven days, to clarify that any of the permissible forms of notice described may be used for any meeting of the Board, and to add a

³⁶One difference is noteworthy in the conflicts of interest provision. The proposed By-Laws for NASD Regulation and Nasdaq provide that a transaction also is not void or voidable if the material facts pertaining to the Director's or officer's relationship or interest and the contract or transaction are disclosed or are known to the stockholder, *i.e.*, the NASD, and the contract or transaction is approved in good faith by vote of the stockholder. (Proposed NASD Regulation and Nasdaq By-Laws Article IV, Section 4.15.)

subsection that provides that any meeting of the Board is a legal meeting without any prior notice if all Directors are present.

Proposed Section 4.14 (current Section 3.13 as renumbered) sets forth new provisions regarding committees. Proposed Section 4.14(a) authorizes the Board to appoint committees. Proposed Section 4.14(b) describes how the Board may delegate to such committees. With respect to functions and responsibilities set forth in the Delegation Plan, the Board may delegate its authority to any duly appointed committee. Any action by such committee is subject to review, ratification, or rejection by the Board. In addition, such delegations must be in conformance with applicable law, the Restated Certificate of Incorporation, these By-Laws, and the Delegation Plan. These limitations previously were set forth in the Delegation Plan. Proposed Section 4.14(b) further clarifies that, with respect to other matters, the Board may delegate its powers and authority to act on behalf of the Board in managing the business and affairs of NASD Regulation only to committees consisting solely of one or more Directors, and that any such delegation must be not inconsistent with the Delegation Plan.

Proposed Section 4.14(f), like proposed Article IX of the NASD By-Laws, authorizes the NASD Regulation Board to appoint specific committees, including an Executive Committee, a Finance Committee, and a National Business Conduct Committee, and specifies their compositional requirements. Some of the provisions regarding the National Business Conduct Committee currently are set forth in the Delegation Plan.³⁷

Proposed Section 4.15, like proposed Article XV, Section 4 of the NASD By-Laws, sets standards of conduct for Directors with regard to conflicts of interest. Proposed Section 4.15(b) addresses conflicts of interests in non-adjudicatory matters in a manner consistent with the By-Laws for the NASD Board and the Nasdaq Board. Proposed Section 4.15 provides that no contract or transaction between NASD Regulation and a Director or officer, or between NASD Regulation and any other entity in which a Director or officer is a director or officer, or has a financial interest, shall be void or voidable solely for this reason if: (i) The material facts pertaining to the Director's or officer's relationship or interest and the contract or transaction are disclosed or are known to the Board or the committee, and the Board or

committee in good faith authorizes the contract or transaction by the affirmative vote of a majority of the disinterested Directors; (ii) the material facts are disclosed or become known to the Board or committee after the contract or transaction is entered into, and the Board or committee in good faith ratifies the contract or transaction by the affirmative vote of a majority of the disinterested Directors; or (iii) the material facts pertaining to the Director's or officer's relationship or interest and the contract or transaction are disclosed or are known to the stockholder entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholder. Only disinterested Directors may be counted in determining the presence of a quorum at the portion of a meeting of the Board or of a committee that authorizes the contract or transaction.

Article V. Compensation

Proposed Article V, Compensation, is a new Article that parallels proposed Article X of the NASD By-Laws.

Article VI. Regional Nominating Committees

The Association proposes to add a new Article VI, Regional Nominating Committees, to the NASD Regulation By-Laws. The procedures for regional nominations are currently set forth in the Delegation Plan³⁸ and in NASD Regulation Board resolutions. Proposed Article VI combines and expands on those procedures.

As noted previously, Industry Directors who serve on the NASD Regulation Board represent a region designated by the Board. These Directors are initially nominated by a Regional Nominating Committee. Each Regional Nominating Committee presents a nominee to the National Nominating Committee to represent such region on the Board of Directors. The Regional Nominating Committee acts essentially in an advisory capacity because only the National Nominating Committee may formally nominate to the NASD Board a candidate for Director of the NASD Regulation Board. The NASD Board, in turn, may elect or reject the candidates nominated by the National Nominating Committee.

Proposed Article VI sets forth the following procedures for the regional nominating process. As previously noted, the Board designates each region. Each region has a Regional Nominating Committee. The Regional Nominating Committee is composed of two members

from each District Committee in the region, who are selected by their District Nominating Committee. (See discussion of proposed NASD Regulation By-Laws Article VIII for a description of how District Committee and District Nominating Committee members are elected.) When the term of office of an Industry Director representing a region is due to expire, the Secretary of NASD Regulation notifies the appropriate Regional Nominating Committee, which initiates the regional nominating process.

The Regional Nominating Committee receives from the Secretary of NASD Regulation a description of the firms eligible to vote in the Districts. Firms eligible to vote are those that either are headquartered in the region or have a branch office in the region. In making nominations, the Regional Nominating Committee seeks to ensure appropriate and fair representation of the classes and types of firms eligible to vote in the region.

Currently, corporate resolutions authorize the Regional Nominating Committee to nominate one candidate for the consideration of the NASD membership in the region. The Association proposes to authorize the Regional Nominating Committee to nominate more than one candidate so that the NASD membership in the region may vote on a nominee to present to the National Nominating Committee. (This process would work in the same manner as a contested nomination, which is described below.)

Once the Regional Nominating Committee selects a nominee (or nominees), it sends notice of its nomination to the Executive Representative of each NASD member eligible to vote. The Executive Representative is the officer or employee of the member who casts votes for the member in all nominations and elections. If any person not nominated wishes to contest a nomination, he or she sends notice of intent to contest to the Regional Nominating Committee or the Secretary of NASD Regulation within a specified period. Such person then must submit within a specified period a written petition signed by at least ten percent of the members eligible to vote in the region supporting such person's candidacy. If support of ten percent of the membership is not obtained within the requisite time, and if the Nominating Committee has nominated only one candidate, then the nominee of the Regional Nominating Committee is presented to the National Nominating Committee.

³⁷ See Delegation Plan II.D.

³⁸ See Delegation Plan II.B.

If the Nominating Committee nominates more than one candidate, or if a person who is not nominated obtains the necessary support, then contested nomination procedures apply. Under these procedures, the Association pays for two mailings of nomination literature for each candidate, and the members of all NASD, Nasdaq, and NASD Regulation Boards and committees, and NASD, Nasdaq, and NASD Regulation staff, are prohibited from expressing views on the nomination. However, members of the Boards and committees may express views if they make it clear they are acting in their individual capacities and disclaim any intention to communicate in an official capacity. A ballot is sent to Executive Representatives of the firms eligible to vote, and specified procedures, including the use of an independent agent to qualify returned ballots and count votes, are then followed to determine the outcome of the nomination. If the National Nominating Committee or the NASD Board rejects a nominee of a Regional Nominating Committee, the Regional Nominating Committee goes through the regional election procedures again and submits another nominee to the National Nominating Committee.

Article VII. Officers, Agents and Employees

Former Article IV, Officers, Agents and Employees, is set forth as proposed Article VII. Former Sections 4.1, 4.3, 4.4, and 4.5 were renumbered, respectively, as 7.1, 7.4, 7.5, and 7.6. Changes to these sections were made only as necessary to conform to the proposed definitions in proposed Article I and other drafting conventions. The Association proposes to add a new Section 7.2, Absence of the President, to provide a standard operational mechanism in the event of the President's inability to act, absence, or a vacancy in the position, in conformity with proposed Article 8, Section 2 of the NASD By-Laws. In proposed Section 7.3, the Association proposes a conforming change to clarify supervision and control of agents and employees. (Proposed NASD By-Laws Article VIII, Section 3, and Proposed Nasdaq By-Laws Article VI, Section 6.3.)

Article VIII. District Committees and District Nominating Committees

Proposed Article VIII, District Committees and District Nominating Committees, is a new Article. Proposed Article VIII authorizes the Board to designate districts and sets forth procedures for the members within each district to elect a District Committee and

a District Nominating Committee. The language of proposed Article VIII is drawn from former Article VIII of the NASD By-Laws, which authorized the NASD Board to form such committees. Proposed Article VIII is drafted to conform to the Undertakings. Specifically, under Proposed Article VIII, Section 8.2, the role of the District Committee members is limited to serving as panelists in disciplinary proceedings in accordance with the Rule 9200 Series, recommending policy and rule changes to the NASD Regulation Board, and selecting members of the Regional Nominating Committees in a manner consistent with the proposed NASD Regulation By-Laws. (Proposed NASD Regulation By-Laws Article VI.)

Election procedures for District Committees and District Nominating Committees currently are set forth in corporate resolutions. The Association proposes to add these procedures, with further clarifications and detail, to the By-Laws in proposed Article VIII. The procedures conform to the nomination procedures in proposed Article VI.

Proposed Article VIII sets forth the following procedures for district elections. In May of each year, each District Nominating Committee solicits candidates to fill the vacancies anticipated to occur on its District Committees as well as candidates to serve on the following year's District Nominating Committee. (District Nominating Committee members serve a one-year term, while District Committee members serve a three-year term.) The District Nominating Committee receives from the Secretary of NASD Regulation a description of the firms eligible to vote in the district. Firms eligible to vote are those that either are headquartered in the district or have a branch office in the district. In making nominations, the District Nominating Committee seeks to ensure appropriate and fair representation of the classes and types of firms eligible to vote in the district.

Current corporate resolutions authorize the District Nominating Committee to nominate one candidate for each vacancy. The Association proposes to authorize the District Nominating Committee to nominate more than one candidate per vacancy. (This process would trigger contested election procedures, which work like the contested nomination procedures described above.)

Once the District Nominating Committee selects its nominees, it sends notice of its slate to the District Committee and the Executive Representative of each firm eligible to vote. If any person not nominated

wishes to contest an election, he or she sends notice of intent to contest to the District Director or the Secretary of NASD Regulation within a specified period. Such person then must submit within a specified period a written petition evidencing support for such contest by at least ten percent of the members eligible to vote in the district. If the person does not obtain ten percent support for a contest within the requisite period, or if the District Nominating Committee has not nominated more candidates than there are vacancies, then nominees of the District Nominating Committee are deemed elected, and the election process is finished.

If the District Nominating Committee nominates more candidates than there are vacancies, or if a person obtains the necessary support for a contest, then contested election procedures apply. These procedures conform to the procedures for contested regional nominations. See discussion of Proposed NASD Regulation By-Laws, Article VI. The candidates for District Committee membership receiving the largest number of votes cast in the district for that office are declared elected such that the number of candidates declared elected equals the number of vacancies on the District Committee. The candidates for District Nominating Committee membership receiving the largest number of votes cast in the district for that office are declared elected such that the number of candidates declared elected equals the number of vacancies on the District Nominating Committee.

Article IX. Indemnification

Current Article V, Indemnification, is renumbered as proposed Article IX. Sections 5.1 through 5.5 are combined, amended, and renumbered as proposed Section 9.1, and current Section 5.6 is renumbered as proposed Section 9.2. The Association proposes to make the indemnification policies for all three corporate entities identical. Therefore, proposed Sections 9.1 and 9.2 conform to proposed Article VII, Sections 7.1 and 7.2 of Nasdaq By-Laws and the provisions for indemnification in the NASD's Restated Certificate of Incorporation.

NASD Regulation By-Laws provide for the indemnification of and advancement of expenses to persons named or threatened to be named as a party to any civil, administrative, or investigative proceeding because such person is or was a Director, officer, employee, or agent of the corporation. The By-Laws also provide that: (1) The right of indemnification is not exclusive

of any other right the person may have; (2) the amount of indemnification is reduced by the amount the indemnified person collects from another source; and (3) NASD Regulation has the power to purchase and maintain indemnification insurance.

The Association proposes to modify NASD Regulation's By-Laws to make indemnification and advancement of expenses to agents discretionary with the Board rather than mandatory, in order to permit the Board to determine whether indemnification is appropriate under the particular circumstances. Indemnification of non-officer employees remains the presumption. However, the Association proposes to authorize the Board to refuse to advance expenses to an employee if: (1) The employee (i) acted in bad faith, or (ii) did not act in a manner that the employee believed to be in or not opposed to the best interests of NASD Regulation; (2) with respect to a criminal matter, the employee believed or had reasonable cause to believe that his or her conduct was unlawful; or (3) the employee breached his or her duty to NASD Regulation. Finally, the Association proposes to add a provision requiring NASD Regulation, in response to a written claim for indemnification or advancement, to make such payment within 60 days of the claim.

While it is a common corporate practice to provide for discretionary indemnification of employees (as well as agents), NASD Regulation believes that it is essential that employees have confidence that they will be indemnified in the event they are named in any proceeding resulting from actions taken in good faith. At the same time, NASD Regulation believes it is essential that the Board have the opportunity to evaluate and deny advancement of expenses if it determines the action was not taken in good faith or if the person had reason to believe the action was illegal or breached a duty to the corporation.

Article X. Capital Stock

Current Article VI, Capital Stock, is renumbered as proposed Article X. The Association proposes to add a new Section 10.1, recognizing the NASD's status as sole stockholder. Current Sections 6.1 through 6.7 are renumbered as proposed Section 10.2 through 10.8. The Association proposes certain changes only to conform the proposed Article to the drafting conventions and stylistic changes incorporated generally in the NASD By-Laws, the NASD Regulation By-Laws, and the Nasdaq By-Laws. There are no substantive changes to proposed Article X. In proposed

Section 10.8, the Association proposes to delete detailed provisions of Delaware law for the fixing of record dates, which are more useful to corporations with more than one stockholder, and instead provide that a record date may be fixed in accordance with Delaware law.

Article XI. Miscellaneous Provisions

Current Article VII, Miscellaneous Provisions, is renumbered as proposed Article XI. There are no substantive changes in proposed Article XI. Current Sections 7.1, 7.2, 7.3, 7.4, and 7.5 are proposed to be renumbered, respectively, as Sections 11.1, 11.2, 11.3., 11.4, and 11.5.

Article XII. Amendments; Emergency By-Laws

Current Article VIII, Amendments; Emergency By-Laws, is renumbered as proposed Article XII. There are no substantive changes in Article XII. Current Sections 8.1, 8.2, and 8.3 are proposed to be renumbered, respectively, as Sections 12.1, 12.2, and 12.3.

(iii) Proposed Changes to Nasdaq By-Laws

Nasdaq adopted its current By-Laws on October 27, 1993. These By-Laws were drafted to comply with the requirements of Delaware law and to include more detailed provisions describing the powers of the Board and the corporation's officers, employees, and agents. Nasdaq's By-Laws have not previously been filed with the Commission. The Association proposes to amend the Nasdaq By-Laws to conform them to the proposed NASD and NASD Regulation By-Laws, where appropriate, and to certain other changes proposed for the Rules of the Association. Significant changes to Nasdaq's By-Laws are described below. Minor, non-substantive changes and changes to reflect drafting conventions are not described.

Article I. Definitions

The Association proposes to add a new Article I, Definitions. As noted previously, the Association proposes that the By-Laws for each corporate entity have a free-standing set of definitions. Therefore, the Association proposes to add the following definitions, which conform to definitions proposed for inclusion in the NASD and NASD Regulation By-Laws: "Act"; "Board"; "broker"; "Commission"; "day"; "dealer"; "Delaware law"; "Delegation Plan"; "Director"; "Industry Director" or "Industry committee member";

"NASD"; "NASD Board"; "NASD Regulation"; "Nasdaq"; "National Nominating Committee"; "Non-Industry Director" or "Non-Industry committee member"; "Public Director" or "Public committee member"; and "Rules of the Association" or "Rules."

Article II. Offices

Current Article I, Offices, is renumbered as proposed Article II, and the Sections are renumbered accordingly.

Article III. Meetings of Stockholders

Current Article II, Meetings of Stockholders, is renumbered as proposed Article III and conformed to the changes in proposed Article III of the NASD Regulation By-Laws.

Article IV. Board of Directors

Current Article III, Board of Directors, is renumbered as proposed Article IV. The changes in proposed Article IV are designed to conform it, as appropriate, to proposed Article IV of the NASD Regulation By-Laws, with the following exceptions. First, the number, qualifications, and election of the Directors reflects the current provisions of the Delegation Plan. See Delegation Plan III.B and Proposed Nasdaq By-Laws Sections 4.2 through 4.4. Second, like the NASD Regulation Board, the Nasdaq Board is divided into three classes, except that the terms of office of the Directors of Nasdaq Board are set to expire beginning in 1998, rather than 1997. Third, proposed Section 4.14 concerning Committees, largely parallels the same provision in the NASD Regulation By-Laws, except the Nasdaq By-Laws authorize only one specific committee, an Executive Committee. (Other provisions concerning Nasdaq committees remain in proposed Section III.D. of the Delegation Plan.)

Fourth, Proposed Section 4.15, like proposed Article XV, Section 4 of the NASD By-Laws, sets standards of conduct for Directors with regard to conflicts of interest. Proposed Section 4.15(b) addresses conflicts of interests in non-adjudicatory matters in a manner consistent with the By-Laws for the NASD Board and the NASD Regulation Board. Proposed Section 4.15 provides that no contract or transaction between Nasdaq and a Director or officer, or between Nasdaq and any other entity in which a Director or officer is a director or officer, or has a financial interest, shall be void or voidable solely for this reason if: (i) The material facts pertaining to the Director's or officer's relationship or interest and the contract or transaction are disclosed or are

known to the Board or the committee, and the Board or committee in good faith authorizes the contract or transaction by the affirmative vote of a majority of the disinterested Directors; (ii) the material facts are disclosed or become known to the Board or committee after the contract or transaction is entered into, and the Board or committee in good faith ratifies the contract or transaction by the affirmative vote of a majority of the disinterested Directors; or (iii) the material facts pertaining to the Director's or officer's relationship or interest and the contract or transaction are disclosed or are known to the stockholder entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholder. Only disinterested Directors may be counted in determining the presence of a quorum at the portion of a meeting of the Board or of a committee that authorizes the contract or transaction.

In addition, in proposed Section 4.15(a), Conflicts of Interest; Contracts and Transactions Involving Directors, there is no cross-reference to the Rules of the Association because the present Nasdaq rules do not include particular disqualification standard for Nasdaq proceedings as has been included in the proposed Rule 9160 Series for NASD Regulation disciplinary proceedings. Finally, proposed Section 4.17, Communication of Views Regarding NASD or NASD Regulation Elections or Nomination, holds Nasdaq and its Board, committee, and staff to the same standards proposed for NASD and NASD Regulation with respect to contested elections or nominations. (Proposed NASD By-Laws Article VII, Sections 11 and 12, and Proposed NASD Regulation By-Laws Article VI, Sections 6.14 and 6.19, and Article VIII, Sections 8.21 and 8.26.)

Article V. Compensation

Article V, Compensation, is a new Article that conforms with proposed Article X of the NASD By-Laws and proposed Article V of the NASD Regulation By-Laws.

Article VI. Officers, Agents and Employees

Current Article IV, Officers, Agents and Employees, is renumbered as proposed Article VI, and the Sections are renumbered accordingly. Only one substantive change is proposed. Proposed Section 6.3 (current Section 4.3), Subordinate Officers, Agents, or Employees, includes a provision that clarifies that agents and employees of Nasdaq are under the supervision and

control of the officers of Nasdaq, unless the Nasdaq Board, by resolution, provides that an agent or employee shall be under its supervision and control. (Proposed NASD By-Laws Article VIII, Section 3 and Proposed NASD Regulation By-Laws Article VII, Section 7.3.)

Article VII. Indemnification

Current Article V, Indemnification, is renumbered as proposed Article VII, and the Sections are renumbered accordingly. Proposed Article VII conforms to the provisions for indemnification in the NASD's Restated Certificate of Incorporation and proposed Article IX of the NASD Regulation By-Laws. As noted above, the Association proposes to make the indemnification policies for all three corporate entities identical.

Current Article V provides for the mandatory indemnification of persons made or threatened to be made a party to any civil, administrative, or investigative proceeding by reason of the fact that he or she was a director or officer of the corporation. Advancement of expenses, and the indemnification of employees and agents, is discretionary. Current Article V also provides that (1) the right of indemnification is not exclusive of any other right the person may have; (2) the amount of indemnification is reduced by the amount an indemnified person collects from another source; and (3) Nasdaq has the power to purchase and maintain indemnification insurance.

The Association proposes to modify current Article V in the same manner and for the same reasons set forth in the discussion of proposed Article IX of the NASD Regulation By-Laws.

Article VIII. Capital Stock

Current Article VI, Capital Stock, is renumbered as proposed Article VIII. The Association proposes changes to conform to those set forth for proposed Article X of the NASD Regulation By-Laws.

Article IX. Miscellaneous Provisions

Current Article VII, Miscellaneous Provisions, is renumbered as proposed Article IX, and the Sections are renumbered accordingly. There are no substantive changes.

Article X. Amendments; Emergency By-Laws

Current Article VIII, Amendments; Emergency By-Laws, is renumbered as proposed Article X, and the Sections are renumbered accordingly. There are no substantive changes.

c. Proposed Changes to the Delegation Plan and Restated Certificates of Incorporation

The Association proposes to amend the Delegation Plan to delete provisions added to the By-Laws of the NASD, NASD Regulation, and Nasdaq. Specifically, in Section I.A., the definitions of Industry, Non-Industry, and Public Governors, Directors, and committee members are deleted and instead cross-reference the By-Laws of the NASD, NASD Regulation, and Nasdaq, where the Association proposes to define such terms. (Proposed NASD By-Laws Article I; Proposed NASD Regulation By-Laws Article I; and Proposed Nasdaq By-Laws Article I.)

Similarly, the Association proposes to delete Section I.C., I.D., II.B., III.B., and parts of II.D. and III.D., which address the composition of the Boards, elections, terms of office, vacancies, disqualification due to change in classification, and the composition and authority of certain committees because the Association proposes to include these provisions in the appropriate By-Laws. (Proposed NASD By-Laws Article VII, Sections 4, 5, 6, 7, 9, and 10; Proposed NASD Regulation By-Laws Article IV, Sections 4.2, 4.3, 4.4, 4.5, 4.8, 4.9 and 4.14; and Proposed Nasdaq By-Laws Article IV, Sections 4.2., 4.3, 4.4, 4.5, 4.8, 4.9 and 4.14.) With respect to committees, the Association proposes to include in the appropriate By-Laws or in the Delegation Plan the compositional requirements for specified committees as provided in the Undertakings. Generally, if the committee consists solely of Directors or Governors, the Association proposes to include provisions describing the committee's powers and compositional requirements in the appropriate corporate By-Laws. If the committee consists of Directors or Governors as well as other members, the Association proposes to include provisions describing the committee's powers and compositional requirements in the Delegation Plan. Thus, the Association proposes to add provisions regarding the powers and composition of the Market Regulation Committee and the National Arbitration and Mediation Committee as proposed Section II.C. of the Delegation Plan.

The Association proposes to amend Section II.A.1.f. to specify that NASD Regulation will establish procedures to consider requests by members, associated person, and members of the public that NASD Regulation initiate formal disciplinary action. This provision is discussed below in

connection with the discussion of the proposed deletion of current Rule 8120.

The Association proposes to amend Section II.C., which sets forth certain NASD Regulation Board review procedures, by deleting specific procedures that are set forth in the proposed Rule 9000 Series. Instead, the Rules of the Association are cross-referenced.

Finally, the Association proposes to clarify that both NASD Regulation and Nasdaq are responsible for operating Stockwatch. Therefore, new Sections II.A.1.t. and III.A.1.o. are added and the Section pertaining to Stockwatch is renumbered as Section IV of the Delegation Plan.

The Association also proposes to amend the Certificates of Incorporation for the NASD, NASD Regulation, and Nasdaq. This is the first time the Association has filed the Certificates of Incorporation for NASD Regulation and Nasdaq with the Commission. The Association proposes to revise the three Certificates to conform them to the proposed changes to the By-Laws of the three corporations and other proposed rule changes and to make the Certificates more consistent with one another. No substantive changes are intended.

d. Proposed Changes to Rules 0120 and 0121

The Association proposes to add four new definitions to Rule 0120, which provides definitions of general applicability, and amend one definition. The four definitions that the Association proposes to add are: "NASD," "NASD Regulation," "Nasdaq," and "National Business Conduct Committee." NASD, NASD Regulation, and Nasdaq are the same terms defined in the By-Laws of the NASD, NASD Regulation, and Nasdaq. The Association proposes to define these terms in Rule 0120, to aid a person reading the Rules of the Association and any future drafter of a Rule. The Association proposes to add the term "National Business Conduct Committee" to avoid duplicating the definition in several proposed Rule Series and to aid the reader. The term is defined in the current Rule 9120 and used in other series of the Rules (e.g., the Rule 1010 Series).

The Association intends to amend one currently defined term, "Rules," to "Rules" or "Rules of the Association," and to clarify the definition. The new definition clarifies that the terms "Rules" and "Rules of the Association" are synonymous and that the definition includes any Rule set forth as a numbered Rule in the NASD Manual.

Finally, paragraph (j) is relettered as proposed paragraph (n), paragraph (k) is relettered as proposed paragraph (o), paragraph (l) is relettered as proposed paragraph (p), and paragraph (m) is relettered as proposed paragraph (q).

The Association proposes to amend current Rule 0121 to clarify that the definitions in the NASD By-Laws apply unless a Rule indicates otherwise.

e. Proposed IM-2210-4

The Association proposes to add IM-2210-4 as a filed interpretation of Rule 2210. IM-2210-4 is based on a resolution of the NASD Board of Directors that currently is included in Article XVI, Section 2 of the NASD By-Laws, which concerns the use of the Association's name by members. Because the Association will no longer include corporate resolutions with the By-Laws, the Association proposes to convert the resolution into interpretive material for Rule 2210, which addresses members' communications with the public. In addition, the language of the resolution is clarified and reorganized to make it easier to read and understand.

f. Proposed Changes to the Membership Application Procedures in the Rule 1010 Series

The Rule 1010 Series sets forth procedures for processing membership applications. The Rule 1010 Series is revised to reflect the recommendations of the Implementation Plan and to comply with Undertakings 4 and 5. The Implementation Plan recommended that the NASD strive to bring about greater national uniformity and coordination in the membership application process and lighten the National Business Conduct Committee's workload in order to allow the National Business Conduct Committee to assist in providing such uniformity. Undertaking 4 requires the NASD to "provide for the autonomy and independence of the regulatory staff * * * such that the staff, subject only to the supervision of the Board of Governors of the NASD and the Board of Directors of NASDR * * * has sole discretion to handle the approval of applications for membership." Undertaking 4 also requires that the District Business Conduct Committees no longer be involved in reviewing or approving membership applications. Undertaking 5 requires that the Association "promulgate and apply on a consistent basis uniform standards for regulatory and other access issues, such as admission to the NASD as a member firm, and conditions to becoming a market maker; and institute safeguards to ensure fair and evenhanded access to all services and facilities of the NASD."

(i) Current Rules

Under the current Rule 1010 Series, a prospective member files a membership application with the district office in the district in which it intends to have its principal place of business. A Subcommittee is designated by the District Committee to render a determination on the application. Current Rule 1011 specifies a short list of documents and information to be provided with the application and generally permits the district office to request any other relevant information or documents. If the applicant fails to respond to a request for information by the district office or responds to such a request in a materially inadequate manner, the Rule provides that the application terminates, unless the Subcommittee determines otherwise.

Before an applicant is admitted to membership, current Rule 1011 requires that the applicant participate in a pre-membership interview. The Association has one year from the date of application to complete the pre-membership interview process. During the pre-membership interview, there is a review of the applicant's: (1) Business plan; (2) capital arrangements; (3) proposed record keeping system; (4) proposed internal procedures; (5) familiarity with Rules of the Association and federal securities laws; and (6) capability to properly conduct the type of business intended in view of (a) The number, experience, and qualifications of persons to be associated with the applicant at the time of its admission to membership, (b) the applicant's planned facilities, (c) arrangements with banks and clearings corporations, (d) supervisory personnel, methods, and procedures, and (e) other factors relevant to the scope and operation of the applicant's business. The applicant is required to demonstrate "the appropriateness of its admission to membership in the Association to conduct the type of business intended in the manner specified in its submission."

Within 30 days after the pre-membership interview or the receipt of any additional documents requested, whichever is later, the Subcommittee notifies the applicant whether its application is granted, denied, or granted subject to restrictions on its business activities. If restrictions are imposed at this stage or after appeal or review under Rule 1012, the applicant must execute a written agreement to abide by any restrictions imposed and to obtain the Association's approval before modifying its business activities in any way inconsistent with the agreement.

Under current Rule 1012, the applicant may request that the full District Committee review the Subcommittee's determination. The applicant may request a hearing before a separate Hearing Subcommittee of the District Committee. No member of the Subcommittee that rendered the initial determination on the application may participate in the determination of the District Committee. After review, the District Committee determines whether the application should be granted, denied, or granted subject to restrictions.

The applicant may appeal the full District Committee's decision to the National Business Conduct Committee, or the National Business Conduct Committee on its own motion may call the decision for review. The applicant has the right to appear before the National Business Conduct Committee and may supplement the record; the National Business Conduct Committee may require the applicant to appear and provide additional information. Unless the NASD Board calls the membership application proceeding for discretionary review, the National Business Conduct Committee notifies the applicant whether its application is granted, denied, or granted subject to restrictions, and the National Business Conduct Committee's action constitutes final action of the Association. The applicant may apply for review by the Commission.

A Governor of the NASD Board may call a determination of the National Business Conduct Committee on a membership application for review. The NASD Board may affirm, modify, or reverse the National Business Conduct Committee's determination, and the Board's determination constitutes final action of the Association. The applicant may apply for review by the Commission.

Under current Rule 1013, a member may request that the Association remove or modify any restrictions imposed on its business activities as a result of the membership admission process. The request must be filed in writing and reviewed by a Subcommittee of the District Committee of the district in which the member currently has its principal place of business. The member must demonstrate that such action is appropriate in light of the criteria in current Rule 1013. The Subcommittee considers the circumstances that gave rise to the imposition of the restrictions, the operations of the member since the imposition of the restrictions, and any new evidence submitted in connection with the request. The District Committee, the National Business

Conduct Committee, and the NASD Board may review a modification of restrictions approved by the Subcommittee pursuant to the procedures for reviewing a membership application under current Rule 1012. If the Subcommittee denies a request to remove or modify restrictions, the member may file a request for review with the District Committee. The District Committee's determination is subject to appeal or review pursuant to current Rule 1012.

Under current Rule 1014, if the ownership or control of a member changes, the Association may condition continuance in membership on prompt compliance with the pre-membership procedures contained in current Rules 1011 through 1015.

Under current Rule 1015, a member must notify the Association of certain mergers, acquisitions, or other changes in equity ownership or partnership capital within 10 business days after the event.

(ii) *Proposed New Rules*

The proposed rule change substantially alters current membership procedures. First, consistent with Undertaking 4, the proposed rule change shifts the authority to render an initial decision on a membership application from the District Committees to the Department of Member Regulation ("Department") of NASD Regulation. Second, consistent with Undertaking 5, the proposed rule change sets forth in greater detail the information that must be submitted with a membership application, sets forth more detailed and objective standards for rendering a decision on a membership application, and requires that any restrictions placed on an Applicant's business activities be specifically related to a particular standard and that the rationale for such restrictions be clearly articulated. Third, the proposed rule change sets forth additional details about membership application procedures and generally provides more procedural rights to Applicants, including time limits by which the Department, and if applicable, the National Business Conduct Committee, the NASD Regulation Board, and the NASD Board must issue a decision. Finally, various other time limits are imposed throughout the admission process to ensure that applications are acted on promptly. These changes will help bring about greater national uniformity and coordination in the membership application process and more even-handed access to the facilities of the NASD.

Proposed Rule 1011 sets forth definitions for the proposed Rule 1010 Series. The terms "Applicant," "Associated Person," "Department," "Director," "district," "district office," "Governor," "Interested Association Staff," "sales practice violations," and "Subcommittee" are defined.

Proposed Rule 1012 sets forth general procedural provisions for service of notices and decisions by the Association and filings by an Applicant, prohibitions on *ex parte* communications with Applicants or Interested Association staff, recusals or disqualifications of NASD and NASD Regulation Board members and National Business Conduct Committee members, computations of time, and recording of events in the Association's membership application docket.

Proposed Rule 1013 sets forth procedures for filing a membership application and conducting a membership interview.³⁹ Applicants must file membership applications with the Membership Department,⁴⁰ which will transmit the application for processing to Department staff at the district office in the district in which the Applicant has or intends to have its principal place of business. Proposed Rule 1013(a) sets forth a detailed list of items that must be submitted with a membership application. Newly specified items include a more detailed business plan; evidence of all required registrations and licenses and copies of the most recent Forms U-4 and U-5 for each Associated Person; documentation of disciplinary history and certain regulatory, civil, and criminal actions, arbitrations, and customer complaints for the Applicant and its Associated Persons; a written acknowledgment that heightened supervisory procedures may be required for certain Associated Persons; copies of proposed or final contracts with banks, clearing entities, and service bureaus; a description of the nature and source of Applicant's capital; a description of financial controls; a more detailed description of the Applicant's supervisory system and

³⁹ The Association proposes to discontinue the use of the term "pre-membership interview" and instead use the term "membership interview." Under the proposed rule change, interviews are required before an Applicant may become a member and may be required after an Applicant becomes a member in order to remove or modify a restriction under proposed Rule 1018 or to review a change in ownership or operations under proposed Rule 1019. Thus, interviews will occur before and may occur after admittance to membership.

⁴⁰ The Membership Department is located in the Association's Rockville offices and performs certain administrative functions for all membership applications. It is distinct from the Department of Member Regulation.

personnel; a description of the proposed recordkeeping system; and a copy of the Applicant's written training plan.

Proposed Rule 1013 adds a new provision requiring the Department to determine if the application is complete within 30 days after receipt of the application. If the application is not complete, the Department may request additional information and documents, and may continue to make such requests at any time during the membership application process. Unless the Applicant and the Department agree otherwise, additional documents or information must be provided within 60 days after the initial request and 30 days after any subsequent request. Proposed Rule 1013(b) provides that an application for membership lapses if the Applicant fails to respond fully to requests for information or fails to appear at a membership interview, absent a showing of good cause by the Applicant.

Proposed Rule 1013(c) describes the membership interview process. The Department must conduct a membership interview before it issues a decision on an application for admission. The Applicant is notified of the interview by facsimile or commercial courier at least seven days before the interview. Unless the Department directs otherwise for good cause shown, a membership interview must be scheduled to occur within 90 days after receipt of the application or within 60 days after the receipt of all requested documents and information, whichever is later. During the membership interview, the Department reviews the standards for admission with the Applicant's representatives and informs them of any preliminary determinations as to whether the Applicant meets such standards. If the Department intends to rely on information not submitted by the Applicant, such information is provided to the Applicant.

Proposed Rule 1014 provides that after considering the application, membership interview, other information and documents, the public interest, and the protection of investors, the Department must determine whether the Applicant meets the specified standards. For standards relating to capital, supervision, and capability of complying with applicable law, the proposed rule change sets forth specific criteria that the Department may consider in determining whether the Applicant meets the standard. Other standards address the completeness and accuracy of the application and supporting documents; possession of all required licenses and registrations;

establishment of necessary relationship with banks, clearing corporations, and service bureaus; plans to obtain necessary facilities; financial controls; compliance, supervisory, operational, and internal control practices and standards; recordkeeping; and training. In addition, the Association must not possess any information indicating that the Applicant may circumvent, evade, or otherwise avoid compliance with the federal securities laws or the Rules of the Association, and the application and supporting documents must otherwise be consistent with the federal securities laws and the Rules of the Association.

If an Applicant meets each of the standards, the Department grants the application for membership. If an Applicant fails in whole or part to meet one or more of the standards, the Department may deny the application or grant it subject to restrictions designed to address specific financial, operational, supervisory, disciplinary, investor protection, or other regulatory concerns based on the standards in proposed Rule 1014.

Under the proposed rule change, if the Department grants an application, with or without restriction, the Applicant's approval for membership is contingent upon the Applicant's submission of a membership agreement to engage only in the business set forth in its business plan and the membership agreement; abide by any restriction specified in the Department's written decision; obtain the Department's prior approval of the removal or modification of such restriction under proposed Rule 1018; and notify and obtain the Department's approval of a change in ownership or control or a material change in business operations under proposed Rule 1019. The execution of this membership agreement does not affect the Applicant's right to request a review of the Department's decision under proposed Rule 1015.

Under subparagraph (d) of Rule 1014, if the Department denies an application, the decision must explain the reason for the denial and reference the applicable standard that is not met. If the Department grants the application subject to restrictions, the decision must explain the reason for each restriction, referencing the applicable standard that is not met and identifying the specific financial, operational, supervisory, disciplinary, investor protection, or other regulatory concern that the restriction is designed to address and the manner in which the restriction is reasonably designed to address the concern.

The Department must issue a written decision within 30 days after the

conclusion of the membership interview or after the submission of additional information or documents, whichever is later. The proposed rule change also provides a new remedy if the Department fails to act promptly on an application. If the Department fails to issue a written decision within 180 days after receipt of an application, or such later date as the Department and the Applicant agree, the Applicant may request that the NASD Board direct the Department to issue the decision immediately or show good cause for an extension. If the Department shows good cause, the 180 day time limit may be extended by not more than 90 days.

Under proposed Rule 1015, the Applicant may request that the National Business Conduct Committee review the decision of the Department by filing a written request within 25 days after service of the Department's decision. As under current Rule 1012, upon submission of the membership agreement, an Applicant may begin operating subject to the terms of such agreement while the review is pending.⁴¹

If the Applicant requests a review, the National Business Conduct Committee appoints a Subcommittee to participate in the review. The Subcommittee is composed of two or more members. At least one member must be a current member of the National Business Conduct Committee; the remaining member or members may be current or past members of the NASD Regulation Board or past members of the NASD Board. The Applicant may request a hearing before the Subcommittee, or the Subcommittee may direct that a hearing be held. After the Subcommittee completes its review, the Subcommittee transmits a recommended decision in writing to the National Business Conduct Committee and to the other Directors of the NASD Regulation Board not later than 60 days after the date of the membership hearing, and not later than seven days before the National Business Conduct Committee meeting at which the proceeding will be considered.

After considering all matters presented in the review and the Subcommittee's recommended decision, the National Business Conduct Committee may affirm, modify, or reverse the Department's decision or remand the proceeding with instructions. The National Business

⁴¹ The Commission notes that only an Applicant who has been approved, but subject to a restriction, may begin operating subject to the terms of its membership agreement while its review is pending. An Applicant who has not been disapproved may not begin operating.

Conduct Committee prepares a proposed written decision that describes the Department's decision and rationale, describes the principal issues raised in the review, summarizes the evidence on each issue, and states the National Business Conduct Committee's disposition of the proceeding and the rationale therefor, referencing the applicable standards in proposed Rule 1014. A Director of the NASD Regulation Board or a Governor of the NASD Board may call the National Business Conduct Committee's proposed written decision for review in the sequence and within the time limits set forth in proposed Rule 1016, as described below.

If the National Business Conduct Committee's proposed written decision is not called for review by either Board, the National Business Conduct Committee's proposed written decision becomes the final written decision. The Applicant is notified that the call for review period has expired and that the National Business Conduct Committee is required to serve its final written decision within 15 days. If the National Business Conduct Committee does not serve its final written decision within 15 days, the Applicant may request that the NASD Board direct the National Business Conduct Committee to serve its decision immediately or show good cause for an extension of time. If the National Business Conduct Committee shows good cause, the NASD Board may extend the 15 day limit by an additional 15 days.

Proposed Rule 1016 sets forth procedures for the NASD Regulation Board to call the National Business Conduct Committee's proposed written decision for review and for the NASD Board to call a proposed written decision of the National Business Conduct Committee or the NASD Regulation Board for review. The call for review process begins with the mailing of the Subcommittee's recommended decision to the National Business Conduct Committee and to the other Directors at least seven days in advance of the National Business Conduct Committee meeting at which the National Business Conduct Committee will consider and act upon the recommended decision. The National Business Conduct Committee then holds its meeting and acts on the Subcommittee's recommended decision. Under current practices, the NASD Regulation Board meets on the day after the National Business Conduct Committee meeting. At this Board meeting, each Director receives a summary (not the full written text) of the National Business Conduct

Committee's proposed decision, including any changes the National Business Conduct Committee made to the Subcommittee's recommended decision. Based upon the Subcommittee's recommended decision (which Directors will have had at least seven days to review) and the summary of the National Business Conduct Committee's proposed decision, any Director may call the National Business Conduct Committee's proposed decision for review.

After the Board meeting, Directors get a second opportunity to call a proposed National Business Conduct Committee decision for review when they receive the full written text and the summary of the National Business Conduct Committee's proposed decision, which incorporate any changes from the Subcommittee's recommended decision. A Director may call the National Business Conduct Committee's proposed written decision for review by the full Board not later than seven days after the date on which the Director receives the decision. Thus, in most cases a Director will have at least 14 days to consider whether to call a proceeding for review—seven days before the Board meeting and at least seven days after the Board meeting. (The Board, by a unanimous vote, may shorten the seven-day period following the Board meeting, or by majority vote, may lengthen the seven-day period following the Board meeting.) If a Director calls the National Business Conduct Committee's proposed written decision for review, the review is conducted at the next Board meeting. The NASD Regulation Board may affirm, modify, or reverse the National Business Conduct Committee's proposed written decision or remand the proceeding with instructions. The NASD Regulation Board prepares a proposed written decision that describes the Department's decision and rationale, describes the principal issues raised in the review, summarizes the evidence on each issue, and states the NASD Regulation Board's disposition of the proceeding and the rationale therefor, referencing the applicable standards in proposed Rule 1014. The NASD Regulation Board transmits its proposed written decision to the Governors of the NASD Board.

If a Governor does not call the NASD Regulation Board's proposed written decision for review within the time prescribed, the NASD Regulation Board's proposed written decision becomes the final written decision. The Applicant is notified that the call for review period has expired and that the NASD Regulation Board is required to

serve its final written decision within 15 days. If the decision is not served within such time, the Applicant may request that the NASD Board direct the NASD Regulation Board to serve its final written decision immediately or show good cause for an extension of time. If the NASD Regulation Board shows good cause, the NASD Board may extend the 15 day limit by an additional 15 days.

The process for review by the NASD operates similarly to that described above. A Governor of the NASD Board may call the NASD Regulation Board's proposed written decision for review not later than the next NASD Board meeting that is at least seven days after the date on which the Governor receives the decision. (The Board, by a unanimous vote, may shorten the seven-day period, or by majority vote, may lengthen the seven-day period.) If a Governor calls the NASD Regulation Board's proposed written decision for review, the review is conducted at the following Board meeting. The NASD Board may affirm, modify, or reverse the NASD Regulation Board's proposed written decision or remand the proceeding with instructions. The NASD Board prepares a final written decision that describes the Department's decision and rationale, describes the principal issues raised in the review, summarizes the evidence on each issue, and states the NASD Board's disposition of the proceeding and the rationale therefor, referencing the applicable standards in proposed Rule 1014. The NASD Board must serve its final written decision within 15 days after the meeting at which it conducted its review.

Alternatively, if a Director of the NASD Regulation Board does not call the National Business Conduct Committee's proposed written decision for review within the time prescribed, the NASD Board may call such decision for review. Upon the expiration of the NASD Regulation Board's call for review period, the National Business Conduct Committee's proposed written decision is transmitted to the Governors of the NASD Board. A Governor may call the National Business Conduct Committee's proposed written decision for review not later than the next Board meeting that is at least seven days after the Governor receives the decision. (The Board, by a unanimous vote, may shorten the seven-day period, or by majority vote, may lengthen the seven-day period.) If a Governor calls the National Business Conduct Committee's proposed written decision for review, the review is conducted at the following NASD Board meeting. The NASD Board may affirm, modify, or reverse the

National Business Conduct Committee's proposed written decision or remand the proceeding with instructions. The NASD must serve its final written decision within 15 days after the meeting at which it conducted its review. The final written decision contains the same elements described in the preceding paragraph.

Under proposed Rule 1017, as under current Rule 1012(h), a decision by the National Business Conduct Committee, NASD Regulation Board, or the NASD Board that constitutes final action of the Association may be appealed to the Commission.

Under proposed Rule 1018, a member may submit an application to remove or modify a restriction on its business activities by submitting a written application to the Department at the district office in the district in which the member's principal place of business is located. The application must present facts showing that the circumstances that gave rise to the restriction have changed and state with specificity why the restriction should be modified or removed in light of the membership application standards in proposed Rule 1014 and the articulated rationale for the imposition of the restriction. The Department has 30 days to determine whether an application is complete and, if not, the Department may request that the Applicant submit additional information or documents. The Department also may request that the Applicant participate in a membership interview. The Department issues its written decision after considering whether maintenance of the restriction is appropriate in light of the standards set forth in proposed Rule 1014, the circumstances that gave rise to the imposition of the restrictions, the Applicant's operations since the restrictions were imposed, any change in ownership or control or supervisors and principals, and any new evidence submitted in connection with the application. (Proposed Rule 1018(b)(1).) The Applicant may file a written request for review of the Department's decision by the National Business Conduct Committee. The procedures set forth in proposed Rules 1015 and 1016 apply to such a request. In addition, a new provision is added requiring the Department of Member Regulation to modify or remove restrictions on its own initiative if that Department determines that such action is appropriate in light of the circumstances described above.

Current Rule 1015 requires a member to notify the Association of certain changes in ownership and control within 10 days after the event. In

contrast, proposed Rule 1019 requires members to notify the Association at least 30 days prior to the occurrence of certain changes in ownership, control, or operations and obtain approval of such changes prior to their effectiveness. The changes specified in proposed Rule 1019 include a merger with or acquisition of another member, an acquisition of substantially all assets of the member, a change in the equity ownership or partnership capital of a member that results in one person or entity controlling 25 percent or more of the equity or partnership capital, and a material change in a member's business operations. The Department must review such a change before it takes effect and may maintain existing restrictions on the member's business activities and place new interim restrictions on the member based on the standards in proposed Rule 1014, pending final Department action. The Department may condition continued membership on the submission of information and the participation in a membership interview pursuant to proposed Rule 1013 and on prompt compliance with the standards and requirements in proposed Rule 1014, in which case all procedural protections under the proposed Rule 1010 Series apply, including the time limits imposed on the issuance of a decision.

As discussed above, the Association proposes that the proposed Rule 1010 Series become effective 30 days after approval by the Commission.

g. Proposed Changes to the Rule 8000 Series

The Association proposes to amend the Rule 8000 Series to reflect proposed rule changes to the Rule 9000 Series and to clarify and reorganize certain provisions in order to make them easier to read and understand.

Rule 8110, which requires members to keep certain NASD corporate documents, rules, and interpretations in their branch offices, is revised to require members to keep a current copy of the NASD Manual in their main and branch offices. The NASD Manual will contain the corporate documents for the NASD, NASD Regulation, and Nasdaq as well as the Rules of the Association and interpretations.

Current Rules 8120, 8130, and 8140 concern the initiation of disciplinary proceedings. Current Rule 8120 allows any person who believes he or she has been aggrieved by any act of any member or associated person to institute a formal disciplinary proceeding. In view of the enhancements to the disciplinary process being proposed (including the change to staff-initiated

disciplinary proceedings), enhancements to the arbitration process, and the institution of an expanded and independent NASD internal review function (including an Ombudsman Office), the Association believes it is no longer necessary to give "aggrieved persons" the right to invoke Association processes to institute formal disciplinary actions. The Association also believes that the availability of such a procedure to "aggrieved persons," who may include members and associated persons seeking to advance competitive or pecuniary interests, as well as to members of the public, could permit such persons to encumber the Association's disciplinary process. This would be inconsistent with the fundamental purpose of the Association's disciplinary procedures, which are designed to provide a mechanism for the protection of investors generally and the promotion of the public interest, rather than a means to redress individual private grievances. In this connection, the Association notes that no other self-regulatory organization has a similar provision in its rules.

For these reasons, the Association proposes to rescind current Rule 8120. While the Association believes this Rule is no longer necessary or appropriate, the Association also acknowledges its responsibility as a self-regulatory organization to give due consideration to complaints by members, associated persons, or members of the public who bring forth information suggesting wrongdoing. Under these circumstances, the Association recognizes its duty to investigate and to determine whether its disciplinary process should be invoked. For this reason, the Association proposes to add to the Delegation Plan a provision requiring NASD Regulation to establish internal procedures for considering complaints by members, associated persons, and members of the public who request an investigation or disciplinary action by the Association.⁴² The procedures established would involve regular oversight by NASD Internal Review.

The Association also proposes to delete current Rule 8130, which authorizes District Business Conduct Committees to file complaints, to comply with Undertaking 4. The Association proposes to delete current Rule 8140, which authorizes the NASD Board to file a complaint, because

⁴² NASD Regulation currently logs, tracks, and investigates all customer complaints through the Association's long-standing customer complaint program.

procedures for the NASD Board and the NASD Regulation Board to initiate a complaint are included in proposed Rule 9211.

The Association proposes a new Rule 8120 to clarify that the terms used in the proposed Rule 8000 Series have the meaning defined in the proposed Rule 0120 Series, except the term "Adjudicator," which has the meaning defined in the proposed Rule 9120 Series as described below.

Proposed Rule 8210 combines current Rule 8210, which provides for reports and inspections of books, records, and accounts for the purpose of investigating or hearing a complaint, and current Rule 9132, which requires members to provide reports and permit examinations of books and records for the purpose of an investigation or a Rule 9000 Series proceeding.⁴³ Proposed Rule 8210 also clarifies that the Association may require a member, a person associated with a member, or a person still subject to the Association's jurisdiction to testify under oath or affirmation if requested. In addition, proposed Rule 8210 divides the concepts in Rule 8210 into shorter sentences and more paragraphs in order to make the Rule easier to read and understand.

The Association proposes significant changes to current Rule 8220, which authorizes the suspension of a member for failure to furnish the Association with duly requested information or for failure to keep a membership application and supporting documents current. The proposed changes retain the summary suspension power the Association requires, but provide members with enhanced procedural protections in connection with the suspension process.

The proposed Rule 8220 Series applies to members and persons associated with members. Under the proposed revisions to Rule 8221, the National Business Conduct Committee, rather than the President of the Association, must provide written notice of the suspension to the member or associated person. The notice specifies the information that must be provided or the action that must be taken and states that the failure to do so within 20 days after service of the notice constitutes grounds for suspension. The National Business Conduct Committee must serve notice of the suspension via personal service or commercial courier.

Proposed Rule 8222 makes explicit the right of a member or associated

person to request a hearing concerning the notice of suspension. This change conforms the proposed Rule with the Act and proposed Article VII, Section 2 of the NASD By-Laws, which authorize such a suspension after notice and opportunity for a hearing is provided. If a member or associated person wants a hearing on the suspension, the member or associated person must request a hearing within five days after service of the notice of suspension under Rule 8221. Any requested hearing is scheduled on an expedited basis (within 20 days after service of the Rule 8221 notice) and is held before a subcommittee of the National Business Conduct Committee. At least seven days before the scheduled hearing, the member or associated person receives written notice (via commercial courier or facsimile) of the date and time of the hearing and is provided with copies of all documents the National Business Conduct Committee considered in determining to issue the proposed Rule 8221 notice.

The appropriate NASD Regulation department or office⁴⁴ and the member or associated person may be represented by counsel at the hearing. Copies of proposed hearing exhibits and witness lists must be exchanged and provided to the subcommittee at least four days before the hearing. Witnesses subject to the jurisdiction of the Association must testify under oath or affirmation. The hearing is recorded by a court reporter, and a transcript is prepared.

Proposed Rule 8223 requires the subcommittee to prepare a proposed written decision. If the subcommittee decides to impose a suspension, then the decision must state the grounds for the suspension and the conditions for terminating the suspension. The subcommittee's proposed written decision must be presented to the NASD Board. A Governor may call a suspension proceeding for review within ten days of receipt of the subcommittee's proposed written decision, unless the Board votes to extend or shorten this call for review period. If no Governor calls the proposed decision for review within the prescribed time, the subcommittee's decision becomes final and is served on the member or associated person. If, however, a Governor calls the suspension proceeding for review, the

NASD Board must consider the matter not later than its next meeting and, within seven days of that meeting, serve a final written decision on the member or associated person. Any decision to impose a suspension must state the grounds for the suspension and the conditions for terminating it. A suspension, if imposed, becomes final upon service of the decision.

Proposed Rule 8224 requires the Association to provide to the NASD membership notice of any suspension imposed pursuant to Rule 8223, and proposed Rule 8226 requires that the Association also serve a copy of a notice or decision served on a person associated with a member on such member.

Proposed Rule 8225 adds a new provision for termination of the suspension. Upon request by the suspended member or associated person, the head of the appropriate NASD Regulation department or office may terminate a suspension if the member or associated person has fully complied with a notice or decision issued under the Rule 8220 Series. If the head of the appropriate department or office denies the request, the proposed Rule provides the member or associated person with the right to apply to the National Business Conduct Committee for relief from the suspension on the ground of full compliance with the notice issued under proposed Rule 8221 or the conditions specified in a decision issued under proposed Rule 8223.

Finally, proposed Rule 8227 clarifies that any action taken under the Rule 8220 Series does not foreclose the Association from taking action against the member or associated person under any other Rule.

With respect to the Rule 8300 Series, the NASD proposes to amend Rule 8310, which provides for sanctions, to conform with the proposed Rule 9000 Series and to make Rule 8310 shorter, clearer, and easier to understand. IM-8310-1, which addresses the effect of a suspension, revocation, or bar, is amended to add clarity and readability to the interpretive material. No change is proposed to IM-8310-2.⁴⁵ Rule 8320, which sets forth requirements for the payment of fines, other monetary sanctions, or costs, is amended to divide the provisions of the Rule into shorter and clearer sentences and more numerous paragraphs for clarity. Rule

⁴³ Proposed Rule 8210 also reflects a proposed rule change to provide for electronic submissions, which was submitted to the Commission in rule filing NASD-96-46.

⁴⁴ The appropriate department or office of NASD Regulation is the department or office that issued the request for information, reports, material, data, or testimony that the member or associated person failed to provide, or in the case of a member that failed to keep its membership application or supporting documents current, the Department of Member Regulation.

⁴⁵ NASD Regulation has pending at the Commission a rule proposal to amend IM-8310-2 that was published for comment by the Commission in Securities Exchange Act Rel. No. 38380 (March 10, 1997), 62 FR 12866 (March 18, 1997). This rule filing does not propose further changes to IM-8310-2.

8330, which addresses the assessment of costs in Rule 9000 Series proceedings, is amended to conform to the proposed Rule 9000 Series.

h. Proposed Changes to Disciplinary Proceedings in the Rule 9000 Series

(i) Summary

In the current and proposed Rule 9000 Series, the Rule 9100 Series sets forth rules of general applicability to disciplinary proceedings and other proceedings brought against a member or a person associated with a member. The Rule 9200 Series sets forth the specific procedures for disciplinary proceedings, including settlements, letters of acceptance, waiver, and consent ("AWCs") and minor rule plan violation letters ("MRVs"), and the Rule 9300 Series sets forth the appeal or review of a disciplinary proceeding.

The Rule 9100 Series now contains seven rules, the three most important of which set forth a series of defined terms and provide for disqualification of an adjudicator in case of conflict of interest, and the service of complaints, decisions and notices.⁴⁶ In contrast, the proposed Rule 9100 Series contains 20 proposed Rules, setting forth a variety of important procedural improvements, including a series of rules regarding service and notice of various papers and filing requirements (the proposed Rule 9130 Series), rules relating to the appearance of counsel, or other person authorized to act in a representative capacity (Proposed Rules 9141, 9142, 9150), a detailed rule provision prohibiting *ex parte* communications generally (Proposed Rule 9143) and a related provision regarding separation of functions (Proposed Rule 9144), a proposed Rule providing for a motions practice (Proposed Rule 9146), a provision for disqualification of an Adjudicator (Proposed Rule 9160),⁴⁷ and

a provision prohibiting interlocutory review (Proposed Rule 9148).⁴⁸ The more significant proposed Rules in the Rule 9100 Series are discussed in greater detail below.

The Rule 9200 Series now contains 13 rules, the most important of which provide for: the issuance of a complaint by a District Committee, the Market Regulation Committee, or the NASD Board of Governors or the National Business Conduct Committee; the use of AWCs or MRVs to resolve certain disciplinary matters prior to issuing a complaint; summary complaint procedures; hearings; the consideration of a complaint by a Hearing Panel comprised of persons from a District Committee in the geographic area where the relevant office of the Respondent is located (the venue provision), the composition of Hearing Panels; evidence and procedure in a committee hearing; the decision of a committee; and settlement procedures.⁴⁹

In comparison, the proposed Rule 9200 Series contains 30 proposed Rules. The roles of the District Committee and Market Regulation Committee are greatly reduced. Neither may initiate a complaint; instead, the Department of Enforcement may investigate a case and file a complaint to initiate a disciplinary proceeding. (Proposed Rule 9211(a).) Hearing Panels or, if applicable,

Extended Hearing Panels,⁵⁰ are now selected by a Chief Hearing Officer, and are composed of a Hearing Officer, a professional NASD Regulation staff member, and two Panelists, both selected from the securities industry and drawn from a pool of persons including those who currently serve on a District Committee or who formerly served on a disciplinary hearing panel, and others who have served previously in certain aspects of the disciplinary process, including former members of the NASD Regulation Board, the NASD Board and the Nasdaq Board of Directors. (Proposed Rules 9120(o), 9120(i), 9120(n), 9120(q), 9213, 9231, and 9232.) The Hearing Panel, or, if applicable, the Extended Hearing Panel, issues the "trial-level" decision in a disciplinary proceeding. (Proposed Rule 9268.)

A number of procedural enhancements are proposed. Proposed Rule 9215(c) provides for the filing of a motion for a more definite statement (in addition to proposed Rule 9146, providing for the filing of motions generally), proposed Rule 9221 allows a Hearing Officer or a Hearing Panel to order a hearing if the Adjudicator determines a hearing is necessary, notwithstanding that Respondents have waived their rights to a hearing, and proposed Rules 9233 and 9234 set forth detailed disqualification provisions.

The proposed Rule 9240 Series and proposed Rule 9250 Series set forth requirements for Parties to participate in pre-hearing conferences, and exchange, before a hearing on the merits, documentary evidence, a list of witnesses and expert witnesses, and an outline of the case or defense. The same proposed rules also provide that a Complainant must provide documents to a Respondent, and set forth procedures for doing so. Sanctions for not complying with Rule requirements regarding the production of Documents, other provisions of the Rule 9200 Series, or an order of an Adjudicator in the Rule 9200 Series, are set forth in proposed Rule 9280.

At hearings, under proposed Rule 9262, a witness subject to the jurisdiction of the Association is required to testify under oath or

⁴⁶The seven rules are: Rule 9110, entitled "Application and Purpose of Code"; Rule 9111, entitled "Communications Relating to Grievances"; Rule 9120, entitled "Definitions"; Rule 9131, entitled "Grounds of Disqualification to Participate in Proceedings"; Rule 9132, entitled "Reports and Examination of Books and Records"; Rule 9133, entitled "Rulings on Procedural Matters"; and, Rule 9134, entitled "Service of Complaints, Decisions and Other Notices."

⁴⁷The term "Adjudicator" means: (1) A body, board, committee, other group, or natural person that presides over a proceeding and renders a decision; (2) a body, board, committee, other group, or natural person that presides over a proceeding and renders a recommended or proposed decision which is acted upon by an Adjudicator described in (1); or, (3) a natural person who serves on a body, board, committee, or other group described in (1) or (2). The term includes a Subcommittee as defined in paragraph (z), an Extended Proceeding Committee as defined in paragraph (k), and a Statutory Disqualification Committee as defined in paragraph (y). (Proposed Rule 9120(a).)

⁴⁸The proposed Rules of general applicability to all proceedings do not include a specific provision regarding the attorney-client privilege and the work-product privilege. The Association has an important obligation to detect and address violations of its rules and the federal securities laws and the rules and regulations thereunder, and member firms are obligated to cooperate in such efforts. The attorney-client privilege and the work-product privilege are recognized. In the context of the obligations and statutory responsibilities of a self-regulatory organization ("SRO") and a member's agreement to abide by the rules of the SRO, however, the existence of such privileges does not limit the obligation of a member to comply with duties imposed by the SRO or shield a member from such obligations. (See, e.g., letter from Edward Kwalwasser, Executive Vice President, Regulatory Group, New York Stock Exchange ("NYSE"), to Robert I. Kleinberg, Executive Vice President, Oppenheimer & Co., January 30, 1991, appending 11 "Broad Principles" discussed by the NYSE and the Securities Industry Association.)

⁴⁹The rules of the current Rule 9200 Series are: Rule 9211, entitled "Issuance of Complaints by Committees"; Rule 9212, entitled "Form, Content, Notice and Withdrawal of Complaints"; Rule 9213, entitled "Complaints Directed by the Board or the National Business Conduct Committee"; Rule 9214, entitled "Complaint Docket"; Rule 9215, entitled "Consolidation of Complaints"; Rule 9216, entitled "Answers to Complaints"; Rule 9217, entitled "Acceptance, Waiver and Consent, Minor Rule Violations, and Summary Complaint Procedures"; Rule 9221, entitled "Request for Hearing"; Rule 9222, entitled "Venue"; Rule 9223, entitled "Hearing Panels"; Rule 9224, entitled "Evidence and Procedure in Committee Hearings"; Rule 9225, entitled "Decision of the Committee"; and Rule 9226, entitled "Settlement Procedure."

⁵⁰The Chief Hearing Officer appoints an Extended Hearing Panel if upon consideration of the complexity of the issues involved, the probable length of the hearing, or other factors, the Chief Hearing Officer determines that a matter shall be an Extended Hearing. (Proposed Rule 9120(i) and proposed Rule 9120(h).) Designation of a matter as an Extended Hearing provides the Chief Hearing Officer the ability to select, among other potential Panelists, persons who are retired and may have both time and relevant experience to bring to an Extended Hearing. (Proposed Rule 9231(c).)

affirmation. Under proposed Rule 9264, rules are set forth allowing a Party to file a motion for summary disposition.

In the post-hearing time frame, under proposed Rule 9266, a Hearing Officer may require a Party to file proposed findings of fact, conclusions of law, and post-hearing briefs. A Hearing Officer prepares a decision representing the majority of the Hearing Panel or, if applicable, the Extended Hearing Panel under proposed Rule 9268. Proposed Rule 9268(c) allows a Panelist or a Hearing Officer to write a dissenting opinion. Under proposed Rule 9270, the Association proposes to modify existing settlement procedures.

The most important of the changes proposed to the Rule 9200 Series are discussed in greater detail below.

In the current and proposed Rule 9300 Series, procedures are set forth for the appeal of a case by a Party or the review of a case by the National Business Conduct Committee, and the NASD Regulation Board and the NASD Board. Current Rule 9300 Series contains eight rules;⁵¹ the proposed Rule 9300 Series contains 19 proposed rules.

In the proposed Rule 9300 Series, important changes include the unlimited right of the Department of Enforcement to appeal a disciplinary proceeding decision issued by a Hearing Panel or, if applicable, an Extended Hearing Panel (Proposed Rule 9311(a)), the requirement that persons subject to the jurisdiction of the Association testify under oath or affirmation (Proposed Rule 9346(h)); and the requirement that members of the NASD Regulation Board or the NASD Board shall have at least a specific period of time to review a disciplinary proceeding decision in order to determine whether to call a case for discretionary review by such board. (Proposed Rules 9351 and 9352.) Proposed Rule 9360 provides that a sanction imposed in a final disciplinary action of the Association becomes effective not earlier than 30 days after the date of service of the decision. In a proposed change designed to reflect current practice in most cases, proposed Rule 9370 codifies existing

⁵¹ In the Rule 9300 Series, the eight rules are: Rule 9310, entitled "Review of Disciplinary Actions by the National Business Conduct Committee and the Board"; Rule 9311, entitled "Proceedings"; Rule 9312, entitled "Evidence in National Business Conduct Committee Proceedings"; Rule 9313, entitled "Powers of the National Business Conduct Committee on Review"; Rule 9314, entitled "Decision of the National Business Conduct Committee"; Rule 9315, entitled "Notification of Decision; Final Disciplinary Action"; Rule 9316, entitled "Discretionary Review by the Board"; and Rule 9317, entitled "Application to SEC for Review."

practice under which sanctions, other than a bar or expulsion, are stayed when a person files a request for review of a final disciplinary action of the Association with the Commission.

Some of the most significant proposed changes requiring greater explanation are discussed in detail in the discussion following.

Currently, the Rule 9400 Series consists of two Rules, Rule 9410, Sanctions, and Rule 9420, Costs of Proceedings. The Association proposes to delete the current Rule 9400 Series because it duplicates provisions in the current and proposed Rule 8000 Series. The Rules providing for sanctions and the imposition of costs, now set forth in proposed Rules in the Rule 8000 Series, are discussed above in Part g, entitled "Proposed Changes to Rule 8000 Series."

(ii) *The Role of the District Committees*

Under the current Rule 9000 Series, each of the District Committees, in addition to authorizing complaints, also (1) serves as a pool for the hearing panels that hear disciplinary proceedings and recommend decisions to the full District Business Conduct Committee; and (2) issues initial decisions in disciplinary proceedings brought against NASD members and their associated persons. (Rules 9211 through Rule 9216, and Rules 9221 through 9225.) Under the proposed rule change, a District Committee's adjudicatory role is to serve as a pool of persons from which the Chief Hearing Officer may select Panelists to serve on the adjudicatory panels. (Proposed Rules 9231 and 9232.) This change is designed to preserve the core of the NASD's disciplinary process, "member participation and peer review," while eliminating aspects of the disciplinary process pursuant to the Undertakings. (Select Committee Report, p. C-16.)

Specifically, proposed Rule 9231(b) provides, in pertinent part: "The Hearing Panel shall be composed of a Hearing Officer and two Panelists * * *." To serve as a Panelist for a Hearing Panel, each Panelist must be associated with a member and be:

- (A) A current member of a District Committee;
- (B) A person who previously served on a disciplinary hearing panel;
- (C) A former member of the National Business Conduct Committee;
- (D) A person who previously served on a disciplinary subcommittee of the National Business Conduct Committee, including a Subcommittee, an Extended Proceeding Committee, or their predecessor subcommittees; or

(E) A person who previously was a Director, a member of the Nasdaq Board of Directors, or a Governor, but does not sit currently on any of the boards. (Proposed Rule 9231(b)(1) (A) through (E).) The parallel provision in paragraph (c) of proposed Rule 9231 provides, in pertinent part, that: "The Extended Hearing Panel shall be composed of a Hearing Officer and two Panelists * * *." To serve as a Panelist for an Extended Hearing Panel, each Panelist must be associated with a member or retired therefrom. In other respects, the pool from which a Panelist may be drawn is identical to that described above for a Hearing Panel. (Compare proposed Rule 9231(b)(1) (A) through (E) and proposed Rule 9231(c)(1) (A) through (E).)

Generally, both Panelists will be selected from the larger pool of Panelists based upon whether they reside in the same geographic area in which the alleged misconduct occurred. (Proposed Rule 9232(c).) Specifically, in proposed Rule 9232(d), the Association proposes that the Chief Hearing Officer generally select Panelists in the following priority: (1) From the current members of the Primary District Committee; (2) from the other categories of persons eligible to serve as Panelists as set forth in Rule 9231(b)(1) (A) through (E) or, if applicable, in Rule 9231(c)(1) (A) through (E), who are located in the same geographic areas as the Primary District Committee; and (3) if applicable, and discussed in greater detail below, from current or former members of the Market Regulation Committee. However, the Chief Hearing Officer has discretion to select one or both Panelists from the larger, national pool. (Proposed Rule 9232 (d) and (e).)

Proposed Rule 9232 provides, in paragraph (a)(1), that the Chief Hearing Officer shall determine "which District Committee will be the Primary District Committee from which Panelists may be selected." The term "Primary District Committee" is defined in Rule 9120(w).⁵² Paragraph (c) of proposed Rule 9232 sets forth the non-exclusive list of factors used by the Chief Hearing Officer to designate a Primary District Committee.⁵³

⁵² The term "Primary District Committee" means, in a disciplinary proceedings, the District Committee designated by the Chief Hearing Officer pursuant to Rule 9232 to provide one or more of the Panelists to a Hearing Panel or, if applicable, to an Extended Hearing Panel, for such disciplinary proceedings. (Proposed 9120(w).)

⁵³ The factors used by the Chief Hearing Officer are as follows:

- (1) The location of a Respondent's principal office if the Respondent is or was a member firm;

After designating the Primary District Committee, the Chief Hearing Officer selects two Panelists based on expertise, the absence of any conflict of interest or bias, and any appearance thereof, availability, and the frequency with which a member has served as a Panelist on Hearing Panels or Extended Hearing Panels during the past two years. (Proposed Rule 9232(d).)

However, as noted previously, proposed Rule 9232 provides the Chief Hearing Officer flexibility to select one or both Panelists from the national pool of Panelists. Specifically, proposed Rule 9232 provides that the designation of a Primary District Committee "does not preclude the Chief Hearing Officer from selecting one or more Panelists from other categories of eligible Panelists if the Chief Hearing Officer determines that one or more persons from other categories of eligible Panelists more clearly meet the criteria of paragraph (d) (1) through (4)" (Proposed Rule 9232(e) (regarding expertise, absence of any conflict of interest or bias, availability, and frequency of service)) "and the public interest or the administration of NASD Regulation's regulatory and enforcement program would be enhanced" by such selection (Proposed Rule 9232(e)). Moreover, as discussed in greater detail below, proposed Rule 9232 provides the Chief Hearing Officer flexibility to select one Panelist from the pool of Market Regulation Committee members and former members, if appropriate. (Proposed Rule 9232 (b) and (d).)

In summary, the District Committees, in contrast to their current authority, are not allowed to initiate a disciplinary proceeding, serve as an evidentiary Hearing Panel for a disciplinary proceeding, issue a final decision, or review or approve a final decision. These revisions are consistent with Undertakings 3 and 4 and incorporate

(2) The location of a Respondent's office at the time of the alleged misconduct if the Respondent is or was an associated person;

(3) The location of the office of a member or an associated person, or a former member or associated person, where the alleged misconduct occurred;

(4) The location of witnesses at the time of the filing of the complaint, especially the location of witnesses who are or were customers of a Respondent;

(5) The location, at the time of the alleged misconduct, of the main, branch, or other office in which supervisory personnel, who are or were responsible for the supervision of a Respondent, were employed; and

(6) The location, at the time of the alleged misconduct, of the main, branch, or other office in which supervisory personnel, who are or were responsible for the supervision of the office, division, function, or segment of the member where the alleged misconduct occurred, were employed.

(Proposed Rule 9232(c).)

the recommendations of the Select Committee.

(iii) *The Role of the Market Regulation Committee*

Under the proposed rule change, the only adjudicative role for the former Market Surveillance Committee, now the Market Regulation Committee, is to serve as a pool of Panelists to serve on a Hearing Panel or, if applicable, an Extended Hearing Panel. A current or former Market Regulation Committee member who is associated with an NASD member may be chosen by the Chief Hearing Officer to serve as a Panelist on a Hearing Committee or an Extended Hearing Committee. However, a current or former member of the Market Regulation Committee may be selected by the Chief Hearing Officer only in limited instances, *i.e.*, when the Chief Hearing Officer determines that the complaint alleges at least one cause of action involving a violation of a statute or a rule within the scope of proposed Rule 9120(q),⁵⁴ the Chief Hearing Officer, in the exercise of his or her discretion, may determine to appoint *one* of the two Panelists from within the Market Regulation Committee pool. (See, *e.g.*, Rule 9232(b)(2).)

Specifically, proposed Rule 9231(b)(2) pertaining to Hearing Panel selection provides: "If the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120(q), the Chief Hearing Officer may select as a Panelist a current member of the Market Regulation Committee or a former member of the Market Regulation Committee who previously served on a disciplinary hearing panel." In addition, the general criteria in proposed Rule 9231 that a Panelist be associated with a member applies to any Panelist drawn from the Market Regulation Committee pool."

The parallel provision in paragraph (c)(2) of proposed Rule 9231 pertaining to Extended Hearing Panel selection provides: "If the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120(q), the Chief Hearing Officer may select as a Panelist a current member of the Market Regulation Committee, or a Panelist drawn from the Market Regulation Committee pool.

The parallel provision in paragraph (c)(2) of proposed Rule 9231 pertaining to Extended Hearing Panel selection provides: "If the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120(q), the Chief Hearing

Officer may select as a Panelist a current member of the Market Regulation Committee, or a former member of the Market Regulation Committee, who, at the time of his or her membership on the Market Regulation Committee, was associated with a member of the Association. In order to be eligible to sit as a Panelist on an Extended Hearing Panel, a former member of the Market Regulation Committee shall have served previously on a disciplinary hearing panel." (Proposed Rule 9231(c)(2).) With respect to an Extended Hearing Panel, a former member of the Market Regulation Committee may be chosen, if retired from the securities industry, only if such person has retired from such employment not earlier than four years before the date the complaint was filed. (Proposed Rule 9231(c).)

The potential impact of Market Regulation Committee members or former members on a disciplinary proceeding decision is limited in two significant ways. First, a Market Regulation Committee member or former member may not be selected to serve as a Panelist unless at least one of the causes of action alleges a violation of a federal securities statute, or a rule or regulation, a Rule of the Association or a policy designated in proposed Rule 9120(q).⁵⁵ Second, the Chief Hearing Officer in each case has discretion whether to select a Panelist from the Market Regulation Committee (Proposed Rules 9231 (b) and (c), and 9232 (a)(2) and (b)), and may not select more than one such Panelist (Proposed Rules 9231 (b)(2) and (c)(2), and 9232(a)(2) and (b)).

In summary, the limitations on the Market Regulation Committee imposed in the proposed Rule 9200 Series, in contrast to its current authority in disciplinary proceedings, are parallel to those limitations imposed on the District Committees. Thus, under the proposed Rule 9200 Series, the Market Regulation Committee is not allowed to initiate a disciplinary proceeding, serve as an evidentiary Hearing Panel for a disciplinary proceeding, issue a final decision, or review or approve a final decision. These revisions are consistent with Undertakings 3 and 4 and incorporate the recommendations of the Select Committee. In contrast to the District Committee provisions relating to Panelists, Market Regulation Committee Panelists will participate in fewer disciplinary proceedings than the Panelists drawn from the District Committee portion of the pool.

⁵⁴ See *supra* note 9.

⁵⁵ See *supra* note 9.

(iv) How Disciplinary Proceedings Are Initiated

As noted above, currently, the Rule 9200 Series provides that a complaint to initiate a disciplinary proceeding may be initiated by a District Committee, the Market Regulation Committee, the National Business Conduct Committee, or the NASD Board. (Rule 9211 and Rule 9213.) In contrast, proposed Rules 9211 authorizes the Department of Enforcement of NASD Regulation to authorize and issue complaints. (Proposed Rule 9211 (a) and (b).) In addition, as also provided in Undertaking 3 of the SEC Settlement, the Department of Enforcement may be directed to authorize and issue a complaint by the NASD Regulation Board or the NASD Board. (Proposed Rule 9211(b).) The shift in the allocation of the "grand jury" function from the District Committees and the Market Regulation Committee to the Department of Enforcement is a key element in providing the professional staff of NASD Regulation with the autonomy and independence required to implement a vigorous and evenhanded enforcement program. The Association believes proposed Rules 9211 (a) and (b) comply fully with Undertaking 3 of the SEC Settlement and avoid conflicts of interest or inconsistencies in application that may result from the division of the "grand jury" function among the District Committees.

(v) Ex Parte Communications Prohibited

As recommended by the Select Committee, *ex parte* contacts between the disciplinary panels and the Parties or their representatives (counsel and other representatives) are prohibited in the new Rule 9000 Series disciplinary proceedings. Proposed Rule 9143 defines and prohibits *ex parte* communications. Proposed Rule 9143 is derived from Section 554(d)⁵⁶ and Section 557(d)(1) of the APA,⁵⁷ SEC Rules of Practice 120,⁵⁸ and ACUS Model Adjudication Rule 120.⁵⁹ Where appropriate, the prohibition also applies to the other proceedings governed by the Rule 9000 Series.

1. *Persons Subject to Rule.* In order to understand the scope of proposed Rule 9143, the four basic parts of the Rule and proposed Rule 9120(p), the definition of "Interested Association Staff," must be considered together. First, in paragraphs (a) (1) and (2) of proposed Rule 9143, three groups of

people are identified (two Parties and persons identified with such Parties and one Adjudicator and persons identified with such Adjudicator). Each group is subject to the prohibition against making or receiving communications in a proceeding for the benefit of only one side or one Party. Second, in paragraphs (a) (1) and (2) of proposed Rule 9143 and the introductory clause of paragraph (a) providing "or to the extent required for the disposition of *ex parte* matters as authorized by this Rule 9000 Series," the broad classes of communications that are subject to this prohibition are described and narrow exceptions are set forth. Third, in proposed Rule 9143 (b) and (c), the remedy for an aggrieved Party and any remedial action to be taken by an Adjudicator when an opposing Party (or a person identified with such Party) has made a prohibited communication is set forth. Fourth, in proposed Rule 9143(d), the point in time after which communications in violation of the Rule could occur is established for disciplinary proceedings. (In various provisions in the proposed Rule 9400 Series and the proposed Rule 9500 Series, proposed Rule 9143 applies, but the point in time after which violative communications could occur is modified to reflect the particular aspects of the proceeding.)

First, the adjudicatory group that is prohibited from making or receiving prohibited communications includes the Adjudicator and any person, such as a law clerk or other person, who is engaged in advising the Adjudicator. In proposed Rule 9143, these persons are:

A Governor,⁶⁰ a Director⁶¹ or an Adjudicator who is participating in a decision with respect to that proceeding, or [to] an Association employee who is participating or advising in the decision of a Governor, a Director, or an Adjudicator with respect to that proceeding * * *.⁶²

⁶⁰The term "Governor" means a member of the NASD Board. (Proposed Rule 9120(l).)

⁶¹The term "Director" means a member of the NASD Regulation Board only. Nasdaq directors are excluded intentionally because they do not participate in disciplinary proceedings. (Proposed Rule 9120(e).)

⁶²Routinely, there are a number of people in addition to the staff of the Department of Enforcement who participate in the factual inquiry forming the basis for the determination that a complaint should be issued. For example, district offices are responsible for the examination of certain members. If, for example, the Department of Enforcement authorizes the issuance of a complaint against a member located in a particular district, in most cases, at least the following staff would be involved in the disciplinary process and would be considered "Interested Association Staff": the examiners employed in the district office who are responsible for the examination of the member, the regional attorney in the district, and the director of the district.

(Proposed Rule 9143(a)(1).) Like ACUS Model Rule 120,⁶³ the proposed rule is not intended to preclude persons acting in an adjudicatory role, either singly or on a committee or panel, from consulting with adjudicatory employees, such as attorney advisers or law clerks, because they are viewed as within the Adjudicator's group.⁶⁴

The two other groups are identifiable based on their affiliation with either the Complainant or Respondent. Each group consists of at least a Party, and his or her counsel or representative. In disciplinary proceedings, the relevant group includes the Respondent or the several Respondents (each a member firm or an associated person), and counsel or representatives.

The third group is the Complainant's group. The Complainant is the Department of Enforcement, and because of its institutional nature, this group is more difficult to identify. In addition to counsel or a representative identified with such Party, an additional group of persons is identified with the Complainant and also is subject to the *ex parte* prohibition. This additional group of persons, "Interested Association Staff," is defined in proposed Rule 9120(p). "Interested Association Staff" represents other parts of the Association that have been involved with the Department of Enforcement in certain stages prior to or during the actual prosecution of the disciplinary proceeding (e.g., referring the case to the Department of Enforcement or forwarding examination reports or other relevant information or documents to the Department of Enforcement for use as evidence). For a proposed Rule 9200 Series disciplinary proceeding, for example, "Interested Association Staff" means:

- (a) The Head of Enforcement;
- (b) A Department of Enforcement employee who reports to the Head of Enforcement;
- (c) An Association employee who directly participated in the authorization of the complaint; or
- (d) An Association employee who directly participated in an examination, investigation, prosecution, or litigation related to a specific disciplinary proceeding, and a district director or department head to whom such employee reports * * *.

(Proposed Rule 9120(p)(1)(D).) The definition encompasses persons who are engaged "in the investigative or prosecuting functions" referred to in SEC Rules of Practice 120(a)(2).⁶⁵ For example, certain Association personnel involved in examining a member may

⁶³MAR 120.

⁶⁴MAR 120, comment 1.

⁶⁵17 CFR 201.120(a)(2).

⁵⁶5 U.S.C. 554(d).

⁵⁷5 U.S.C. 557(d)(7).

⁵⁸17 CFR 201.120.

⁵⁹MAR 120.

be included in "Interested Association Staff."

2. *Scope.* To ensure that Respondents in an Association disciplinary proceeding are protected from unfair *ex parte* communication, the proposed *ex parte* Rule prohibits the initiating Party, the Department of Enforcement, such Party's counsel, and all other persons within the Association who have had sufficient contact with the case, *i.e.*, the "Interested Association Staff," from engaging in any prohibited communication with the Adjudicator (or a person identified with such Adjudicator).⁶⁶ Proposed Rule 9143 is broader in that the scope of persons who are subject to the prohibition against *ex parte* communications is greater than under both Section 557 of the APA⁶⁷ and ACUS Model Rule 120⁶⁸ because "Interested Association Staff," is broader than the term "no interested person outside the agency" used in Section 557(d)(1) (A) and (B) of the APA⁶⁹ and ACUS Model Rule 120.⁷⁰

3. *Narrow Exceptions.* In Rule 9143(a) (1) and (2), all communications "relative to the merits" of a proceeding are prohibited between one Party (or persons identified with such Party) and the Adjudicator (or persons identified with the Adjudicator). Paragraph (a), which prohibits communication except "to the extent required for the disposition of *ex parte* matters as authorized by the Rule 9000 Series," is intended to clarify that a communication that ultimately is not related to the merits of the proceeding is not intended to be prohibited. For example, the proposed Rule is not intended to prohibit communications such as inquiries about such matters as the status of the case, when it will be heard, and similar inquiries. Similar language is found in Section 554⁷¹ and Section 557 of the APA⁷² and ACUS Model Adjudication Rule 120.⁷³

4. *Remedy.* In paragraphs (b) and (c), proposed Rule 9143 provides a remedy for an aggrieved Party and remedial action to be taken by an Adjudicator when an opposing Party (or a person identified with such Party) has made a communication in violation of the Rule. Paragraph (b) of proposed Rule 9143 is parallel to the language in Section

557(d)(1)(C)⁷⁴ of the APA and paragraph (C) of ACUS Model Adjudication Rule 120.⁷⁵ Paragraph (c) of proposed Rule 9143 is substantially drawn from Section 557(d)(1)(D) of the APA.⁷⁶ Paragraph (c) of proposed Rule 9143, although somewhat parallel to paragraph (D) of ACUS Model Adjudication Rule 120,⁷⁷ allows an Adjudicator to apply a sanction with more frequency than the corresponding provision of ACUS Model Adjudication Rule 120.⁷⁸

5. *When Prohibition Begins.* Proposed Rule 9143(d) establishes, for a disciplinary proceeding brought under the proposed Rule 9200 Series, the point in time beginning with which the prohibition applies. Specifically, the prohibition applies upon "the authorization of a complaint * * * unless the person responsible for the communication has knowledge that the complaint will be authorized, in which case the prohibitions shall apply beginning at the time of his or her acquisition of such knowledge."⁷⁹ Section 557(d)(1)(E) of the APA⁸⁰ is more flexible in its application than Rule 9143(d). Section 557(d)(1)(E) of the APA⁸¹ provides that the prohibitions apply no "later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge." Model Adjudication Rule 120, paragraph (E), adopts a similar standard, providing that: "The prohibitions of this rule shall apply beginning (time designated by (the AA)), but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of her/his acquisition of such knowledge."⁸²

⁷⁴ 5 U.S.C. 557(d)(1)(C).

⁷⁵ MAR 120.

⁷⁶ 5 U.S.C. 557(d)(1)(D).

⁷⁷ MAR 120.

⁷⁸ *Id.*

⁷⁹ For example, if after a meeting among various staff members of NASD Regulation, a staff member who attended the meeting knew that a complaint would be issued and then spoke to an Adjudicator concerning the case, the staff member would violate the Rule 9143 prohibition against *ex parte* communication.

⁸⁰ 5 U.S.C. 557(d)(1)(E).

⁸¹ *Id.*

⁸² MAR 120. In MAR 120, the term "AA" means "adopting agency." The phrase "(time designated by (the AA))" means the time designated by the agency adopting the model rule.

6. *Waiver.* Paragraph (e) of proposed Rule 9143 provides that the protections under the proposed rule for a Respondent, or a person anticipating that he or she will be named as a Respondent if potential charges are not resolved using alternative procedures (*e.g.*, an AWC or a MRV), are waived if: (1) A Respondent submits an offer of settlement under Rule 9270, or (2) a member or a person associated with a member executes an AWC under proposed Rule 9216(a) or a MRV under proposed Rule 9216(b). This provision provides all persons involved in the settlement process or the pre-complaint resolution process with the flexibility to attempt to dispose of a disciplinary matter, and is consistent with the *ex parte* concepts applied in civil litigation.

In summary, the Association believes that proposed Rule 9143 either parallels or provides for slightly more stringent protections against *ex parte* communications than do other standard procedural rules referred to above. Based on the breadth of the term "Interested Association Staff" and the other parts of proposed Rule 9143, the *ex parte* protections in the proposed Rule provide assurance that no Party will be able to obtain an unfair advantage by discussions with a person involved in adjudicating a proceeding. Finally, proposed Rule 9143 incorporates a change specifically recommended by the Select Committee.

(vi) *The Role of The Hearing Officer and Hearing Panel*

1. *Establishment of Office of Hearing Officers.* As recommended by the Select Committee and pursuant to Undertaking 3, NASD Regulation has established an Office of Hearing Officers ("OHO") as an independent office within NASD Regulation. The OHO is headed by the Chief Hearing Officer, who is an Executive Vice President and reports directly to the President of NASD Regulation. The purpose of the OHO is to provide a corps of independent and professional Hearing Officers (attorneys with appropriate experience and training) to preside over all formal NASD disciplinary proceedings. The Association believes the appointment of such Hearing Officers is consistent with the recommendations of the Select Committee and complies with Undertaking 3.

The participation of Hearing Officers will enhance dispassionate application of the rules and promote fairness in the disciplinary process. In addition, as recognized by the Select Committee, the participation of Hearing Officers will help ensure that complex or contentious

⁶⁶ In proceedings subject to the Rule 9000 Series other than disciplinary proceedings, the Department of Member Regulation generally initiates the specified proceeding.

⁶⁷ 5 U.S.C. 557.

⁶⁸ MAR 120.

⁶⁹ 5 U.S.C. 557(d)(1) (A) and (B).

⁷⁰ MAR 120.

⁷¹ 5 U.S.C. 554.

⁷² 5 U.S.C. 557.

⁷³ MAR 120, comment 2.

cases are managed effectively. All litigated disciplinary proceedings will be decided by a panel comprised of one Hearing Officer and two Panelists, *i.e.*, the two securities industry representatives. The use of industry Panelists is intended to ensure that market expertise and judgment will continue to be brought to bear on the disciplinary process. Participation of a professional Hearing Officer in a securities industry disciplinary proceeding is not new; for example, the New York Stock Exchange maintains a similar procedure.⁸³

2. *Assignment of Hearing Officer.* Proposed Rule 9213(a) requires the Chief Hearing Officer to assign a Hearing Officer to preside over a disciplinary proceeding "as soon as practicable after a Complainant has filed his or her complaint with the Office of Hearing Officers." Thus, once a complaint is filed, a Hearing Officer is appointed and presides over all matters relating to the proceeding. This helps ensure effective case management from the outset of the proceeding. For example, a Hearing Officer considers motions to amend a complaint (Proposed Rule 9212(b)) and motions by Respondents for a more definite statement (Proposed Rule 9215(c)).

3. *Appointment of Hearing Panel or Extended Hearing Panel, Timing, and Hearing Panel Composition.* Proposed Rule 9213(b) requires that the Chief Hearing Officer appoint persons to serve as Panelists in the disciplinary proceeding "[a]s soon as practicable after assigning a Hearing Officer" to such proceeding. In doing so, the Chief Hearing Officer must determine if the case will require the appointment of a Hearing Panel or an Extended Hearing Panel. (Proposed Rule 9213(b).)

Proposed Rules 9231(a) and 9231(b) set forth the composition of a Hearing Panel and an Extended Hearing Panel and provide that both types of panels are composed of two Panelists and a Hearing Officer. A Hearing Panel is appointed for and decides most disciplinary proceedings. (Proposed Rule 9231(a).) As referenced above, an Extended Hearing Panel is appointed if the Chief Hearing Officer determines that the matter should be designated an Extended Hearing because the issues are complex, or it is anticipated that the hearing will be lengthy, or based upon other material factors. (Proposed Rules 9231(b) and 9120(h).) By designating a proceeding as an Extended Hearing, the Chief Hearing Officer has a larger pool of persons from which to appoint Panelists and may consider appointing

persons who have greater time to donate to the disciplinary process, *i.e.*, persons who have retired recently from employment in the securities industry.

4. *Hearing Officer Responsibility for Case Management.* Consistent with the recommendations of the Select Committee, the Hearing Officer has the authority to and will be responsible for determining procedural, evidentiary, scheduling, and other matters pertaining to case management during the pre-hearing and hearing phase of the disciplinary process. In this regard, various rules setting forth the authority of the Hearing Officer have been incorporated in the proposed Rule 9000 Series. Also consistent with the recommendations of the Select Committee, the Hearing Officer's authority is limited to determining non-dispositive matters; determinations of motions for summary disposition require action by the Hearing Panel, or, if applicable, the Extended Hearing Panel. (Proposed Rule 9146(j).) Effective case management by the Hearing Officer will enhance the disciplinary process. Early, pre-hearing resolution of various procedural and evidentiary matters will save time and assist in streamlining the presentation of evidence at the hearing. Effective case management also will help ensure that the Parties appropriately satisfy their discovery and other obligations in a timely fashion, and will thus enhance fairness in the disciplinary process.

Broad statements of a Hearing Officer's authority are set forth in proposed Rule 9235, "Hearing Officer Authority," proposed Rule 9241, "Pre-hearing Conferences," proposed Rule 9242, "Pre-hearing Submissions," and proposed Rule 9266, "Proposed Findings of Fact, Conclusions of Law, and Post-Hearing Briefs." These proposed rules, along with various other proposed rules addressing specific duties of a Hearing Officer, delegate to a Hearing Officer responsibility for case management, from the institution of a proceeding to its conclusion.

Specifically, proposed Rule 9235 provides that a Hearing Officer shall have authority to: hold pre-hearing and other conferences and require the attendance at such conferences of persons who have authority to negotiate on behalf of the Parties (Proposed Rule 9235(a)(1)); regulate the course of the hearing (Proposed Rule 9235(a)(2)); order the Parties to present oral argument at any stage of the disciplinary hearing (Proposed Rule 9235(a)(3)); resolve procedural, evidentiary, discovery, and other non-dispositive matters (Proposed Rule 9235(a)(4)); reopen any hearing, if necessary

(Proposed Rule 9235(a)(5)); create and maintain the official record of the disciplinary proceeding (Proposed Rule 9235(a)(6)); and draft a decision that represents the views of the majority of the Hearing Panel or, if applicable, the Extended Hearing Panel assigned to the proceeding (Proposed Rule 9235(a)(7)).

Proposed Rule 9235 expressly indicates that the list of powers is illustrative, not exhaustive; the Hearing Officer is permitted to take any action "necessary and appropriate to discharge his or her duties." The proposed rule is patterned on SEC Rules of Practice 111,⁸⁴ entitled "Hearing Officer Authority," and the powers enumerated in proposed Rule 9235 are consistent with many of the powers enumerated in that rule. The powers set forth in proposed Rule 9235 are also consistent with certain of the powers enumerated in ACUS Model Adjudication Rule 111,⁸⁵ "Adjudicator: Powers."

In connection with a Hearing Officer's responsibility for case management, it is anticipated that through the use of pre-hearing conferences (Proposed Rule 9241), a Hearing Officer will assist in eliminating unnecessary delay and improving the quality of the hearing. For example, these conferences may be used to clarify and simplify the issues, sharpen the preparation of the case, and facilitate the pre-hearing exchange of documents and witness lists. A Hearing Officer also has the authority to require the submission of a variety of pre-hearing materials (Proposed Rule 9242) and post-hearing findings of fact, conclusions of law, and post-hearing briefs (Proposed Rule 9266). These materials likely will be of particular assistance to the Hearing Panel, or, if applicable, the Extended Hearing Panel in complex or lengthy proceedings.

In addition to the broad delegations of discretionary authority discussed above, the proposed rules specifically authorize a Hearing Officer to perform various functions in the pre-hearing stage and during the hearing. With respect to pre-hearing matters, a Hearing Officer is authorized to: rule on motions to amend a complaint (Proposed Rule 9212(b)); rule on motions for a more definite statement and to amend an answer (Proposed Rule 9215(c) and (d)); issue a notice of hearing (Proposed Rule 9221(d)); grant the Parties' extensions of time for the completion of tasks and grant adjournments of a hearing (*e.g.*, proposed Rule 9222); rule on motions to disqualify one or both of the Panelists (Proposed Rule 9234(d)); and rule on discovery issues (Proposed Rules 9251,

⁸⁴ 17 CFR 201.111.

⁸⁵ MAR 111.

⁸³ See, *e.g.*, NYSE Rule 476.

9252 and 9253). With respect to a hearing, a Hearing Officer is authorized to rule on the admission of evidence during the hearing. (Proposed Rule 9263.) These powers are comparable to the powers delegated to a hearing officer in an SEC administrative proceeding.

Consistent with a Hearing Officer's case management responsibilities, a Hearing Officer is authorized to enter a default judgment when a Respondent fails to file an answer to the complaint within the prescribed time (Proposed Rule 9215(f)); or when, after receiving proper notice, a Respondent fails to appear at a pre-hearing conference (Proposed Rule 9241(f)) or at the hearing (Proposed Rule 9269(a)). Finally, to help ensure that a Hearing Officer's efforts to enhance the fairness of and promote order in the disciplinary process are not thwarted by recalcitrant Parties, their representatives, or their counsel, the proposed rules empower a Hearing Officer to fashion discretionary sanctions for violations of an order issued by the Hearing Officer, Hearing Panel or, if applicable, Extended Hearing Panel, or for other contemptuous conduct during any stage of the disciplinary proceeding. (Proposed Rule 9280.)

(vii) *The Role of Motions*

1. *Establishment of Motions Practice.* There is no rule in the current Rule 9000 Series explicitly governing a motions practice. As recommended by the Select Committee, the proposed Rule 9000 Series provides for a formal motions practice in NASD disciplinary proceedings. The purpose of the proposed change is to enhance the fair and efficient preparation and conduct of the hearings.

The general provisions for and structure governing motions practice set forth in proposed Rule 9146 are modeled upon ACUS Model Adjudication Rule 170.⁸⁶ Except for the treatment of motions for summary disposition, proposed Rule 9146 incorporates all of the provisions of ACUS Model Adjudication Rule 170⁸⁷ with only minor variations. In addition, reference was made to Rule 154 of the SEC Rules of Practice⁸⁸ and F.R.C.P. Rule 7(b).

Consistent with ACUS Model Adjudication Rule 170,⁸⁹ proposed Rule 9146 expressly permits written and oral motions, but the Adjudicator may order that an oral motion be set forth in writing if the Adjudicator finds that a

written motion is warranted by the facts and circumstances. Under both the ACUS Model Adjudication Rule 170⁹⁰ and the proposed Rule 9146, a motion must state the specific relief requested, the basis for the motion, and it may be denied without awaiting a response if it is dilatory, repetitive or frivolous. Likewise, unless otherwise ordered, the filing of a motion does not stay a proceeding.

There are two minor dissimilarities between the proposed Rule 9146 and ACUS Model Adjudication Rule 170.⁹¹ First, the time limit to respond to a written motion is longer under proposed Rule 9146(d) than it is under ACUS Model Adjudication Rule 170:⁹² 14 versus 10 days. In neither case, however, is the moving party granted the right to file a reply to an opposition without the Adjudicator's permission. Second, proposed Rule 9146(i) includes page limits and format requirements for written motions. Similar format requirements but not page limits are found in ACUS Model Adjudication Rule 152.⁹³ The Association believes that the page limit is appropriate because in the disciplinary proceeding forum generally there should be a narrower range of issues and fewer contested legal issues than in civil litigation.

2. *Motion for Summary Disposition.* Paragraph (a) of proposed Rule 9264 provides that, after a Respondent's answer has been filed and Documents have been made available to that Respondent, the Respondent or Complainant may file a motion for summary disposition of some or all of the causes of action in the complaint without leave of the Hearing Officer. Such motions must be filed at least 21 days before the time set for the hearing on the merits. Paragraph (b) of proposed Rule 9264 provides that, after a Complainant has completed presentation of its case in chief as to a Respondent, the Respondent or the Complainant, without leave of the Hearing Officer, may file a motion for summary disposition with respect to that Respondent. If a Complainant has not completed its case in chief, a Complainant or Respondent may move for summary disposition only with leave of the Hearing Officer. As noted previously, the current Rule 9000 Series does not provide for the filing of a motion for summary disposition.

The standards for motions for summary disposition under proposed

Rule 9264 deviate from the standards in the ACUS Model Adjudication Rules⁹⁴ and the SEC Rules of Practice⁹⁵ in two respects. First, proposed Rule 9146(j) explicitly states that a motion for summary disposition may only be decided by a majority vote of a Hearing Panel or Extended Hearing Panel not by a Hearing Officer. This provision should be read in conjunction with proposed Rules 9147 and 9235, which set out the power of a Hearing Officer to rule on procedural and other administrative matters arising during the course of a disciplinary proceeding. Proposed Rule 9235(a)(4) restricts a Hearing Officer's decisional authority to resolving all procedural and evidentiary matters, discovery requests, and other non-dispositive motions. Second, proposed Rule 9264 limits when a motion for summary disposition may be made without leave of a Hearing Officer. In this aspect, proposed Rule 9264 closely mirrors SEC Rules of Practice 250,⁹⁶ by restricting the filing of pre-hearing motions for summary disposition until after a Respondent has answered and Documents have been made available to the Respondent for inspection and copying pursuant to proposed Rule 9251. After a hearing on the merits has started, a motion for summary disposition may be made without leave of the Hearing Officer only after the Complainant in the proceeding has completed presentation of its case in chief.

(viii) *Expanded Discovery*

1. *Basis for Expanded Discovery Provisions.* The Select Committee recommended that:

The documentary discovery rights of respondents in NASD disciplinary proceedings should be expanded to furnish respondents, at a reasonable time in advance of the initial hearing, with all non-privileged materials in the NASD's possession (including exculpatory evidence) directly relevant to the dispute.

(Select Committee Report, p. C-25.) In response to and consistent with the Select Committee's recommendation, proposed Rules 9251 through 9253 provide for the discovery of non-privileged Documents⁹⁷ by Respondents in a disciplinary proceeding. Special attention was devoted to the Rule 9250 Series to assure that Documents received by the Department of

⁹⁴ *Id.*

⁹⁵ 17 CFR 201.111.

⁹⁶ 17 CFR 201.250.

⁹⁷ "Document" means a writing, drawing, graph, chart, photograph, recording, or any other data compilation, including data stored by computer, from which information can be obtained. (Proposed Rule 9120(g).)

⁸⁶ MAR 170.

⁸⁷ *Id.*

⁸⁸ 17 CFR 201.154.

⁸⁹ MAR 170.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ MAR 152.

Enforcement after a Respondent had inspected and copied Documents would be made available expeditiously to Respondents (Proposed Rule 9251(a)(2)) and that evidence that becomes available shortly before or during a hearing on the merits would be produced expeditiously to Respondents⁹⁸ (Proposed Rule 9252(c)). Under the proposed Rules, a Respondent has a right to obtain certain Documents, and the right to insist upon their production based upon a schedule set forth in the rules.

2. *Mandatory Document Disclosure Obligations of the Department of Enforcement.* Proposed Rule 9251(a)(1) requires the Department of Enforcement to make available for inspection and copying to any Respondent Documents prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of the disciplinary proceeding. This includes, but is not limited to: Requests for information pursuant to Rule 8210; written requests for information to persons not employed by the Association and all Documents provided in response to such requests; all transcripts and transcript exhibits; and all other Documents obtained from persons not employed by the Association.

Under proposed Rule 9251(d), unless otherwise ordered by a Hearing Officer, the Department of Enforcement must begin making these Documents available for inspection and copying not later than 21 days after the last timely answer has been filed. These Documents will be made available for inspection in the Association office where they are ordinarily maintained, unless agreed to or ordered otherwise.

With respect to Documents obtained by the staff pursuant to Rule 8210 after the issuance of a complaint, but under the same investigative file number, proposed Rule 9251(a)(2) specifies that the Department of Enforcement also must make those documents available to the Respondents for inspection and copying.

Proposed Rule 9251(b) identifies those Documents that may be withheld by the Department of Enforcement. A Document need not be produced if it is privileged, constitutes attorney work product, is an examination or inspection report, or is an internal memorandum or writing prepared by Association staff that will not be offered in evidence. Documents that would disclose an

examination or investigatory technique or the identity of a confidential source likewise, need not be disclosed. The proposed rule also allows the Hearing Officer to grant leave to withhold Documents that are not relevant or for good cause shown. The Hearing Officer may require the Department of Enforcement to submit a list of the Documents withheld, and may conduct an *in camera* inspection of any such Documents to determine whether they should be produced.

Although Rule 9251(b)(1) allows the Department of Enforcement to withhold certain Documents from discovery, proposed Rule 9251(b)(2) requires the Department of Enforcement to provide a Document or a part of a Document that contains material exculpatory evidence.⁹⁹ For example, if a portion of an examination report includes statements or documentary evidence that is exculpatory, the Department of Enforcement is required to provide that portion of the Document. This is a significant enhancement over the existing rules, which contain no such obligation.

Proposed Rule 9251 is modeled on and is substantially the same as SEC Rules of Practice 230¹⁰⁰ in that, among other things, the proposed Rule: Affords Respondents an automatic right to Document discovery from the Department of Enforcement; allows the Department of Enforcement to withhold privileged and certain other categories of Documents from discovery; requires the disclosure of material exculpatory evidence; and requires that the Respondents bear the cost of photocopying the Documents.

3. *Respondents' Requests for Documents and Production of Witness Statements.* Proposed Rule 9252 formally recognizes a current practice in disciplinary proceedings that allows Respondents to request the Association to compel the production of Documents or testimony for hearing pursuant to Rule 8210. As set forth in proposed Rule 9252, such requests must be made not later than 21 days prior to the scheduled hearing date; describe with specificity the Documents or testimony sought; state why the Documents or testimony are material; describe the Respondent's previous efforts to obtain the Documents or testimony through other means; and state whether the custodian of the Documents or each proposed witness is subject to the jurisdiction of the Association.

4. *Proposed Rule 9253.* Proposed Rule 9253 further broadens the discovery procedures by establishing a procedure for Respondents to obtain copies of statements of any person called or to be called as a witness by the Department of Enforcement that pertain to that witness' direct testimony. Such written statements include those that would be required to be furnished under the Jencks Act, 18 U.S.C. 3500. This new requirement is consistent with SEC Rules of Practice 231.¹⁰¹

(ix) *Pre-hearing Procedures*

1. *General Considerations.* In connection with the goal of enhancing the fairness and efficiency of NASD disciplinary proceedings, the proposed rules grant the Hearing Officer discretionary authority to require the Parties to participate in pre-hearing conferences or to file a variety of informational materials in advance of the hearing. Effective planning and increased control over the proceeding by the Hearing Officer during the pre-hearing phase will assist in accelerating the disciplinary process. The use of pre-hearing procedures as a means of effective case management is consistent with the practice in SEC administrative proceedings and in federal district courts.

2. *The Uses of Pre-Hearing Conferences.* Proposed Rule 9241 grants the Hearing Officer authority to require the Parties or their counsel to participate in a pre-hearing conference. As set forth in the proposed rule, the conference is intended, among other things, to: expedite the disposition of the proceeding; establish procedures to manage the proceeding efficiently; and improve the quality of the hearing through more thorough preparation. (Proposed Rule 9241(a).) At the discretion of the Hearing Officer, such conferences may be held with one or more persons participating by telephone or other remote means. (Proposed Rule 9241(b).)

The proposed rule enumerates a list of subjects that the Hearing Officer may consider and with respect to which the Hearing Officer may take action at the pre-hearing conference, including: Simplification and clarification of the issues; exchange of witness and exhibit lists, and copies of exhibits; stipulations and admissions; matters of which official notice may be taken; the schedule for exchanging pre-hearing motions, if any; the method of service and filing of papers by the Parties; determination of hearing dates; amendments to the complaint or

⁹⁸ Currently, the disciplinary hearing panel before whom the Respondent shall appear determines the extent of discovery, the scope and the timing of the production of documents, and other issues.

⁹⁹ This provision is intended to be consistent with the doctrine enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁰⁰ 17 CFR 201.230.

¹⁰¹ 17 CFR 201.231.

answers; and production of documents. (Proposed Rule 9241(c).) By its terms, the list of enumerated subjects is not exhaustive; any "other matters as may aid in the orderly and expeditious disposition of the proceeding" may be considered at a pre-hearing conference. (Proposed Rule 9241(c)(10).) Following the conclusion of the pre-hearing conference, the Hearing Officer is required to enter an order or ruling reciting any agreements reached and any procedural determinations made by the Hearing Officer during the conference.

Unless determined by the Hearing Officer to be unnecessary or premature, the proposed rules require that an initial pre-hearing conference be held within 21 days of the last-filed answer. Pursuant to proposed Rule 9251(d), the Department of Enforcement is required to commence making documents available to the Respondents for inspection and copying within 21 days of the last-filed answer. Consequently, the initial pre-hearing conference may be used to address any pending issues related to document availability, as well as claims of privilege and other matters pertaining to the Department of Enforcement's document production.

Recognizing that pre-hearing conferences are important in contributing to effective case management, the proposed Rule provides for the imposition of sanctions, *i.e.*, entry of a default judgment against a Party who, after receiving proper notice, fails to appear at a pre-hearing conference. (Proposed Rule 9241(f).)

Proposed Rule 9241 is consistent with the intent and concepts underlying SEC Rules of Practice 221,¹⁰² F.R.C.P. Rule 16, entitled "Pre-trial Conferences; Scheduling; Management;" and ACUS Model Adjudication Rule 221,¹⁰³ entitled "Pre-hearing, Settlement, and Other Conferences." In addition, the provisions included in proposed Rule 9241 are substantially the same as certain provisions in SEC Rules of Practice 221,¹⁰⁴ specifically, those that set forth the purpose of pre-hearing conferences, the subjects to be addressed at such conferences, the entry of a default judgment for failure to attend such conferences, and the necessity of issuing an order or ruling reciting any agreements reached and determinations made during such conferences. For example, each of the pre-hearing conference subjects enumerated in proposed Rule 9241(c) is

included in SEC Rules of Practice 221.¹⁰⁵

3. *Pre-hearing Submissions.* As part of the pre-hearing process, the proposed rules also contemplate that the Hearing Officer may, in the exercise of his or her discretion, order the Parties to file one or more types of pre-hearing submissions. (Proposed Rule 9242.) Among the possible pre-hearing submissions that may be required are: An outline or narrative summary of the case or defense; the legal theories upon which the parties will rely; a list of documents and copies of documents that the Parties intend to introduce at the hearing; a list of the Parties' anticipated witnesses, including the witnesses' names, occupations, addresses, and brief summary of their expected testimony; and, with respect to an expert witness, a statement of the expert's qualifications, a listing of other proceedings in which the witness has given expert testimony, a list of the expert's publications, and copies of those publications that are not readily available. (Proposed Rule 9242(a) (1)–(5).)

Proposed Rule 9242 is modeled on SEC Rules of Practice 222¹⁰⁶ and also is consistent with ACUS Model Adjudication Rule 220,¹⁰⁷ entitled "Pre-hearing Statement." The descriptive list of pre-hearing submissions in proposed Rule 9242 (a)(1)–(a)(5) is virtually identical to that set forth in SEC Rules of Practice 222.¹⁰⁸ It also reflects the concept underlying ACUS Model Adjudication Rule 220,¹⁰⁹ which suggests that the Parties, in advance of hearing, file a statement setting forth the issues involved in the adjudication, the facts in dispute, and the identity of witnesses and exhibits to be presented at the hearing.

(x) *Pro Se Respondents*

Enhancing the Rule 9000 Series to formalize requirements regarding the filing of papers and service of such papers upon Parties, the timely production to Respondents of relevant evidence, the use of motions and to incorporate other procedural protections should improve the fairness and efficiency of a disciplinary proceeding, but could disadvantage some *pro se* Respondents.

The NASD, through the NASD Regulation's Office of Dispute Resolution and the Chief Hearing Officer, is committed to providing a fair

forum for all Parties. Thus, the Chief Hearing Officer and all Hearing Officers shall adopt as a practice the flexible approach adopted in state and federal judicial proceedings. *Pro se* Respondents shall be granted waivers from certain procedural requirements¹¹⁰ or otherwise be excused from fully or partially complying with certain procedural or technical rules to the extent that the Adjudicator may allow and still: (i) Provide fair notice to other Parties of the issues before the Adjudicator; (ii) provide the Parties an opportunity to respond to the issues; and (iii) establish and maintain a record for any appeal of the matter.

The Association believes that this approach will be fairer for all Parties and more effective in promoting the efficient administration of disciplinary proceedings than adopting a general waiver of one or more procedural rules for the benefit of a *pro se* Respondent. The Hearing Officers will be trained and instructed to provide flexibility to *pro se* Respondents to further fairness, which is a fundamental principle guiding the revision of the proposed Rule 9000 Series.

(xi) *Offers of Settlement, AWCs and MRVs*

As set forth in proposed Rule 9216(a), an AWC is a letter that a person or a member who perceives he or it will be the subject of a complaint initiating a disciplinary proceeding agrees to execute to resolve the matter in a pre-complaint environment. As set forth in proposed Rule 9216(b), an MRV is a letter that a person or a member who perceives he or it will be the subject of a complaint initiating a disciplinary proceeding agrees to execute to resolve the matter prior to the issuance of a complaint.¹¹¹ As set forth in proposed

¹¹⁰ For example, in certain circumstances it would be appropriate to excuse a *pro se* Respondent from complying with certain requirements in Rule 9146. NASD Regulation anticipates that with respect to several of the proposed rules, *pro se* Respondents will be treated with good faith, fairness, and flexibility.

¹¹¹ Current MRV procedures are set forth in Rule 9217(b) and Rule IM-9217. Current Rule IM-9217 also includes Rules 2847(b) and (c), Rules 4615 and 4616, the Rule 4650 Series, Rules 6620 and 6420, Rules 4613(d), and the Rule 6700 Series.

By this filing, the Association proposes to amend IM-9216 by removing trade reporting violations from the list. As amended, proposed Rule IM-9216, listing those violations appropriate for disposition under the minor rule violations plan, includes only the following violations:

- Rule 2210 (b) and (c), and Rule 2220(b) and (c)—Failure to have advertisements and sales literature approved by a principal prior to use, failure to maintain separate files of advertisements and sales literature containing required information, and failure to file advertisements with the Association within the required time limits.

Continued

¹⁰⁵ Id.

¹⁰⁶ 17 CFR 201.222.

¹⁰⁷ MAR 220.

¹⁰⁸ 17 CFR 201.222.

¹⁰⁹ MAR 220.

¹⁰² 17 CFR 201.221.

¹⁰³ MAR 221.

¹⁰⁴ 17 CFR 201.221.

Rule 9270, an offer of settlement is an offer made by a Respondent prior to a determination on the merits after a hearing, which a person or a member makes in order to resolve the matter prior to the issuance of a decision on the merits. Each of these proceedings exists in the current Code. (Rules 9217 and 9226.)

In proposing Rules 9216 and 9270 relating to AWC, MRVs, and offers of settlement, the NASD recognizes that such actions taken voluntarily by a Respondent, or a person about to be named as a Respondent, create different conditions under which the involved persons may act. Thus, in proposed Rules 9216 and 9270, to go forward with such procedures, a Party (or a potential Party) must agree to waive the protections offered against *ex parte* communications and the separation of function concept expressed in proposed Rule 9144. (Proposed Rules 9216 (a)(2) and (b)(2), and 9270(d)(3).) However, if the AWC, MRV, or offer of settlement is not accepted by the final arbiter, the rejected document does not constitute a part of the record in any proceeding. (See, e.g., Proposed Rules 9270(h), 9216(a)(4), and 9216(b)(4).)

The Select Committee recommended that the Association seek to reduce the workload of the National Business Conduct Committee by limiting its review of certain cases, including certain settlements and related types of voluntary, negotiated resolutions of disputed matters, such as AWCs and MRVs. To achieve this goal, NASD and NASD Regulation, by resolution, have delegated to the General Counsel of NASD Regulation the authority of the National Business Conduct Committee to accept or refer to the National Business Conduct Committee for its consideration AWCs, MRVs, and offers of settlement, and have delegated to the Chair and the Vice Chair of the National Business Conduct Committee the authority of the National Business Conduct Committee to accept or reject such AWCs, MRVs, and offers of settlement. Proposed Rule 9216 and proposed Rule 9270(e)(2) codify these delegations. However, a contested offer of settlement and order of acceptance may be accepted or rejected only by either the full National Business Conduct Committee or the Chair and

Vice Chair, as provided in proposed Rule 9270(f)(2). The Association believes these delegations will allow the National Business Conduct Committee to concentrate on contested disciplinary matters and those matters raising policy questions.

(xii) *National Business Conduct Committee Appeals or Review of Disciplinary Proceedings and Discretionary Review By the NASD Regulation Board or the NASD Board*

Like the current Rule 9300 Series, proposed Rule 9312 through proposed Rule 9349 provide that the National Business Conduct Committee may review any disciplinary proceeding for which a first or "trial-level" decision has been rendered.¹¹² Also, like current Rule 9310(a), proposed Rule 9311 provides that a Respondent may appeal any "trial level" decision, including a default decision.¹¹³ Proposed Rule 9311(a) also contains a new right—the right of the Department of Enforcement (or any other Complainant) to appeal as a matter of right. This provision recognizes that, following the complete separation of the adjudicative function from the Department of Enforcement and the complete segregation of the prosecutorial function within the Department of Enforcement, it is appropriate to permit the Department of Enforcement staff to make an independent, professional judgment as to whether an appeal should be filed.

There are very few other changes of significance to the review procedures used by the National Business Conduct Committee. Proposed Rule 9311(c) and proposed Rule 9312(c) now explicitly set forth the information required for a Party to file a notice of appeal and the National Business Conduct Committee to file a notice of review. Further, proposed Rule 9311 provides for the right of a Party to cross-appeal.

In proposed Rule 9312(a)(1), the National Business Conduct Committee's decision whether to call a case for review rests with a National Business Conduct Committee Review Subcommittee. The Review Subcommittee is composed of two to

four persons who are current members of the National Business Conduct Committee, and must include a balance of Non-Industry Directors and Industry Directors, or, if not balanced, shall include a majority of Non-Industry Directors. (Proposed Rule 9312(a)(1).)

Proposed Rule 9312(a)(2), codifies existing delegations to the General Counsel of NASD Regulation of the authority of the National Business Conduct Committee to determine if a default decision issued pursuant to Rule 9269 should be reviewed by the National Business Conduct Committee. The provision reflects another part of the decision of the NASD Board to reduce the work of the National Business Conduct Committee and the related Select Committee's recommendation.

Subcommittees¹¹⁴ and Extended Proceeding Committees¹¹⁵ continue to act as the appeal forum to which the Parties present arguments, and if allowed, any new evidence. (Proposed Rule 9346.) Proposed Rule 9346(h) contains the new requirement that any person testifying in such a hearing will do so under oath or by affirmation, except in unusual circumstances.

A Subcommittee or, if applicable, an Extended Proceeding Committee transmits a written, recommended decision to the National Business Conduct Committee. (Proposed Rule 9345.) The National Business Conduct Committee receives the recommended decision in writing not later than seven days before the meeting of the National Business Conduct Committee at which the disciplinary proceeding is considered. (Proposed Rule 9345.) At the same time, all other Directors who sit on the NASD Regulation Board also receive the written recommended decision. (Proposed Rule 9345.)

Pursuant to proposed Rule 9349, the National Business Conduct Committee, after considering all matters presented in the appeal or review, and the written recommended decision of the Subcommittee, or, if applicable, the

¹¹⁴ The term "Subcommittee" means an appellate body that is appointed by the National Business Conduct Committee: (1) Constituted by Rule 9331(a) to participate in the National Business Conduct Committee's consideration of a disciplinary proceeding pursuant to the Rule 9300 Series; or (2) constituted under the Rule 9400 Series or Rule 9500 Series to conduct a review proceeding. (Proposed Rule 9120(z).)

¹¹⁵ The terms "Extended Proceeding Committee" means an appellate body that is appointed by the National Business Conduct Committee and constituted under Rule 9331(a)(2) to participate in the National Business Conduct Committee's consideration of a disciplinary proceeding that is classified as an "Extended Proceeding" and governed by the Rule 9300 Series. (Proposed rule 9120(k).)

• Rule 3360—Failure to timely file reports of short positions on Form NS-1.

• Rule 3110—Failure to keep and preserve books, accounts, records, memoranda and correspondence in conformance with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the Rules of the Association.

Thus, only certain types of violations may be resolved pursuant to an MRV.

¹¹² In the current rules, such decisions are rendered by a Hearing Committee or an Extended Hearing Committee. (Rule 9223 (a) and (b).) As noted earlier, under the proposed rules such decisions would be rendered by a Hearing Panel, or, if applicable, an Extended Hearing Panel.

¹¹³ A Respondent may not "appeal" any final action contained in an AWC, an MRV or an offer of settlement and an order of acceptance that has been accepted by any of the General Counsel of NASD Regulation, the Chair and the Vice Chair of the National Business Conduct Committee, or the National Business Conduct Committee. (Proposed Rules 9216 (a) and (b), and 9270.)

Extended Proceeding Committee, may affirm, modify, or reverse the decision of the Hearing Panel, or, if applicable, the Extended Hearing Panel, and may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the National Business Conduct Committee may remand the disciplinary proceeding with instructions.

Although proposed Rule 9346 provides that the National Business Conduct Committee may hear the Parties present arguments, and consider and rule upon motions for leave to introduce new evidence, the Association anticipates these functions will be performed by the appointed Subcommittee or Extended Proceeding Committee as provided explicitly in Rule 9331(b). Thus, the inclusion of the National Business Conduct Committee in certain procedural rules (e.g., proposed Rules 9341, 9342, 9343, 9346, and 9347) is intended to provide flexibility to the whole National Business Conduct Committee in extraordinary circumstances.¹¹⁶

After reaching its conclusions on the issues, the National Business Conduct Committee prepares a proposed written decision.¹¹⁷ (Proposed Rule 9349(b).) Under proposed Rule 9351 and proposed Rule 9352, the proposed written decision of the National Business Conduct Committee may be called for review by, respectively, any Director of the NASD Regulation Board, and any Governor of the NASD Board. The opportunity for a Director or

Governor to call a case for review occurs sequentially.

Each Director receives a summary of the National Business Conduct Committee's decisions at the NASD Regulation Board meeting the day after the National Business Conduct Committee meeting at which the written recommended decisions of the Subcommittees or the Extended Proceeding Committees are considered. As discussed above, each Director previously will have received the full text of such written recommended decisions of the Subcommittees and the Extended Proceeding Committees. Any Director may call a case for review at the NASD Regulation Board meeting next following the National Business Conduct Committee meeting.

Second, the National Business Conduct Committee transmits the full text of its proposed written decisions and summaries to each of the NASD Regulation Board Directors immediately after the Board meeting following the National Business Conduct Committee meeting at which the written recommended decisions of the Subcommittees and the Extended Proceeding Committees are considered by the National Business Conduct Committee.¹¹⁸ If no Director calls the case for review during the second seven day call for review period provided in Rule 9351(b), then the National Business Conduct Committee proposed written decision is transmitted to each Governor of the NASD Board. If no Governor calls the case for review during the period provided in Rule 9352(b), then the proposed written decision of the National Business Conduct Committee is served upon the Parties and is the final disciplinary action of the Association for purposes of SEC Rule 19d-1(c)(1). (Proposed Rule 9349(c).)

If a proposed written decision of the National Business Conduct Committee is called for review by a Director of the NASD Regulation Board, the disciplinary proceeding is placed on the agenda for the next scheduled meeting of the NASD Regulation Board and the NASD Regulation Board considers the disciplinary proceeding at that meeting. (Proposed Rule 9351(c).) The NASD

Regulation Board then prepares a proposed written decision, which becomes the final disciplinary action of the Association for purposes of SEC Rule 19d-1(c)(1), unless the NASD Board exercises its right to call the disciplinary proceeding for review (Proposed Rules 9351(e) and 9352(b)(1)), or unless the proceeding is remanded (Proposed Rule 9351(e)).

As referenced earlier, proposed Rule 9352 provides for the NASD Board to call for review, and thereafter review at its next meeting, either a proposed written decision of the National Business Conduct Committee, or, if the NASD Regulation Board reviewed the disciplinary proceeding, a proposed written decision of the NASD Regulation Board. (Proposed Rule 9352(b) (1) and (2).) The review procedures of the NASD Board in other respects follow those described above with respect to review by the NASD Regulation Board. (Proposed Rule 9352.)

(xiii) *Recusal or Disqualification*

There are four provisions in the proposed Rule 9000 Series dealing with the recusal or disqualification of an Adjudicator in the event the Adjudicator in a disciplinary or other proceeding, at the "trial level" or in a subsequent appeal or review of such proceeding, has a conflict of interest or a bias. (Proposed Rules 9160, 9233, 9234, and 9332.) In the Rule 9000 Series, the standard set forth under which an Adjudicator must recuse himself or herself or may be disqualified by motion is: "a conflict of interest or bias, or circumstances otherwise exist where the * * * [the Adjudicator's] fairness might reasonably be questioned."

The standard borrows heavily from the conflict of interest standard applicable to federal judges. Under 28 U.S.C. 455(a) "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In addition, the Association has also looked to the APA. Section 556(b) of the APA provides that "[a] presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter * * *."

The proposed standard will be interpreted in a manner that accords with the operation of a self-regulatory disciplinary system in which members of the industry are intended to serve as Adjudicators. The judicial interpretation of 28 U.S.C. 455(a) provides a basis for

¹¹⁶ For example, Respondent in a simple case may unearth clear new documentary evidence which may alter the disposition of the case and submit a motion for consideration of such new evidence after the Subcommittee or the Extended Proceeding Committee has transmitted a recommended decision to the National Business Conduct Committee, but before the National Business Conduct Committee had prepared a proposed written decision. The National Business Conduct Committee generally would request that the Subcommittee or the Extended Proceeding Committee consider the motion, but, using the flexibility provided in Rule 9346, could consider and decide the motion itself.

¹¹⁷ Specifically, the decision must include:

- (1) A statement describing the investigative or other origin of the disciplinary proceeding;
- (2) The specific statutory or rule provisions that were alleged to have been violated;
- (3) A statement setting forth the findings of fact with respect to any act or practice the Respondent was alleged to have committed or omitted;
- (4) The conclusions as to whether the Respondent violated any provision alleged in the complaint;
- (5) A statement in support of the disposition of the principal issues raised in the proceeding; and
- (6) A statement describing any sanction imposed, the reasons therefore, and, pursuant to Rule 9360, the date upon which such sanction shall become effective.

(Proposed Rule 9349(b) (1)-(6).)

¹¹⁸ Because the National Business Conduct Committee sometimes changes the written recommended decisions of the Subcommittees (or, if applicable, those of the Extended Proceeding Committees), the second call-for-review period gives each Director a chance to carefully consider whether these changes to the Subcommittees' (or, if applicable, the Extended Proceeding Committees') written recommended decisions, which each Director receives seven days before the NASD Regulation Board meeting, suggest the need for a call for review.

such an interpretation because the judicial interpretation relies upon additional objective factors used to determine a disputed claim of bias. The Association intends to rely on such judicial interpretation of the clause "in which his impartiality might reasonably be questioned" in 28 U.S.C. 455(a), in interpreting the proposed clause, "if circumstances otherwise exist where * * * [the Adjudicator's] fairness might reasonably be questioned." The notions of impartiality and fairness are inextricably linked in an analysis of whether an Adjudicator fairly judges a proceeding.

In *Pepsico, Inc. v. McMillan*, 764 F.2d 458, 460 (7th Cir.1985), the Seventh Circuit said: "[t]he test for an appearance of partiality is * * * whether an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." Cases in the Second, Eighth and Eleventh Circuits set forth similar interpretive language. The Second Circuit stated, in *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992), that in interpreting the statutory standard, a person would be required to ask: "Would a reasonable person, knowing all the facts, conclude that the trial judge's impartiality could reasonably be questioned?" See also *United States v. Walker*, 920 F.2d 513, 517 (8th Cir. 1990) (after considering public and private circumstances, would a reasonable, uninvolved observer question the judge's impartiality, and would an objective, disinterested observer fully informed of facts underlying the ground on which recusal is sought entertain significant doubt that justice would be done); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir.), cert. denied, 490 U.S. 1066 (1988) (Section 455(a) embodies an objective standard; "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality").

The general provision for disqualification is set forth in proposed Rule 9160, and refers to each of the various persons or groups that may act as an Adjudicator under the proposed Rule 9000 Series. Each of the rules contemplates that an Adjudicator shall exercise good faith and recuse himself or herself as necessary.

Consistent with the Select Committee Report, proposed Rules 9233 and 9234 expressly provide a procedure for a Party to seek the disqualification of a

Hearing Officer or a Hearing Panelist. The purpose of these proposed changes is to formalize the existing practice of permitting such challenges so that they can be dealt with expeditiously.

In addition, the Association proposes to authorize the Chief Hearing Officer to disqualify a Panelist of a Hearing Panel or an Extended Hearing Panel. (Proposed Rule 9234(b).) This provision was added to assure that if a Hearing Officer or any other person became aware of a factual basis for the disqualification of a Panelist, the Chief Hearing Officer could act even if the Parties did not, and the Panelist or Hearing Officer had not recused himself or herself.

Proposed Rules 9233 and 9234 governing the disqualification of a Hearing Officer or one or both Panelists of a Hearing Panel or an Extended Hearing Panel draw, in part, on the basic provisions found in Model Adjudication Rule 112¹¹⁹ and SEC Rules of Practice 112.¹²⁰ But rather than relying on the challenged Adjudicator to make the initial decision regarding disqualification, the proposed rules initially place that decision with the Chief Hearing Officer when the challenge is to the impartiality or fairness of a Hearing Officer (Proposed Rule 9233(c)), or to the Hearing Officer appointed to a disciplinary proceeding if the challenge is to the impartiality or fairness of one or both of the other Panelists (Proposed Rule 9234 (c) and (d)). If a person challenges the composition of the entire Hearing Panel, or Extended Hearing Panel, the Chief Hearing Officer decides whether one or all three members of the Hearing Panel or Extended Hearing Panel shall be disqualified. (Proposed Rule 9234(e).) In all cases a written ruling must be issued on the motion, which will facilitate review of the decision.

Proposed Rule 9332, providing for the disqualification of Panelists appointed to one of the two panels or committees used in the appeal or review process by the National Business Conduct Committee, the Subcommittee or an Extended Proceeding Committee, as described above, is substantively the same as proposed Rules 9233 and 9234, except that under proposed Rule 9332 the Chair or the Vice Chair of the National Business Conduct Committee shall determine a motion for the disqualification of a Panelist, and appoint a replacement Panelist. (Proposed Rule 9332 (c) and (d).)

(xiv) *Contemptuous Conduct*

The Select Committee recognized that NASD disciplinary proceedings have become increasingly more "contentious," which presents a "growing need for the power to sanction frivolous practice or contumacious conduct." (Select Committee Report, p. R-24.) The Select Committee broadly recommended rule revisions "to discipline parties or counsel on either side who engage in such behavior." (*Id.*) The prospect of potential sanctions can be an important impetus toward compliance with otherwise unenforceable orders.

Proposed Rule 9280 is responsive to the Select Committee's recommendation. The proposed rule suggests a variety of sanctions that may be imposed for conduct that violates orders of a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, and for other contemptuous conduct during a hearing.

Under Proposed Rule 9280(b)(1), The Hearing Officer, Hearing Panel, or, if applicable, an Extended Hearing Panel can sanction contemptuous conduct by ruling, among other things, that: the subject matter of the violated order or any other designated facts be taken as established for purposes of the proceeding; the violator or contemptuous Party be precluded from supporting or opposing certain claims or defenses, or precluded from introducing evidence on certain matters; and particular pleadings or parts thereof be stricken.

Proposed Rule 9280(b)(2) provides for the imposition of sanctions for a Party's unjustified refusal to make disclosures required by the proposed Rule 9250 Series, or otherwise required by order of a Hearing Officer, Hearing Panel, or, if applicable, an Extended Hearing Panel. Unless the failure to make disclosures is harmless, the recalcitrant Party is precluded from using any of the information withheld or the testimony of the witness that was not disclosed as evidence at the hearing, or otherwise relying on such information or testimony. This sanction may be imposed in addition to, or in lieu of, the various restrictions on the conduct of the case authorized by proposed Rule 9280(b)(1). Further, under Proposed Rule 9280(c), absent reasonable basis, a Party's failure to admit the genuineness of a document that is later found to be genuine may also be subject to the sanctions listed in proposed Rule 9280(b)(1).

Proposed Rule 9280, read in conjunction with proposed Rule 9150, also authorizes a Hearing Officer,

¹¹⁹ MAR 112.

¹²⁰ 17 CFR 201.112.

Hearing Panel, or, if applicable, an Extended Hearing Panel to exclude an offending attorney or person acting in a representative capacity from functioning as such in the particular proceedings. In this regard, proposed Rule 9141(b) also makes clear that the right to representation in a disciplinary proceeding is subject to the power to exclude a Party's representative or attorney under proposed Rules 9150 and 9280. Under proposed Rule 9280(c), an attorney or representative who is excluded from participating in a disciplinary proceeding may seek immediate review of the exclusion order by the National Business Conduct Committee by filing a motion to vacate within five days after service of the order. The filing of such a motion operates to stay all aspects of the disciplinary proceeding, pending expedited consideration and a prompt decision by the National Business Conduct Committee.

Proposed Rule 9280 is, in part, modeled on SEC Rules of Practice 180.¹²¹ SEC Rule 180,¹²² also entitled "Contemptuous Conduct," similarly authorizes excluding the violator from the proceeding and/or suspending that person from representing others in it. Under SEC Rule 180(b),¹²³ any filing which fails to comply with SEC rules or with any order issued in the proceeding can be rejected. In addition, under SEC Rule 180(c),¹²⁴ a failure to make a required filing or to cure a deficiency within the time ordered can lead to dismissal or default, or to orders limiting or restricting the offending party's evidentiary opportunities. The Association believes the discretionary sanctioning powers granted to hearing officers in SEC administrative proceedings are comparable to those authorized by proposed Rule 9280.

The sanctions set forth in proposed Rule 9280(b)(1) are also drawn from F.R.C.P. 37(b)(2), which authorizes federal district courts to impose a variety of sanctions for violations of the courts' discovery orders. As reflected in SEC Rule 180(c)¹²⁵ and ACUS Model Rule 111(L),¹²⁶ F.R.C.P. 37-type sanctions may be appropriate for other contemptuous conduct, in addition to discovery violations. Comment 5 to ACUS Model Rule 111(L) lists possible appropriate sanctions: "Refusing to allow the support or opposition to a

defense, prohibiting the introduction of disputed matters into evidence, excluding testimony or expelling a party or person from the hearing."¹²⁷ As noted, these are among the sanctions set forth in proposed Rule 9280.

i. Proposed Changes to Proceedings in the Rule 9500 Rule Series and the Rule 9600 Series

(i) *General*

The Association is requesting temporary approval of the proposed Rule 9400 and 9500 Series as an interim step to give the Association the opportunity to review comprehensively these Rules, consider the consolidation of the procedures covered by these Rules, and propose a revision of these Rules based upon this review. The Association will submit this proposed revision as an amendment to this filing. Temporary approval of the changes proposed in this filing will give the Commission time to publish for comment and consider approval of this amendment.

In this rule filing, in addition to renumbering the Rules (the current Rules are found in the Rule 9500 and 9600 Series), the Association proposes to amend the Rules only as necessary to conform the procedures to the Association's revised organizational structure and to the changes being made to the proposed Rule 9200 and 9300 Series. In addition, the Association proposes to delete Rule 9520 (Expedited Remedial Proceedings) because these proceedings, as currently designed, do not serve their intended purpose. The Association intends to submit a separate rule filing proposing a different approach to expedited remedial proceedings after submitting the amendment proposing the comprehensive revision of the other Rule 9500-9600 Series proceedings.

(ii) *Proposed Rule 9410 Series*

The current Rule 9510 Series sets forth procedures to limit the business operations of a member that is experiencing financial or operational difficulty as specified in Rules 3130 and 3131. Rule 3130 was adopted in connection with the adoption of regulatory changes by the SEC to reduce net capital requirements, in order to permit the Association to be able to respond quickly to a firm's deteriorating financial or operational conditions. At the time Rule 3130 was adopted, the New York Stock Exchange and other stock exchanges had long-established rules to reduce or restrict the business

activities of their members under certain circumstances.

Rule 3130 applies to members for which the NASD is the designated self-regulatory organization, but excludes certain brokers that generally do not carry customer accounts, certain broker/dealers engaged solely in the sale of redeemable shares of registered investment companies and certain other share accounts, and any other broker/dealer that is exempt from SEC Rule 15c3-1. Rule 3130 addresses two levels of possible financial or operational difficulties. First, it restricts a member from expanding its business whenever certain early warning financial criteria relating to minimum net capital ratio requirements are met, or scheduled capital withdrawals are exceeded. Second, Rule 3130 covers a deteriorating situation in which another set of warning criteria with lower tolerances are exceeded.

Rule 3131 was recently adopted to provide the Association with similar authority with respect to certain members of the Association that are registered with the Commission under Section 15C of the Act as government securities brokers and dealers.

Under the current Rule 9510 Series, a District Surveillance Committee notifies a member if limitations are to be imposed pursuant to Rule 3130. The member may request a hearing before the District Surveillance Committee, which issues a written decision. The decision may be appealed by the member or called for review by the NASD Board.

The Association proposes to renumber this Rule Series as the Rule 9410 Series and to conform it to other changes made in the Rule 9000 Series. Under the proposed Rule 9410 Series, the Department of Member Regulation notifies a member if limitations are to be imposed under Rule 3130 or Rule 3131. The limitations may go into effect seven days after service of the notice unless the member requests a hearing. The member may request a hearing before the Department of Member Regulation, which then issues a written decision. The member may request review of the Department of Member Regulation's decision by the National Business Conduct Committee, or a member of the National Business Conduct Committee or the Review Subcommittee (described in the discussion of proposed Rule 9312) may call such a decision for review. *Ex parte* rules apply when Association staff has knowledge that the member intends to file a request for a review with the National Business Conduct Committee or that the National Business Conduct Committee intends to

¹²¹ 17 CFR 201.180.

¹²² *Id.*

¹²³ 17 CFR 201.180(b).

¹²⁴ 17 CFR 201.180(c).

¹²⁵ *Id.*

¹²⁶ See MAR 111(L), which authorizes the Adjudicator to impose "appropriate sanctions" for disobeying orders.

¹²⁷ *Id.*

call the decision of the Department of Member Regulation for review. If oral argument is requested, the National Business Conduct Committee appoints a Subcommittee to hear it and take any evidence that the member can show good cause for not previously submitting. The Subcommittee recommends a decision to the full National Business Conduct Committee. The National Business Conduct Committee may affirm, modify, or reverse the Department of Member Regulation's decision or remand it with instructions. The contents of the National Business Conduct Committee's proposed decision, which must be in writing, are specified in proposed Rule 9414(c)(2). The National Business Conduct Committee's proposed decision is subject to discretionary review by the NASD Regulation Board and the NASD Board. If the proceeding is not called for review, the National Business Conduct Committee's proposed written decision becomes final and is issued upon expiration of the discretionary review periods specified in the proposed Rule. The call for review procedures for the NASD Regulation Board and the NASD Board are parallel to the procedures set forth in proposed Rules 9351 and 9352.

(iii) *Proposed Rule 9420 Series*

The current Rule 9520 Series sets forth procedures for implementing Rule 3140, which requires a member to seek approval of a change in its business operations that will result in a change in its exemptive status under SEC Rule 15c3-3. Rule 15c3-3 generally sets forth minimum requirements for reserves and custody of securities. Rule 15c3-3 exempts broker/dealers that engage in transactions limited to certain investment company securities and that do not hold customer securities or accounts, clearing broker/dealers that do not carry margin accounts or hold customer securities or funds, and introducing broker/dealers that clear on a fully disclosed basis. The purpose of Rule 3140 is to require any firm that intends to begin holding customer funds or securities or clearing its own transactions, and thereby change its exemptive status, to notify the Association so that the Association can determine if the firm has adequate procedures to safeguard customer funds and securities.

Under the current Rule 9520 Series, a member must file an application seeking the approval of the District Office staff prior to making the type of change noted above. If the application is denied in whole or in part, the member may request a hearing before the District Business Conduct Committee. The

written decision of the District Business Conduct Committee may be appealed or called for review by the NASD Board.

The Association proposes to renumber this Rule Series as the Rule 9420 Series and to conform it to other changes made in the Rule 9000 Series. Under the proposed Rule 9420 Series, the member files the application with the Department of Member Regulation at the NASD Regulation district office. The Department of Member Regulation issues a written decision on the application. If the application is denied in whole or part by the Department of Member Regulation, the member may request review by the National Business Conduct Committee, or a member of the National Business Conduct Committee or the Review Subcommittee may call the decision for review. *Ex parte* rules apply when Association staff has knowledge that the member intends to file a request for review or that the National Business Conduct Committee intends to call the decision of the Department of Member Regulation for review. If review is requested, the National Business Conduct Committee appoints a Subcommittee to hear oral argument and take any evidence that the member can show good cause for not previously submitting. The Subcommittee recommends a decision to the full National Business Conduct Committee. The National Business Conduct Committee may affirm, modify, or reverse the Department of Member Regulation's decision. The National Business Conduct Committee's proposed decision must be in writing, and the contents of the decision are specified in proposed Rule 9423(c)(2).

The National Business Conduct Committee's proposed decision is subject to discretionary review by the NASD Regulation Board and the NASD Board. If the proceeding is not called for review, the National Business Conduct Committee's proposed written decision becomes final and is issued upon expiration of the discretionary review periods specified in the proposed Rule. The call for review procedures for the NASD Regulation Board and the NASD Board are parallel to the procedures set forth in proposed Rules 9351 and 9352.

(iv) *Proposed Rule 9510 Series*

Summary suspension procedures are authorized by Section 15A(h)(3) of the Act. The Act permits summary suspension if: (1) A member or person associated with a member has been and is expelled or suspended from any self-regulatory organization or barred or suspended from being associated with a member of any self-regulatory organization; or (2) a member is in such

financial or operating difficulty that the Association determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors, creditors, other members, or the Association. The Act also permits a summary limitation or prohibition against any person with respect to access to services of the Association if the person is subject to a summary suspension under (1) or (2) or, in the case of a person who is not a member, if the Association determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, other members, or the Association. The Act requires that any person aggrieved by the summary action be promptly afforded an opportunity for a hearing.

Under the current Rule 9610 Series, the NASD Board Executive Committee may authorize the staff to issue a notice of summary suspension to a member or person on any of the three grounds set forth in the Act. The suspension is effective immediately. The member or person may request a hearing before a Hearing Panel of the NASD Board, which issues a written decision. The decision may be appealed to or called for review by the full Board.

The Association proposes to amend the Rule 9610 Series and renumber it as the Rule 9510 Series. Under the proposed Rule 9510 Series, the NASD Board may authorize the President of NASD Regulation or Nasdaq to issue a summary suspension to a member or person on the three grounds listed in Section 15A(h)(3) of the Act.¹²⁸ Under the proposed rule change, as under the current rule, the suspension is effective immediately. The member or person may request a hearing on the summary suspension before a Hearing Panel of the NASD Board. The Hearing Panel is composed of two or more members, one of whom must be a current NASD Board member. The other members of the Hearing Panel must be current or former members of the NASD Regulation, Nasdaq, or NASD Boards. The Hearing Panel determines whether the summary suspension should be affirmed or reversed. The Hearing Panel's proposed decision must be in writing, and the contents of the proposed decision are specified in proposed Rule 9513(c)(2).

¹²⁸ In a subsequent rule filing, the Association intends to propose to divide the authority to initiate a summary suspension on the grounds set forth in the Act between NASD Regulation and Nasdaq and set forth the procedures for each subsidiary in separate rule series for clarity.

The proposed written decision is subject to discretionary review by the NASD Board. If the NASD Board does not call the proceeding for review, the Hearing Panel's proposed decision becomes final and is issued upon expiration of the discretionary review period specified in the Rule. The call for review procedures for the NASD Board are essentially parallel to the procedures set forth in proposed Rule 9352.

(v) *Proposed Rule 9520 Series*

Under the current Rule 9620 Series, "revocation" procedures provide a rapid means to cancel or suspend the membership of a member or bar or suspend a person from being associated with a member for the following reasons: Ineligibility for membership or association; failure to make a required payment of fees, dues, assessments, or other charges; failure to submit a required report or information related to such a payment; failure to comply with an arbitration award; failure to comply with a settlement agreement obtained in connection with an arbitration or mediation; or failure to file or submit on request any report, document, or other information required to be filed with or requested by the Association.

Under the current Rule 9620 Series, a "revocation" proceeding is initiated by sending the affected member or associated person a notice. If the member or associated person wants a hearing, he must request one within five to 15 days of the notice (depending on which Article of the NASD By-Laws authorizes the notice). The request stays the effective date of the revocation. A hearing is held before a Hearing Panel of the NASD Board, which issues a final decision. There is no appeal or call for review by the full Board.

Under the proposed Rule 9520 Series, revocation procedures are renamed "Non-Summary Suspension, Cancellation, and Bar Procedures" to describe better the specific actions that the Association may take under this Rule Series and to differentiate these procedures from other similar procedures set forth in the Rules of the Association. Under the proposed Rule 9520 Series, Association staff initiates a non-summary cancellation, suspension, or bar proceeding by sending a notice to the affected member or associated person. The member or associated person may request a hearing before a Hearing Panel of the NASD Board. *Ex parte* rules apply when the Association staff has knowledge that the member or associated person intends to request a hearing on the notice. As under the current Rule, the request stays the effective date of the cancellation,

suspension, or bar set forth in the notice. The Hearing Panel is composed of two or more current or former members of the NASD Regulation Board. The Hearing Panel decides whether a cancellation, suspension, or bar should be imposed. The Hearing Panel's proposed decision must be in writing, and the contents of the proposed decision are specified in the proposed Rule 9523(g). The proposed written decision is subject to discretionary review by the NASD Board. There is no call for review by the full NASD Regulation Board in order to expedite the resolution of the proceeding. If the NASD Board does not call the proceeding for review, the Hearing Panel's proposed written decision is issued as the final decision upon expiration of the discretionary review period specified in the Rule. The call for review procedures for the NASD Board is essentially parallel to the call for review procedures in proposed Rule 9352.

(vi) *Proposed Rule 9530 Series*

The eligibility procedures in the current Rule 9640 Series provide another means to cancel the membership of a member or bar a person from association with a member when a statutory disqualification exists or a member or person otherwise becomes ineligible for membership or association (e.g., when there is a similarity of membership names). Typically, a cancellation or bar proceeding is used when the ground for statutory disqualification is serious (e.g., conviction of a financial crime) and the Association needs to take quick action. An eligibility proceeding, which moves more slowly, is used when the ground for the statutory disqualification does not raise immediate customer protection concerns (e.g., a drunk driving conviction). An eligibility proceeding can be initiated by the Association or by a member when it determines that a statutory disqualification exists (as to itself, which is less common, or as to one of its current registered representatives, which is more often the case) or when the member wishes to associate with a person subject to a statutory disqualification.

Under the current Rule 9640 Series, an eligibility proceeding may be initiated by the Association sending a notice to a member or by a member filing an application for relief from the Association's membership or eligibility requirements. A hearing on the application may be held before a Hearing Panel of the NASD Board, which makes a recommendation to the full NASD Board. The Board issues a

written decision, which may include conditions on the member and person.

Under the proposed Rule 9530 Series, the Department of Member Regulation may initiate an eligibility proceeding by sending a notice to the affected member or person if the Department of Member Regulation has reason to believe that a statutory disqualification exists. The notice specifies that a member may file a written application for relief on its own behalf and on behalf of its associated person, as applicable. Alternatively, a member may initiate an eligibility proceeding by submitting a written application for relief. *Ex parte* rules apply when the Department of Member Regulation initiates the proceeding and Association staff has knowledge that the member intends to file a written application for relief. If a member files an application for relief, a National Business Conduct Committee Hearing Panel is appointed. The Hearing Panel is composed of at least two current or former members of the NASD Regulation Board or former members of the NASD Board. The Hearing Panel holds a hearing and provides a recommended written decision on the application for relief to the Statutory Disqualification Committee. The Statutory Disqualification Committee, which reviews the Hearing Panel's recommendation to ensure consistency in the disposition of requests for relief, then forwards a recommended written decision to the full National Business Conduct Committee. The National Business Conduct Committee decides whether to grant the request for relief. The National Business Conduct Committee's proposed decision must be in writing, and the contents of the decision are specified in the proposed Rule. The National Business Conduct Committee's proposed written decision is subject to discretionary review by the NASD Regulation Board and the NASD Board. If neither Board calls the eligibility proceeding for review, the National Business Conduct Committee's proposed decision is issued as the final decision upon expiration of the discretionary review periods specified in the Rule. The call for review procedures for the NASD Regulation Board and the NASD Board are parallel to the call for review procedures in proposed Rules 9351 and 9352.

2. *Statutory Basis*

The NASD believes the proposed rule change is consistent with section 15A(b)(7), 15 U.S.C. 78o-3(b)(7), and Section 15A(b)(8), 15 U.S.C. 78o-3(b)(8), under the Act. In pertinent part, Section 15A(b)(7) mandates that a national securities association establish rules

providing that "its members and persons associated with its members shall be appropriately disciplined for violation of any provision of this title, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of the association, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction." In pertinent part, section 15A(b)(8) mandates that a national securities association establish rules providing for "a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the association of any person with respect to access to services offered by the association or a member thereof." The NASD believes the proposed rule changes will further the goals of Sections 15A(b) (7) and (8).

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe 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

The NASD has neither solicited nor received written comments.

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

Within 35 days of the 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 the 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. In addition to general comments concerning the Association's proposal,

the Commission requests particular comments addressing whether the proposal would result in any burdens on competition and whether the proposal would promote efficiency, competition and capital formation. Furthermore, the Commission invites interested persons to comment on the following specific issues:

(a) Currently, the NASD By-Laws require applicants for NASD membership to agree to waive the liability of the NASD, Nasdaq and NASD Regulation Boards, committee members, officers, and employees for action taken within the scope of their authority, except for willful malfeasance. As proposed, the amended By-Laws will maintain this waiver of liability provision. Prospective members will still be required to sign an agreement to waive this liability as a condition of membership in the NASD.

(b) The proposed By-Laws and Rules 1012, 9160, 9233, 9234, and 9332 prohibit Governors, Directors, and members of the NBCC or a subcommittee thereof from participating in a matter if they have "a conflict of interest or bias, or if circumstances otherwise exist where [their] fairness might reasonably be questioned." This standard is derived from 28 U.S.C. 455(a).

(c) The proposed revisions to the procedures relating to election of the members of the NASD Board of Governors, the NASD Regulation Board of Directors and the Nasdaq Board of Directors.

(d) The proposed By-Laws incorporate the Delegation Plan provision permitting "employees of an entity that is affiliated with a broker or dealer that does not account for a material portion of the revenues of the consolidated entity, and who are primarily engaged in the business of the non-member entity" to serve as Non-Industry Governors, Directors and/or Committee Members. Commenters are asked to address whether a specific standard for materiality would be appropriate and if so, what such a standard should be.

The Commission seeks comment on whether the proposal, given the unique nature of the Association as a self-regulatory organization, adequately promotes the goals of the Act.

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC. 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 at the Commission's Public Reference Room. Copies of such filing will also be

available for inspection and copying at the principal office of the Association. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. File Number SR-NASD-97-28 should be included on the subject line if E-mail is used to submit a comment letter. Electronically submitted comment letters will be posted on the Commission's Internet web site (<http://www.sec.gov>).

All submissions should refer to File No. SR-NASD-97-28 and should be submitted by June 9, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²⁹

Margaret H. McFarland,
Deputy Secretary.

Exhibit 1

Additions are italicized; deletions are bracketed.

By-Laws of the National Association of Securities Dealers, Inc.

Article I

Definitions

When used in these By-Laws, [and any rules of the Corporation,] unless the context otherwise requires, the term: (a) "Act" means the Securities Exchange Act of 1934, as amended; (b) "bank" means (1) a banking institution organized under the laws of the United States, (2) a member bank of the Federal Reserve System, (3) any other banking institution, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the Currency pursuant to the first section of Public Law 87-722 (12 U.S.C. §92a), and which is supervised and examined by a State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of the Act, and (4) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (1), (2), or (3) of this subsection; (c) "Board" means the Board of Governors of the [Corporation.] *NASD*;

[(d) "Boards" means the Board of Governors of the Corporation and the Boards of Directors of The Nasdaq Stock Market, Inc. and NASD Regulation, Inc.;

(e)](d) "branch office" means an office defined as a branch office in [NASD Rule 3010;] *the Rules of the Association*;

¹²⁹ 17 CFR 200.30-3(a)(12).

[(f)](e) "broker" means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of effecting transactions in securities for the account of others, but does not include a bank;

[(g)](f) "Commission" means the Securities and Exchange Commission;

[(h)] "Corporation" means the National Association of Securities Dealers, Inc.;

[(i)] "Corporations" means the National Association of Securities Dealers, Inc. ("NASD"), and its subsidiaries, The Nasdaq Stock Market, Inc. ("Nasdaq") and NASD Regulation, Inc. ("NASD Regulation");

(g) "day" means calendar days;

[(j)](h) "dealer" means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of buying and selling securities for [his] such individual's or entity's own account, through a broker or otherwise, but does not include a bank, or any person insofar as [he] such person buys or sells securities for [his] such person's own account, either individually or in some fiduciary capacity, but not as part of a regular business;

[(k)] "delegation" (i) "Delegation Plan" means the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries" as approved by the Commission, and as amended from time to time;

(j) "district" means a district established by the NASD Regulation Board pursuant to the NASD Regulation By-Laws;

[(l)](k) "government securities broker" shall have the same meaning as in Section 3(a)(43) of the Act except that it shall not include financial institutions as defined in Section 3(a)(46) of the Act;

[(m)](l) "government securities dealer" shall have the same meaning as in Section 3(a)(44) of the Act except that it shall not include financial institutions as defined in Section 3(a)(46) of the Act;

[(n)](m) "Governor" means a member of the Board[.];

(n) "Industry Director" means a Director of the NASD Regulation Board (excluding the President of NASD Regulation) or a Director of the Nasdaq Board (excluding the President of Nasdaq) who: (1) is an officer, director, or employee of a broker or dealer or has been employed in any such capacity at any time within the prior three years; or (2) has a consulting or employment relationship with or provides professional services to the NASD, NASD Regulation, or Nasdaq or has had any such relationship or provided any

such services at any time within the prior three years;

(o) "Industry Governor" or "Industry committee member" means a Governor (excluding the Chief Executive Officer of the NASD) or committee member who (1) is an officer, director, or employee of a broker or dealer or has been employed in any such capacity at any time within the prior three years; and (2) has a consulting or employment relationship with or provides professional services to the NASD, NASD Regulation, or Nasdaq or has had any such relationship or provided any such services at any time within the prior three years;

[(o)](p) "investment banking or securities business" means the business, carried on by a broker, dealer, or municipal securities dealer (other than a bank or department or division of a bank), or government securities broker or dealer, of underwriting or distributing issues of securities, or of purchasing securities and offering the same for sale as a dealer, or of purchasing and selling securities upon the order and for the account of others;

[(p)](q) "member" means any broker or dealer admitted to membership in the [Corporation] NASD;

[(q)](r) "municipal securities" means securities which are direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States, or any security which is an industrial development bond as defined by Section 3(a)(29) of the Act;

[(r)](s) "municipal securities broker" means a broker, except a bank or department or division of a bank, engaged in the business of effecting transactions in municipal securities for the account of others;

[(s)](t) "municipal securities dealer" means any person, except a bank or department or division of a bank, engaged in the business of buying and selling municipal securities for [his] such person's own account, through a broker or otherwise, but does not include any person insofar as [he] such person buys or sells securities for [his] such person's own account either individually or in some fiduciary capacity, but not as a part of a regular business;

(u) "NASD" means the National Association of Securities Dealers, Inc.;

(v) "NASD Regulation" means NASD Regulation, Inc.;

(w) "NASD Regulation Board" means the Board of Directors of NASD Regulation;

(x) "Nasdaq" means The Nasdaq Stock Market, Inc.;

(y) "Nasdaq Board" means the Board of Directors of Nasdaq;

(z) "National Nominating Committee" means the National Nominating Committee appointed pursuant to Article VII, Section 9 of these By-Laws;

(aa) "Non-Industry Director" means a Director of the NASD Regulation Board or Nasdaq Board who is (1) a Public Director; (2) an officer or employee of an issuer of securities listed on Nasdaq or traded in the over-the-counter market; (3) a person affiliated with a broker or a dealer that operates solely to assist the securities-related activities of the business of a non-member affiliate (such as a broker or dealer established to (i) distribute an affiliate's securities which are issued on a continuous or regular basis, or (ii) process the limited buy and sell orders of the shares of employee owners of the affiliate); (4) an employee of an entity that is affiliated with a broker or a dealer that does not account for a material portion of the revenues of the consolidated entity, and who is primarily engaged in the business of the non-member entity; or (5) any other individual who would not be an Industry Director;

(bb) "Non-Industry Governor" or "Non-Industry committee member" means a Governor or committee member who is (1) a Public Governor or committee member; (2) an officer or employee of an issuer of securities listed on Nasdaq or traded in the over-the-counter market; (3) a person affiliated with a broker or dealer that operates solely to assist the securities-related activities of the business of a non-member affiliate (such as a broker or dealer established to (i) distribute an affiliate's securities which are issued on a continuous or regular basis, or (ii) process the limited buy and sell orders of the shares of employee owners of the affiliate); (4) an employee of an entity that is affiliated with a broker or a dealer that does not account for a material portion of the revenues of the consolidated entity, and who is primarily engaged in the business of the non-member entity; or (5) any other individual who would not be an Industry Governor or committee member;

[(t)](cc) "person associated with a member" or "associated person of a member" means every sole proprietor, partner, officer, director, or branch manager of any member, or any natural person occupying a similar status or performing similar functions, or any natural person engaged in the investment banking or securities

business who is directly or indirectly controlling or controlled by such member, whether or not any such person is registered or exempt from registration with the [Corporation] NASD pursuant to these By-Laws or the Rules of the Association;

(dd) "Public Director" means a Director of the NASD Regulation Board or Nasdaq Board who has no material business relationship with a broker or dealer or the NASD, NASD Regulation, or Nasdaq;

(ee) "Public Governor" or "Public committee member" means a Governor or committee member who has no material business relationship with a broker or dealer or the NASD, NASD Regulation, or Nasdaq;

(u)(ff) "registered broker, dealer, municipal securities broker or dealer, or government securities broker or dealer" means any broker, dealer, municipal securities broker or dealer, or government securities broker or dealer which is registered with the Commission under the Act; and

(v) "rules of the Corporation" means all rules of the Corporation (which rules may be referred to as "NASD Rules"), Certificate of Incorporation, By-Laws,] (gg) "Rules of the Association[, any other rules, and any interpretations thereunder.]" or "Rules" means the numbered rules set forth in the NASD Manual beginning with the Rule 0100 Series, as adopted by the Board pursuant to these By-Laws, as hereafter amended or supplemented.

Article II

Offices

Location

Sec. 1. The address of the registered office of the NASD in the State of Delaware and the name of the registered agent at such address shall be: The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware 19801. The NASD also may have offices at such other places both within and without the State of Delaware as the Board may from time to time designate or the business of the NASD may require.

Change of Location

Sec. 2. In the manner permitted by law, the Board or the registered agent may change the address of the NASD's registered office in the State of Delaware and the Board may make, revoke, or change the designation of the registered agent.

Article [III] III

Qualifications of Members and Associated Persons

Persons Eligible to [become] *Become Members and Associated Persons of Members*

Sec. 1. (a) Any registered broker, dealer, municipal securities broker or dealer, or government securities broker or dealer authorized to transact, and whose regular course of business consists in actually transacting, any branch of the investment banking or securities business in the United States, under the laws of the United States, shall be eligible for membership in the [Corporation] NASD, except such registered brokers, dealers, or municipal securities brokers or dealers, or government securities brokers or dealers which are excluded under the provisions of [Sections 3 (a) or (b) of this Article] *Section 3*.

(b) Any person shall be eligible to become an associated person of a member, except such persons who are excluded under the provisions of Section 3[(b) of this Article].

Authority of Board to Adopt Qualification Requirements

Sec. 2. (a) The Board [of Governors] shall have authority to adopt rules and regulations applicable to applicants for membership, members, and persons associated with applicants or members establishing specified and appropriate standards with respect to the training, experience, competence, and such other qualifications as the Board [of Governors] finds necessary or desirable, and in the case of an applicant for membership or a member, standards of financial responsibility and operational capability.

(b) In establishing and applying such standards, the Board [of Governors] may classify members and persons associated with such members, taking into account relevant matters, including the nature, extent, and type of business being conducted and of securities sold, dealt in, or otherwise handled. The Board [of Governors] may specify that all or any portion of such standards shall be applicable to any such class and may require the persons in any such class to be registered with the [Corporation] NASD.

(c) The Board [of Governors] may from time to time make changes in such rules, regulations, and standards as it deems necessary or appropriate.

Ineligibility of Certain Persons for Membership or Association

Sec. 3. (a) No registered broker, dealer, municipal securities broker or

dealer, or government securities broker or dealer shall be admitted to membership, and no member shall be continued in membership, if such broker, dealer, municipal securities broker or dealer, government securities broker or dealer, or member fails or ceases to satisfy the qualification requirements established under Section 2 [of this Article], if applicable, or if such broker, dealer, municipal securities broker or dealer, government securities broker or dealer, or member is or becomes subject to a disqualification under Section 4 [of this Article], or if such member fails to comply with the requirement that all forms filed pursuant to these By-Laws be filed via electronic process or such other process the [Corporation] NASD may prescribe.

(b) No person shall become associated with a member, continue to be associated with a member, or transfer association to another member, if such person fails or ceases to satisfy the qualification requirements under Section 2 [of this Article], if applicable, or if such person is or becomes subject to a disqualification under Section 4 [of this Article]; and no broker, dealer, municipal securities broker or dealer, or government securities broker or dealer shall be admitted to membership, and no member shall be continued in membership, if any person associated with it is ineligible to be an associated person under this subsection.

(c) If it deems appropriate, the Board [of Governors], upon notice and opportunity for a hearing, may cancel the membership of a member if it becomes ineligible for continuance in membership under subsection (a) [hereof], may suspend or bar a person [for] from continuing to be associated with any member if such person is or becomes ineligible for association under subsection (b) [hereof], and may cancel the membership of any member who continues to be associated with any such ineligible person.

(d) Any [broker, dealer, municipal securities dealer, or government securities broker or dealer which is ineligible for admission into membership, or any member which] member that is ineligible for continuance in membership[,] may file with the Board [of Governors] an application requesting relief from the ineligibility pursuant to [procedures adopted by the Board of Governors and contained in the Corporation's Procedural Rules. The Board of Governors] the Rules of the Association. A member may file such application on its own behalf and on behalf of a current or prospective associated person. The Board may, in its discretion, approve

the [admission] *continuance in membership, and may also approve the association or continuance of [an applicant or member, or the] association [of any person], if the Board determines that such approval is consistent with the public interest and the protection of investors. Any approval hereunder may be granted unconditionally or on such terms and conditions as the Board considers necessary or appropriate. In the exercise of the authority granted hereunder, the Board [of Governors] may[: (1) conduct such inquiry or investigation into the relevant facts and circumstances as it, in its discretion, considers necessary to its determination, which, in addition to the background and circumstances giving rise to the failure to qualify or disqualification, may include the proposed or present business of [an applicant for membership or of] a member and the conditions of association of any *current or prospective associated person*. [prospective or presently] associated person, among other matters; (2) permit, in limited types of situations, a membership or association with a member pending completion of its inquiry or investigation, and its final determination, based upon a consideration of relevant factors, and may classify situations taking into account the status of brokers, dealers, municipal securities brokers and dealers and government securities brokers and dealers as applicants or existing members and of persons as prospective or presently associated persons of members; the type of disqualification or failure to qualify; whether a member or associated person has been the subject of a previous approval and the terms and conditions thereof; and any other relevant factors; and*

(3) delegate any of its functions and authority under this subsection (d) to appropriate committees of the Corporation or to Corporation staff members.]

(e) An application filed under subsection (d) [hereof] shall not foreclose any action which the Board [of Governors] is authorized to take under subsection (c) [hereof] until approval has been granted.

(f) Approval by the Board of [Governors of] an application made under subsection (d) shall be subject to whatever further action the Commission may take pursuant to authority granted to the Commission under the Act.

(g) *The Board may delegate its authority under this Section in a manner not inconsistent with the Delegation Plan.*

Definition of Disqualification

Sec. 4. A person is subject to a "disqualification" with respect to membership, or association with a member, if such person:

(a) has been and is expelled or suspended from membership or participation in, or barred or suspended from being associated with a member of, any self-regulatory organization, foreign equivalent of a self-regulatory organization, foreign or international securities exchange, contract market designated pursuant to Section 5 of the Commodity Exchange Act, or foreign equivalent of a contract market designated pursuant to any substantially equivalent foreign statute or regulation, or futures association registered under Section 17 of the Commodity Exchange Act or a foreign equivalent of a futures association designated pursuant to any substantially equivalent foreign statute or regulation, or has been and is denied trading privileges on any such contract market or foreign equivalent;

(b) is subject to—

(1) an order of the Commission, other appropriate regulatory agency, or foreign financial regulatory authority:

(i) denying, suspending for a period not exceeding 12 months, or revoking [his] *such person's* registration as a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer, or limiting [his] *such person's* activities as a foreign person performing a function substantially equivalent to any of the above; or

(ii) barring or suspending for a period not exceeding 12 months [his] *such person* being associated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or foreign person performing a function substantially equivalent to any of the above;

(2) an order of the Commodity Futures Trading Commission denying, suspending, or revoking [his] *such person's* registration under the Commodity Exchange Act (7 U.S.C. § 1 et seq.); or

(3) an order by a foreign financial regulatory authority denying, suspending, or revoking the person's authority to engage in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof;

(c) by [his] *such person's* conduct while associated with a broker, dealer, municipal securities dealer, government securities broker, or government

securities dealer, or while associated with an entity or person required to be registered under the Commodity Exchange Act, has been found to be a cause of any effective suspension, expulsion, or order of the character described in [subsections] *subsection (a) or (b) of this Section;*

(d) by [his] *such person's* conduct while associated with any broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or any other entity engaged in transactions in securities, or while associated with an entity engaged in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof, has been found to be a cause of any effective suspension, expulsion, or order by a foreign or international securities exchange or foreign financial regulatory authority empowered by a foreign government to administer or enforce its laws relating to financial transactions as described in subsection (a) or (b) of this Section;

(e) has associated with him or her any person who is known, or in the exercise of reasonable care should be known, to him or her to be a person described in [subsections] *subsection (a), (b), (c), or (d) of this Section;*

(f) has willfully made or caused to be made in any application for membership in a self-regulatory organization, or to become associated with a member of a self-regulatory organization, or in any report required to be filed with a self-regulatory organization, or in any proceeding before a self-regulatory organization, any statement which was at the time, and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application, report, or proceeding any material fact which is required to be stated therein;

(g)(1) has been convicted within ten years preceding the filing of any application for membership in the [Corporation] *NASD*, or to become associated with a member of the [Corporation] *NASD*, or at any time thereafter, of any felony or misdemeanor or of a substantially equivalent crime by a foreign court of competent jurisdiction which:

(i) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, any substantially equivalent activity however denominated by the laws of the relevant

foreign government, or conspiracy to commit any such offense;

(ii) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, investment adviser, bank, insurance company, fiduciary, transfer agent, foreign person performing a function substantially equivalent to any of the above, or any entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation;

(iii) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities, or substantially equivalent activity however denominated by the laws of the relevant foreign government; or

(iv) involves the violation of Sections 152, 1341, 1342, or 1343 or Chapters 25 or 47 of Title 18, United States Code, or a violation of a substantially equivalent foreign statute;

(2) has been convicted within ten years preceding the filing of any application for membership in the [Corporation] NASD, or to become associated with a member of the [Corporation] NASD, or at any time thereafter of any other felony;

(h) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, municipal securities dealer, government securities broker, government securities dealer, transfer agent, foreign person performing a function substantially equivalent to any of the above, entity or person required to be registered under the Commodity Exchange Act, or any substantially equivalent foreign statute or regulation, or as an affiliated person or employee of any investment company, bank, insurance company, foreign entity substantially equivalent to any of the above, or entity or person required to be registered under the Commodity Exchange Act or any substantially equivalent foreign statute or regulation, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security;

(i) has been found by a foreign financial regulatory authority to have—

(1) made or caused to be made in any application for registration or report required to be filed with a foreign financial regulatory authority, or in any proceeding before a foreign financial regulatory authority with respect to

registration, any statement that was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any application or report to the foreign financial regulatory authority any material fact that is required to be stated therein;

(2) violated any foreign statute or regulation regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded on or subject to the rules of a contract market or any board of trade; or

(3) aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of any statutory provisions enacted by a foreign government, or rules or regulations thereunder, empowering a foreign financial regulatory authority regarding transactions in securities, or contracts of sale of a commodity for future delivery, traded or subject to the rules of a contract market or any board of trade, or has been found, by a foreign financial regulatory authority, to have failed reasonably to supervise, with a view to preventing violations of such statutory provisions, rules, and regulations, another person who commits such a violation, if such other person is subject to [his] *such person's* supervision.

Article [III] IV

Membership

Application for Membership

Sec. 1. (a) Application for membership in the [Corporation] NASD, properly signed by the applicant, shall be made to the [Corporation] NASD via electronic process or such other process the [Corporation] NASD may prescribe, on the form to be prescribed by the [Corporation] NASD, and shall contain: (1) an [acceptance of and an agreement to abide by, comply with, and adhere to, all the provisions, conditions, and covenants of the Restated Certificate of Incorporation, the By-Laws] *agreement to comply with the federal securities laws, the rules and regulations [of the Corporation as they are or may from time to time be adopted, changed or amended,] thereunder, the rules of the Municipal Securities Rulemaking Board and the Treasury Department, the By-Laws of the NASD, NASD Regulation, and NASDAQ, the Rules of the Association, and all rulings, orders, directions, and decisions [of,] issued and sanctions imposed [by, the Board of Governors or any duly authorized committee, and the provisions of the federal securities laws, including the rules and regulations adopted*

thereunder, including the rules of the Municipal Securities Rulemaking Board and the Treasury Department, provided, however, that such an agreement shall not be construed as a waiver by the applicant of any right to appeal as provided in the Act;] *under the Rules of the Association;*

(2) an agreement to pay such dues, assessments, and other charges in the manner and amount as [shall from time to time be fixed by the Board of Governors pursuant to these By-Laws;] *from time to time shall be fixed pursuant to the NASD By-Laws, Schedules to the NASD By-Laws, and the Rules of the Association;*

(3) an agreement that [none of] *neither* the [Corporations, or] *NASD, nor* any officer[,] or employee[, or] *thereof, nor* any member of the Board [or committees of the Corporations] *of Governors or of any district or other committee, shall be liable, except for willful malfeasance, to the applicant or to any member of the [Corporation] NASD or to any other person, for any action taken by such officer or member of the [Boards] Board of Governors or of any district or other committee, in his official capacity, or by any employee of the [Corporations] NASD while acting within the scope of his employment or under instruction of any officer, [Board] board, or committee of the [Corporations] NASD, in connection with the administration or enforcement of any of the provisions of the [rules] Rules of the [Corporation] Association as they are or may from time to time be adopted, or amended, or any ruling, order, directive, decision of, or penalty imposed by, the [Boards] Board of Governors or any duly authorized committee [thereof], [or] the provisions of the federal securities laws, including the rules and regulations adopted thereunder, [and] including the rules of the Municipal Securities Rulemaking Board and the Treasury Department; and*

(4) such other reasonable information with respect to the applicant as the [Corporation] *Board of Governors* may require. (b) Any application for membership received by the [Corporation] NASD shall be processed in the manner set forth in the [Procedural] Rules of the [Corporation] *Association.* (c) Each member shall ensure that the member's membership application with the [Corporation] NASD is kept current at all times by supplementary amendments via electronic process or such other process the [Corporation] NASD may prescribe to the original application. Such amendments to the application shall be filed with the [Corporation] NASD not later than [thirty (30) calendar] 30 days

after learning of the facts or circumstances giving rise to the amendment.

Similarity of Membership Names

Sec. 2. (a) No person or firm shall be admitted to or continued in membership in the [Corporation] NASD having a name [which] *that is identical to the name of another member appearing on the membership roll of the [Corporation] NASD or a name so similar to any such name as to tend to confuse or mislead.* (b) No member may change its name without prior approval of the [Corporation] NASD.

Executive Representative

Sec. 3. Each member shall appoint and certify to the Secretary of the [Corporation] one "executive" NASD one "executive representative" who shall represent, vote, and act for the member in all the affairs of the [Corporation] NASD, except that other executives of a member may also hold office in the [Corporation] NASD, serve on the Board [of Governors] or committees of the [Corporation] NASD, or otherwise take part in the affairs of the [Corporation] NASD. A member may change its executive representative upon giving notice thereof via electronic process or such other process the [Corporation] 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.

Membership Roll

Sec. 4. The Secretary of the [Corporation] NASD shall keep a currently accurate and complete membership roll, containing the name and address of each member, and the name and address of the executive representative of each member. In any case where a membership has been terminated, such fact shall be recorded together with the date on which the membership ceased. The membership roll of the [Corporation] NASD shall at all times be available to all members of the [Corporation] NASD, to all governmental authorities, and to the general public.

Resignation of Members

Sec. 5. Membership in the [Association] NASD may be voluntarily terminated only by formal resignation. Resignations of members must be filed via electronic process or such other process the [Corporation] NASD may

prescribe and addressed to the [Corporation] NASD. Any member may resign from the [Corporation] NASD at any time. Such resignation shall not take effect until [thirty (30) calendar] 30 days after receipt thereof by the [Corporation] NASD and until all indebtedness due the [Corporation] NASD from such member shall have been paid in full and so long as any complaint or action is pending against the member under the [Procedural] Rules of the Association. The [Corporation] NASD, however, may in its discretion declare a resignation effective at any time.

Retention of Jurisdiction

Sec. 6. A resigned member or a member that has had its membership canceled or revoked shall continue to be subject to the filing of a complaint under the [Procedural] Rules of the Association based upon conduct which commenced prior to the effective date of the member's resignation from the [Corporation] NASD or the cancellation or revocation of its membership. Any such complaint, however, shall be filed within two [(2)] years after the effective date of resignation, cancellation, or revocation.

Transfer and Termination of Membership

Sec. 7. (a) Except as provided hereinafter, no member of the [Corporation] NASD may transfer its membership or any right arising therefrom and the membership of a corporation, partnership, or any other business organization which is a member of the [Corporation] NASD shall terminate upon its liquidation, dissolution, or winding up, and the membership of a sole proprietor which is a member shall terminate at death, provided that all obligations of membership under the By-Laws and the [other rules] Rules of the [Corporation] Association have been fulfilled.

(b) The consolidation, reorganization, merger, change of name, or similar change in any corporate member shall not terminate the membership of such corporate member provided that the member or surviving organization, if any, shall be deemed a successor to the business of the corporate member, and the member or the surviving organization shall continue in the investment banking and securities business, and shall possess the qualifications for membership in the [Corporation] NASD. The death, change of name, withdrawal of any partner, the addition of any new partner, reorganization, consolidation, or any change in the legal structure of a

partnership member shall not terminate the membership of such partnership member provided that the member or surviving organization, if any, shall be deemed a successor to the business of the partnership member, and the member or surviving organization shall continue in the investment banking and securities business and shall possess the qualifications for membership in the [Corporation] NASD. If the business of any predecessor member is to be carried on by an organization deemed to be a successor organization by the [Corporation] NASD, the membership of such predecessor member shall be extended to the successor organization *subject to the notice and review requirements of the Rules of the Association and the right of the NASD to place restrictions on the successor organization pursuant to the Rules of the Association;* otherwise, any surviving organization shall be required to satisfy all of the *membership application* requirements of [the] *these By-Laws and the Rules of the Association.*

Registration of Branch Offices

Sec. 8. (a) Each branch office of a member of the [Corporation] NASD shall be registered with and listed upon the membership roll of the [Corporation] NASD, and shall pay such dues, assessments, and other charges as shall be fixed from time to time by the Board [of Governors] pursuant to Article [V of the By-Laws] VI. (b) Each member of the [Corporation] NASD shall promptly advise the [Corporation] NASD via electronic process or such other process the [Corporation] NASD may prescribe of the opening, closing, relocation, change in designated supervisor, or change in designated activities of any branch office of such member not later than [thirty (30) calendar] 30 days after the effective date of such change.

Article [IV] V

Registered Representatives and Associated Persons

Qualification Requirements

Sec. 1. No member shall permit any person associated with [such] *the member to engage in the investment banking or securities business unless the member determines that such person [has complied with the applicable provisions under Article II of the By-Laws.] satisfies the qualification requirements established under Article III, Section 2 and is not subject to a disqualification under Article III, Section 4.*

Application for Registration

Sec. 2. (a) Application by any person for registration with the [Corporation] NASD, properly signed by the applicant, shall be made to the [Corporation] NASD via electronic process or such other process the [Corporation] NASD may prescribe, on the form to be prescribed by the [Corporation] NASD and shall contain:

(1) [an acceptance of and] an agreement to comply with the [all the provisions of the rules of the Corporation as they are or may from time to time be adopted or amended,] *federal securities laws, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board and the Treasury Department, the By-Laws of the NASD, NASD Regulation, and Nasdaq, the Rules of the Association, and all rulings, orders, directions [and decisions of, and penalties imposed by, the Board of Governors or any duly authorized committee, and the provisions of the federal securities laws, including the rules and regulations adopted thereunder, and the rules of the Municipal Securities Rulemaking Board and the Treasury Department, provided, however, that such an agreement shall not be construed as a waiver by the applicant of any right to appeal as provided in the Act;], and decisions issued and sanctions imposed under the Rules of the Association;*

(2) an agreement that [none of] *neither the [Corporations, or] NASD, nor any officer[,] or employee[,] or thereof, nor any member of the [Boards or committees of the Corporation] Board of Governors or of any district or other committee, shall be liable except for willful malfeasance, to the applicant or to any member of the [Corporation] NASD or to any other person, for any action taken by such officer, member of the [Boards] Board of Governors or of any district or other committee in his official capacity, or by any employee of the [Corporation] NASD while acting within the scope of his employment, or under instruction of any officer, [Board] board, or committee of the [Corporations] NASD, in connection with the administration or enforcement of any of the provisions of the By-Laws, any [rules] Rules of the [Corporation] Association as they are or may from time to time be adopted or amended, any ruling, order, direction, decision of, or penalty imposed by the [Boards] Board of Governors or any duly authorized committee [thereof], [and] the provisions of the federal securities laws, including the rules and regulations adopted thereunder*

including the rules of the Municipal Securities Rulemaking Board and the rules of the Treasury Department; and

(3) such other reasonable information with respect to the applicant as the [Corporation] NASD may require.

(b) The [Corporation] NASD shall not approve an application for registration of any person who is not eligible to be an associated person of a member under the provisions of *Article III, Section 3(b) of Article II of these By-Laws*.

(c) Every application for registration filed with the [Corporation] NASD shall be kept current at all times by supplementary amendments via electronic process or such other process the [Corporation] NASD may prescribe to the original application. Such amendment to the application shall be filed with the [Corporation] NASD not later than [thirty (30) calendar] 30 days [of] *after learning of the facts or circumstances giving rise to the amendment. If such amendment involves a statutory disqualification as defined in Section 3(a)(39) and Section 15(b)(4) of the Act, such amendment shall be filed not later than ten [(10) calendar] days after such disqualification occurs.*

Notification by Member to [Corporation] the NASD and Associated Person of Termination; Amendments to Notification

Sec. 3. (a) Following the termination of the association with a member of a person who is registered with it, such member shall not later than [thirty (30) calendar] 30 days after such termination, give notice of the termination of such association to the [Corporation] NASD via electronic process or such other process the [Corporation] NASD may prescribe on a form designated by the [Corporation] NASD, and concurrently shall provide to the person whose association has been terminated a copy of said notice as filed with the [Corporation.] NASD. A member [which] *that does not submit such notification, and provide a copy to the person whose association has been terminated, within the time period prescribed, shall be assessed a late filing fee as specified by the [Corporation] NASD. Termination of registration of such person associated with a member shall not take effect so long as any complaint or action under the [rules] Rules of the [Corporation] Association is pending against a member and to which complaint or action such person associated with a member is also a respondent, or so long as any complaint or action is pending against such person individually under the [rules] Rules of the [Corporation. The Corporation]*

Association. The NASD, however, may in its discretion declare the termination effective at any time.

(b) The member shall notify the [Corporation] NASD via electronic process or such other process the [Corporation] NASD may prescribe by means of an amendment to the notice filed pursuant to *subsection [paragraph] (a) [above]* in the event that the member learns of facts or circumstances causing any information set forth in said notice to become inaccurate or incomplete. Such amendment shall be filed with the [Corporation] NASD via electronic process or such other process the [Corporation] NASD may prescribe and a copy provided to the person whose association with the member has been terminated not later than [thirty (30) calendar] 30 days after the member learns of the facts or circumstances giving rise to the amendment.

Retention of Jurisdiction

Sec. 4. A person whose association with a member has been terminated and is no longer associated with any member of the [Corporation] NASD or a person whose registration has been revoked *or canceled* shall continue to be subject to the filing of a complaint under the [rules] *Rules* of the [Corporation] Association based upon conduct which commenced prior to the termination [or], revocation, *or cancellation* or upon such person's failure, while subject to the [Corporation's] NASD's jurisdiction as provided herein, to provide information requested by the [Corporation] NASD pursuant to [NASD Rule 8210] *the Rules of the Association*, but any such complaint shall be filed within:

(a) two [(2)] years after the effective date of termination of registration pursuant to Section 3 [above], provided, however that any amendment to a notice of termination filed pursuant to Section 3(b) that is filed within two years of the original notice which discloses that such person may have engaged in conduct actionable under any applicable statute, rule, or regulation shall operate to recommence the running of the two-year period under this [paragraph] *subsection;*

(b) two [(2)] years after the effective date of revocation *or cancellation* of registration pursuant to [NASD Rule 8320] *the Rules of the Association;* or

(c) in the case of an unregistered person, within two [(2)] years after the date upon which such person ceased to be associated with the member.

Article [V] VI**Dues, Assessments, and Other Charges****Power of [Corporation] the NASD to Fix and Levy Assessments**

Sec. 1. The [Corporation] NASD shall prepare an estimate of the funds necessary to defray reasonable expenses of administration in carrying on the work of the [Corporation] NASD each fiscal year, and on the basis of such estimate, shall fix and levy the amount of admission fees, dues, assessments, and other charges to be paid by members of the [Corporation] NASD and issuers and any other persons using any facility or system which the [Corporation] NASD, NASD Regulation, or Nasdaq operates or controls. Fees, dues, assessments, and other charges shall be called and payable as determined by the [Corporation] NASD from time to time; provided, however, that such admission fees, dues, assessments, and other charges shall be equitably allocated among members and issuers and any other persons using any facility or system which the [Corporation] NASD operates or controls. The [Corporation] NASD may from time to time make such changes or adjustments in such fees, dues, assessments, and other charges as it deems necessary or appropriate to assure equitable allocation of dues among members. In the event of termination of membership or the extension of any membership to a successor organization during any fiscal year for which an assessment has been levied and become payable, the [Corporation] NASD may make such adjustment in the fees, dues, assessments, or other charges payable by any such member or successor organization or organizations during such fiscal years as it deems fair and appropriate in the circumstances.

Reports of Members

Sec. 2. Each member, issuer, or other person shall promptly furnish all information or reports requested by the [Corporation] NASD in connection with the determination of the amount of admission fees, dues, assessments, or other charges.

Suspension or Cancellation of Membership or Registration

Sec. 3. The [Corporation] NASD after [fifteen (15)] 15 days notice in writing, may suspend or cancel the membership of any member or the registration of any person in arrears in the payment of any fees, dues, assessments, or other charges or for failure to furnish any information or reports requested pursuant to Section 2 [of this Article], or for failure to

comply with an award of arbitrators properly rendered pursuant to [Section 41] the Rules of the [Code of Arbitration Procedure] Association, where a timely motion to vacate or modify such award has not been made pursuant to applicable law or where such a motion has been denied, or for failure to comply with a written and executed settlement agreement obtained in connection with an arbitration or mediation submitted for disposition pursuant to the [procedures specified by the Corporation] Rules of the Association.

Reinstatement of Membership or Registration

Sec. 4. Any membership or registration suspended or canceled under this Article may be reinstated by the [Corporation] NASD upon such terms and conditions as it shall deem just; provided, however, that any applicant for reinstatement of membership or registration shall possess the qualifications required for membership or registration in the [Corporation.] NASD.

Delegation

Sec. 5. The NASD may delegate its authority under this Article in a manner not inconsistent with the Delegation Plan.

Article [VI] VII**Board of Governors****Powers and Authority of Board**

Sec. 1. (a) The Board [of Governors] shall be the governing body of the [Corporation] NASD and, except as otherwise provided by applicable law, the Restated Certificate of Incorporation, or these By-Laws, shall be vested with all powers necessary for the management and administration of the affairs of the [Corporation] NASD and the promotion of the [Corporation's] NASD's welfare, objects, and purposes. In the exercise of such powers, the Board [of Governors] shall have the authority to:

[(1)](i) adopt for submission to the membership, as hereinafter provided, such By-Laws and changes or additions thereto as it deems necessary or appropriate;

[(2)](ii) adopt such other [rules] Rules of the [Corporation] Association and changes or additions thereto as it deems necessary or appropriate, provided, however, that the Board may at its option submit to the membership any such adoption, change, or addition to such [rules] Rules;

[(3)](iii) make such regulations, issue such orders, resolutions, interpretations, including interpretations of these By-

Laws and the [rules] Rules of the [Corporation] Association, and directions, and make such decisions as it deems necessary or appropriate;

[(4)](iv) prescribe [a code of arbitration procedure providing] rules for the required or voluntary arbitration of controversies between members and between members and customers or others as it shall deem necessary or appropriate;

[(5)](v) establish rules and procedures to be followed by members in connection with the distribution of securities issued by members and affiliates thereof;

[(6)](vi) require all over-the-counter transactions in securities between members, other than transactions in exempted securities as defined in Section 3(a)(12) of the Act, to be cleared and settled through the facilities of a clearing agency registered with the Commission pursuant to the Act, which clears and settles such over-the-counter transactions in securities;

[(7)](vii) organize and operate automated systems to provide qualified subscribers with securities information and automated services. The systems may be organized and operated by a division or subsidiary company of the [Corporation] NASD or by one or more independent firms under contract with the [Corporation] NASD as the Board [of Governors] may deem necessary or appropriate. The Board [of Governors] may adopt rules for such automated systems, establish reasonable qualifications and classifications for members and other subscribers, provide qualification standards for securities included in such systems, require members to report promptly information in connection with securities included in such systems, and establish charges to be collected from subscribers and others;

[(8)](viii) require the prompt reporting by members of such original and supplementary trade data as the Board deems appropriate. Such reporting requirements may be administered by the [Corporation] NASD, a division or subsidiary thereof, or a clearing agency registered under the Act; and

[(9)](ix) engage in any activities or conduct necessary or appropriate to carry out the [Corporation's] NASD's purposes under its Restated Certificate of Incorporation and the federal securities laws.

(b) In the event of the refusal, failure, neglect, or inability of any member of the Board [of Governors] to discharge [his] such member's duties, or for any cause affecting the best interests of the [Corporation] NASD the sufficiency of which the Board [of Governors] shall be

the sole judge, the Board shall have the power, by the affirmative vote of two-thirds of the Governors then in office, to remove such member and declare [his] *such member's* position vacant and that it shall be filled in accordance with the provisions of Section 6 [of this Article].

(c) To the fullest extent permitted by *applicable law*, the Restated Certificate of Incorporation [and applicable law, the Corporation], *and these By-Laws, the NASD* may delegate any power of the [Corporation or the Board of Governors to any person or entity, including a subsidiary of the Corporation; provided that such delegation is] *NASD or the Board to a committee appointed pursuant to Article IX, Section 1, the NASD Regulation Board, the Nasdaq Board, or NASD staff in a manner* not inconsistent with the Delegation Plan.

Authority to Cancel or Suspend for Failure to Submit Required Information

Sec. 2. (a) The Board [of Governors] shall have authority, upon notice and opportunity for a hearing, to cancel or suspend the membership of any member or suspend the association of any person associated with a member for failure to file, or to submit on request, any report, document, or other information required to be filed with or requested by the [Corporation.] *NASD pursuant to these By-Laws or the Rules of the Association.*

(b) *Any membership or association suspended or canceled pursuant to this Section may be reinstated by the NASD pursuant to the Rules of the Association.*

[(b)](c) The Board [of Governors] is authorized to delegate [the authority hereinabove granted to the Chief Executive Officer of the Corporation; provided, however, that the Executive Committee of the Board of Governors shall be notified in writing of any such contemplated action by the Chief Executive Officer.] *its authority under this Section in a manner not inconsistent with the Delegation Plan and otherwise in accordance with the Rules of the Association.*

Authority To Take Action Under Emergency or Extraordinary Market Conditions

Sec. 3. The Board [of Governors], or such person or persons as may be designated by the Board, in the event of an emergency or extraordinary market conditions, shall have the authority to take any action regarding[.]:

[(1)](a) the trading in or operation of the over-the-counter securities market, the operation of any automated system owned or operated by the [Corporations] *NASD, NASD Regulation, or Nasdaq,* and the participation in any such

system of any or all persons or the trading therein of any or all securities; and

[(2)](b) the operation of any or all member firms' offices or systems, if, in the opinion of the Board or the person or persons hereby designated, such action is necessary or appropriate for the protection of investors or the public interest or for the orderly operation of the marketplace or the system.

Composition [and Qualifications] of the Board

Sec. 4. (a) The Board [of Governors] shall be composed of [five or more members] *at least nine and not more than thirteen Governors,* the number thereof to be determined [from time to time by the Board of Governors, and shall include at all times the] *by the Board prior to each annual election of the Governors. Any new Governor position created as a result of an increase in the size of the Board shall be filled as part of the annual election conducted under Sections 9 through 13.* The Chief Executive Officer [and such Industry, Non-Industry, and Public Governors as shall be determined from time to time by the Board of Governors, both of which determinations shall be consistent with the Delegation Plan and Section 15A(b)(4) of the Act. The criteria for the categories of Industry, Non-Industry and Public Governors, as used herein, shall be established by the Board of Governors from time to time, which criteria shall be consistent with the Delegation Plan.] *of the NASD shall be a Governor, and a majority of the remaining Governors shall be Non-Industry Governors, including at least two Public Governors. In the event that the Board shall consist of eleven or more Governors, at least three Governors shall be Public Governors.*

(b) As soon as practicable, following the annual election of members to the Board [of Governors], the Board [of Governors] shall elect from the members of the Board [of Governors a Chairman,] *a Chair* and such other persons having such titles as it shall deem necessary or advisable, to serve until the next annual election or until their successors are chosen and qualify. The persons so elected shall have such powers and duties as may be determined from time to time by the Board [of Governors]. The Board [of Governors, by affirmative vote of], *by resolution adopted by a majority of [its members] the Governors then in office,* may remove any such person from such position at any time.

Term of Office of Governors

Sec. 5. Each Governor, except as otherwise provided by the Restated

Certificate of Incorporation or these By-Laws, shall hold office for a term of not more than three years, such term to be fixed by the Board at the time of the nomination or certification of such Governor, or until [his] a successor is elected and qualified, or until [his] death, resignation, disqualification, or removal. Except for the Chief Executive Officer, no Governor may serve more than two consecutive terms[.]; provided, however, that if a Governor is appointed to fill a term of less than one year, such Governor may serve up to two consecutive terms following the expiration of such Governor's [current] *initial* term. The Chief Executive Officer of the [Corporation] *NASD* shall serve as a member of the Board until [his] a successor is selected and qualified, or until [his] death, resignation, disqualification, or removal.

Disqualification

Sec. 6. *A Governor shall immediately resign or be automatically removed from office if the Board determines by a majority vote of the remaining Governors that (a) the Governor no longer satisfies the classification (Industry, Non-Industry, or Public Governor) for which the Governor was elected; (b) failure to remove the Governor would violate the compositional requirements of the Board set forth in Section 4; and (c) the Governor has a remaining term of office of more than six months.*

Filling of Vacancies

Sec. [6.] 7. [(a) Any vacancy in the office of] *If a Governor position becomes vacant, whether [occurring by reason] because of death, disability, disqualification, removal, or resignation, [other than a vacancy by reason of an increase in the size of the Board, shall be filled] the National Nominating Committee shall nominate, and the Board shall elect by majority vote of the remaining Governors then in office [and any person elected to fill such vacancy shall satisfy the qualifications and criteria], a person satisfying the classification (Industry, Non-Industry, or Public Governor) for the governorship [being filled] as provided in Section 4 [of this Article.] to fill such vacancy, except that if the remaining term of office for the vacant Governor position is not more than six months, no replacement shall be required. If the remaining term of office for the vacant Governor position is more than one year, the Governor elected by the Board to fill such position shall stand for election in the next annual election pursuant to this Article.*

[(b) Any vacancy in the office of a Governor occurring by reason of an increase in the size of the Board shall be filled by majority vote of the Board and any person elected to fill such vacancy shall satisfy the criteria for such newly created governorship as shall be established by resolution of the Board, provided that the filling of any such vacancy shall not be inconsistent with any other provisions of these By-Laws or the Delegation Plan.]

Meetings of Board; Quorum; Required Vote

Sec. 8. Meetings of the Board shall be held at such times and places, upon such notice, and in accordance with such procedure as the Board [of Governors] in its discretion may determine. *At all meetings of the Board, unless otherwise set forth in these By-Laws or required by law, a quorum [of the Board of Governors] for the transaction of business shall consist of a majority of the [total number of Governors of the Corporation and any] Board, including not less than 50 percent of the Non-Industry Governors. Any action taken by a majority vote at any meeting at which a quorum is present, except as otherwise provided in the Restated Certificate of Incorporation or these By-Laws, shall constitute the action of the Board [of Governors]. Members of the Board [of Governors], or any committee [appointed] designated by the Board [of Governors] or any other committee of the [Corporation] NASD, may participate in a meeting thereof by means of communications facilities that ensure all persons participating in the meeting can hear and speak to each other, and participation in a meeting pursuant to this By-Law shall constitute presence in person at such meeting. No member of the Board [of Governors] shall vote by proxy at any meeting of the Board.*

The National Nominating Committee

[(b)] **Sec. 9.** (a) The National Nominating Committee shall [have such powers and shall perform such functions as shall be determined by resolution of the Board of Governors from time to time, consistent with the Delegation Plan.] *nominate Industry, Non-Industry, and Public Governors for each vacant or new Governor position on the NASD Board and Industry, Non-Industry, and Public Directors for each vacant or new position on the NASD Regulation Board and the Nasdaq Board.*

(b) The National Nominating Committee shall [consist of six or more persons who shall have such qualifications, and who shall be selected in such manner, as shall be determined

by resolution of the Board of Governors from time to time, which qualifications and manner of selection shall be consistent with the Delegation Plan.] *be composed of at least six and not more than nine members, the number thereof to be determined by the Board from time to time.*

(c) *The members of the National Nominating Committee shall be equally balanced between Industry and Non-Industry committee members, including at least two Public committee members. If the Nominating Committee shall consist of seven or more members, at least three shall be Public committee members. If at any time there shall be an odd number of members of the National Nominating Committee, Non-Industry committee members shall be in the majority. No officer or employee of the NASD, NASD Regulation, or Nasdaq shall serve as a member of the National Nominating Committee in any voting or non-voting capacity. The NASD Regulation Board and the Nasdaq Board each shall select two members of the National Nominating Committee, and the NASD Board shall select the remaining committee members. Not more than three of the committee members and not more than two of the Industry committee members shall be current members of the Board, the NASD Regulation Board, or the Nasdaq Board. A National Nominating Committee member may not simultaneously serve on the National Nominating Committee and the Board, the NASD Regulation Board, or the Nasdaq Board, unless such member is in his or her final year of service on any such board, and following that year, that member may not stand for election to the Board, the NASD Regulation Board, or the Nasdaq Board until such time as he or she is no longer a member of the National Nominating Committee.*

(d) *The members of the National Nominating Committee shall be appointed annually by the Board and may be removed for cause by a majority vote of the Board. The Board shall ensure that the composition of the National Nominating Committee meets the requirements of subsection (c). If the selection of a National Nominating Committee member by the NASD Regulation Board or Nasdaq Board would violate the compositional requirements of subsection (c), the Board shall request that the NASD Regulation Board or Nasdaq Board select another member such that the compositional requirements of subsection (c) are met.*

(e) *The Secretary of the NASD shall collect from each nominee for Governor of the NASD Board and each nominee*

for Director of the NASD Regulation Board or Nasdaq Board such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, or Public Governor or Director, and the Secretary shall certify to the National Nominating Committee each nominee's classification.

Procedure for Nomination of Governors

[(c)] **Sec. 10.** At least 90 days prior to a meeting of members for the election of Governors pursuant to Section 13, the [Corporation] NASD shall notify the members of the date, place, and time of such meeting and shall set forth in such notice the names of each nominee [(a "Nominee").] as selected by the National Nominating Committee[,] for each governorship up for election, [and shall further provide in such notice the qualifications] *the category of governorship (Industry, Non-Industry, or Public Governor) for which the nominee is nominated, the qualifications of each nominee, and such other information regarding each [such Nominee] nominee as the National Nominating Committee deems pertinent. A person who has not been so nominated may be included on the ballot for the election of Governors if [(1)](a) at least 60 days prior to the scheduled date for the meeting of members, such person [complies with the requirements and procedures for nomination set forth in the Delegation Plan and (2) the person is certified] presents duly executed petitions to the Secretary of the NASD demonstrating that such person has the support of three percent of the members, one-half of which must have their principal place of business outside of the district in which the person is employed; and (b) the Secretary certifies that (i) the petitions are duly executed by the requisite number of members; and (ii) the person satisfies the classification (Industry, Non-Industry, or Public Governor) of the governorship to be filled, based on such information provided by the person as is reasonably necessary to make the certification. The Secretary shall not unreasonably withhold or delay the certification. Upon certification, the election shall be deemed a contested election.*

Communication of Views

Sec. 11. *The NASD, the Board, the National Nominating Committee, a committee appointed pursuant to Article IX, Section 1, and NASD staff shall not take any position publicly or with a member or person associated with or employed by a member with respect to any candidate in a contested*

election or nomination held pursuant to these By-Laws or the NASD Regulation By-Laws. A Governor or a member of the National Nominating Committee or any other committee may communicate his or her views with respect to any candidate if such Governor or committee member acts solely in his or her individual capacity and disclaims any intention to communicate in any official capacity on behalf of the NASD, the NASD Board, the National Nominating Committee or any other committee. Except as provided herein, any candidate and his or her representatives may communicate support for the candidate to a membership or person associated with or employed by a member.

Administrative Support

Sec. 12. The Secretary shall provide administrative support to the candidates in a contested election under this Article by sending to NASD members eligible to vote up to two mailings of materials prepared by the candidates. The NASD shall pay the postage for the mailings. The materials shall be prepared on the personal stationery of each candidate and shall state that the materials represent the opinions of the candidate. A candidate nominated by the National Nominating Committee may identify himself or herself as such in his or her materials. Any candidate may send additional materials to NASD members at the candidate's own expense. Except as provided in this Article, the NASD, the Board, any committee, and NASD staff shall not provide any other administrative support to a candidate in a contested election conducted under this Article or a contested election or nomination conducted under the NASD Regulation By-Laws.

Election of Board Members

Sec. [7.(a)] 13 The members of the Board [of Governors] shall be elected by a plurality of the votes of the members of the [Corporation] NASD present in person or represented by proxy at the annual meeting of the [Corporation] NASD and entitled to vote thereat. The annual meeting of the [Corporation] NASD shall be on such date and at such place as the Board [of Governors] shall designate. Any Governor so elected must be nominated or certified by the National Nominating Committee [described in subsection (b) below or certified] pursuant to [subsection (c) below and must satisfy the other qualifications for Governors set forth in Section 4 of this Article or as established by resolution of the Board of Governors from time to time, which

qualifications shall be consistent with the Delegation Plan] Section 10.

Maintenance of Compositional Requirements of the Board

Sec. 14. Each Governor shall update the information submitted under Section 9(e) regarding his or her classification as an Industry, Non-Industry, or Public Governor at least annually and upon request of the Secretary, and shall report immediately to the Secretary any change in such classification.

Article [VII] VIII

Officers, Agents, and Employees Officers

Sec. 1. The Board [of Governors] shall [elect] select a Chief Executive Officer, who shall be responsible for the management and administration of its affairs and shall be the official representative of the [Corporation] NASD in all public matters and who shall have such powers and duties in the management of the [Corporation] NASD as may be prescribed in a resolution by the Board [of Governors], and which powers and duties shall not be inconsistent with the Delegation Plan. The Board shall elect a Secretary, who shall have such powers and duties conferred by these By-Laws and such other duties and powers as may be prescribed in a resolution by the Board. The Board may provide for such other executive or administrative officers as it shall deem necessary or advisable, including, but not limited to, Executive Vice [-]President, Senior Vice [-]President, Vice [-]President, [Secretary,] and Treasurer of the [Corporation] NASD. All such officers shall have such titles, [such] powers, and duties, and shall be entitled to such compensation, as shall be determined from time to time by the Board [of Governors]. Each such officer shall hold office until [his] a successor is elected and qualified or until [his] such officer's earlier resignation or removal. Any officer may resign at any time upon written notice to the [Corporation.] NASD. The Board [of Governors] may remove any officer, with or without cause, at any time, but such removal shall be without prejudice to the contractual rights of such officer, if any, with the [Corporation] NASD. Any number of offices may be held by the same person. Any vacancy occurring in any office of the [Corporation] NASD by death, resignation, removal, or otherwise may be filled for the unexpired portion of the term by the Board [of Governors] at any meeting.

Absence of Chief Executive Officer

Sec. 2. In the case of the absence or inability to act of the [President] Chief Executive Officer of the [Corporation,] NASD, or in the case of a vacancy in such office, the Board [of Governors] may appoint its [Chairman] Chair or such other person as it may designate to act as such officer pro tem, who shall assume all the functions and discharge all the duties of the [President.] Chief Executive Officer.

Agents and Employees

Sec. 3. The Board may employ or authorize the employment and prescribe the powers and duties of such agents and employees as it deems necessary or advisable. The employment and compensation of such agents and employees shall be at the pleasure of the Board, provided that such determinations are not inconsistent with the requirements of the Delegation Plan. Agents and employees of the NASD shall be under the supervision and control of the officers of the NASD, unless the Board, by resolution, provides that an agent or employee shall be under the supervision and control of the Board.

Employment of Counsel

Sec. [3.] 4. The Board [of Governors] may retain or authorize the employment of counsel, with such powers, titles, duties, and authority as it shall deem necessary or advisable.

Administrative Staff

Sec. 4. The Board of Governors may employ or authorize the employment and prescribe the powers and duties of such an administrative staff as it deems necessary or advisable. The employment and compensation of such administrative staff of the Corporation shall be at the pleasure of the Board of Governors, provided that such determinations are not inconsistent with the requirements of the Delegation Plan.]

Delegation of Duties of Officers

Sec. 5. The Board may delegate the duties and powers of any officer of the NASD to any other officer or to any Governor for a specified period of time and for any reason that the Board may deem sufficient.

Resignation and Removal of Officers

Sec. 6. (a) Any officer may resign at any time upon written notice of resignation to the Board, the President, or the Secretary. Any such resignation shall take effect upon receipt of such notice or at any later time specified therein. The acceptance of a resignation

shall not be necessary to make the resignation effective.

(b) Any officer of the NASD may be removed, with or without cause, by resolution adopted by a majority of the Governors then in office at any regular or special meeting of the Board or by a written consent signed by all of the Governors then in office. Such removal shall be without prejudice to the contractual rights of the affected officer, if any, with the NASD.

Bond

Sec. 7. The NASD may secure the fidelity of any or all of its officers, agents, or employees by bond or otherwise.

Article [VIII] IX

Committees

Appointment

Sec. 1. Subject to Article VII, Section 1(c), the Board may appoint such committees or subcommittees as it deems necessary or desirable, and it shall fix their powers, duties [and terms of office; provided that such determinations are not inconsistent with requirements of the Delegation Plan], and terms of office. Any such committee or subcommittee consisting solely of one or more Governors, to the extent provided by these By-Laws or by resolution of the Board, shall have and may exercise all powers and authority of the Board in the management of the business and affairs of the [Corporation.] NASD.

Maintenance of Compositional Requirements of Committees

Sec. 2. Upon request, each prospective committee member who is not a Governor shall provide to the Secretary of the NASD such information as is reasonably necessary to serve as the basis for a determination of the prospective committee member's classification as an Industry, Non-Industry, or Public committee member, and the Secretary shall certify to the Board each prospective committee member's classification. Each committee member shall update the information submitted under this Section at least annually and upon request of the Secretary of the NASD, and shall report immediately to the Secretary any change in such classification.

Removal of Committee Member

Sec. [2] 3. Any member of any committee or subcommittee appointed pursuant to this Article [VIII] may be removed from such committee or subcommittee only by a majority vote of

the whole Board, after appropriate notice, for refusal, failure, neglect, or inability to discharge [his] such member's duties, or for any cause the sufficiency of which shall be decided by the Board.

[Resolution of the Board of Governors Interpretations and Explanations

The Executive Committee be and hereby is authorized and directed to consider and make recommendations to the Board of Governors with respect to such interpretative questions, having to do with the Certificate of Incorporation, By-Laws, Rules of Fair Practice and Code of Procedure of the Association, as may from time to time be submitted to the Committee by the Board of Governors or the President.

Where a decision is required as to which reasonable men, equally well informed, might well not differ, the ruling shall be deemed to be an explanation. Where a decision is required where reasonable men, equally well informed, might well differ, the ruling shall be deemed to be an interpretation.

Where in the judgment of the President and upon advice of Counsel, any question involves an answer clearly in the nature of an explanation, such question may be answered in the Office of the President.

Where in the judgment of the President and upon advice of Counsel, any question involves an answer in the nature of an interpretation, the President shall present such question to the Executive Committee.

The President may, after consultation with and upon advice of Counsel, give an office opinion. Such office opinion shall state that it reflects only the opinion of the office of the President and it is provisional and subject to the approval of the Board of Governors.

District Committees, District Business Conduct Committees, Counsel or staff thereof, are hereby directed not to issue any interpretations of the Certificate of Incorporation, By-Laws, Rules of Fair Practice or Code of Procedure, either in oral or written form without presentation of the question to the President and in such case, if the questions presented appear to be an interpretation with the meaning of this resolution the matter shall be presented in writing to the Executive Committee.]

Executive Committee

Sec. 4. The Board may appoint an Executive Committee, which shall, to the fullest extent permitted by the General Corporation Law and other applicable law, have and be permitted

to exercise all the powers and authority of the Board in the management of the business and affairs of the NASD between meetings of the Board and which may authorize the seal of the NASD to be affixed to all papers that may require it. The Chief Executive Officer of the NASD shall be a member of the Executive Committee, and with respect to the remaining members, the Executive Committee shall have a percentage of Non-Industry Governors at least as great as the percentage of Non-Industry Governors on the whole Board, and a percentage of Public Governors at least as great as the percentage of Public Governors on the whole Board.

Audit Committee

Sec. 5. (a) The Board shall appoint an Audit Committee. The Audit Committee shall be composed of four or five Governors, none of whom shall be officers or employees of the Association. The Audit Committee shall include at least one Public Governor who shall serve as Chair of the Committee. If the Audit Committee is composed of five Governors, it shall have not more than two Industry Governors. If the Committee is composed of four Governors, it shall have not more than one Industry Governor. If the size of the NASD Board shall at any time consist of 11 or more members, the Audit Committee shall include two Public Governors. The NASD Regulation Board and the Nasdaq Board each shall designate a Public Director of its Board as a liaison to the Audit Committee. The Audit Committee may consult with such liaisons on issues relating to the functions of NASD Regulation and Nasdaq, but neither the liaisons nor any officer or employee of the NASD, NASD Regulation, or Nasdaq shall serve on the Audit Committee in any voting or non-voting capacity.

(b) The Audit Committee shall perform the following functions: (1) ensure the existence of adequate controls and the integrity of the financial reporting process of the NASD; (2) recommend to the NASD Board, and monitor the independence and performance of, the certified public accountants retained as outside auditors by the NASD; and (3) direct and oversee all the activities of the NASD's internal review function, including but not limited to management's responses to the internal review function.

(c) No member of the Audit Committee shall participate in the consideration or decision of any matter relating to a particular NASD member, company, or individual if such Audit

Committee member has a material interest in, or a professional, business, or personal relationship with, that member, company, or individual, or if such participation shall create an appearance of impropriety. Audit Committee members shall consult with the General Counsel of the NASD to determine if recusal is necessary. If a member of the Audit Committee is recused from consideration of a matter, any decision on the matter shall be by a vote of a majority of the remaining members of the Audit Committee.

(d) The Audit Committee shall have exclusive authority to: (1) hire or terminate the Director of Internal Review; (2) determine the compensation of the Director of Internal Review; and (3) determine the budget for the Office of Internal Review. The Office of Internal Review shall report directly to the Audit Committee. The Audit Committee may, in its discretion, direct that the Office of Internal Review also report to senior management of the NASD on matters the Audit Committee deems appropriate and may request that senior NASD management perform such operational oversight as necessary and proper, consistent with preservation of the independence of the internal review function.

Article X

Compensation of Board and Committee Members

[Sec. 5.] The Board may provide for reasonable compensation of the Chair[man] of the Board, the Governors, and the members of any committee [of the Board from the Corporation]. The Board may also provide for reimbursement of reasonable expenses incurred by such persons in connection with the business of the [Corporation] NASD.

Article [IX] XI

Rules

To promote and enforce just and equitable principles of trade and business, to maintain high standards of commercial honor and integrity among members of the [Corporation] NASD, to prevent fraudulent and manipulative acts and practices, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, to protect investors and the public interest, to collaborate with governmental and other agencies in the promotion of fair practices and the elimination of fraud, and in general to carry out the purposes of the [Corporation] NASD and of the Act, the Board [of Governors] is hereby authorized to adopt such [Rules of Fair

Practice] rules for the members and persons associated with members, and such amendments thereto as it may, from time to time, deem necessary or appropriate. If any such [Rules] rules or amendments thereto are approved by the Commission as provided in the Act, they shall become effective Rules of the Association as of such date as the Board [of Governors] may prescribe. The Board [of Governors] is hereby authorized, subject to the provisions of the By-Laws and the Act, to administer, enforce, suspend, or cancel any Rules of [Fair Practice] the Association adopted hereunder.

Article [X] XII

Disciplinary Proceedings

Sec. 1. The Board [of Governors] shall have authority to establish procedures relating to disciplinary proceedings involving members and their associated persons.

Sec. 2. Except as otherwise permitted under these By-Laws or the Act, in any disciplinary proceeding [before the Corporation] under the Rules of the Association, any member or person associated with a member shall be given the opportunity to have a hearing at which [he] such member or person associated with a member shall be entitled to be heard in person [and/or by counsel] or by counsel or by a representative as provided in the Rules of the Association. Such persons may present any relevant material in accordance with the Rules of the Association. In any such proceeding against a member or against a person associated with a member to determine whether the member [and/or] or the person associated with a member shall be disciplined:

- (a) specific charges shall be brought;
- (b) such member or person associated with a member shall be notified of and be given an opportunity to defend against such charges;
- (c) a record shall be kept; and
- (d) any determination shall include a statement setting forth:
 - (1) any act or practice, in which such member or person associated with a member may be found to have engaged or which such member or person associated with a member may be found to have omitted;
 - (2) the rule, regulation, or statutory provision of which any such act or practice, or omission to act, is deemed to be in violation;
 - (3) the basis upon which any findings are made; and
 - (4) the [penalty] sanction imposed.

Article [XI] XIII

Powers of Board to [Prescribe] Impose Sanctions

Sec. 1. The Board is hereby authorized to [prescribe] impose appropriate sanctions applicable to members, including censure, fine, suspension, or expulsion from membership, suspension or bar from being associated with all members, limitation of activities, functions, and operations of a member, or any other fitting sanction, and to [prescribe] impose appropriate sanctions applicable to persons associated with members, including censure, fine, suspension or barring a person associated with a member from being associated with all members, limitation of activities, functions, and operations of a person associated with a member, or any other fitting sanction, for:

- (a) breach by a member or a person associated with a member of any covenant with the [Corporation] NASD or its members;
- (b) violation by a member or a person associated with a member of any of the terms, conditions, covenants, and provisions of the [rules of the Corporation] By-Laws of the NASD, NASD Regulation, or Nasdaq, the Rules of the Association, or the federal securities laws, including the rules and regulations adopted thereunder, [and including] the rules of the Municipal Securities Rulemaking Board, and the rules of the Treasury Department;
- (c) failure by a member or person associated with a member to submit a dispute for arbitration [under the Code of Arbitration Procedure ("Arbitration Code")] as required by the [Arbitration Code] Rules of the Association, or to fail to appear or to produce any document in [their] the member's or person's possession or control as directed pursuant to provisions of the [Arbitration Code] Rules of the Association, or to fail to [honor] comply with an award of arbitrators properly rendered pursuant to the [Arbitration Code] Rules of the Association, where a timely motion [has not been made] to vacate or modify such award has not been made pursuant to applicable law or where such a motion has been denied or for failure to comply with a written and executed settlement agreement obtained in connection with an arbitration or mediation submitted for disposition pursuant to the Rules of the Association;
- (d) refusal by a member or person associated with a member to abide by an official ruling of the Board or any committee exercising powers assigned by the Board with respect to any

transaction which is subject to the Uniform Practice Code; or

(e) failure by a member or person associated with a member to adhere to any ruling, order, direction, or decision of[,] or to pay any [penalty,] *sanction*, fine, or costs[,] imposed by the Board[, or any committee exercising powers assigned by the Board] or any entity to which the Board has delegated its powers in accordance with the *Delegation Plan*.

Sec. 2. The Board may delegate its authority under this Article in accordance with the Delegation Plan.

Article [XII] XIV

Uniform Practice Code

Authority to Adopt Code

Sec. 1. The Board [of Governors] is hereby authorized to adopt a Uniform Practice Code and amendments, interpretations and explanations thereto, designed to make uniform, where practicable, custom, practice, usage, and trading technique in the investment banking and securities business with respect to such matters as trade terms, deliveries, payments, dividends, rights, interest, reclamations, exchange of confirmations, stamp taxes, claims, assignments, powers of substitution, computation of interest and basis prices, due-bills, transfer fees, "when, as and if issued" trading, "when, as and if distributed" trading, marking to the market, and close-out procedure, all to the end that the transaction of day-to-day business by members may be simplified and facilitated, that business disputes and misunderstandings, which arise from uncertainty and lack of uniformity in such matters, may be eliminated, and that the mechanisms of a free and open market may be improved and impediments thereto removed.

Administration of Code

Sec. 2. The administration of any Uniform Practice Code, or any amendment thereto, adopted by the Board [of Governors] pursuant to Section 1 [of this Article], shall be vested in the Board [of Governors], and the Board is hereby granted such powers as are reasonably necessary to achieve its effective operation. In the exercise of such powers, the Board may issue explanations and interpretations and make binding rulings with respect to the applicability of the provisions of the Uniform Practice Code to situations in which there is no substantial disagreement as to the facts involved. [The] *In accordance with the Delegation Plan*, the Board may delegate to [appropriate committees such of its

powers,] *the NASD Regulation Board and the Nasdaq Board such of the Board's powers* hereunder as it deems necessary and appropriate to achieve effective administration and operation of the Uniform Practice Code.

Transactions Subject to Code

Sec. 3. All over-the-counter transactions in securities by members, except transactions in securities which are exempted under Section 3(a)(12) of the Act, or are municipal securities as defined in Section 3(a)(29) of the Act, are subject to the provisions of the Uniform Practice Code and to the provisions of Section 2 [of this Article] unless exempted therefrom by the terms of the Uniform Practice Code.

Article [XIII] XV

Limitation of Powers

Prohibitions

Sec. 1. Under no circumstances shall the Board [of Governors] or any officer, employee, or member of the [Corporation] *NASD* have the power to:

- (a) make any donation or contribution from the funds of the [Corporation] *NASD* or to commit the [Corporation] *NASD* for the payment of any donations or contributions for political or charitable purposes; or
- (b) use the name of the facilities of the [Corporation] *NASD* in aid of any political party or candidate for any public office.

Use of Name of [Corporation] the *NASD* by Members

Sec. 2. No member shall use the name of the [Corporation] *NASD* except to the extent that may be [authorized by the Board of Governors] *permitted by the Rules of the Association*.

[Resolution of the Board of Governors Limitations Upon Use of the Association Name

Members are permitted, in conformity with Article XVI, Section 2 of the Association's By-Laws, and within the limitations prescribed by this Resolution, to indicate membership in the Association in the following manner:

1. Solely as a matter of record in recognized trade directories or other similar types of business listings.
2. Solely in conjunction with the identifying use of the firm name on letterheads, booklet covers, sales literature headings, in the masthead of market letters and on other similar types of circular material, so long as this use is exclusively for identification purposes, is separate and apart from the regular text of the literature and is

always in a smaller size type and with lesser emphasis than that used for the firm name.

3. The Association's name may be used in institutional or any other type of general print and/or electronic advertising media so long as such use is solely and exclusively for identifying the firm as a member, used only in proximity to and in conjunction with the firm name, carries no implied or specific indication of Association approval of the securities or services discussed in the advertisement, is separate and apart from the primary text material in the advertisement, and is always in a smaller size type and of lesser emphasis than that used for the firm name.

4. The following language may be used on confirmation forms, "this transaction (if over-the-counter) has been executed in conformity with the rules and regulations of the Uniform Practice Code of the National Association of Securities Dealers, Inc."

5. The name of the Association may be used on the door or entrance way of a member's principal office or any registered branch office in the following manner: "Member, (of the) National Association of Securities Dealers, Inc."

6. Each member shall be entitled to receive upon request to the Association an appropriate certification of membership which may be displayed in the principal office or any registered branch office of the member. Such certification shall be and remain the property of the Association and shall be returned by a member upon request of the Board of Governors or the President of the Association.

No member or person associated with a member shall use the name of the Association in a fraudulent or misleading manner in connection with the promotion or sale of any specific security or in connection with any other aspect of the member's business; or imply orally, visually or in writing that the Association endorses, indemnifies or guarantees any member's business practices, selling methods or class or type of securities offered.

Any improper, fraudulent or misleading use of the Association's name by a member or person associated with a member shall be deemed conduct inconsistent with high standards of commercial honor and just and equitable principles of trade in violation of Article III, Section 1 of the Association's Rules of Fair Practice.]

Unauthorized Expenditures

Sec. 3. No officer, employee, member of the Board [of Governors] or of any committee[,] shall have any power to

incur or contract any liability on behalf of the [Corporation] NASD not authorized by the Board [of Governors]. The Board may delegate to the Chief Executive Officer of the [Corporation or his delegate] NASD or the Chief Executive Officer's delegate, such authority as it deems necessary to contract on behalf of the [Corporation] NASD or to satisfy unanticipated liabilities during the period between Board meetings.

Conflicts of Interest

Sec. 4. [A](a) A Governor or a member of [the Board of Governors or of any] a committee [of the Corporation] shall not directly or indirectly participate in any adjudication of the interests of any party if such [participation would violate the] Governor or committee member has a conflict of interest [provisions of the Procedural Rules of the Corporation.] or bias, or if circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case, the Governor or committee member shall recuse himself or herself or shall be disqualified in accordance with the Rules of the Association. (b) No contract or transaction between the NASD and one or more of its Governors or officers, or between the NASD and any other corporation, partnership, association, or other organization in which one or more of its Governors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason if: (i) the material facts pertaining to such Governor's or officer's relationship or interest and the contract or transaction are disclosed or are known to the Board or the committee, and the Board or committee in good faith authorizes the contract or transaction by the affirmative vote of a majority of the disinterested Governors; or (ii) the material facts are disclosed or become known to the Board or committee after the contract or transaction is entered into, and the Board or committee in good faith ratifies the contract or transaction by the affirmative vote of a majority of the disinterested Governors. Only disinterested Governors may be counted in determining the presence of a quorum at the portion of a meeting of the Board or of a committee that authorizes the contract or transaction.

Municipal Securities

Sec. 5. The provisions of the By-Laws conferring rulemaking authority upon the Board [of Governors] shall not be applicable to the municipal securities activities of members or persons associated with members to the extent

that the application of such authority would be inconsistent with Section 15B of the Act.

[Government Securities

Sec. 6. The provisions of the By-Laws governing qualifications of members and persons associated with members and conferring rulemaking authority upon the Board of Governors shall not be applicable to the Government securities activities of members or persons associated with members to the extent that the application of such provisions or authority would be inconsistent with Section 15A(f) of the Act.]

Article [XIV] XVI

Procedure for Adopting Amendments to By-Laws

[Any member of the Board of Governors by resolution, any District Committee by resolution, or any twenty-five members of the Corporation by petition signed by such members,] A Governor, a committee of the Board, the NASD Regulation Board, and the Nasdaq Board by resolution may propose amendments to these By-Laws. [Every proposed amendment shall be presented in writing to the Board of Governors and a record shall be kept thereof. The board of Governors may adopt any proposed amendment to these By-Laws by affirmative vote of a majority of the members of the Board of Governors then in office. The Board of Governors, upon adoption of any such amendment to these By-Laws, except as otherwise provided in these By-Laws shall forthwith cause a copy to be sent to and voted upon by each member of the Corporation.] Any 25 members of the NASD by petition signed by such members may propose amendments to these By-Laws. The Chief Executive Officer of the NASD, the President of NASD Regulation, and the President of Nasdaq may propose amendments to these By-Laws. Every proposed amendment shall be presented in writing to the Board and a record shall be kept thereof. The Board may adopt any proposed amendment to these By-Laws [is approved by]by affirmative vote of a majority of the members [voting within thirty (30)] of the Board then in office. The Board, upon adoption of any such amendment to these By-Laws, except as otherwise provided in these By-Laws, shall forthwith cause a copy to be sent to and voted upon by each member of the NASD. If such amendment to these By-Laws is approved by a majority of the members voting within 30 days after the date of submission to the membership,

and is approved by the Commission as provided in the Act, it shall become effective as of such date as the Board [of Governors] may prescribe.

Article [XV] XVII

Corporate Seal

[Sec. 1.] The corporate seal shall have inscribed thereon the name of the [Corporation] NASD, the year of its organization and the words "Corporate Seal, Delaware." Said seal may be used by causing it or a facsimile thereof to be imposed or affixed or reproduced or otherwise.

Article [XVI] XVIII

Checks

All checks or demands for money and notes of the [Corporation] NASD shall be signed by such officer or officers or such other person or persons as the Board [of Governors] may from time to time designate.

Article [XVII] XIX

Annual Financial Statement

As soon as practicable after the end of each fiscal year, the Board [of Governors] shall send to each member of the [Corporation] NASD a reasonably itemized statement of receipts and expenditures of the [Corporation] NASD for such preceding fiscal year.

* * * * *

By-Laws of NASD Regulation, Inc.

Article I

Definitions

When used in these By-Laws, unless the context otherwise requires, the term:

- (a) "Act" means the Securities Exchange Act of 1934, as amended;
- (b) "Board" means the Board of Directors of NASD Regulation;
- (c) "broker" means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of effecting transactions in securities for the account of others, but does not include a bank;
- (d) "Commission" means the Securities and Exchange Commission;
- (e) "day" means calendar day;
- (f) "dealer" means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of buying and selling securities for such individual's or entity's own account, through a broker or otherwise, but does not include a bank, or any person insofar as such person buys or sells securities for such person's own

account, either individually or in some fiduciary capacity, but not as part of a regular business;

(g) "Delaware law" means the General Corporation Law of the State of Delaware;

(h) "Delegation Plan" means the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries" as approved by the Commission, and as amended from time to time;

(i) "Director" means a member of the Board, excluding the Chief Executive Officer of the NASD;

(j) "district" means a district established by the Board pursuant to Article VIII, Section 8.1 of these By-Laws;

(k) "District Committee" means a District Committee elected pursuant to Article VIII of these By-Laws;

(l) "District Director" means an NASD Regulation staff member who heads a district office;

(m) "District Nominating Committee" means a District Nominating Committee elected pursuant to Article VIII of these By-Laws;

(n) "district office" means an office of NASD Regulation located in a district;

(o) "Executive Representative" means the executive representative of an NASD member appointed pursuant to Article IV, Section 3 of the NASD By-Laws;

(p) "Independent Agent" means a corporation or entity selected by the Secretary of NASD Regulation to assist NASD Regulation with nomination and election procedures under Articles VI and VIII of these By-Laws and the representatives of such corporation or entity;

(q) "Industry Director" or "Industry committee member" means a Director (excluding the President of NASD Regulation) or a committee member who (1) is an officer, director, or employee of a broker or dealer or has been employed in any such capacity at any time within the prior three years; or (2) has a consulting or employment relationship with or provides professional services to the NASD, NASD Regulation, or Nasdaq or has had any such relationship or provided any such services at any time within the prior three years;

(r) "NASD" means the National Association of Securities Dealers, Inc.;

(s) "NASD Board" means the NASD Board of Governors;

(t) "NASD member" means any broker or dealer admitted to membership in the NASD;

(u) "NASD Regulation" means NASD Regulation, Inc.;

(v) "National Nominating Committee" means the National Nominating Committee appointed pursuant to Article VII, Section 9 of the NASD By-Laws;

(w) "Non-Industry Director" or "Non-Industry committee member" means a Director or a committee member who is

(1) a Public Director or committee member; (2) an officer or employee of an issuer of securities listed on Nasdaq or traded in the over-the-counter market; (3) a person affiliated with a broker or dealer that operates solely to assist the securities-related activities of the business of a non-member affiliate (such as a broker or dealer established to (i) distribute an affiliate's securities which are issued on a continuous or regular basis, or (ii) process the limited buy and sell orders of the shares of employee owners of the affiliate); (4) an employee of an entity that is affiliated with a broker or dealer that does not account for a material portion of the revenues of the consolidated entity, and who is primarily engaged in the business of the non-member entity; or (5) any other individual who would not be an Industry Director or committee member;

(x) "Public Director" or "Public committee member" means a Director or committee member who has no material business relationship with a broker or dealer or the NASD, NASD Regulation, or Nasdaq;

(y) "Regional Nominating Committee" means a Regional Nominating Committee that nominates to the National Nominating Committee a candidate for the Board to represent a geographical region as provided in Article VI of these By-Laws; and

(z) "Rules of the Association" or "Rules" means the numbered rules set forth in the NASD Manual beginning with the Rule 0100 Series, as adopted by the NASD Board pursuant to the NASD By-Laws, as hereafter amended or supplemented.

Article [I] II

Offices

Location

Sec. [1.1] 2.1 The address of the registered office of [the Corporation] NASD Regulation in the State of Delaware and the name of the registered agent at such address shall be: The Corporation Trust Company, 1209 Orange [St.,] Street, Wilmington, [DE] Delaware 19801. [The Corporation may] NASD Regulation also may have offices at such other places both within and without the State of Delaware as the Board [of Directors] may from time to time designate or the business of [the Corporation] NASD Regulation may require.

Change of Location

Sec. [1.2] 2.2 In the manner permitted by law, the Board [of

Directors] or the registered agent may change the address of [the Corporation's] NASD Regulation's registered office in the State of Delaware and the Board [of Directors] may make, revoke, or change the designation of the registered agent.

Article [II] III

Meetings of Stockholders

[Annual Meeting

Sec. 2.1 The annual meeting of stockholders of the Corporation for the election of Directors and for the transaction of such other business as may properly come before the meeting shall be held on such date, and at such time, and place, within or without the State of Delaware, as may be fixed, from time to time, by the Board of Directors.]

[Special Meetings

Sec. 2.2 Special meetings of stockholders of the Corporation, unless otherwise prescribed by law, may be called at any time by the Chair of the Board, by the President or by order of a majority of the Board of Directors. Special meetings of stockholders prescribed by law for the election of directors shall be called by the Board of Directors, the President, or the Secretary. Special meetings of stockholders shall be held at such place within or without the State of Delaware as shall be designated in the notice of meeting.]

[Notice of Meetings

Sec. 2.3 (a) Whenever stockholders are required or permitted to take any action at a meeting, they shall be given written notice stating the place, date and hour of the meeting, and, in the case of a special meeting, the purpose or purposes thereof. Unless otherwise required by law, the Certificate of Incorporation or these By-Laws, written notice shall be delivered or mailed at least ten but not more than sixty days before such meeting date to each stockholder entitled to vote at such meeting. If mailed, such notice shall be deposited in the United States mail, postage prepaid, directed to each stockholder at the address that appears on the records of the Corporation.

(b) When a meeting of stockholders is adjourned to another time or place, notice need not be given of the adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At the adjourned meeting, the Corporation may transact any business that might have been transacted at the original meeting. If, however, the adjournment is for more than thirty days from the date of the

original meeting, or if, after the adjournment, a new record date is set for the adjourned meeting, notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting in the manner prescribed above in subsection (a).]

[Quorum]

Sec. 2.4 Except as otherwise provided by law, the Certificate of Incorporation or these By-Laws, at each meeting of stockholders the presence in person or by proxy of the holders of record of a majority of the outstanding shares of capital stock entitled to vote or act at such a meeting shall constitute a quorum for the transaction of any business. In the absence of a quorum, the stockholders so present may by majority rule, adjourn any meeting until a quorum shall be present. When a quorum is once present to organize a meeting, the quorum cannot be destroyed by the subsequent withdrawal or revocation of the proxy of any stockholder.]

[Voting]

Sec. 2.5 (a) At any meeting of stockholders, each stockholder as of the record date is entitled to one vote for each such share of stock having voting power, upon the matter in question, except as otherwise provided in the Certificate of Incorporation. Each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for him by proxy, provided that no proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period. A duly executed proxy shall be irrevocable if it states that it is irrevocable and if, and only so long as, it is coupled with an interest sufficient in law to support an irrevocable power. A stockholder may revoke any proxy that is not irrevocable by attending the meeting and voting in person or by filing an instrument in writing revoking the proxy or by delivering a proxy in accordance with applicable law bearing a later date to the Secretary of the Corporation.]

[(b) Directors of the Corporation shall be elected by a plurality of the votes cast at a meeting of stockholders pursuant to Sec. 2.5 of these By-Laws. Corporate action other than the election of directors shall be authorized by a majority of the votes cast at a meeting of stockholders, except as otherwise required by law, the Certificate of Incorporation or these By-Laws.]

[(c) Upon the demand of any stockholder entitled to vote, the election

of directors or a vote on any other matter at a meeting of stockholders shall be by written ballot; otherwise, the method of voting and the manner in which votes are counted at such a meeting shall be discretionary with the presiding officer of the meeting.]

[Presiding Officer and Secretary]

Sec. 2.6 At every meeting of stockholders, the Chair, or in his/her absence, the President, or in his/her absence, the appointee of the meeting, shall preside. The Secretary, or in his/her absence, the appointee of the presiding officer of the meeting, shall act as Secretary of the meeting.]

[Action by Consent of Stockholder[s]]

Sec. [2.7] 3.1 Any action required[,] or permitted by law to be taken at any meeting of the stockholder[s] of [the Corporation] *NASD Regulation* may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, is signed by the holder[s] of the outstanding stock. [having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Prompt notice of the taking of corporate action without a meeting and by less than unanimous written consent shall be given to those stockholders who have not consented in writing.]

Article [III] IV

Board of Directors

General Powers

Sec. [3.1] 4.1 The property, business, and affairs of [the Corporation] *NASD Regulation* shall be managed by or under the direction of the Board [of Directors]. The Board [of Directors] may exercise all such powers of [the Corporation] *NASD Regulation* and have the authority to perform all such lawful acts as are permitted by law, the *Restated Certificate of Incorporation* [or], these By-Laws, or the *Delegation Plan* to assist the [National Association of Securities Dealers, Inc.] *NASD* in fulfilling its self-regulatory responsibilities as set forth in Section 15A of the [Securities Exchange Act of 1934, and] *Act*, and to support such other initiatives as the Board [of Directors] may deem appropriate. *To the fullest extent permitted by applicable law, the Restated Certificate of Incorporation, and these By-Laws, the Board may delegate any of its powers to a committee appointed pursuant to Section 4.14 or to NASD Regulation*

staff in a manner not inconsistent with the Delegation Plan.

Number of Directors

Sec. [3.2] 4.2 [The Board of Directors of the Corporation shall consist of one or more members; the exact number of directors that shall constitute the whole Board of Directors shall be fixed from time to time by resolution adopted by the whole Board of Directors. After fixing the number of directors constituting the whole Board of Directors, the Board of Directors may, by resolution adopted by the whole Board of Directors, from time to time change the number of directors constituting the whole Board of Directors; provided that such determination shall be consistent with the Plan of Allocation and Delegation of Functions by *NASD* to Subsidiaries (the "Delegation Plan").] *The Board shall be composed of at least 21 and not more than 25 Directors, the number thereof to be determined by the Board prior to the annual election of Directors. Any new Director position created as a result of an increase in the size of the Board shall be filled as part of the annual election conducted under Section 4.4.*

Qualifications

Sec. [3.3] 4.3 (a) Directors need not be stockholders of [the Corporation]. The Board of Directors shall include at all times the President of the Corporation and such Industry, Non-Industry, and Public Governors as shall be determined from time to time by the Board of Directors, which determination shall be consistent with the Delegation Plan. The criteria for the categories of Industry, Non-Industry, and Public Directors, as used herein, shall be established by the Board of Directors from time to time, which criteria shall be consistent with the Delegation Plan.] *NASD Regulation. The President of NASD Regulation shall be a Director, and the remaining Directors shall be equally balanced between Industry and Non-Industry Directors. If at any time there shall be an odd number of Directors, excluding the President, a majority of the Directors other than the President shall be Non-Industry Directors. The Board shall include at least ten Industry Directors, who shall represent a geographic region designated by the Board pursuant to Article VI, Section 6.1, or who shall represent the industry at-large. The Board shall include at least ten Non-Industry Directors, including at least three Public Directors. In the event that the Board shall consist of more than 22 Directors, at least four shall be Public Directors. The Board shall include representatives of an issuer of*

investment company shares or an affiliate of such an issuer and an insurance company or an affiliated NASD member. The Chief Executive Officer of the NASD shall be an ex-officio non-voting member of the Board.

(b) As soon as practicable, following the annual election of Directors, the Board shall elect from its members a Chair and a Vice Chair, and such other persons having such titles as it shall deem necessary or advisable, to serve until the next annual election or until their successors are chosen and qualify. The persons so elected shall have such powers and duties as may be determined from time to time by the Board. The Board, by resolution adopted by a majority of Directors then in office, may remove any such person from such position at any time.

(c) Each Director shall update the information submitted to the Secretary of NASD pursuant to Article VII, Section 9(e) of the NASD By-Laws regarding the Director's classification as an Industry, Non-Industry, or Public Director at least annually and upon request of the Secretary of the NASD, and shall report immediately to the Secretary of the NASD any change in such classification.

Election

Sec. [3.4]4.4 (a) Except as otherwise provided by law [or], these By-Laws, or the Delegation Plan, after the first meeting of [the Corporation] NASD Regulation at which [directors] Directors are elected, [directors of the Corporation] Directors of NASD Regulation shall be elected each year at the annual meeting of [stockholders] the stockholder, or at a special meeting called for such purpose in lieu of the annual meeting[, by a plurality of the votes cast at such meeting]. If the annual election of [directors] Directors is not held on the date designated [therefore,] therefore, the [directors] Directors shall cause such election to be held as soon thereafter as convenient.

(b) The National Nominating Committee shall nominate Industry, Non-Industry, and Public Directors for each vacant or new Director position on the Board to the NASD Board in accordance with Article VII of the NASD By-Laws. The Regional Nominating Committees shall nominate Industry Directors to represent geographical regions for consideration by the National Nominating Committee as provided in Article VI of these By-Laws.

Term

Sec. [3.5]4.5 (a) Each Director shall hold office for a term of three years or until [his] a successor is duly elected and qualified, except in the event of

earlier termination from office by reason of death, resignation, removal[,] with or without cause, disqualification, or other reason.

(b) The Board [of Directors] shall be divided into three classes. The term of office of those of the first class shall expire at the January 1997 meeting of the Board, of the second class one year thereafter, and of the third class two years thereafter. At each annual election, commencing January 1997, Directors shall be elected for a term of three years to replace those whose terms expire.

(c) The President of [of the Corporation] NASD Regulation shall serve as a [member of the Board] Director until a [his] successor is selected and qualified, or until [his] death, resignation, or removal.

(d) Except for the President, no Director may serve more than two consecutive terms; provided, however, that if a Director is appointed to fill a term of less than one year, such Director may serve up to two consecutive terms following the expiration of such Director's [current term] initial term.

(e) Each director chosen to fill a newly created directorship shall serve until the next succeeding annual meeting of stockholders.]

Resignation

Sec. [3.6]4.6 Any [director] Director may resign at any time either upon written notice of resignation to the Chair of the Board, the President, or the Secretary. Any such resignation shall take effect at the time specified therein or, if the time [be] is not specified, upon receipt thereof, and the acceptance of such resignation, unless required by the terms thereof, shall not be necessary to make such resignation effective.

Removal

Sec. [3.7]4.7 Any or all of the [directors] Directors may be removed from office at any time, with or without cause, [by the stockholders] only by a majority vote of the NASD Board.

Disqualification

Sec. 4.8 A Director shall immediately resign or be automatically removed from office if the NASD Board determines by majority vote that (a) the Director no longer satisfies the definition for the category (Industry, Non-Industry or Public Director) for which the Director was elected; (b) failure to remove the Director would violate the compositional requirements for the Board set forth in Section 4.3(a); and (c) the Director has a remaining term of office of more than six months.

Filling of Vacancies

Sec. 4.9 If a Director position becomes vacant, whether because of death, disability, disqualification, removal, or resignation, the National Nominating Committee shall nominate, and the NASD Board shall elect by majority vote, a person satisfying the classification (Industry, Non-Industry, or Public Director) for the directorship as provided in Section 4.3 to fill such vacancy, except that if the remaining term of office for the vacant Director position is not more than six months, no replacement shall be required. If the remaining term of office for the vacant Director position is more than one year, and the Director who vacated the position was nominated pursuant to Article VI, the Director elected by the Board to fill such position shall stand for election in the next annual election pursuant to Article VI.

Quorum and Voting

Sec. [3.8]4.10 (a) At all meetings of the Board [of Directors, one-third of the total number of directors shall constitute], unless otherwise set forth in these By-Laws or required by law, a quorum for the transaction of business shall consist of a majority of the Board, including not less than 50 percent of the Non-Industry Directors. In the absence of a quorum, a majority of the [directors] Directors present may adjourn the meeting until a quorum [be present] is present.

(b) [A director interested in a matter to be acted upon by the Board of Directors may be counted in determining the presence of a quorum at a meeting of the Board of Directors that determines the Corporation's action.]

(c) Subject to the restrictions of Section 3.12] Except as provided in Section 4.15(b), the vote of a majority of the [directors] Directors present at a meeting at which a quorum is present shall be the act of the Board [of Directors].

Regulation

Sec. [3.9]4.11 The Board [of Directors] may adopt such rules, regulations, and requirements for the conduct of the business and management of [the Corporation,] NASD Regulation not inconsistent with the law, the Restated Certificate of Incorporation, these By-Laws, [or the rules and By-Laws of the National Association of Securities Dealers, Inc., as the Board of Directors may deem proper. A member of the Board of Directors] the Rules of the Association, or the By-Laws of the NASD, as the Board may deem proper. A Director

shall, in the performance of [his or her] *such Director's* duties, be fully protected in relying in good faith upon the books of account or reports made to [the Corporation] *NASD Regulation* by any of its officers, [or] by an independent certified public accountant, [or] by an appraiser selected with reasonable care by the Board [of Directors] or any committee of the Board [of Directors] or by any agent of [the Corporation] *NASD Regulation*, or in relying in good faith upon other records of [the Corporation] *NASD Regulation*.

Meetings

Sec. [3.10]4.12 (a) An annual meeting of the Board [of Directors] shall be held for the purpose of organization, election of officers, and transaction of any other business. If such meeting is held promptly after and at the place specified for the annual meeting of [stockholders] *the stockholder*, no notice of the annual meeting of the Board [of Directors] need be given. Otherwise, such annual meeting shall be held at such time and place as may be specified in a notice given in accordance with Section [3.11 of these By-Laws] 4.13.

(b) Regular meetings of the Board [of Directors] may be held at such time and place, within or without the State of Delaware, as determined from time to time by the Board [of Directors]. After such determination has been made, notice shall be given in accordance with Section [3.11 of these By-Laws] 4.13.

(c) Special meetings of the Board [of Directors] may be called by the Chair of the Board, [or] by the President, or by at least one-third of the [directors at that time being] *Directors then in office*. Notice of any special meeting of the Board [of Directors] shall be given to each [director] *Director* in accordance with Section [3.11 of these By-Laws.] 4.13.

(d) [Members of the Board of Directors, or any committee designated by the Board of Directors,] *A Director or member of any committee appointed by the Board* may participate in a meeting of the Board [of Directors] or of such committee through the use of a *conference telephone or similar communications [facilities that ensure] equipment by means of which* all persons participating in the meeting may hear one another, and such participation in a meeting shall constitute presence in person at such meeting for all purposes.

Notice of Meetings; Waiver of Notice

Sec. [3.11]4.13 (a) Notice of any meeting of the Board [of Directors] shall be deemed to be duly given to a

[director] *Director if:* (i) [if] mailed to the address last made known in writing to [the Corporation] *NASD Regulation* by such [director] *Director* as the address to which such notices are to be sent, at least [two] *seven* days before the day on which such [special] meeting is to be held[, or]; (ii) [if] sent to the [director] *Director* at such address by telegraph, telefax, cable, radio, or wireless, not later than the day before the day on which such meeting is to be held[.]; or (iii) [if] delivered to the [director] *Director* personally or orally, by telephone or otherwise, not later than the day before the day on which such [special] meeting is to be held. Each notice shall state the time and place of the meeting and the purpose(s) thereof.

(b) Notice of any meeting of the Board [of Directors] need not be given to any [director] *Director* if waived by that [director] *Director* in writing (or by telegram, telefax, cable, radio, or wireless and subsequently confirmed in writing) whether before or after the holding of such meeting, or if such [director] *Director* is present at such meeting, subject to [Section 7.3(b) hereof.] *Article XI, Section 11.3(b)*.

(c) *Any meeting of the Board shall be a legal meeting without any prior notice if all Directors then in office shall be present thereat.*

Committees [of the Board of Directors]

Sec. [3.13] 4.14 (a) The Board [of Directors] may, by resolution or resolutions adopted by a majority of the whole Board [of Directors, designate], *appoint* one or more committees[, each committee to consist of one or more directors of the Corporation]. Except as herein provided, vacancies in membership of any committee shall be filled by the vote of a majority of the whole Board [of Directors]. The Board [of Directors] may designate one or more [directors] *Directors* as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of any member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not [he, she,] *such member* or [they] *members* constitute a quorum, may unanimously appoint another [member of the Board of Directors] *Director* to act at the meeting in the place of any such absent or disqualified member. Members of a committee shall hold office for such period as may be fixed by a resolution adopted by a majority of the whole Board [of Directors], subject, however, to removal, with or without cause, at any time *only* by the vote of

a majority of the whole Board [of Directors].

(b) [Any committee, to the extent permitted by law and to the extent provided in the] *The Board may, by resolution or resolutions [creating such committee, shall have and may exercise all the powers and authority of the Board of Directors] adopted by a majority of the whole Board, delegate to one or more committees the power and authority to act on behalf of the Board in carrying out the functions and authority delegated to NASD Regulation by the NASD under the Delegation Plan. Such delegations shall be in conformance with applicable law, the Restated Certificate of Incorporation, these By-Laws, and the Delegation Plan. Action taken by a committee pursuant to such delegated authority shall be subject to review, ratification, or rejection by the Board. In all other matters, the Board may, by resolution or resolutions adopted by a majority of the whole Board, delegate to one or more committees that consist solely of one or more Directors the power and authority to act on behalf of the Board in the management of the business and affairs of [the Corporation, and] NASD Regulation to the extent permitted by law and not inconsistent with the Delegation Plan. A committee, to the extent permitted by law and provided in the resolution or resolutions creating such committee, may authorize the seal of [the Corporation] NASD Regulation to be affixed to all papers that may require it.*

(c) Except as otherwise permitted by applicable law, no [such] committee shall have the power or authority of *the Board* with regard to: amending the *Restated Certificate of Incorporation* or the *By-Laws of [the Corporation,] NASD Regulation*; adopting an agreement of merger or consolidation; recommending to the [stockholders] *stockholder* the sale, lease, or exchange of all or substantially all [the Corporation's] *NASD Regulation's* property and assets; or recommending to the [stockholders] *stockholder* a dissolution of [the Corporation] *NASD Regulation* or a revocation of a dissolution. Unless the resolution of the Board [of Directors] expressly so provides, no [such] committee shall have the power or authority to authorize the issuance of stock.

[(c)] (d) Each committee may adopt its own rules of procedure and may meet at stated times or on such notice as such committee may determine. Each committee shall keep regular minutes of its proceedings and report the same to the Board [of Directors] when required.

(d) (e) Unless otherwise provided by the Board [of Directors, a majority of any such committee], a majority of any committee, excluding the President if the President is a member of the committee, shall constitute a quorum for the transaction of business, and the vote of a majority of the members of such committee present at a meeting at which a quorum is present shall be an act of such committee.

(f) The Board may appoint an Executive Committee, which shall, to the fullest extent permitted by Delaware law and other applicable law, have and be permitted to exercise all the powers and authority of the Board in the management of the business and affairs of NASD Regulation between meetings of the Board, and which may authorize the seal of NASD Regulation to be affixed to all papers that may require it. The Executive Committee shall be composed of at least seven and not more than nine Directors, a majority of whom shall be Non-Industry Directors (including at least one Public Director). In the event that the Executive Committee shall consist of nine members, at least two shall be Public Directors. The President of NASD Regulation shall be a member of the Executive Committee.

(g) The Board may appoint a Finance Committee. The Finance Committee shall be composed of eight or more Directors. The President of NASD Regulation shall serve as a member of the Committee, and the Vice Chair of the Board shall be the Committee Chair. The Finance Committee shall advise the Board with respect to the oversight of the financial operations and conditions of NASD Regulation, including recommendations for NASD Regulation's annual operating and capital budgets and proposed changes to the rates and fees charged by NASD Regulation.

(h) The Board may appoint a National Business Conduct Committee. The National Business Conduct Committee shall be composed of at least eight Directors equally balanced between Industry and Non-Industry Directors (including at least two Public Directors). If at any time there shall be an odd number of committee members, a majority of the members shall be Non-Industry Directors. Each National Business Conduct Committee member shall be elected to serve a one-year term. The National Business Conduct Committee may be authorized and directed to act for the Board in a manner consistent with these By-Laws, the Rules of the Association, and the Delegation Plan with respect to: (1) An appeal or review of a disciplinary

proceeding; (2) a statutory disqualification decision; (3) a review of a membership proceeding; (4) a review of an offer of settlement, a letter of acceptance, waiver, and consent, and a minor rule violation plan letter; (5) the exercise of exemptive authority; and (6) such other proceedings or actions authorized by the Rules of the Association.

(i) Upon request, each prospective committee member who is not a Director shall provide to the Secretary of the NASD such information as is reasonably necessary to serve as the basis for a determination of the prospective committee member's classification as an Industry, Non-Industry, or Public committee member, and the Secretary of the NASD shall certify to the Board each prospective committee member's classification. Such committee members shall update the information submitted under this Section at least annually and upon request of the Secretary of the NASD, and shall report immediately to the Secretary of the NASD any change in such classification.

Conflicts of Interest; Contracts and Transactions Involving Directors

Sec. [3.12] 4.15 (a) [No member of the Board of Directors or of any committee of the Corporation shall] A Director or a member of any committee shall not directly or indirectly participate in any adjudication of the interests of any party [that would at the same time substantially affect his interest or the interests of any person in whom he is directly or indirectly interested] if that Director or committee member has a conflict of interest or bias, or if circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case, the [member shall disqualify himself or shall be disqualified by the Chairman of the Board or Committee] Director or committee member shall recuse himself or herself or shall be disqualified in accordance with the Rules of the Association.

(b) No contract or transaction between [the Corporation] NASD Regulation and one or more of its [directors] Directors or officers, or between [the Corporation] NASD Regulation and any other corporation, partnership, association, or other organization in which one or more of its [directors] Directors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason[, or solely because the director or officer is present at or participates in the meeting of the Board of Directors or the committee thereof which] if: (i) the material facts pertaining to such Director's or officer's

relationship or interest and the contract or transaction are disclosed or are known to the Board or the committee, and the Board or committee in good faith authorizes the contract or transaction[, or solely because his, her, or their votes are counted for such purposes if: (i) the material facts pertaining to such director's or officer's relationship or interest and] by the affirmative vote of a majority of the disinterested Directors; (ii) the material facts are disclosed or become known to the Board or committee after the contract or transaction [are disclosed or are known to the Board of Directors or the committee, and the Board] is entered into, and the Board or committee in good faith [authorizes] ratifies the contract or transaction by the affirmative vote of a majority of the disinterested [directors, even though the disinterested directors be less than a quorum; or (ii)] Directors; or (iii) the material facts pertaining to the [director's] Director's or officer's relationship or interest and the contract or transaction are disclosed or are known to the [stockholders] stockholder entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the [stockholders; or (iii) the contract or transaction is fair as to the Corporation as of the time it is authorized, approved or ratified by the Board of Directors, a committee thereof, or the stockholders. Common or interested directors] stockholder. Only disinterested Directors may be counted in determining the presence of a quorum at the portion of a meeting of the Board [of Directors,] or of a committee that authorizes the contract or transaction.

Action Without Meeting

Sec. [3.14]4.16 Any action required or permitted to be taken at [any] a meeting of the Board [of Directors or any] or of a committee [thereof] may be taken without a meeting if all Directors or all members of [the Board of Directors or] such committee, as the case may be, consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the Board [of Directors or such] or the committee.

Article V

Compensation

Compensation of Board and Committee Members

Sec. [4.6]5.1 The Board [of Directors] may provide for reasonable compensation of the [Chairman] Chair of the Board, the Directors, and the members of any committee of the Board or any District Committee [from the

Corporation]. The Board may also provide for reimbursement of reasonable expenses incurred by such persons in connection with the business of [the Corporation] *NASD Regulation*.

[Article V

Indemnification

Indemnification of Directors, Officers, Employees and Agents Right to Indemnification

Sec. 5.1 The corporation shall indemnify and hold harmless, to the fullest extent permitted by applicable law as it presently exists or may hereafter be amended, any person who was or is made or is threatened to be made a party or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (a "proceeding"), by reason of the fact that he, or a person for whom he is the legal representative, is or was a director, officer, employee, or agent of the corporation or is or was serving at the request of the corporation as a director, officer, employee, or agent of another corporation or of a partnership, joint venture, trust, enterprise or nonprofit entity, including service with respect to employee benefit plans (an "indemnitee"), against all liability and loss suffered and expenses (including attorneys' fees) reasonably incurred by such indemnitee, notwithstanding the foregoing, but subject to Section 5.3 hereof, the corporation shall be required to indemnify an indemnitee in connection with a proceeding (or part thereof) initiated by such indemnitee only if the initiation of such proceeding (or part thereof) by the indemnitee was authorized by the Board of Directors.]

[Payment of Expenses

Sec. 5.2 The corporation shall pay the expenses (including attorneys' fees) incurred by the persons set forth in Section 5.1 in defending any proceeding in advance of its final disposition, provided, however, that the payment of expenses incurred by such person in advance of the final disposition of the proceeding shall be made only upon receipt of an undertaking by that person to repay all amounts advanced if it should be ultimately determined that the person is not entitled to be indemnified under this Article or otherwise.]

[Nonexclusivity of Rights

Sec. 5.3 The rights conferred on any person by this Article shall not be exclusive of any other rights which such person may have or hereafter acquire under any statute, provision of the

Certificate of Incorporation, these By-Laws, agreement, vote of stockholders or disinterested directors or otherwise.]

[Other Indemnification

Sec. 5.4 The corporation's obligation, if any, to indemnify or advance expenses to any person who was or is serving at its request as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, enterprise or nonprofit entity shall be reduced by any amount such person may collect as indemnification or advancement from such other corporation, partnership, joint venture, trust, enterprise or nonprofit entity.]

[Amendment or Repeal

Sec. 5.5 Any repeal or modification of the foregoing provisions of this Article shall not adversely affect any right or protection hereunder of any person in respect of any act or omission occurring prior to the time of such repeal or modification.]

[Indemnification Insurance

Sec. 5.6 The Corporation shall have power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the Corporation, or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust, enterprise, or nonprofit entity against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the Corporation would have the power to indemnify him against such liability under the provisions of this section.]

Article VI

Regional Nominating Committees

Establishment of Regions

Sec. 6.1 The Board shall establish boundaries for geographical regions within the United States for the purpose of nominating candidates for Industry Directors to the National Nominating Committee to represent such regions on the Board pursuant to Article IV, Sections 4.3(a) and 4.4(b). The Board may make changes from time to time in the number or boundaries of the regions as the Board deems necessary or appropriate. The Board shall prescribe such policies and procedures as are necessary or appropriate to address the implementation of a new region configuration in the event of a change in the number or boundaries of the regions.

Composition

Sec. 6.2 (a) A Regional Nominating Committee shall be elected for each region designated by the Board under Section 6.1. Each District Nominating Committee for a district located in the region shall elect two District Committee members from the district to serve on the Regional Nominating Committee. If a region shall consist of one district, the District Nominating Committee for the district shall elect four District Committee members from the district to serve on the Regional Nominating Committee.

(b) In the event of the refusal, failure, neglect, or inability of a member of a Regional Nominating Committee to discharge his or her duties, or for any cause affecting the best interests of NASD Regulation, the sufficiency of which shall be decided by the Regional Nominating Committee, the Regional Nominating Committee may remove the member by the affirmative vote of two-thirds of the members of the Regional Nominating Committee then in office and declare the member's position vacant. The Regional Nominating Committee shall notify the Regional Nominating Committee member of his or her removal within seven days after the vote. The member's position shall be filled pursuant to Section 6.4. A member who is removed may submit a written appeal of the removal to the Board within 30 days after the date he or she is notified in writing of the removal. The Board may affirm, reverse, or modify the determination of the Regional Nominating Committee. A vote of a majority of the Directors then in office shall be required to reverse or modify the action of the Regional Nominating Committee.

Term of Office

Sec. 6.3 Each regularly elected member of a Regional Nominating Committee shall hold office for a term of one year, and until a successor is elected and qualified, or until death, resignation, or removal. A member of a Regional Nominating Committee may not serve more than three consecutive terms.

Filling of Vacancies

Sec. 6.4 In the event of a vacancy on a Regional Nominating Committee caused by the departure of a member prior to the expiration of the member's term of office, the District Nominating Committee who elected the member shall appoint by majority vote another member of the District Committee to fill the vacancy. The appointment shall be effective until the next regularly

scheduled election occurs pursuant to this Article.

Meetings

Sec. 6.5 Meetings of a Regional Nominating Committee shall be held at such times and places, upon such notice, and in accordance with such procedures as each Regional Nominating Committee in its discretion may determine. A quorum of a Regional Nominating Committee shall consist of a majority of its members, and any action taken by a majority at any meeting, except as otherwise provided in these By-Laws, shall constitute the action of the Committee. Action by a Regional Nominating Committee may be taken by mail, telephonic, or telegraphic vote, in which case any action taken by a majority of the Committee shall constitute the action of the Committee. Action taken by telephonic vote shall be confirmed in writing at a regular meeting of the Regional Nominating Committee.

Election of Officers

Sec. 6.6 Following the annual election of members of the Regional Nominating Committees pursuant to this Article, each Regional Nominating Committee shall elect from its members a Chair and such other officers as it deems necessary for the proper performance of its duties under these By-Laws.

Expenses

Sec. 6.7 Funds to meet the regular expenses of each Regional Nominating Committee shall be provided by the Board, and all such expenses shall be subject to the approval of the Board.

Notice to Chair

Sec. 6.8 On or before August 1 of each year, the Secretary of NASD Regulation shall send a written notice to the Chair of a Regional Nominating Committee if the term of office of the Industry Director representing the region shall expire in the next calendar year. The notice shall describe the nomination procedures for filling the office.

Solicitation of Candidates

Sec. 6.9 NASD Regulation staff shall provide the Regional Nominating Committee with a description of the NASD membership in the region. The Regional Nominating Committee shall identify and solicit candidates to nominate to the National Nominating Committee for the Industry Director vacancy on the Board. The Regional Nominating Committee Chair shall send a written notice of the upcoming

vacancy to the Executive Representative and each branch office of the NASD members in the region and request that such NASD members submit names of candidates to the Regional Nominating Committee or the Secretary of NASD Regulation for consideration.

Secretary's Notice to NASD Members

Sec. 6.10 The Secretary of NASD Regulation shall send a written notice to NASD members in the region describing the nomination procedures.

Regional Nominating Committee Candidate

Sec. 6.11 The Regional Nominating Committee shall review the background of the candidates and the description of the NASD membership provided by NASD Regulation staff and shall propose one or more candidates for nomination to the National Nominating Committee. In proposing a candidate for nomination, the Regional Nominating Committee shall endeavor to secure appropriate and fair representation of the region.

Notice of Regional Nominating Committee Candidate

Sec. 6.12 The Regional Nominating Committee shall send to the Executive Representatives and branch offices of the NASD members in the region a written notice of the name of the candidate or candidates the Regional Nominating Committee proposes for nomination to the National Nominating Committee.

Designation of Additional Candidates

Sec. 6.13 If an officer, director, or employee of an NASD member in the region is not proposed for nomination by the Regional Nominating Committee and wants to seek the nomination, he or she shall send a written notice to the Regional Nominating Committee Chair or the Secretary of NASD Regulation within 14 calendar days after the mailing date of the Regional Nominating Committee's notice under Section 6.12. The Regional Nominating Committee Chair or the Secretary of NASD Regulation shall make a written record of the time and date of the receipt of the officer's, director's, or employee's notice. The officer, director, or employee shall be designated as an "additional candidate."

Communication of Views

Sec. 6.14 If the Regional Nominating Committee proposes more than one candidate for nomination, or if an additional candidate is designated pursuant to Section 6.13, NASD Regulation, the Board, the Regional Nominating Committee, any other

committee, and NASD Regulation staff shall not take a position publicly or with an NASD member or person associated with or employed by an NASD member with respect to any candidate for the nomination. A Director or a member of the Regional Nominating Committee or any other committee may communicate his or her views with respect to any candidate for the nomination if the Director or committee member acts solely in his or her individual capacity and disclaims any intention to communicate in any official capacity on behalf of NASD Regulation, the Board, the Regional Nominating Committee, or any other committee. Except as provided herein, any candidate and his or her representatives may communicate support for the candidate to an NASD member or a person associated with or employed by an NASD member.

List of NASD Members Eligible to Vote

Sec. 6.15 (a) The Secretary of NASD Regulation shall mail a list of all NASD members eligible to vote in the region and their Executive Representatives to the additional candidate immediately following receipt of the additional candidate's notice by the Regional Nominating Committee Chair or the Secretary of NASD Regulation.

(b) An NASD member that has its principal office, one or more registered branch offices, or a principal office and one or more registered branch offices in the region shall be eligible to cast one vote on the nomination through the NASD member's Executive Representative.

Requirement for Petition Supporting Additional Candidate

Sec. 6.16 An additional candidate shall be proposed for nomination if a petition signed by at least ten percent of the NASD members eligible to vote in the region is filed with the Regional Nominating Committee within 30 calendar days after the date of mailing of the list to the additional candidate pursuant to Section 6.15. Only an Executive Representative may sign a petition on behalf of an NASD member.

Uncontested Nomination

Sec. 6.17 If the Regional Nominating Committee proposes one candidate for nomination and no additional candidate is proposed for nomination pursuant to Section 6.16, the Regional Nominating Committee shall nominate its candidate to the National Nominating Committee.

Notice of Contested Nomination

Sec. 6.18 If the Regional Nominating Committee proposes more than one candidate for nomination, or if an additional candidate is proposed for nomination pursuant to Section 6.16, the Regional Nominating Committee shall send a written notice to the Executive Representatives of the NASD members eligible to vote in the region announcing the names of the candidates and describing contested nomination procedures.

Administrative Support

Sec. 6.19 The Secretary of NASD Regulation shall designate a district office in the region to provide administrative support to all candidates by sending to NASD members eligible to vote in the region up to two mailings of materials prepared by the candidates. NASD Regulation shall pay the postage for the mailings. Each candidate may prepare material for the mailing on his or her personal stationery, and the material shall state that it represents the opinion of the candidate. A candidate proposed for nomination by the Regional Nominating Committee may identify himself or herself as such in his or her materials. Any candidate may send additional mailings to NASD members at the candidate's own expense. Except as provided in this Article, NASD Regulation, the Board, the Regional Nominating Committee, any other committee, and NASD Regulation staff shall not provide any other administrative support to a candidate for the nomination or any candidate in a contested election conducted under Article VII of the NASD By-Laws.

Ballots

Sec. 6.20 With the assistance of the Secretary of NASD Regulation and an Independent Agent, the Regional Nominating Committee shall prepare a ballot with the name or names of its candidate and any additional candidates proposed for nomination pursuant to Section 6.16. The ballot shall list the candidates in alphabetical order and shall identify the candidate or candidates proposed for nomination by the Regional Nominating Committee. The Regional Nominating Committee shall send a ballot to the Executive Representative of each NASD member eligible to vote in the region. Instructions on the ballot shall direct the Executive Representative to return the ballot to the Independent Agent and state that the ballot envelope must be postmarked on or before the return date specified on the ballot. The return date

specified on the ballot shall be at least 30 but not more than 45 days after the date of mailing of the ballot.

Vote Qualification List

Sec. 6.21 Eligibility to vote on a regional nomination shall be based on the NASD's membership records as of a date designated by the Secretary of NASD Regulation that is not more than 30 days before the date of mailing of the ballot. The Secretary of NASD Regulation shall prepare a list of NASD members eligible to vote in the region and their Executive Representatives, which shall be used for vote qualification purposes, and shall provide the list to the candidates.

Ballots Returned As Undelivered

Sec. 6.22 The Independent Agent shall open any ballot envelope returned undelivered and shall determine whether it was sent to the NASD member's address of record. If incorrectly addressed, the Independent Agent shall send a new ballot to the NASD member's address of record.

General Procedures for Qualification and Accounting of Ballots

Sec. 6.23 After the voting period, on a date or dates designated by the Secretary of NASD Regulation, the qualification and accounting of ballots shall take place. The date or dates designated shall be not later than 14 calendar days after the return date specified on the ballot pursuant to Section 6.20. Candidates and their representatives shall be allowed to observe the qualification and accounting of ballots. Representation for each candidate shall be limited to two individuals. The Independent Agent shall bring to a specified district office in the region all ballots timely received. Under the direction of the Secretary of NASD Regulation or the Secretary's designee, the Independent Agent shall open and count the ballots. For ballot qualification purposes, the Independent Agent shall identify to the candidates the NASD members that timely returned ballots and inform the candidates of the Independent Agent's determination of whether or not a ballot is qualified for voting purposes. The determination shall be based on a comparison of ballots received against the list of NASD members eligible to vote in the region and their Executive Representatives as prepared by the Secretary of NASD Regulation under Section 6.21. The Secretary of NASD Regulation or the Secretary's designee shall make the final determination of the qualification of a ballot. Upon the qualification of a ballot, the Independent Agent shall

record the vote indicated on the ballot. The candidates and their representatives shall not be allowed to see the vote of an NASD member.

Ballots Set Aside

Sec. 6.24 The Independent Agent shall set aside a ballot if: (a) the ballot is received from an NASD member eligible to vote in the region and the ballot is signed by a person who is not the Executive Representative listed on the vote qualification list prepared under Section 6.21, and the Secretary of the NASD has not received proper notice of a change in Executive Representative pursuant to the NASD By-Laws; or (b) two or more properly executed ballots are received from an NASD member eligible to vote in the region. If the Independent Agent determines that the ballots set aside are material to the outcome of the nomination, the Secretary of NASD Regulation and the Independent Agent shall make reasonable efforts to resolve each ballot set aside. With respect to a ballot not signed by an Executive Representative of record, the Secretary of NASD Regulation shall contact the NASD member to request that the NASD member send proper written notice of any change in Executive Representative by facsimile so that the ballot may be counted. With respect to multiple ballots from an NASD member, the Independent Agent shall contact the Executive Representative of the NASD member to obtain the NASD member's vote. The Secretary of NASD Regulation shall keep a list of NASD members that reported their ballot was lost or not received and that were provided with a duplicate ballot. The Secretary of NASD Regulation shall provide the list to the Independent Agent and, upon request, to the candidates.

Invalid Ballots

Sec. 6.25 The Independent Agent shall declare a ballot invalid if one or more of the following conditions exists:

- (a) the ballot is not signed by the Executive Representative (unless Section 6.24 applies);
- (b) a vote is not indicated on the ballot; or
- (c) a vote for more than one candidate is indicated on the ballot.

Certification of Nomination

Sec. 6.26 Under the direction of the Secretary of NASD Regulation or the Secretary's designee, the Independent Agent shall count the votes received for each candidate. The candidate receiving the largest number of votes cast in the region shall be declared the nominee from the region and the Regional

Nominating Committee shall nominate such candidate to the National Nominating Committee. In the event of a tie, there shall be a run-off vote for the nomination. The Regional Nominating Committee shall send a written certification of the nomination results to the National Nominating Committee. The certification shall state the number of votes received by each candidate and the number of ballots set aside.

Rejection of Regional Nominating Committee Nominee

Sec. 6.27 If the National Nominating Committee rejects the nominee of the Regional Nominating Committee, the Regional Nominating Committee shall repeat the nomination procedures in Section 6.9 through Section 6.26.

Extension of Time and Additional Procedures

Sec. 6.28 The Secretary of NASD Regulation may extend a time period under this Article for good cause shown. In extraordinary circumstances, the Secretary of NASD Regulation, with the approval of the Executive Committee or the Board, may adopt additional procedures for nominations under this Article.

Article VII

Officers, Agents, and Employees

Officers

Sec. [4.1]7.1 The Board [of Directors] shall elect the officers of [the Corporation] NASD Regulation, which shall include a President, a Secretary, and such [for] other executive or administrative officers as it shall deem necessary or advisable, including, but not limited to: Executive Vice [-]President, Senior Vice [-]President, Vice [-]President, General Counsel, [Secretary] and Treasurer of [the Corporation] NASD Regulation. All such officers shall have such titles, powers, and duties, and shall be entitled to such compensation, as shall be determined from time to time by the Board [of Directors]. The terms of office of such officers shall be at the pleasure of the Board [of Directors], which by affirmative vote of a majority of the [members] Board, may remove any such officer at any time. One person may hold the offices and perform the duties of any two or more of said offices, except the offices and duties of President and Vice President or of President and Secretary. None of the officers, except the President, need be [directors of the Corporation] Directors of NASD Regulation.

Absence of the President

Sec. 7.2 In the case of the absence or inability to act of the President of NASD Regulation, or in the case of a vacancy in such office, the Board may appoint its Chair or such other person as it may designate to act as such officer pro tem, who shall assume all the functions and discharge all the duties of the President.

Agents and Employees

Sec. [4.2]7.3 In addition to the officers, [the Corporation] NASD Regulation may employ such agents and employees as the Board [of Directors] may deem necessary or advisable, each of whom shall hold office for such period and exercise such authority and perform such duties as the Board [of Directors], the President, or any officer designated by the Board [of Directors,] may from time to time determine. [The Board of Directors at any time may appoint and remove, or may delegate to any principal officer the power to appoint and to remove, any agent or employee of the Corporation.] Agents and employees of NASD Regulation shall be under the supervision and control of the officers of the NASD Regulation, unless the Board, by resolution, provides that an agent or employee shall be under the supervision and control of the Board.

Delegation of Duties of Officers

Sec. [4.3]7.4 The Board [of Directors] may delegate the duties and powers of any officer of [the Corporation] NASD Regulation to any other officer or to any [director] Director for a specified period of time and for any reason that the Board [of Directors] may deem sufficient.

Resignation and Removal of Officers

Sec. [4.4]7.5 (a) Any officer may resign at any time upon written notice of resignation to the Board [of Directors], the President, or the Secretary. Any such resignation shall take effect upon receipt of such notice or at any later time specified therein. The acceptance of a resignation shall not be necessary to make the resignation effective.

(b) Any officer[, agent or employee of the Corporation] of NASD Regulation may be removed, with or without cause, by resolution adopted by a majority of the [directors] Directors then in office at any regular or special meeting of the Board [of Directors] or by a written consent signed by all of the [directors] Directors then in office. Such removal shall be without prejudice to the contractual rights of the affected officer, [agent, or employee,] if any, with [the Corporation] NASD Regulation.

Bond

Sec. [4.5]7.6 [The Corporation] NASD Regulation may secure the fidelity of any or all of its officers, agents, or employees by bond or otherwise.

Article VIII

District Committees and District Nominating Committees

Establishment of Districts

Sec. 8.1 The Board shall establish boundaries for 11 districts within the United States to assist NASD Regulation in administering its affairs in a manner that is consistent with applicable law, the Restated Certificate of Incorporation, these By-Laws, the Delegation Plan, and the Rules of the Association. The Board may make changes from time to time in the number or boundaries of the districts as it deems necessary or appropriate. The Board shall prescribe such policies and procedures as are necessary or appropriate to address the implementation of a new district configuration in the event of a change in the number or boundaries of the districts.

Composition of District Committees

Sec. 8.2 (a) A district created under Section 8.1 shall elect a District Committee pursuant to this Article. A District Committee shall be composed of not more than 12 members, unless otherwise provided by resolution of the Board. A District Committee shall determine the number of its members to be elected each year. Members of the District Committees shall serve as panelists in disciplinary proceedings in accordance with the Rules of the Association. The District Committees shall consider and recommend policies and rule changes to the Board. The District Committees shall endeavor, in such manner as they deem appropriate, to educate NASD members and other brokers and dealers in their respective districts as to the objects, purposes, and work of the NASD, NASD Regulation, and Nasdaq in order to foster NASD members' interest and cooperation.

(b) In the event of the refusal, failure, neglect, or inability of a member of a District Committee to discharge his or her duties, or for any cause affecting the best interests of NASD Regulation, the sufficiency of which shall be decided by the District Committee, the District Committee may remove the member by the affirmative vote of two-thirds of the members of the District Committee then in office and declare the member's position vacant. The District Committee shall notify the District Committee member of his or her removal within

seven days after the vote. The member's position shall be filled pursuant to Section 8.4. A member who is removed may submit a written appeal of the removal to the Board within 30 days after the date he or she is notified of the removal. The Board may affirm, reverse, or modify the determination of the District Committee. A vote of a majority of the Directors then in office shall be required to reverse or modify the action of the District Committee.

Term of Office of District Committee Members

Sec. 8.3 Each regularly elected member of a District Committee shall hold office for a term of three years, and until a successor is elected and qualified, or until death, resignation, or removal. A member of a District Committee may not serve more than two consecutive terms.

Filling of Vacancies on District Committees

Sec. 8.4 In the event of a vacancy on a District Committee caused by the departure of a Committee member prior to the expiration of the member's term of office, the District Committee shall appoint by majority vote a representative of an NASD member eligible to vote in the district to fill the vacancy. The appointment shall be effective until the next regularly scheduled election occurs. Following the election, the newly elected Committee member shall serve only the duration of the departed Committee member's term.

Meetings of District Committees

Sec. 8.5 Meetings of a District Committee shall be held at such times and places, upon such notice, and in accordance with such procedures as each District Committee in its discretion may determine. A quorum of a District Committee shall consist of a majority of its members, and any action taken by a majority at any meeting at which a quorum is present, except as otherwise provided in these By-Laws, shall constitute the action of the Committee. Action by a District Committee may be taken by mail, telephonic, or telegraphic vote, in which case any action taken by a majority of the Committee shall constitute the action of the Committee. Any action taken by telephonic vote shall be confirmed in writing at a regular meeting of the District Committee.

Election of District Officers

Sec. 8.6 Following the annual election of members of the District Committees pursuant to this Article, each District Committee shall elect from its members a Chair and such other

officers as it deems necessary for the proper performance of its duties under these By-Laws, and shall prescribe their powers and duties.

Advisory Council

Sec. 8.7 (a) The Chairs of the District Committees, elected pursuant to Section 8.6, shall constitute an Advisory Council to the Board.

(b) The Advisory Council shall be advised of and entitled to attend such meetings of the Board as the Board may designate for such Advisory Council's attendance, and the Board shall designate at least one such meeting annually. The Advisory Council shall not be entitled to vote at meetings of the Board.

Expenses of District Committees

Sec. 8.8 Funds to meet the regular expenses of each District Committee shall be provided by the Board, and all such expenses shall be subject to the approval of the Board.

Composition of District Nominating Committees

Sec. 8.9 (a) Each district created under Section 8.1 shall elect a District Nominating Committee pursuant to this Article. A District Nominating Committee shall consist of five members, unless the Board by resolution increases a District Nominating Committee to a larger number. Members of a District Nominating Committee shall be representatives of NASD members eligible to vote in the district, but shall not be members of the District Committee. A District Nominating Committee shall include a majority of persons who previously have served on a District Committee or who are current or former Directors or current or former Governors of the NASD Board, and shall include at least one current or former Director or Governor.

(b) In the event of the refusal, failure, neglect, or inability of a member of a District Nominating Committee to discharge his or her duties, or for any cause affecting the best interests of NASD Regulation, the sufficiency of which shall be decided by the District Nominating Committee, the District Nominating Committee may remove the member by the affirmative vote of two-thirds of the members of the District Nominating Committee then in office and declare the member's position vacant. The member's position shall be filled pursuant to Section 8.11. The District Nominating Committee shall notify the District Nominating Committee member of his or her removal within seven days after the vote. A member who is removed may

submit a written appeal of the removal to the Board within 30 days after the date he or she is notified in writing of the removal. The Board may affirm, reverse, or modify the determination of the District Nominating Committee. A vote of a majority of the Directors then in office shall be required to reverse or modify the action of the District Nominating Committee.

Term of Office of District Nominating Committee Members

Sec. 8.10 Each regularly elected member of a District Nominating Committee shall hold office for a term of one year, and until a successor is elected and qualified, or until death, resignation, or removal. A member of a District Nominating Committee may not serve more than two consecutive terms.

Filling of Vacancies for District Nominating Committees

Sec. 8.11 In the event of a vacancy on a District Nominating Committee caused by the departure of a Committee member prior to the expiration of the member's term of office, the District Nominating Committee shall appoint by majority vote a representative of an NASD member eligible to vote in the district to fill the vacancy. The appointment shall be effective until the next regularly scheduled election occurs pursuant to this Article.

Meetings of District Nominating Committees

Sec. 8.12 Meetings of a District Nominating Committee shall be held at such times and places, upon such notice, and in accordance with such procedures as each District Nominating Committee in its discretion may determine. A quorum of a District Nominating Committee shall consist of a majority of its members, and any action taken by a majority of the entire Committee at any meeting, except as otherwise provided in these By-Laws, shall constitute the action of the Committee. Action by a District Nominating Committee may be taken by mail, telephonic, or telegraphic vote, in which case any action taken by a majority of the Committee shall constitute the action of the Committee. Action taken by telephonic vote shall be confirmed in writing at a regular meeting of the District Nominating Committee.

Election of District Nominating Committee Officers

Sec. 8.13 Following the annual election of members of the District Nominating Committees pursuant to this Article, each District Nominating Committee shall elect from its members

a Chair and such other officers as it deems necessary for the proper performance of its duties under these By-Laws, and shall prescribe their powers and duties.

Expenses of District Nominating Committees

Sec. 8.14 Funds to meet the regular expenses of each District Nominating Committee shall be provided by the Board, and all such expenses shall be subject to the approval of the Board.

Notice to Chair

Sec. 8.15 On or before May 1 of each year, the Secretary of NASD Regulation shall send a written notice to the Chair of each District Nominating Committee and each District Committee identifying the members of the District Nominating Committee and the District Committee whose terms of office shall expire in the next calendar year. The notice shall describe election procedures for filling the offices.

Solicitation of Candidates

Sec. 8.16 NASD Regulation staff shall provide the District Nominating Committee with a description of the NASD membership in the region. The District Nominating Committee shall identify and solicit candidates to nominate for the vacancies on the District Committee and the District Nominating Committee. The District Nominating Committee Chair shall send a written notice of the upcoming election to the Executive Representative and each branch office of the NASD members in the district and request that such NASD members submit names of candidates to the District Nominating Committee or the District Director for consideration.

Secretary's Notice to NASD Members

Sec. 8.17 The Secretary of NASD Regulation shall send a written notice to NASD members in the district describing the election procedures.

District Nominating Committee Slate

Sec. 8.18 (a) The District Nominating Committee shall review the background of proposed candidates and the description of the NASD membership provided by NASD Regulation staff and shall nominate a slate of candidates for the election. The slate shall include one or more candidates for each vacancy. In nominating candidates for the office of member of the District Committee and the office of member of the District Nominating Committee, the District Nominating Committee shall endeavor to secure appropriate and fair representation on the District

Committee and on the District Nominating Committee of the various sections of the district and all classes and types of NASD members engaged in the investment banking or securities business within the district. In nominating candidates for the office of member of the District Nominating Committee, a District Nominating Committee shall assure that the composition of the District Nominating Committee meets the standards in Section 8.9(a).

(b) A District Nominating Committee shall not nominate an incumbent member of the District Committee to succeed himself or herself unless the District Nominating Committee first takes appropriate action by a written ballot of the entire NASD membership within the district to ascertain that such nomination is acceptable to a majority of the NASD members in the district, unless the incumbent member of the District Committee is serving pursuant to the provisions of Section 8.4. A District Nominating Committee may not nominate more than two incumbent members of the District Nominating Committee to succeed themselves.

Certification of Nomination

Sec. 8.19 The District Nominating Committee shall certify to the District Committee each candidate nominated by the District Nominating Committee. Within five calendar days after the certification, the District Committee shall send to the Executive Representatives of NASD members in the district a copy of the certification.

Designation of Additional Candidates

Sec. 8.20 If an officer, director, or employee of an NASD member is not nominated by the District Nominating Committee and wants to be considered for a vacancy on the District Committee or the District Nominating Committee, he or she shall send a written notice to the District Director within 14 calendar days after the mailing date of the certification to the Executive Representatives pursuant to Section 8.19. The District Director shall make a written record of the time and date of the receipt of the officer's, director's, or employee's notice. The officer, director, or employee shall be designated as an "additional candidate."

Communication of Support

Sec. 8.21 If the District Nominating Committee nominates more than one candidate for a vacancy, or if an additional candidate is designated pursuant to Section 8.20, NASD Regulation, the Board, the District Nominating Committee, any other

committee, and NASD Regulation staff shall not take any position publicly or with an NASD member or person associated with or employed by an NASD member with respect to any candidate. A Director or a member of the Regional Nominating Committee or any other committee may communicate his or her views with respect to any candidate if the Director or committee member acts solely in his or her individual capacity and disclaims any intention to communicate in any official capacity on behalf of NASD Regulation, the NASD Regulation Board, the Regional Nominating Committee, or any other committee. Except as provided herein, any candidate and his or her representatives may communicate support for the candidate to an NASD member or person associated with or employed by an NASD member.

List of NASD Members Eligible to Vote

Sec. 8.22 (a) The Secretary of NASD Regulation shall prepare a list of all NASD members eligible to vote in the district and their Executive Representatives to the additional candidate immediately following receipt of the additional candidate's notice by the District Director.

(b) An NASD member that has its principal office, one or more registered branch offices, or its principal office and one or more registered branch offices in the district shall be eligible to cast one vote through the NASD member's Executive Representative for each vacancy to be filled in the election.

Requirement for Petition Supporting Additional Candidate

Sec. 8.23 An additional candidate shall be nominated if a petition signed by at least ten percent of the NASD members eligible to vote in the district is filed with the District Nominating Committee within 30 calendar days after the date of mailing of the list to the additional candidate pursuant to Section 8.22. Only an Executive Representative may sign a petition on behalf of an NASD member.

Uncontested Election

Sec. 8.24 If the District Nominating Committee nominates one candidate for each vacancy and no additional candidate is nominated pursuant to Section 8.23, the candidates nominated by the District Nominating Committee shall be considered duly elected and the District Committee shall certify the election to the Board.

Notice of Contested Election

Sec. 8.25 If the District Nominating Committee nominates more than one

candidate for a vacancy, or if an additional candidate is nominated pursuant to Section 8.23, the election shall be considered a contested election. The District Committee shall send a notice to the Executive Representatives of the NASD members eligible to vote in the district announcing the names of the candidates and describing contested election procedures.

Administrative Support

Sec. 8.26 The District Office shall provide administrative support to all candidates by sending mailings to NASD members eligible to vote in the district up to two mailings of materials prepared by the candidates. NASD Regulation shall pay the postage for the mailings. Each candidate may prepare material for the mailing on his or her personal stationery, and the material shall state that it represents the opinion of the candidate. Candidates nominated by the District Nominating Committee may identify themselves as such in their materials. Any candidate may send additional mailings at the candidate's own expense. Except as provided in this Article, NASD Regulation, the Board, the Regional Nominating Committee, any other committee, and NASD Regulation staff shall not provide any other administrative support to a candidate in the election.

Ballots

Sec. 8.27 With the assistance of the Secretary of NASD Regulation and an Independent Agent, the District Nominating Committee shall prepare a ballot with the names of the District Nominating Committee's candidates and any additional candidate nominated pursuant to Section 8.23. The ballot shall list the candidates in alphabetical order and shall identify the candidates nominated by the District Nominating Committee. The District Nominating Committee shall send a ballot to the Executive Representative of each NASD member eligible to vote in the district. Instructions on the ballot shall direct the Executive Representative to return the ballot to the Independent Agent and state that the ballot envelope must be postmarked on or before the return date specified on the ballot. The return date specified on the ballot shall be at least 30 but not more than 45 days after the date of mailing of the ballot.

Vote Qualification List

Sec. 8.28 Eligibility to vote in a district election shall be based on the NASD's membership records as of a date selected by the Secretary of NASD Regulation that is not more than 30 days before the date of mailing of the ballot.

The Secretary of NASD Regulation shall prepare a list of NASD members eligible to vote in the district and their Executive Representatives, which shall be used for vote qualification purposes, and shall provide the list to the candidates.

Ballots Returned As Undelivered

Sec. 8.29 The Independent Agent shall open any ballot envelope returned undelivered and shall determine whether it was sent to the NASD member's address of record. If incorrectly addressed, the Independent Agent shall send a new ballot to the address of record.

General Procedures for Qualification and Accounting of Ballots

Sec. 8.30 After the voting period, on a date or dates designated by the Secretary of NASD Regulation, the qualification and accounting of ballots shall take place. The date or dates designated shall be not later than 14 calendar days after the return date specified on the ballot pursuant to Section 8.27. Candidates and their representatives shall be allowed to observe the qualification and accounting of ballots. Representation for each candidate shall be limited to two individuals. The Independent Agent shall bring to the district office all ballots timely received. Under the direction of the Secretary of NASD Regulation or the Secretary's designee, the Independent Agent shall open and count the ballots. For ballot qualification purposes, the Independent Agent shall identify to the candidates the NASD members that timely returned ballots and inform the candidates of the Independent Agent's determination of whether or not a ballot is qualified for voting purposes. The determination shall be based on a comparison of ballots received against the list of NASD members eligible to vote in the district and their Executive Representatives as prepared by the Secretary of NASD Regulation pursuant to Section 8.28. The Secretary of NASD Regulation or the Secretary's designee shall make the final determination of the qualification of a ballot. Upon the qualification of a ballot, the Independent Agent shall record the vote indicated on the ballot. The candidates and their representatives shall not be allowed to see the vote of an NASD member.

Ballots Set Aside

Sec. 8.31 The Independent Agent shall set aside a ballot if: (a) the ballot is received from an NASD member eligible to vote in the district and the ballot is signed by a person who is not

the Executive Representative listed on the vote qualification list prepared under Section 8.28, and the Secretary of the NASD has not received proper notice of a change in Executive Representative pursuant to the NASD By-Laws; or (b) if two or more properly executed ballots are received from an NASD member eligible to vote in the district. If the Independent Agent determines that the ballots set aside are material to the outcome of the election, the Secretary of NASD Regulation and the Independent Agent shall make reasonable efforts to resolve each ballot set aside. With respect to a ballot not signed by an Executive Representative of record, the Secretary of NASD Regulation shall contact the NASD member to request that the NASD member send written notice of any change in Executive Representative by facsimile so that the ballot may be counted. With respect to multiple ballots from an NASD member, the Independent Agent shall contact the Executive Representative of the NASD member to obtain the NASD member's vote. The Secretary of NASD Regulation shall keep a list of NASD members that reported their ballot was lost or not received and that were provided with a duplicate ballot. The Secretary of NASD Regulation shall provide the list to the Independent Agent and, upon request, to the candidates.

Invalid Ballots

Sec. 8.32 The Independent Agent shall declare a ballot invalid if one or more of the following conditions exist: (a) the ballot is not signed by the Executive Representative (unless Section 8.31 applies); (b) a vote is not indicated on the ballot; or (c) the ballot indicates votes for more candidates than there are vacancies for an office.

Certification of Election

Sec. 8.33 Under the direction of the Secretary of NASD Regulation or the Secretary's designee, the Independent Agent shall count the votes received for each candidate in a district. The candidates for the office of member of the District Committee receiving the largest number of votes cast in the district for the office shall be declared elected such that the number of candidates declared elected equals the number of vacancies on the District Committee. The candidates for the office of member of the District Nominating Committee receiving the largest number of votes cast in the district for the office shall be declared elected such that the number of

candidates declared elected equals the number of vacancies on the District Nominating Committee. In the event of a tie, there shall be a run-off election. Each District Committee shall send a written certification of the election results to the Board. The certification shall state the number of votes received by each candidate and the number of ballots set aside.

Extensions of Time and Additional Procedures

Sec. 8.34 The Secretary of NASD Regulation may extend a time period under this Article for good cause shown. In extraordinary circumstances, the Secretary of NASD Regulation, with the approval of the Executive Committee or the Board, may adopt additional procedures for elections under this Article.

Article IX

Indemnification

Indemnification of Directors, Officers, Employees, and Agents

Sec. 9.1 (a) NASD Regulation shall indemnify, and hold harmless, to the fullest extent permitted by Delaware law as it presently exists or may thereafter be amended, any person (and the heirs, executors, and administrators of such person) who, by reason of the fact that he or she is or was a Director, officer, or employee of NASD Regulation, or is or was a Director, officer, or employee of NASD Regulation who is or was serving at the request of NASD Regulation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or non-profit entity, including service with respect to employee benefit plans, is or was a party, or is threatened to be made a party to:

(i) any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative (other than an action by or in the right of NASD Regulation) against expenses (including attorneys' fees and disbursements), judgments, fines, and amounts paid in settlement actually and reasonably incurred by such person in connection with any such action, suit, or proceeding; or

(ii) any threatened, pending, or completed action or suit by or in the right of NASD Regulation to procure a judgment in its favor against expenses (including attorneys' fees and disbursements) actually and reasonably incurred by such person in connection with the defense or settlement of such action or suit.

(b) NASD Regulation shall advance expenses (including attorneys' fees and disbursements) to persons described in subsection (a); provided, however, that the payment of expenses incurred by such person in advance of the final disposition of the matter shall be conditioned upon receipt of a written undertaking by that person to repay all amounts advanced if it should be ultimately determined that the person is not entitled to be indemnified under this Section or otherwise.

(c) NASD Regulation may, in its discretion, indemnify and hold harmless, to the fullest extent permitted by Delaware law as it presently exists or may thereafter be amended, any person (and the heirs, executors, and administrators of such persons) who, by reason of the fact that he or she is or was an agent of NASD Regulation or is or was an agent of NASD Regulation who is or was serving at the request of NASD Regulation as a director, officer, employee, or agent of another corporation, partnership, trust, enterprise, or non-profit entity, including service with respect to employee benefit plans, was or is a party, or is threatened to be made a party to any action or proceeding described in subsection (a).

(d) NASD Regulation may, in its discretion, pay the expenses (including attorneys' fees and disbursements) reasonably and actually incurred by an agent in defending any action, suit, or proceeding in advance of its final disposition; provided, however, that the payment of expenses incurred by such person in advance of the final disposition of the matter shall be conditioned upon receipt of a written undertaking by that person to repay all amounts advanced if it should be ultimately determined that the person is not entitled to be indemnified under this Section or otherwise.

(e) Notwithstanding the foregoing or any other provision of these By-Laws, no advance shall be made by NASD Regulation to an agent or non-officer employee if a determination is reasonably and promptly made by the Board by a majority vote of those Directors who have not been named parties to the action, even though less than a quorum, or, if there are no such Directors or if such Directors so direct, by independent legal counsel, that, based upon the facts known to the Board or such counsel at the time such determination is made: (1) the person seeking advancement of expenses (i) acted in bad faith, or (ii) did not act in a manner that he or she reasonably believed to be in or not opposed to the best interests of NASD Regulation; (2)

with respect to any criminal proceeding, such person believed or had reasonable cause to believe that his or her conduct was unlawful; or (3) such person deliberately breached his or her duty to NASD Regulation.

(f) The indemnification provided by this Section in a specific case shall not be deemed exclusive of any other rights to which a person seeking indemnification may be entitled, both as to action in his or her official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a Director, officer, employee, or agent and shall inure to the benefit of such person's heirs, executors, and administrators.

(g) Notwithstanding the foregoing, but subject to subsection (j), NASD Regulation shall be required to indemnify any person identified in subsection (a) in connection with a proceeding (or part thereof) initiated by such person only if the initiation of such proceeding (or part thereof) by such person was authorized by the Board.

(h) NASD Regulation's obligation, if any, to indemnify or advance expenses to any person who is or was serving at its request as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or non-profit entity shall be reduced by any amount such person may collect as indemnification or advancement from such other corporation, partnership, joint venture, trust, enterprise, or non-profit entity.

(i) Any repeal or modification of the foregoing provisions of this Section shall not adversely affect any right or protection hereunder of any person respecting any act or omission occurring prior to the time of such repeal or modification.

(j) If a claim for indemnification or advancement of expenses under this Article is not paid in full within 60 days after a written claim therefor by an indemnified person has been received by NASD Regulation, the indemnified person may file suit to recover the unpaid amount of such claim and, if successful in whole or in part, shall be entitled to be paid the expense of prosecuting such claim. In any such action, NASD Regulation shall have the burden of proving that the indemnified person is not entitled to the requested indemnification or advancement of expenses under Delaware law.

Indemnification Insurance

Sec. 9.2 NASD Regulation shall have power to purchase and maintain insurance on behalf of any person who is or was a Director, officer, employee,

or agent of NASD Regulation, or is or was serving at the request of NASD Regulation as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or non-profit entity against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not NASD Regulation would have the power to indemnify such person against such liability hereunder.

Article X

Capital Stock

Sole Stockholder

Sec. 10.1 *The NASD shall be the sole stockholder of the capital stock of NASD Regulation.*

Certificates

Sec. [6.1]10.2 [Each]The stockholder [in the Corporation] shall be entitled to a certificate or certificates in such form as shall be approved by the Board, certifying the number of shares of capital stock in [the Corporation] NASD Regulation owned by [such] the stockholder.

Signatures

Sec. [6.2]10.3 (a) Certificates for shares of capital stock of [the Corporation] NASD Regulation shall be signed in the name of [the Corporation] NASD Regulation by two officers with one being the Chair of the Board, the President, or a Vice President, and the other being the Secretary, the Treasurer, or such other officer that may be authorized by the Board [of Directors]. Such certificates may be sealed with the corporate [Seal] seal of [the Corporation] NASD Regulation or a facsimile thereof.

(b) If any such certificates are countersigned by a transfer agent other than [the Corporation] NASD Regulation or its employee, or by a registrar other than [the Corporation] NASD Regulation or its employee, any other signature on the certificate may be a facsimile. In [case] the event that any officer, transfer agent, or registrar who has signed or whose facsimile signature has been placed upon a certificate shall [have ceased] cease to be such officer, transfer agent, or registrar before such certificate is issued, such certificate may be issued by [the Corporation] NASD Regulation with the same effect as if such person were such officer, transfer agent, or registrar at the date of issue.

Stock Ledger

Sec. [6.3]10.3 (a) A record of all certificates for capital stock issued by [the Corporation] NASD Regulation

shall be kept by the Secretary or any other officer, employee, or agent designated by the Board [of Directors]. Such record shall show the name and address of the person, firm, or corporation in which certificates for capital stock are registered, the number of shares represented by each such certificate, the date of each such certificate, and in the case of certificates that have been canceled, the date of cancellation thereof.

(b) [The Corporation] NASD Regulation shall be entitled to treat the holder of record of shares of capital stock as shown on the stock ledger as the owner thereof and as the person entitled to vote such shares and to receive notice of meetings, and for all other purposes. Except as otherwise required by applicable law, [the Corporation] NASD Regulation shall not be bound to recognize any equitable or other claim to or interest in any share of capital stock on the part of any other person, whether or not [the Corporation] NASD Regulation shall have express or other notice thereof.

Transfers of Stock

Sec. [6.4]10.4 (a) The Board [of Directors] may make such rules and regulations as it may deem expedient, not inconsistent with law, the Restated Certificate of Incorporation, or these By-Laws, concerning the issuance, transfer, and registration of certificates for [share] shares of capital stock of [the Corporation] NASD Regulation. The Board [of Directors] may appoint, or authorize any principal officer to appoint, one or more transfer agents or one or more registrars and may require all certificates for capital stock to bear the signature or signatures of any of them.

(b) Transfers of capital stock shall be made on the books of [the Corporation] NASD Regulation only upon delivery to [the Corporation] NASD Regulation or its transfer agent of: (i) a written direction of the registered holder named in the certificate or such holder's attorney lawfully constituted in writing[.]; (ii) the certificate for the shares of capital stock being transferred[.]; and (iii) a written assignment of the shares of capital stock evidenced thereby.

Cancellation

Sec. [6.5]10.5 Each certificate for capital stock surrendered to [the Corporation] NASD Regulation for exchange or transfer shall be cancelled and no new certificate or certificates shall be issued in exchange for any existing certificate other than pursuant to [Sec. 6.6] Section 10.6 until such

existing certificate shall have been canceled.

Lost, Stolen, Destroyed, and Mutilated Certificates

Sec. [6.6]10.6 In the event that any certificate for shares of capital stock of [the Corporation] NASD Regulation shall be mutilated, [the Corporation] NASD Regulation shall issue a new certificate in place of such mutilated certificate. In [case] the event that any such certificate shall be lost, stolen, or destroyed [the Corporation] NASD Regulation may, in the discretion of the Board [of Directors] or a committee [designated] appointed thereby with power so to act, issue a new certificate for capital stock in the place of any such lost, stolen, or destroyed certificate. The applicant for any substituted certificate or certificates shall surrender any mutilated certificate or, in the case of any lost, stolen, or destroyed certificate, furnish satisfactory proof of such loss, theft, or destruction of such certificate and of the ownership thereof. The Board [of Directors] or such committee may, in its discretion, require the owner of a lost or destroyed certificate, or [his] such owner's representatives, to furnish to [the Corporation] NASD Regulation a bond with an acceptable surety or sureties and in such sum as [will] shall be sufficient to indemnify [the Corporation] NASD Regulation against any claim that may be made against it on account of the lost, stolen, or destroyed certificate or the issuance of such new certificate. A new certificate may be issued without requiring a bond when, in the judgment of the Board [of Directors], it is proper to do so.

Fixing of Record Date

Sec. [6.7]10.7 *The Board may fix a record date in accordance with Delaware law.* [(a) In order that the Corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, or to express consent or dissent to corporate action in writing without a meeting, or to exercise any rights with respect to any change, conversion or exchange of stock, or for the purpose of any other lawful action, the Board of Directors may fix, in advance, a record date, pursuant to and in accordance with Section 213 of the General Corporation Law of the State of Delaware. Only such stockholders as shall be stockholders of record on the date so fixed shall be entitled to notice of and to vote at such meeting or any adjournment thereof, or to give such consent or dissent, or to exercise such rights with respect to any such change, conversion or exchange of stock, or to

participate in any such action, notwithstanding the transfer of any stock on the books of the Corporation after any record date so fixed.]

(b) If no record date is fixed by the Board of Directors:

(i) the record date for determining stockholders entitled to notice of or to vote at a meeting of stockholders shall be at the close of business on the day next preceding the date on which notice is given, or if notice is waived, at the close of business on the day next preceding the day on which the meeting is held;

(ii) the record date for determining stockholders entitled to express consent to corporate action in writing without a meeting, when no prior action by the Board of Directors is necessary, shall be at the close of business on the day on which the first written consent is expressed; and

(iii) the record date for determining stockholders for any other purpose shall be at the close of business on the day on which the Board of Directors adopts the resolution relating thereto.]

(c) A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.]

Article XI

Miscellaneous Provisions

Corporate Seal

Sec. [7.1]11.1 The seal of [the Corporation] *NASD Regulation* shall be circular in form and shall bear, in addition to any other emblem or device approved by the Board [of Directors], the name of [the Corporation] *NASD Regulation*, the year of its incorporation, and the words "Corporate Seal" and "Delaware[']". The seal may be used by causing it to be affixed or impressed, or a facsimile thereof may be reproduced or otherwise used in such manner as the Board [of Directors] may determine.

Fiscal Year

Sec. [7.2]11.2 The fiscal year of [the Corporation] *NASD Regulation* shall begin on the [1st] *first* day of January in each year, or such other month as the Board [of Directors] may determine by resolution.

Waiver of Notice

Sec. [7.3]11.3 (a) Whenever notice is required to be given by law, the *Restated* Certificate of Incorporation, or these By-Laws, a written waiver thereof, signed by the person or persons entitled to such notice, whether before or after

the time stated therein, shall be deemed equivalent to notice. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the [stockholders, directors] *stockholder*, *Directors*, or members of a committee of [directors] *Directors* need be specified in any written waiver of notice.

(b) Attendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a meeting for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened.

Execution of Instruments, Contracts, Etc.

Sec. [7.4]11.4 (a) All checks, drafts, bills of exchange, notes, or other obligations or orders for the payment of money shall be signed in the name of [the Corporation] *NASD Regulation* by such officer or officers or person or persons[,] as the Board [of Directors], or a duly authorized committee thereof, may from time to time designate. Except as otherwise provided by law, the Board [of Directors], any committee given specific authority in the premises by the Board [of Directors], or any committee given authority to exercise generally the powers of the Board [of Directors] during intervals between meetings of the Board [of Directors], may authorize any officer, employee, or agent, in the name of and on behalf of [the Corporation] *NASD Regulation*, to enter into or execute and deliver deeds, bonds, mortgages, contracts, and other obligations or instruments, and such authority may be general or confined to specific instances.

(b) All applications, written instruments, and papers required by any department of the United States Government or by any state, county, municipal, or other governmental authority, may be executed in the name of [the Corporation] *NASD Regulation* by any principal officer or subordinate officer of [the Corporation] *NASD Regulation*, or, to the extent designated for such purpose from time to time by the Board [of Directors], by an employee or agent of [the Corporation] *NASD Regulation*. Such designation may contain the power to substitute, in the discretion of the person named, one or more other persons.

Form of Records

Sec. [7.5]11.5 Any records maintained by [the Corporation] *NASD Regulation* in the regular course of business, including its stock ledger, books of account, and minute books,

may be kept on, or be in the form of, magnetic tape, computer disk, or any other information storage device, provided that the records so kept can be converted into clearly legible form within a reasonable time.

Article [VIII] XII

Amendments; Emergency By-Laws

By Stockholder[s]

Sec. [8.1]12.1 These By-Laws may be altered, amended, or repealed, or new By-Laws may be adopted, at any meeting of [stockholders] *the stockholder*, provided that, in the case of a special meeting, notice that an amendment is to be considered and acted upon shall be inserted in the notice or waiver of notice of said meeting.

By Directors

Sec. [8.2]12.2 To the extent permitted by the *Restated* Certificate of Incorporation, these By-Laws may be altered, amended, or repealed, or new By-Laws may be adopted, at any regular or special meeting of the Board [of Directors].

Emergency By-Laws

Sec. [8.3]12.3 The Board [of Directors] may adopt emergency By-Laws subject to repeal or change by action of the [stockholders] *stockholder* that shall, notwithstanding any different provision of law, the *Restated* Certificate of Incorporation, or these By-Laws, be operative during any emergency resulting from any nuclear or atomic disaster, an attack on the United States or on a locality in which [the Corporation] *NASD Regulation* conducts its business or customarily holds meetings of the Board [of Directors] or stockholders] *or stockholder*, any catastrophe, or other emergency condition, as a result of which a quorum of the Board [of Directors] or a committee thereof cannot readily be convened for action. Such emergency By-Laws may make any provision that may be practicable and necessary [for] *under* the circumstances of the emergency.

* * * * *

By-Laws of the NASDAQ Stock Market, Inc.

Article I

Definitions

When used in these By-Laws, unless the context otherwise requires, the term:

(a) "Act" means the *Securities Exchange Act of 1934, as amended*;

(b) "Board" means the *Board of Directors of Nasdaq*;

(c) "broker" means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of effecting transactions in securities for the account of others, but does not include a bank;

(d) "Commission" means the Securities and Exchange Commission;

(e) "day" means calendar day;

(f) "dealer" means any individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, or other legal entity engaged in the business of buying and selling securities for such individual's or entity's own account, through a broker or otherwise, but does not include a bank, or any person insofar as such person buys or sells securities for such person's own account, either individually or in some fiduciary capacity, but not as part of a regular business;

(g) "Delaware law" means the General Corporation Law of the State of Delaware;

(h) "Delegation Plan" means the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries" as approved by the Commission, and as amended from time to time;

(i) "Director" means a member of the Board, excluding the Chief Executive Officer of the NASD;

(j) "Industry Director" or "Industry committee member" means a Director (excluding the President of Nasdaq) or committee member who (1) is an officer, director, or employee of a broker or dealer or has been employed in any such capacity at any time within the prior three years; or (2) has a consulting or employment relationship with or provides professional services to the NASD, NASD Regulation, or Nasdaq or has had any such relationship or provided any such services at any time within the prior three years;

(k) "NASD" means the National Association of Securities Dealers, Inc.;

(l) "NASD Board" means the NASD Board of Governors;

(m) "NASD Regulation" means NASD Regulation, Inc.;

(n) "Nasdaq" means The Nasdaq Stock Market, Inc.;

(o) "National Nominating Committee" means the National Nominating Committee appointed pursuant to Article VII, Section 9 of the NASD By-Laws;

(p) "Non-Industry Director" or "Non-Industry committee member" means a Director or committee member who is (1) a Public Director or committee member; (2) an officer or employee of an issuer of securities listed on Nasdaq or

traded in the over-the-counter market; (3) a person affiliated with a broker or a dealer that operates solely to assist the securities-related activities of the business of a non-member affiliate (such as a broker or dealer established to (i) distribute an affiliate's securities which are issued on a continuous or regular basis, or (ii) process the limited buy and sell orders of the shares of employee owners of the affiliate; (4) an employee of an entity that is affiliated with a broker or dealer that does not account for a material portion of the revenues of the consolidated entity, and who is primarily engaged in the business of the non-member entity; or (5) any other individual who would not be an Industry Director or committee member;

(q) "Public Director" or "Public committee member" means a Director or committee member who has no material business relationship with a broker or dealer or the NASD, NASD Regulation, or Nasdaq; and

(r) "Rules of the Association" or "Rules" means the numbered rules set forth in the NASD Manual beginning with the Rule 0100 Series, as adopted by the NASD Board pursuant to the NASD By-Laws, as hereafter amended or supplemented.

Article [I] II

Offices

Location

Sec. [1.1]2.1 The address of the registered office of [the Corporation] Nasdaq in the State of Delaware and the name of the registered agent at such address shall be: The Corporation Trust Company, 1209 Orange [St.,] Street, Wilmington, [DE] Delaware 19801. [The Corporation] Nasdaq also may [also] have offices at such other places both within and without the State of Delaware as the Board [of Directors] may from time to time designate or the business of [the Corporation] Nasdaq may require.

Change of Location

Sec. [1.2]2.2 In the manner permitted by law, the Board [of Directors] or the registered agent may change the address of [the Corporation's] Nasdaq's registered office in the State of Delaware and the Board [of Directors] may make, revoke, or change the designation of the registered agent.

Article [II] III

Meetings of Stockholder[s]

[Annual Meeting

Sec. 2.1 The annual meeting of stockholders of the Corporation for the

election of Directors and for the transaction of such other business as may properly come before the meeting shall be held on such date, and at such time, and place, within or without the State of Delaware, as may be fixed, from time to time, by the Board of Directors.]

[Special Meetings

Sec. 2.2 Special meetings of stockholders of the Corporation, unless otherwise prescribed by law, may be called at any time by the Chair of the Board, by the President or by order of a majority of the Board of Directors. Special meetings of stockholders prescribed by law for the election of directors shall be called by the Board of Directors, the President, or the Secretary. Special meetings of stockholders shall be held at such place within or without the State of Delaware as shall be designated in the notice of meeting.]

[Notice of Meetings

Sec. 2.3 (a) Whenever stockholders are required or permitted to take any action at a meeting, they shall be given written notice stating the place, date and hour of the meeting, and, in the case of a special meeting, the purpose or purposes thereof. Unless otherwise required by law, the Certificate of Incorporation or these By-Laws, written notice shall be delivered or mailed at least ten but not more than sixty days before such meeting date to each stockholder entitled to vote at such meeting. If mailed, such notice shall be deposited in the United States mail, postage prepaid, directed to each stockholder at the address that appears on the records of the Corporation.]

[(b) When a meeting of stockholders is adjourned to another time or place, notice need not be given of the adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At the adjourned meeting, the Corporation may transact any business which might have been transacted at the original meeting. If, however, the adjournment is for more than thirty days from the date of the original meeting, or if, after the adjournment, a new record date is set for the adjourned meeting, notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting in the manner prescribed above in subsection (a).]

[Quorum

Sec. 2.4 Except as otherwise provided by law, the Certificate of Incorporation or these By-Laws, at each meeting of stockholders the presence in person or by proxy of the holders of

record of a majority of the outstanding shares of capital stock entitled to vote or act at such a meeting shall constitute a quorum for the transaction of any business. In the absence of a quorum, the stockholders so present may by majority rule, adjourn any meeting until a quorum shall be present. When a quorum is once present to organize a meeting, the quorum cannot be destroyed by the subsequent withdrawal or revocation of the proxy of any stockholder.]

[Voting]

Sec. 2.5 (a) At any meeting of stockholders, each stockholder as of the record date is entitled to one vote for each such share of stock having voting power, upon the matter in question. Each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for him by proxy, provided that no proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period. A duly executed proxy shall be irrevocable if it states that it is irrevocable and if, and only so long as, it is coupled with an interest, whether in the stock itself or in the Corporation, sufficient in law to support an irrevocable power. A stockholder may revoke any proxy which is not irrevocable by attending the meeting and voting in person or by filing an instrument in writing revoking the proxy or by delivering a proxy in accordance with applicable law bearing a later date to the Secretary of the Corporation.]

[(b) Directors of the Corporation shall be elected by a plurality of the votes cast at a meeting of stockholders pursuant to Sec. 2.5 of these By-Laws. Corporate action other than the election of directors shall be authorized by a majority of the votes cast at a meeting of stockholders, except as otherwise required by law, the Certificate of Incorporation or these By-Laws.]

[(c) Upon the demand of any stockholder entitled to vote, the election of directors or a vote on any other matter at a meeting of stockholders shall be by written ballot; otherwise, the method of voting and the manner in which votes are counted at such a meeting shall be discretionary with the presiding officer of the meeting.]

[Presiding Officer and Secretary]

Sec. 2.6 At every meeting of stockholders, the Chair, or in his/her absence, the President, or in his/her absence, the appointee of the meeting, shall preside. The Secretary, or in his/

her absence, the appointee of the presiding officer of the meeting, shall act as Secretary of the meeting.]

Action by Consent of Stockholder[s]

Sec. [2.7]3.1 Any action required[,] or permitted by law to be taken at any meeting of *the stockholder* [stockholders] of [the Corporation] *Nasdaq* may be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, is signed by the [holders] *holder* of the outstanding stock [having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Prompt notice of the taking of corporate action without a meeting and by less than unanimous written consent shall be given to those stockholders who have not consented in writing and who would be entitled to vote thereon at a meeting].

Article [III] IV

Board of Directors

General Powers

Sec. [3.1]4.1 The property, business, and affairs of [the Corporation] *Nasdaq* shall be managed by *or under the direction of* the Board [of Directors]. The Board [of Directors] may exercise all such powers of [the Corporation] *Nasdaq* and have the authority to perform all such lawful acts as are permitted by law, the *Restated Certificate of Incorporation* [or], these *By-Laws*, *or the Delegation Plan* for the organization, development, and operation of electronic data processing and communications facilities, including computer hardware and software, for the purposes of: [(i)](a) supporting the operation, regulation, and surveillance of The Nasdaq Stock Market and other organized securities markets established for trading equity securities, debt securities, derivative instruments, or other financial products that may be developed; [(ii)](b) supporting the efficient clearance and settlement of securities transactions; [(iii)](c) supporting various elements of the national market system pursuant to Section 11A of the [Securities Exchange Act of 1934 ("Exchange Act")] *Act* and the rules thereunder; [(iv)](d) assisting the [National Association of Securities Dealers, Inc.] *NASD* in fulfilling its self-regulatory responsibilities as set forth in Section 15A of the [Exchange] Act[.]; and [(v)](e) supporting such other initiatives as the Board [of Directors] may deem appropriate. *To the fullest extent permitted by applicable law, the*

Restated Certificate of Incorporation, and these By-Laws, the Board may delegate any of its powers to a committee appointed pursuant to Section 4.14 or to Nasdaq staff in a manner not inconsistent with the Delegation Plan.

Number of Directors

Sec. [3.2]4.2 [The Board of Directors of the Corporation shall consist of one or more members; the exact number of directors which shall constitute the whole Board of Directors shall be fixed from time to time by resolution adopted by a majority of the whole Board of Directors. After fixing the number of directors constituting the whole Board of Directors, the Board of Directors may, by resolution adopted by a majority of the whole Board of Directors, from time to time change the number of directors constituting the whole Board of Directors.] *The Board shall be composed of at least 11 and not more than 15 Directors, the number thereof to be determined by the Board prior to the annual election of Directors. Any new Director position created as a result of an increase in the size of the Board shall be filled as part of the annual election conducted under Section 4.4.*

Qualifications

Sec. [3.3]4.3 (a) Directors need not be stockholders of [the Corporation] *Nasdaq*. *The President of Nasdaq shall be a Director, and the remaining Directors shall be equally balanced between Industry and Non-Industry Directors, including at least two Public Directors. If at any time there shall be an odd number of Directors, excluding the President, a majority of the Directors other than the President shall be Non-Industry Directors. In the event that the Board shall consist of more than 12 Directors, at least three shall be Public Directors. The Chief Executive Officer of the NASD shall be an ex-officio non-voting member of the Board.*

(b) *Each Director shall update the information submitted to the Secretary of the NASD pursuant to Article VII, Section 9(e) of the NASD By-Laws regarding the Director's classification as an Industry, Non-Industry, or Public Director at least annually and upon request of the Secretary of the NASD, and shall report immediately to the Secretary of the NASD any change in such classification.*

Election

Sec. [3.4]4.4 (a) Except as otherwise provided by law [or], these *By-Laws*, *or the Delegation Plan*, after the first meeting of [the Corporation] *Nasdaq* at which [directors] *Directors* are elected,

[directors of the Corporation] *Directors of Nasdaq* shall be elected each year at the annual meeting of [stockholders] *the stockholder*, or at a special meeting called for such purpose in lieu of the annual meeting[, by a plurality of the votes cast at such meeting]. If the annual election of [directors] *Directors* is not held on the date designated [therefore,] *therefor*, the [directors] *Directors* shall cause such election to be held as soon thereafter as convenient.

(b) *The National Nominating Committee shall nominate Industry, Non-Industry, and Public Directors for each vacant or new Director position on the Board to the NASD Board in accordance with Article VII of the NASD By-Laws.*

Term

Sec. [3.5]4.5 (a) Each [director] *Director* shall hold office for a term of three years or until [his] a successor is duly elected and qualified, except in the event of earlier termination from office by reason of death, resignation, removal[,] with or without cause, *disqualification*, or other reason.

(b) The Board [of Directors] shall be divided into three classes. *The term of office of those of the first class shall expire at the January 1998 meeting of the Board, of the second class one year thereafter, and of the third class two years thereafter. At each annual election, commencing January 1998, Directors shall be elected for a term of three years to replace those whose terms expire.*

(c) The President of [the Corporation] *Nasdaq* shall serve as a [member of the Board] *Director* until [his] a successor is selected and qualified, or until [his] death, resignation, or removal.

(d) Except for the President, no Director may serve more than two consecutive terms; provided, however, that if a Director is appointed to fill a term of less than one year, such Director may serve up to two consecutive terms following the expiration of such Director's [current term] *initial term*.

(e) Each Director chosen to fill newly created directorship shall serve until the next succeeding annual meeting of stockholders.]

Resignation

Sec. [3.6]4.6 Any [director] *Director* may resign at any time either upon written notice of resignation to the Chair of the Board, the President, or the Secretary. Any such resignation shall take effect at the time specified therein or, if the time [be] *is not specified*, upon receipt thereof, and the acceptance of such resignation, unless required by the

terms thereof, shall not be necessary to make such resignation effective.

Removal

Sec. [3.7]4.7 Any or all of the [directors] *Directors* may be removed from office at any time, with or without cause, *only* by a majority vote of the [stockholders] *NASD Board*.

Disqualification

Sec. 4.8 *A Director shall immediately resign or be automatically removed from office if the NASD Board determines by majority vote that (a) the Director no longer satisfies the definition for the category (Industry, Non-Industry or Public Director) for which the Director was elected; (b) failure to remove the Director would violate the compositional requirements for the Board set forth in Section 4.3(a); and (c) the Director has a remaining term of office of more than six months.*

Filling of Vacancies

Sec. 4.9 *If a Director position becomes vacant, whether because of death, disability, disqualification, removal, or resignation, the National Nominating Committee shall nominate, and the NASD Board shall elect by majority vote, a person satisfying the classification (Industry, Non-Industry, or Public Director) for the directorship as provided in Section 4.3 to fill such vacancy, except that if the remaining term of office for the vacant Director position is not more than six months, no replacement shall be required.*

Quorum and Voting

Sec. [3.8]4.10 (a) At all meetings of the Board [of Directors], one-third of the total number of directors shall constitute], *unless otherwise set forth in these By-Laws or required by law, a quorum for the transaction of business shall consist of a majority of the Board, including not less than 50 percent of the Non-Industry Directors.* In the absence of a quorum, a majority of the [directors] *Directors* present may adjourn the meeting until a quorum be present.

(b) [A director interested in a contract or transaction may be counted in determining the presence of a quorum at a meeting of the Board of Directors which authorizes the contract or transaction.] *Except as provided in Section 4.15(b), the vote of a majority of the Directors present at a meeting at which a quorum is present shall be the act of the Board.*

(c) The vote of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.]

Regulation

Sec. [3.9]4.11 The Board [of Directors] may adopt such rules, regulations, and requirements for the conduct of the business and management of [the Corporation] *Nasdaq*, not inconsistent with law, the *Restated Certificate of Incorporation*, these By-Laws, [or the rules and By-Laws of the National Association of Securities Dealers, Inc., as the Board of Directors may deem proper. A member of the Board of Directors] *the Rules of the Association, or the By-Laws of the NASD, as the Board may deem proper.* A Director shall, in the performance of [his or her] *such Director's* duties, be fully protected in relying in good faith upon the books of account or reports made to [the Corporation] *Nasdaq* by any of its officers, [or] by an independent certified public accountant, [or] by an appraiser selected with reasonable care by the Board [of Directors] or any committee of the Board [of Directors] or by any agent of [the Corporation] *Nasdaq*, or in relying in good faith upon other records of [the Corporation] *Nasdaq*.

Meetings

Sec. [3.10]4.12 (a) An annual meeting of the Board [of Directors] shall be held for the purpose of organization, election of officers, and transaction of any other business. If such meeting is held promptly after and at the place specified for the annual meeting of [stockholders] *the stockholder*, no notice of the annual meeting of the Board [of Directors] need be given. Otherwise, such annual meeting shall be held at such time and place as may be specified in a notice given in accordance with Section [3.11 of these By-Laws] 4.13.

(b) Regular meetings of the Board [of Directors] may be held at such time and place, within or without the State of Delaware, as determined from time to time by the Board [of Directors]. After such determination has been made, notice shall be given in accordance with Section [3.11 of these By-Laws] 4.13.

(c) Special meetings of the Board [of Directors] may be called by the Chair of the Board, [or] by the President, or by at least one-third of the [directors at that time being] *Directors then in office.* Notice of any special meeting of the Board [of Directors] shall be given to each [director] *Director* in accordance with Section [3.11 of these By-Laws.] 4.13.

(d) [Members of the Board of Directors, or any committee designated by the Board of Directors,] *Directors or members of any committee appointed*

by the Board may participate in a meeting of the Board [of Directors] or of such committee through the use of a conference telephone or similar communications equipment by means of which all persons participating in the meeting may hear one another, and such participation in a meeting shall constitute presence in person at such meeting for all purposes.

Notice of Meetings; Waiver of Notice

Sec. [3.11]4.13 (a) Notice of any meeting of the Board [of Directors] shall be deemed to be duly given to a [director (i) if] *Director if: (i)* mailed to the address last made known in writing to [the Corporation] *Nasdaq* by such [director] *Director* as the address to which such notices are to be sent, at least [two] *seven* days before the day on which such [special] meeting is to be held[, or]; (ii) [if] sent to the [director] *Director* at such address by telegraph, telefax, cable, radio, or wireless, not later than the day before the day on which such meeting is to be held[,]; or (iii) [if] delivered to the [director] *Director* personally or orally, by telephone or otherwise, not later than the day before the day on which such [special] meeting is to be held. Each notice shall state the time and place of the meeting and the purpose(s) thereof.

(b) Notice of any meeting of the Board [of Directors] need not be given to any [director] *Director* if waived by that [director] *Director* in writing (or by telegram, telefax, cable, radio, or wireless and subsequently confirmed in writing) whether before or after the holding of such meeting, or if such [director] *Director* is present at such meeting, *subject to Article IX, Section 9.3(b)*.

(c) Any meeting of the Board [of Directors] shall be a legal meeting without any prior notice if all [directors] *Directors* then in office shall be present thereat.

Committees [of the Board of Directors]

Sec. [3.13]4.14 (a) The Board [of Directors] may, by resolution or resolutions adopted by a majority of the whole Board [of Directors, designate], *appoint* one or more committees[, each committee to consist of one or more directors of the Corporation]. Except as herein provided, vacancies in membership of any committee shall be filled by the vote of a majority of the whole Board [of Directors]. The Board [of Directors] may designate one or more [directors] *Directors* as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or

disqualification of any member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not [he, she,] *such member* or [they] *members* constitute a quorum, may unanimously appoint another [member of the Board of Directors] *Director* to act at the meeting in the place of any such absent or disqualified member. Members of a committee shall hold office for such period as may be fixed by a resolution adopted by a majority of the whole Board [of Directors], subject, however, to removal, with or without cause, at any time *only* by the vote of a majority of the whole Board [of Directors].

(b) [Any committee, to the extent permitted by law and to the extent provided in the] *The Board may, by resolution or resolutions [creating such committee, shall have and may exercise all the powers and authority of the Board of Directors] adopted by a majority of the whole Board, delegate to one or more committees the power and authority to act on behalf of the Board in carrying out the functions and authority delegated to Nasdaq by the NASD under the Delegation Plan. Such delegations shall be in conformance with applicable law, the Restated Certificate of Incorporation, these By-Laws, and the Delegation Plan. Action taken by a committee pursuant to such delegated authority shall be subject to review, ratification, or rejection by the Board. In all other matters, the Board may, by resolution or resolutions adopted by a majority of the whole Board, delegate to one or more committees that consist solely of one or more Directors the power and authority to act on behalf of the Board in the management of the business and affairs of [the Corporation, and] Nasdaq to the extent permitted by law and not inconsistent with the Delegation Plan. A committee, to the extent permitted by law and provided in the resolution or resolutions creating such committee, may authorize the seal of [the Corporation] Nasdaq to be affixed to all papers [which] that may require it.*

(c) *Except as otherwise provided by applicable law, no [No such] committee shall have the power or authority of the Board with regard to: amending the Restated Certificate of Incorporation or the By-Laws of [the Corporation,] Nasdaq; adopting an agreement of merger or consolidation; recommending to the [stockholders] stockholder the sale, lease, or exchange of all or substantially all [the Corporation's] Nasdaq's property and assets; or recommending to the [stockholders] stockholder a dissolution of [the*

Corporation] *Nasdaq* or a revocation of a dissolution. Unless the resolution of the Board [of Directors] expressly so provides, no [such] committee shall have the power or authority to authorize the issuance of stock.

(d) *The Board may appoint an Executive Committee, which shall, to the fullest extent permitted by Delaware law and other applicable law, have and be permitted to exercise all the powers and authority of the Board in the management of the business and affairs of Nasdaq between meetings of the Board, and which may authorize the seal of Nasdaq to be affixed to all papers that may require it. The President of Nasdaq shall be a member of the Executive Committee, and with respect to the remaining members, the Executive Committee shall have a percentage of Non-Industry Directors at least as great as the percentage of Non-Industry Directors on the whole Board, and a percentage of Public Directors at least as great as the percentage of Public Directors on the whole Board.*

(e)[(c)] Each committee may adopt its own rules of procedure and may meet at stated times or on such notice as such committee may determine. Each committee shall keep regular minutes of its proceedings and report the same to the Board [of Directors] when required.

(f) [(d)] Unless otherwise provided by the Board [of Directors, a majority of any such committee], *a majority of a committee, excluding the President if the President is a member of the committee, shall constitute a quorum for the transaction of business, and the vote of a majority of the members of such committee present at a meeting at which a quorum is present shall be an act of such committee.*

(g) *Upon request, each prospective committee member who is not a Director shall provide to the Secretary of the NASD such information as is reasonably necessary to serve as the basis for a determination of the prospective committee member's classification as an Industry, Non-Industry, or Public committee member, and the Secretary of the NASD shall certify to the Board each prospective committee member's classification. Such committee members shall update the information submitted under this Section at least annually and upon request of the Secretary of the NASD, and shall report immediately to the Secretary of the NASD any change in such classification.*

Conflicts of Interest; Contracts and Transactions Involving Directors

Sec. [3.12.]4.15 (a) A Director or a member of any committee shall not directly or indirectly participate in any

adjudication of the interests of any party if that Director or committee member has a conflict of interest or bias, or if circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case, the Director or committee member shall recuse himself or herself or shall be disqualified.

(b) No contract or transaction between [the Corporation] *Nasdaq* and one or more of its [directors] *Directors* or officers, or between [the Corporation] *Nasdaq* and any other corporation, partnership, association, or other organization in which one or more of its [directors] *Directors* or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason[, or solely because the director or officer is present at or participates in the meeting of the Board of Directors or the committee thereof which] if: (i) the material facts pertaining to such Director's or officer's relationship or interest and the contract or transaction are disclosed or are known to the Board or the committee, and the Board or committee in good faith authorizes the contract or transaction[, or solely because his, her, or their votes are counted for such purposes if: (i) the material facts pertaining to such director's or officer's relationship or interest and] by the affirmative vote of a majority of the disinterested Directors; (ii) the material facts are disclosed or become known to the Board or committee after the contract or transaction [are disclosed or are known to the Board of Directors or the committee, and the Board] is entered into, and the Board or committee in good faith [authorizes] ratifies the contract or transaction by the affirmative vote of a majority of the disinterested [directors, even though the disinterested directors be less than a quorum; or (ii)] *Directors*; or (iii) the material facts pertaining to the [director's] *Director's* or officer's relationship or interest and the contract or transaction are disclosed or are known to the [stockholders] *stockholder* entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the [stockholders; or (iii) the contract or transaction is fair as to the Corporation as of the time it is authorized, approved or ratified by the Board of Directors, a committee thereof, or the stockholders. Common or interested directors] *stockholder*. Only disinterested *Directors* may be counted in determining the presence of a quorum at the portion of a meeting of the Board [of Directors,] or of a committee that

[which] authorizes the contract or transaction.

Communication of Views Regarding NASD or NASD Regulation Election or Nomination

Sec. 4.16 Nasdaq, the Board, any committee, and Nasdaq staff shall not take any position publicly or with an NASD member or person associated with or employed by a member with respect to any candidate in a contested election or nomination held pursuant to the NASD By-Laws or the NASD Regulation By-Laws. A Director or committee member may communicate his or her views with respect to a candidate if such Director or committee member acts solely in his or her individual capacity and disclaims any intention to communicate in any official capacity on behalf of Nasdaq, the Board, or any committee. Nasdaq, the Board, any committee, and the Nasdaq staff shall not provide any administrative support to any candidate in a contested election or nomination conducted pursuant to the NASD By-Laws or the NASD Regulation By-Laws.

Action Without Meeting

Sec. [3.14]4.17 Any action required or permitted to be taken at [any] a meeting of the Board [of Directors or any] or of a committee [thereof] may be taken without a meeting if all Directors or all members of [the Board of Directors or] such committee, as the case may be, consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the Board [of Directors or such committee] or the committee.

Article V

Compensation

Compensation of Board and Committee Members

Sec. 5.1 The Board may provide for reasonable compensation of the Chair of the Board, the Directors, and the members of any committee. The Board may also provide for reimbursement of reasonable expenses incurred by such persons in connection with the business of Nasdaq.

Article [IV]VI

Officers, Agents, and Employees

Principal Officers

*Sec. [4.1]6.1 The principal officers of [the Corporation] *Nasdaq* shall be elected by the Board [of Directors] and shall include a Chair, a President, a Secretary, a Treasurer, and such other officers as may be designated by the Board [of Directors]. One person may*

hold the offices and perform the duties of any two or more of said principal offices, except the offices and duties of President and Vice President or of President and Secretary. None of the principal officers, except the Chair of the Board and the President, need be [directors of the Corporation] *Directors of Nasdaq*.

Election of Principal Officers; Term of Office

*Sec. [4.2]6.2 (a) The principal officers of [the Corporation] *Nasdaq* shall be elected annually by the Board [of Directors] at the annual meeting of the Board [of Directors] convened pursuant to Section [3.10(a) of these By-Laws] 4.12(a). Failure to elect any principal officer annually shall not dissolve [the Corporation] *Nasdaq*.*

(b) If the Board [of Directors] shall fail to fill any principal office at an annual meeting, or if any vacancy in any principal office shall occur, or if any principal office shall be newly created, such principal office may be filled at any regular or special meeting of the Board [of Directors].

(c) Each principal officer shall hold office until [his or her] a successor is duly elected and qualified, or until [his or her earlier] death, resignation, or removal.

Subordinate Officers, Agents, or Employees

*Sec. [4.3]6.3 In addition to the principal officers, [the Corporation] *Nasdaq* may have one or more subordinate officers, agents, and employees as the Board [of Directors] may deem necessary, each of whom shall hold office for such period and exercise such authority and perform such duties as the Board [of Directors], the President, or any officer designated by the Board [of Directors], may from time to time determine. [The Board of Directors at any time may appoint and remove, or may delegate to any principal officer the power to appoint and to remove, any subordinate officer, agent, or employee of the Corporation.] *Agents and employees of Nasdaq shall be under the supervision and control of the officers of Nasdaq, unless the Board, by resolution, provides that an agent or employee shall be under the supervision and control of the Board.**

Delegation of Duties of Officers

*Sec. [4.4]6.4 The Board [of Directors] may delegate the duties and powers of any officer of [the Corporation] *Nasdaq* to any other officer or to any [director] *Director* for a specified period of time and for any reason that the Board [of Directors] may deem sufficient.*

Resignation and Removal of Officers

Sec. [4.5]6.5 (a) Any officer may resign at any time upon written notice of resignation to the Board [of Directors], the President, or the Secretary. Any such resignation shall take effect upon receipt of such notice or at any later time specified therein. The acceptance of a resignation shall not be necessary to make the resignation effective.

(b) Any officer[, agent or employee of the Corporation] of *Nasdaq* may be removed, with or without cause, by resolution adopted by a majority of the [directors] *Directors* then in office at any regular or special meeting of the Board [of Directors] or by a written consent signed by all of the [directors] *Directors* then in office. Such removal shall be without prejudice to the contractual rights of the affected officer, [agent, or employee,] if any, with [the Corporation] *Nasdaq*.

Bond

Sec. [4.6]6.6 [The Corporation] *Nasdaq* may secure the fidelity of any or all of its officers, agents, or employees by bond or otherwise.

Chair of the Board

Sec. [4.7]6.7 The Chair of the Board shall preside at all meetings of the Board [of Directors] at which [he or she] *the Chair* is present. The Chair shall exercise such other powers and perform such other duties as may be assigned to [him or her] *the Chair* from time to time by the Board [of Directors].

President

Sec. [4.8]6.8 The President shall, in the absence of the Chair of the Board, preside at all meetings of the Board [of Directors] at which [he or she] *the President* is present. The President shall be the [chief executive officer of the Corporation] *Chief Executive Officer of Nasdaq* and shall have general supervision over the business and affairs of [the Corporation] *Nasdaq*. The President shall have all powers and duties usually incident to the office of the President, except as specifically limited by a resolution of the Board [of Directors]. The President shall exercise such other powers and perform such other duties as may be assigned to [him or her] *the President* from time to time by the Board [of Directors].

Vice President

Sec. [4.9]6.9 *The Board shall elect one or more Vice Presidents.* In the absence or disability of the President or if the office of President [be] *becomes vacant*, the Vice Presidents in the order determined by the Board [of Directors],

or if no such determination has been made, in the order of their seniority, shall perform the duties and exercise the powers of the President, subject to the right of the Board [of Directors] at any time to extend or restrict such powers and duties or to assign them to others. Any Vice President may have such additional designations in [his or her] *such Vice President's* title as the Board [of Directors] may determine. The Vice Presidents shall generally assist the President in such manner as the President shall direct. Each Vice President shall exercise such other powers and perform such other duties as may be assigned to [him or her] *such Vice President* from time to time by the Board [of Directors] or the President. The term "Vice President" used in this Section shall include the positions of Executive Vice President, Senior Vice President, and Vice President.

Secretary

Sec. [4.10]6.10 Secretary shall act as Secretary of all meetings of [stockholders] *the stockholder* and of the Board [of Directors] at which [he or she] *the Secretary* is present, shall record all the proceedings of all such meetings in a book to be kept for that purpose, shall have supervision over the giving and service of notices of [the Corporation] *Nasdaq*, and shall have supervision over the care and custody of the corporate records and the corporate seal of [the Corporation] *Nasdaq*. The Secretary shall be empowered to affix the corporate seal to documents, the execution of which on behalf of [the Corporation] *Nasdaq* under its seal, is duly authorized, and when so affixed, may attest the same. The Secretary shall have all powers and duties usually incident to the office of Secretary, except as specifically [listed] *limited* by a resolution of the Board [of Directors]. The Secretary shall exercise such other powers and perform such other duties as may be assigned to [him or her] *the Secretary* from time to time by the Board [of Directors] or the President.

Assistant Secretary

Sec. [4.11]6.11 In the absence of the Secretary or in the event of [his or her] *the Secretary's* inability or refusal to act, any Assistant Secretary, approved by the Board, shall exercise all powers and perform all duties of the Secretary. An Assistant Secretary shall also exercise such other powers and perform such other duties as may be assigned to [him or her] *such Assistant Secretary* from time to time by the Board [of Directors] or the Secretary.

Treasurer

Sec. [4.12]6.12 The Treasurer shall have general supervision over the care and custody of the funds and over the receipts and disbursements of [the Corporation] *Nasdaq* and shall cause the funds of [the Corporation] *Nasdaq* to be deposited in the name of [the Corporation] *Nasdaq* in such banks or other depositories as the Board [of Directors] may designate. The Treasurer shall have supervision over the care and safekeeping of the securities of [the Corporation] *Nasdaq*. The Treasurer shall have all powers and duties usually incident to the office of Treasurer except as specifically limited by a resolution of the Board [of Directors]. The Treasurer shall exercise such other powers and perform such other duties as may be assigned to [him] *the Treasurer* from time to time by the Board [of Directors] or the President.

Assistant Treasurer

Sec. [4.13]6.13 In the absence of the Treasurer or in the event of [his or her] *the Treasurer's* inability or refusal to act, any Assistant Treasurer, approved by the Board, shall exercise all powers and perform all duties of the Treasurer. An Assistant Treasurer shall also exercise such other powers and perform such other duties as may be assigned to [him or her] *such Assistant Treasurer* from time to time by the Board [of Directors] or the Treasurer.

Article [V] VII**Indemnification****Indemnification of Directors, Officers, Employees, and Agents**

Sec. [5.1]7.1 (a) [The Corporation] *Nasdaq* shall indemnify, and hold harmless, to the fullest extent permitted by *Delaware* law as it presently exists or may thereafter be amended, any person (and the heirs, executors, and administrators of such person) who, by reason of the fact that he or she is or was a [director or] *Director*, officer [of the Corporation], or *employee of Nasdaq*, or is or was a [director or] *Director*, officer, or *employee of Nasdaq* who is or was serving at the request of [the Corporation] *Nasdaq* as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust [or other enterprise,], *enterprise, or non-profit entity, including service with respect to employee benefit plans*, is or was a party, or is threatened to be made a party to:

(i) any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative, or investigative (other than an action by or in the right of [the Corporation])

Nasdaq against expenses (including attorneys' fees and disbursements), judgments, fines, and amounts paid in settlement actually and reasonably incurred by such person in connection with any such action, suit, or proceeding; or (ii) any threatened, pending, or completed action or suit by or in the right of [the Corporation] *Nasdaq* to procure a judgment in its favor against expenses (including attorneys' fees and disbursements) actually and reasonably incurred by such [persons] person in connection with the defense or settlement of such action or suit.

(b) *Nasdaq* shall advance expenses (including attorneys' fees and disbursements) to persons described in subsection (a); provided, however, that the payment of expenses incurred by such person in advance of the final disposition of the matter shall be conditioned upon receipt of a written undertaking by that person to repay all amounts advanced if it should be ultimately determined that the person is not entitled to be indemnified under this Section or otherwise.

[(b)](c) [The Corporation] *Nasdaq* may, in its discretion, indemnify and hold harmless, to the fullest extent permitted by Delaware law as it presently exists or may thereafter be amended, any person (and the heirs, executors, and administrators of such persons) who, by reason of the fact that he or she is or was an [employee or agent of the Corporation, or] agent of *Nasdaq* or is or was an agent of *Nasdaq* who is or was serving at the request of [the Corporation] *Nasdaq* as a director, officer, employee, or agent of another corporation, partnership, trust [or other enterprise] enterprise, or non-profit entity, including service with respect to employee benefit plans, was or is a party, or is threatened to be made a party to any action or proceeding described [above] in subsection (a).

[(c)](d) [The Corporation] *Nasdaq* may, in its discretion, pay the expenses (including attorneys' fees and disbursements) reasonably and actually incurred by an agent in defending any action, suit, or proceeding in advance of its final disposition[.]; provided, however, that the payment of expenses incurred by [a director, officer, or employee] such person in advance of the final disposition of the matter shall be conditioned upon receipt of a written undertaking by [the officer, director, or employee] that person to repay all amounts advanced if it should be ultimately determined that [such] the person is not entitled to be indemnified under this Section [5.1 or otherwise] or otherwise.

(e) Notwithstanding the foregoing or any other provision of these By-Laws, no advance shall be made by *Nasdaq* to an agent or non-officer employee if a determination is reasonably and promptly made by the Board by a majority vote of those Directors who have not been named parties to the action, even though less than a quorum, or, if there are no such Directors or if such Directors so direct, by independent legal counsel, that, based upon the facts known to the Board or such counsel at the time such determination is made: (1) the person seeking advancement of expenses (i) acted in bad faith, or (ii) did not act in a manner that he or she reasonably believed to be in or not opposed to the best interests of *Nasdaq*; (2) with respect to any criminal proceeding, such person believed or had reasonable cause to believe that his or her conduct was unlawful; or (3) such person deliberately breached his or her duty to *Nasdaq*.

[(d)] (f) The indemnification provided by this [section] Section in a specific case shall not be deemed exclusive of any other rights to which a person seeking indemnification may be entitled [under any by-law, agreement, vote of stockholders or disinterested directors or otherwise], both as to action in his or her official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a [director] Director, officer, employee, or agent and shall inure to the benefit of [his or her] such person's heirs, executors, and administrators.

(g) Notwithstanding the foregoing, but subject to subsection (j), *Nasdaq* shall be required to indemnify any person identified in subsection (a) in connection with a proceeding (or part thereof) initiated by such person only if the initiation of such proceeding (or part thereof) by such person was authorized by the Board.

[(e)](h) [The Corporation's] *Nasdaq's* obligation, if any, to indemnify or advance expenses to any person who is or was serving at its request as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust [or other], enterprise, or non-profit entity shall be reduced by any amount such person may collect as indemnification or advancement from such other corporation, partnership, joint venture, trust, [or other] enterprise, or non-profit entity.

[(f)] (i) Any repeal or modification of the foregoing provisions of this Section [5.1] shall not adversely affect any right or protection hereunder of any person respecting any act or omission occurring

prior to the time of such repeal or modification.

(j) If a claim for indemnification or advancement of expenses under this Article is not paid in full within 60 days after a written claim therefor by an indemnified person has been received by *Nasdaq*, the indemnified person may file suit to recover the unpaid amount of such claim and, if successful in whole or in part, shall be entitled to be paid the expense of prosecuting such claim. In any such action, *Nasdaq* shall have the burden of proving that the indemnified person is not entitled to the requested indemnification or advancement of expenses under Delaware law.

Indemnification Insurance

Sec. [5.2]7.2 [The Corporation] *Nasdaq* shall have power to purchase and maintain insurance on behalf of any person who is or was a [director] Director, officer, employee, or agent of [the Corporation] *Nasdaq*, or is or was serving at the request of [the Corporation] *Nasdaq* as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust [or other], enterprise, or non-profit entity against any liability asserted against [him or her] such person and incurred by [him or her] such person in any such capacity, or arising out of [his or her] such person's status as such, whether or not [the Corporation] *Nasdaq* would have the power to indemnify [him or her] such person against such liability [under the provisions of this section] hereunder.

Article [VI] VIII

Capital Stock

Sole Stockholder

Sec. 8.1 The NASD shall be the sole stockholder of the capital stock of *Nasdaq*.

Certificates

Sec. [6.1]8.2 [Each] The stockholder [in the Corporation] shall be entitled to a certificate or certificates in such form as shall be approved by the Board [of Directors], certifying the number of shares of capital stock in [the Corporation] *Nasdaq* owned by [such] the stockholder.

Signatures

Sec. [6.2]8.3 (a) Certificates for shares of capital stock of [the Corporation] *Nasdaq* shall be signed in the name of [the Corporation] *Nasdaq* by two officers with one being the Chair of the Board, the President, or a Vice President, and the other being the Secretary, the Treasurer, or such other

officer that may be authorized by the Board [of Directors]. Such certificates may be sealed with the corporate [Seal] seal of [the Corporation] *Nasdaq* or a facsimile thereof.

(b) If any such certificates are countersigned by a transfer agent other than [the Corporation] *Nasdaq* or its employee, or by a registrar other than [the Corporation] *Nasdaq* or its employee, any other signature on the certificate may be a facsimile. In [case] *the event that* any officer, transfer agent, or registrar who has signed or whose facsimile signature has been placed upon a certificate shall [have ceased] cease to be such officer, transfer agent, or registrar before such certificate is issued, such certificate may be issued by [the Corporation] *Nasdaq* with the same effect as if such person were such officer, transfer agent, or registrar at the date of issue.

Stock Ledger

Sec. [6.3]8.4 (a) A record of all certificates for capital stock issued by [the Corporation] *Nasdaq* shall be kept by the Secretary or any other officer, employee, or agent designated by the Board [of Directors]. Such record shall show the name and address of the person, firm, or corporation in which certificates for capital stock are registered, the number of shares represented by each such certificate, the date of each such certificate, and in the case of certificates which have been canceled, the date of cancellation thereof.

(b) [The Corporation] *Nasdaq* shall be entitled to treat the holder of record of shares of capital stock as shown on the stock ledger as the owner thereof and as the person entitled to vote such shares and to receive notice of meetings, and for all other purposes. [The Corporation] *Nasdaq* shall not be bound to recognize any equitable or other claim to or interest in any share of capital stock on the part of any other person, whether or not [the Corporation] *Nasdaq* shall have express or other notice thereof.

Transfers of Stock

Sec. [6.4]8.5 (a) The Board [of Directors] may make such rules and regulations as it may deem expedient, not inconsistent with law, the *Restated Certificate of Incorporation*, or these By-Laws, concerning the issuance, transfer, and registration of certificates for [share] shares of capital stock of [the Corporation] *Nasdaq*. The Board [of Directors] may appoint, or authorize any principal officer to appoint, one or more transfer agents or one or more transfer clerks and one or more registrars and

may require all certificates for capital stock to bear the signature or signatures of any of them.

(b) Transfers of capital stock shall be made on the books of [the Corporation] *Nasdaq* only upon delivery to [the Corporation] *Nasdaq* or its transfer agent of: (i) a written direction of the registered holder named in the certificate or such holder's attorney lawfully constituted in writing[.]; (ii) the certificate for the shares of capital stock being transferred[.]; and (iii) a written assignment of the shares of capital stock evidenced thereby.

Cancellation

Sec. [6.5]8.6 Each certificate for capital stock surrendered to [the Corporation] *Nasdaq* for exchange or transfer shall be canceled and no new certificate or certificates shall be issued in exchange for any existing certificate other than pursuant to [Sec. 6.6. of these By-Laws] *Section 8.7* until such existing certificate shall have been canceled.

Lost, Stolen, Destroyed, and Mutilated Certificates

Sec. [6.6]8.7 In the event that any certificate for shares of capital stock of [the Corporation] *Nasdaq* shall be mutilated, [the Corporation] *Nasdaq* shall issue a new certificate in place of such mutilated certificate. In [case] *the event that* any such certificate shall be lost, stolen, or destroyed [the Corporation], *Nasdaq* may, in the discretion of the Board [of Directors] or a committee [designated] *appointed* thereby with power so to act, issue a new certificate for capital stock in the place of any such lost, stolen, or destroyed certificate. The applicant for any substituted certificate or certificates shall surrender any mutilated certificate or, in the case of any lost, stolen, or destroyed certificate, furnish satisfactory proof of such loss, theft, or destruction of such certificate and of the ownership thereof. The Board [of Directors] or such committee may, in its discretion, require the owner of a lost or destroyed certificate, or [his] *the owner's* representatives, to furnish to [the Corporation] *Nasdaq* a bond with an acceptable surety or sureties and in such sum as will be sufficient to indemnify [the Corporation] *Nasdaq* against any claim that may be made against it on account of the lost, stolen, or destroyed certificate or the issuance of such new certificate. A new certificate may be issued without requiring a bond when, in the judgment of the Board [of Directors], it is proper to do so.

Fixing of Record [Dates] Date

Sec.[6.7]8.8 The Board may fix a record date in accordance with Delaware law. [(a) In order that the Corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, or to express consent or dissent to corporate action in writing without a meeting, or to exercise any rights with respect to any change, conversion or exchange of stock, or for the purpose of any other lawful action, the Board of Directors may fix, in advance, a record date, which shall not be more than sixty nor less than ten days before the date of any meeting of stockholders, nor more than sixty days prior to any other action. Only such stockholders as shall be stockholders of record on the date so fixed shall be entitled to notice of and to vote at such meeting or any adjournment thereof, or to give such consent or dissent, or to exercise such rights with respect to any such change, conversion or exchange of stock, or to participate in any such action, notwithstanding the transfer of any stock on the books of the Corporation after any record date so fixed.]

[(b) If no record date is fixed by the Board of Directors:

(i) the record date for determining stockholders entitled to notice of or to vote at a meeting of stockholders shall be at the close of business on the day next preceding the date on which notice is given, or if notice is waived, at the close of business on the day next preceding the day on which the meeting is held;

(ii) the record date for determining stockholders entitled to express consent to corporate action in writing without a meeting, when no prior action by the Board of Directors is necessary, shall be at the close of business on the day on which the first written consent is expressed; and

(iii) the record date for determining stockholders for any other purpose shall be at the close of business on the day on which the Board of Directors adopts the resolution relating thereto.]

[(c) A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.]

Article [VII] IX

Miscellaneous Provisions

Corporate Seal

Sec. [7.1]9.1 The seal of [the Corporation] *Nasdaq* shall be circular in

form and shall bear, in addition to any other emblem or device approved by the Board [of Directors], the name of [the Corporation] *Nasdaq*, the year of its incorporation, and the words "Corporate Seal" and "Delaware[.]" The seal may be used by causing it to be affixed or impressed, or a facsimile thereof may be reproduced or otherwise used in such manner as the Board [of Directors] may determine.

Fiscal Year

Sec. [7.2]9.2 The fiscal year of [the Corporation] *Nasdaq* shall begin the 1st day of January in each year, or such other month as the Board [of Directors] may determine by resolution.

Waiver of Notice

Sec. [7.3]9.3 (a) Whenever notice is required to be given by law, the *Restated* Certificate of Incorporation, or these By-Laws, a written waiver thereof, signed by the person or persons entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to notice. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the [stockholders, directors] *stockholder*, *Directors*, or members of a committee of [directors] *Directors* need be specified in any written waiver of notice.

(b) Attendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a meeting for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened.

Execution of Instruments, Contracts, Etc.

Sec. [7.4.]9.4 (a) All checks, drafts, bills of exchange, notes, or other obligations or orders for the payment of money shall be signed in the name of [the Corporation] *Nasdaq* by such officer or officers or person or persons[,] as the Board [of Directors], or a duly authorized committee thereof, may from time to time designate. Except as otherwise provided by law, the Board [of Directors], any committee given specific authority in the premises by the Board [of Directors], or any committee given authority to exercise generally the powers of the Board [of Directors] during intervals between meetings of the Board [of Directors], may authorize any officer, employee, or agent, in the name of and on behalf of [the Corporation] *Nasdaq*, to enter into or execute and deliver deeds, bonds, mortgages, contracts, and other obligations or instruments, and such

authority may be general or confined to specific instances.

(b) All applications, written instruments, and papers required by any department of the United States Government or by any state, county, municipal, or other governmental authority, may be executed in the name of [the Corporation] *Nasdaq* by any principal officer or subordinate officer of [the Corporation] *Nasdaq*, or, to the extent designated for such purpose from time to time by the Board [of Directors], by an employee or agent of [the Corporation] *Nasdaq*. Such designation may contain the power to substitute, in the discretion of the person named, one or more other persons.

Form of Records

Sec. [7.5]9.5 Any records maintained by [the Corporation] *Nasdaq* in the regular course of business, including its stock ledger, books of account, and minute books, may be kept on, or be in the form of, magnetic tape, computer disk, or any other information storage device, provided that the records so kept can be converted into clearly legible form within a reasonable time.

Article [VIII] X

Amendments; Emergency By-Laws

By [Stockholders] *Stockholder*

Sec. [8.1]10.1 These By-Laws may be altered, amended, or repealed, or new By-Laws may be adopted, at any meeting of [stockholders by the vote of the holders of not less than a majority of the outstanding shares of stock entitled to vote thereat] *the stockholder*, provided that, in the case of a special meeting, notice that an amendment is to be considered and acted upon shall be inserted in the notice or waiver of notice of said meeting.

By Directors

Sec. [8.2]10.2 To the extent permitted by the *Restated* Certificate of Incorporation, these By-Laws may be altered, amended, or repealed, or new By-Laws may be adopted, at any regular or special meeting of the Board [of Directors] by a resolution adopted by a vote of a majority of the whole Board [of Directors].

Emergency By-Laws

Sec. [8.3]10.3 The Board [of Directors] may adopt emergency By-Laws subject to repeal or change by action of the [stockholders] *stockholder* which shall, notwithstanding any different provision of law, the *Restated* Certificate of Incorporation, or these By-Laws, be operative during any emergency resulting from any nuclear or

atomic disaster, an attack on the United States or on a locality in which [the Corporation] *Nasdaq* conducts its business or customarily holds meetings of the Board [of Directors or stockholders] or *the stockholder*, any catastrophe, or other emergency condition, as a result of which a quorum of the Board [of Directors] or a committee thereof cannot readily be convened for action. Such emergency By-Laws may make any provision that may be practicable and necessary [for] *under* the circumstances of the emergency.

* * * * *

Plan of Allocation and Delegation of Functions by NASD to Subsidiaries

I. NASD, Inc.

The NASD, Inc. (referenced as "NASD"), the Registered Section 15A Association, is the parent company of the wholly-owned Subsidiaries NASD Regulation, Inc. (referenced individually as ["NASDR"]) "NASD Regulation") and The Nasdaq Stock Market, Inc. (referenced individually as "Nasdaq") (referenced collectively as the "Subsidiaries"). The term "Association" shall refer to the NASD and the Subsidiaries collectively.

A. Governors, Directors and Committee Members

The terms "*Industry Governors*," "*Non-Industry Governors*," "*Public Governors*," "*Industry Directors*," "*Non-Industry Directors*," "*Public Directors*," "*Industry committee members*," "*Non-Industry committee members*," and "*Public committee members*," as used *herein*, shall have the meanings set forth in the By-Laws of the NASD, NASD Regulation and Nasdaq, as applicable. [following definitions are applicable to Governors of the NASD, Directors of the Subsidiaries, and Members of Committees of the NASD and the Subsidiaries.

1. "Industry" Governors, Directors or Committee Members shall include (a) officers, directors and employees of brokers and dealers and persons who have been employed in any such capacity at any time within the prior three years; and (b) persons who have consulting or employment relationships with or provided professional services to the Association and persons who have had any such relationship or provided any such services at any time within the prior three years.

2. "Non-industry" Governors, Directors or Committee Members shall be (a) Public Governors; (b) officers and employees of issuers of securities listed on The Nasdaq Stock Market or traded

in the over-the-counter market; (c) persons affiliated with brokers and dealers that operate solely to assist the securities-related activities of the business of non-member affiliates (such as a broker or dealer established to (i) distribute an affiliate's securities which are issued on a continuous or regular basis, or (ii) process the limited buy and sell orders of the shares of employee owners of the affiliate); (d) employees of an entity that is affiliated with a broker or dealer that does not account for a material portion of the revenues of the consolidated entity, and who are primarily engaged in the business of the non-member entity; and (e) other individuals who would not be Industry Governors, Directors or Committee Members.

3. "Public" Governors, Directors or Committee Members shall be non-industry persons who have no material business relationship with a broker, dealer or the Association.]

B. Functions and Authority of the NASD

The NASD shall have ultimate responsibility for the rules and regulations of the Association and its operation and administration. As set forth below in Sections II.A. and III.A., the NASD has delegated certain authority and functions to its [subsidiaries] *Subsidiaries*. Actions taken pursuant to delegated authority, however, remain subject to review, ratification or rejection by the NASD Board in accordance with procedures established by that Board. Any function or responsibility as a registered securities association under the *Securities Exchange Act of 1934 ("Act")*, or as set forth in the [articles of incorporation] *Restated Certificate of Incorporation* or the by-laws is hereby reserved, except as expressly delegated to the [subsidiaries] *Subsidiaries*. In addition, the NASD expressly retains the following authority and functions:

1. To exercise overall responsibility for ensuring that the Association's statutory and self-regulatory obligations and functions are fulfilled.

2. To delegate authority to the Subsidiaries to take actions on behalf of the NASD.

3. To elect the Subsidiary Boards of Directors.

4. To review the rulemaking and disciplinary decisions of the Subsidiaries (See Sections [II.C.] *II.B.* and [III.C.] *III.B.* below).

5. To coordinate actions of the Subsidiary Boards as necessary.

6. To resolve any disputes between the Subsidiaries.

7. To administer common overhead and technology of the Subsidiaries.

8. To administer the Office of Internal Review as provided in Section [I.D.4] *I.C.4.* below.

9. To manage external Association relations on major policy issues.

10. To direct the Subsidiaries to take action necessary to effectuate the purposes and functions of the Association.

[C. Board of Governors

1. Composition: The NASD Board of Governors ("NASD Board") shall be composed of at least Nine (9) and no more than Thirteen (13) Governors, a majority of whom shall be Non-industry (including at least Two (2) Public Governors). The Chief Executive Officer ("CEO") of NASD shall be a Governor. In the event that the NASD Board shall consist of Eleven (11) or more Governors, at least Three (3) shall be Public Governors.

2. Election Procedures

a. Commencing with the selection of Governors to take office in April of 1997, Governors (except the CEO of NASD) shall be elected by a majority vote of those members of the NASD casting ballots on a slate of nominees presented to the NASD membership by the National Nominating Committee for election by secret ballot.

b. National Nominating Committee.

(1) The National Nominating Committee shall be composed of at least Six (6) and not more than Nine (9) members, equally balanced between Industry and Non-industry Committee Members (including at least Two (2) Public Committee Members). In the event that the Nominating Committee shall consist of Seven (7) or more members at least Three (3) shall be Public Committee Members. If at any time there shall be an odd number of members of the National Nominating Committee, Non-industry Committee Members shall be in the majority. No officer or employee of the Association shall serve as a member of the National Nominating Committee in any voting or non-voting capacity. Two members of the National Nominating Committee shall be selected by each of the Subsidiaries and the NASD. No more than three of the Committee Members and no more than two of the Industry Committee Members shall be current members of the NASD Board or of the Board of Directors of one of the Subsidiaries (collectively the "Association Boards"). Any member of the National Nominating Committee who is a current member of any Association Board shall be in his/her final year of service on any Association Board.

(2) Members of the National Nominating Committee shall be appointed annually by the NASD Board and may be removed for cause by a majority vote of the NASD Board.

(3) The National Nominating Committee shall propose to the NASD Board one or more nominees for each vacant or new Governor position, and for each Director position on the Boards of Directors of the Subsidiaries.

3. Contested Elections

a. A candidate for the NASD Board who has not been nominated pursuant to Section 2.b(3) above may be nominated by petition, for the term of office specified by the Board for the vacant governorship, if the candidate presents duly executed petitions to the National Nominating Committee demonstrating that such candidate has the support of Two (2) percent of the members of the NASD.

b. A candidate for the NASD Board may be included on the ballot only if the Committee certifies that the candidate's petitions are duly executed by the requisite number of members of the NASD and that the candidate meets the qualifications for the position to be filled, as defined in Section I.A. above.

4. Term of Office

a. Each Governor shall hold office for a term of not more than three years, or until a successor is elected and qualified, or until death, disqualification, resignation, or removal. Except as provided in paragraph (b) and (c), Governors may not serve more than two consecutive terms of office on any Association Board.

b. The CEO of the NASD shall serve as a member of the NASD Board until a successor is selected and qualified, or until death, resignation, disqualification, or removal.

c. Where a Governor is appointed to fill a term of less than one year, such Governor shall not be precluded from serving two additional terms of office.

5. Vacancies

a. If a Governor position becomes vacant before the expiration of the Governor's term of office, the National Nominating Committee shall recommend, and the NASD Board shall elect by majority vote of the remaining Governors, a person satisfying the criteria for a Governor position of the type (Industry, Non-industry or Public), vacated as defined in Section I.A. above, unless such Governor has a remaining term of office of no more than six months, in which case no replacement will be required.

b. If a Governor no longer satisfies the criteria for the category in which he or she was elected (Industry, Non-industry or Public) and has a remaining term of office of more than six months, such Governor shall be automatically removed from office unless the remaining members of the NASD Board determine otherwise by a majority vote and the failure to remove the Governor does not affect the proportional representation set forth in Section I.C.1. above.

D. Audit Committee

1. The Audit Committee shall be a committee of the NASD Board and shall include the following functions:

a. To ensure the existence of adequate controls and the integrity of the financial reporting process of the Association.

b. To recommend to the NASD Board, and to monitor the independence and performance of, the certified public accountants retained as outside auditors by the NASD.

c. To direct and oversee all the activities of the Association's internal review function, including but not limited to management's responses to the internal review function.

2. Composition: The Audit Committee shall be composed of Four (4) or Five (5) members of the NASD Board, none of whom are officers or employees of the Association. The Committee shall include at least one Public Committee Member who shall serve as Chairperson of the Committee. The Committee shall have no more than two Industry Committee Members. If the Committee shall have Four (4) members it shall have not more than One (1) Industry Committee Member. In the event that the size of the NASD Board shall at any time consist of Eleven (11) or more members, the Audit Committee shall include Two (2) Public Committee Members. In addition, each Subsidiary shall designate a Public Member of its Board as a liaison to the Audit Committee. The Audit Committee may consult with that person on issues relating to the functions of the Subsidiary, but neither the liaison nor any officer or employee of the Association shall serve on the Audit Committee in any voting or non-voting capacity.

3. No member of the Audit Committee shall participate in the consideration or decision of any matter relating to a particular NASD member, company or individual if he or she has a material interest in, or a professional, business or personal relationship with, that member, company or individual or if such participation shall create an

appearance of impropriety. Committee members shall consult with the General Counsel of NASD to determine if recusal is necessary. In the event that a member of the Committee is recused from consideration of a matter, any decision on the matter shall be by a vote of a majority of the remaining members of the Committee.

4. Office of Internal Review: The Audit Committee shall have exclusive authority: (a) to hire or terminate the Director of Internal Review, (b) to determine the compensation of the Director of Internal Review, and (c) to determine the budget for the Office of Internal Review. The Office of Internal Review shall report directly to the Audit Committee. The Audit Committee may, in its discretion, direct that the Office of Internal Review also report to senior management of the NASD on matters it deems appropriate and may request that senior NASD management perform such operational oversight as necessary and proper, consistent with preservation of the independence of the internal review function.]

C.[E.] Management Compensation Committee

1. The Management Compensation Committee shall be a Committee of the NASD Board and shall have the following functions: To consider and recommend compensation policies, programs, and practices for employees of the Association.

2. Composition: The Management Compensation Committee shall be composed of [Four (4)] *four* or more [Members] *members* of the NASD Board, equally balanced between Industry and Non-[industry]-*Industry* Governors. If at any time there shall be an odd number of members of the Management Compensation Committee, Non-[industry Committee Members]-*Industry committee members* shall be in the majority.

D.[F.] Access to and Status of Officers, Directors, Employees, Books, Records, and Premises of Subsidiaries

Notwithstanding the delegation of authority to the Subsidiaries, as set forth in Sections II.A. and III.A. below, the staff, books, records, and premises of the Subsidiaries are the staff, books, records, and premises of the NASD subject to oversight pursuant to the [Securities Exchange Act of 1934 ("Act")] *Act*, and all officers, directors, employees, and agents of the Subsidiaries are officers [and], directors, employees, and agents of the NASD for purposes of the Act.

II. NASD Regulation, Inc. ["NASDR"] ("*NASD Regulation*")

A. Delegation of Functions and Authority

1. The NASD hereby delegates to [the NASDR and the NASDR] *NASD Regulation and NASD Regulation* assumes the following responsibilities of and functions as a registered securities association:

a. To establish rules and regulations for NASD members including, but not limited to fees [and], membership requirements [and the Code of Arbitration and Mediation Procedure.], *and arbitration procedures.*

b. To determine Association policy, including developing and adopting necessary or appropriate rule changes, relating to the business and sales practices of NASD members and associated persons with respect to, but not limited to, (i) arbitration of disputes among and between NASD members, associated persons and customers, (ii) public and private sale or distribution of securities including underwriting arrangements and compensation, (iii) financial responsibility, (iv) qualifications for NASD membership and association with NASD members, (v) clearance and settlement of securities transactions, (vi) NASD member advertising practices, (vii) administration, interpretation and enforcement of Association rules, (viii) administration and enforcement of Municipal Securities Rulemaking Board ("MSRB") rules, the federal securities laws, and other laws, rules and regulations the Association has the authority to administer or enforce, and (ix) standards of proof for violations and sanctions imposed on NASD members and associated persons in connection with disciplinary actions.

c. To take necessary or appropriate action to assure compliance with Association policy, Association and MSRB rules, the federal securities laws, and other laws, rules and regulations the Association has the authority to administer or enforce, through examination, surveillance, investigation, enforcement, disciplinary, and other programs.

d. To administer programs and systems for the surveillance and enforcement of rules governing NASD members' conduct and trading activities in The Nasdaq Stock Market, other markets operated by The Nasdaq Stock Market, the third market for securities listed on a registered exchange, and the over[-]the[-]counter market.

e. To examine and investigate NASD members and associated persons to determine if they have violated

Association or MSRB rules, the federal securities laws, and other laws, rules, and regulations the Association has the authority to administer, interpret [or enforce.], or enforce.

f. To establish and maintain procedures for the consideration and determination regarding complaints by members, associated persons, and members of the public who request investigative or disciplinary actions by the Association.

g. To administer Association enforcement and disciplinary programs, including investigation, adjudication of cases and the imposition of fines and other sanctions.

[g] h. To administer the Association's office of professional hearing officers.

[h] i. To conduct arbitrations, mediations, and other dispute resolution programs.

[i] j. To conduct qualification examinations and continuing education programs.

[j] k. To operate the Central Registration Depository[("CRD")].

[k] l. To determine whether applicants for NASD membership have met the requirements for membership established by the Association.

[l] m. To place restrictions on the business activities of NASD members consistent with the public interest, the protection of investors and the federal securities laws.

[m] n. To determine whether persons seeking to register as associated persons of NASD members have met such qualifications for registration as may be established by the Association, including whether statutorily disqualified persons will be permitted to associate with particular NASD members and the conditions of such association.

[n] o. To oversee all District Office activities.

[o] p. To establish the annual budget and business plan for [NASDR.] *NASD Regulation*.

[p] q. To determine allocation of [NASDR] *NASD Regulation* resources.

[q] r. To establish and assess fees and other charges on NASD members, persons associated with NASD members, and others using the services or facilities of [NASDR.] *NASD Regulation*.

[r] s. To manage external relations on enforcement, regulatory, and other policy issues with Congress, the Securities and Exchange Commission [("SEC")](*"Commission"*), state regulators, other self-regulatory organizations, business groups, and the public.

t. To operate *Stockwatch in conjunction with Nasdaq pursuant to Section IV*.

2. All action taken pursuant to authority delegated pursuant to (1) shall be subject to the review, ratification, or rejection by the NASD Board in accordance with procedures established by the NASD Board.

[B. Board of Directors

1. Subsequent to January of 1997, the NASDR Board of Directors ("NASDR Board") shall be composed of at least Twenty-one (21) and no more than Twenty-five (25) Directors. The President of NASDR shall be a member of the NASDR Board and the remaining members shall be equally balanced between Industry and Non-industry Directors. If at any time there shall be an odd number of Directors, excluding the President, a majority of the Directors other than the President shall be Non-industry. The NASDR Board shall include Seven (7) representatives of NASD members representing geographical regions defined by the NASDR Board, and at least Three (3) at-large industry representatives. The NASDR Board shall include at least Ten (10) Non-industry Directors, including at least Three (3) Public Directors. In the event that the NASDR Board shall consist of more than Twenty-two (22) Members, at least Four (4) shall be Public Directors. The NASDR Board shall include representatives of an issuer of investment company shares or an affiliate of such an issuer and an insurance company or an affiliated NASD member. The CEO of NASD shall be an ex-officio non-voting member of the NASDR Board.

2. Election Procedures

a. The National Nominating Committee shall propose to the NASD Board nominees for each position on the NASDR Board.

b. The Seven (7) Industry Members of the NASDR Board shall be nominated by Regional Nominating Committees for consideration by the National Nominating Committee. A Regional Nominating Committee shall consist of equal numbers of members from each district comprising the regions and members shall be selected by the District Committee for that District.

c. Any officer, director or employee of a NASD member who has not otherwise been nominated by the Regional Nominating Committee may seek nomination if the candidate presents duly executed petitions to the Regional Nominating Committee for the appropriate geographical region demonstrating that such candidate has

the support of at least Ten (10) percent of the NASD members in that region. The Regional Nominating Committee shall submit the names of its nominees and of all the candidates presenting qualifying petitions to the members in that region for nomination by secret ballot. The Regional Nominating Committee shall nominate to the National Nominating Committee the candidate receiving the most votes.

d. Terms of Office and Vacancies: The terms of office of Directors and the procedures for the filling of vacancies shall be the same as those set forth under Section I.C.4. and 5. above.]

[C. NASDR] B. *NASD Regulation* Board Procedures

1. [Disciplinary Actions—]Any initial disciplinary decision of the Association, including dismissals, may be appealed to [the NBCC within 15 calendar days,] or called for review by the NBCC [within 45 calendar days, as] in accordance with the procedures set forth in the [Code of Procedure. A] *Rules of the Association*. Any disciplinary decision of the NBCC and any decision of the NBCC with respect to statutory disqualification may be called for review by [any member of the NASDR Board not later than its meeting next following the NBCC's decision. A] *the NASD Regulation Board in accordance with the procedures set forth in the Rules of the Association*. Any disciplinary decision of the NBCC or [the NASDR Board] *NASD Regulation Board and any decision of the NBCC or NASD Regulation Board with respect to statutory disqualification* may be called for review by [any member of the NASD Board not later than its meeting next following the decision of the NBCC or NASDR Board but which is 15 calendar days or more following the decision of the NBCC or NASD Board. Any disciplinary decision not appealed or called for review shall become the final action of the Association upon the expiration of the time allowed for appeal or call for review] *the NASD Board in accordance with the procedures set forth in the Rules of the Association*. A respondent has the right to appeal a final action of the Association taken by the NBCC, [NASDR or NASD to the SEC.] *NASD Regulation or NASD to the Commission*.

[2. Statutory Disqualification Decisions—]Any decision of the NBCC with respect to statutory disqualification may be called for review by any member of the NASDR Board not later than its meeting next following the NBCC's decision. A decision of the NBCC or the NASDR Board may be called for review by any member of the NASD Board not

later than its meeting next following the decision of the NBCC or NASDR Board but which is 15 calendar days or more following the decision of the NBCC or the NASDR Board. Any decision that is not called for review shall]

2. *Rule Filings*—Any rule change adopted by the NASD Regulation Board that imposes fees or other charges on persons or entities other than NASD members or that the NASD Regulation Board refers to the NASD Board because in the view of the NASD Regulation Board it raises significant policy issues shall be reviewed and ratified by the NASD Board before becoming the final action of the Association. If the NASD Regulation Board does not refer a rule change to the NASD Board for review, the NASD Regulation Board action will become the final action of the Association [upon expiration of the time allowed for appeal or call for review. A respondent has the right to appeal a final action of the Association taken by the NBCC, NASDR or NASD to the SEC.

3. *Rule Filings*—Any rule change adopted by the NASDR Board that imposes fees or other charges on persons or entities other than NASD members or that the NASDR Board refers to the NASD Board because in the view of the NASDR Board it raises significant policy issues shall be reviewed and ratified by the NASD Board before becoming the final action of the Association. If the NASDR Board does not refer a rule change to the NASD Board for review, the NASDR Board action will become the final action of the Association] unless called for review by any member of the NASD Board not later than its meeting next following the [NASDR] NASD Regulation Board's action but which is 15 calendar days or more following the action of the [NASDR Board.] NASD Regulation Board. Notwithstanding the 15 day requirement, the NASD Board may determine it is advisable to call or not call for review any rule change within the 15 calendar day period following the decision of the NASD Regulation Board. During the process of developing rule proposals, [NASDR] NASD Regulation staff shall consult with and seek the advice of Nasdaq staff before presenting any rule proposal to the [NASDR Board.] NASD Regulation Board.

[4. Notwithstanding the requirements set forth in paragraphs 1 through 3 of this Section, the NASD Board may determine it is advisable to call or not call for review any disciplinary action, statutory disqualification decision, or rule change within the 15 calendar day period following the decision of the

NBCC or the NASDR Board, as applicable.

D] C. Supplemental Delegation Regarding [the Formation of Committees] *Committees*

[1. The NASDR board may designate one or more committees and delegate to such committees such powers and authority, as necessary and appropriate, to act on behalf of the NASDR Board in carrying out the functions and authority delegated to the NASDR by the NASD. Such delegations shall be in conformance with law, the charter and the by-laws and the requirements as set forth below as part of this Plan of Allocation and Delegation. Any action taken by a committee pursuant to delegated authority shall be subject to review, ratification or rejection by the NASDR Board in accordance with procedures established by the NASDR Board.]

1. *Market Regulation Committee*

[(a) National Business Conduct Committee—A National Business Conduct Committee may be created for the purpose of:]

a. *The Market Regulation Committee shall advise the NASD Regulation board on regulatory proposals and industry initiatives relating to quotations, execution, trade reporting the trading practices; advise the NASD Regulation Board in its administration of programs and systems for the surveillance and enforcement of rules governing NASD members' conduct and trading activities in The Nasdaq Stock Market, other markets operated by The Nasdaq Stock Market, the third market for securities listed on a registered exchange, and the over-the-counter market; provide a pool of panelists for those hearing panels that the Chief Hearing Officer or his or her designees determines should include a member of the Market Regulation Committee pursuant to the Rules of the Association; participate in the training of hearing panelists on issues relating to quotations, executions, trade reporting, and trading practices; and review the recommend to the National Business Conduct Committee changes to the Association's Sanction Guidelines.*

[(i) Hearing and deciding appeals of initial disciplinary decisions of the Association.

(ii) Considering and recommending to the NASDR Board policy and rule changes relating to the business and sales practices of NASD members and associated persons.

(iii) Considering and recommending Association enforcement policies,

including policies with respect to fines and other sanctions.

(b) The NBCC shall be composed of at least Eight (8) members of the NASDR Board equally]

b. *The NASD Regulation Board shall appoint the Market Regulation Committee by resolution. The members of the Market Regulation Committee shall be balanced between Industry and Non-Industry committee members.*

[industry Committee Members (including at least one Public Member). If at any time there shall be an odd number of Committee Members, a majority of the Members shall be Non-industry. Each NBCC Member shall be elected to serve a one-year term.]

[2. Other Committees—With respect to any other committees that may be formed pursuant to this Section D for purposes other than those set forth in (1) above, such committee shall be created in accordance with the by-laws by resolution or resolutions adopted by a majority of the whole NASDR Board.]

2. *National Arbitration and Mediation Committee*

a. *The National Arbitration and Mediation Committee shall have the powers and authority pursuant to the Rules of the Association to advise the NASD Regulation Board on the development and maintenance of an equitable and efficient system of dispute resolution that will equally serve the needs of public investors and Association members, to monitor rules and procedures governing the conduct of dispute resolution, and to have such other powers and authority as is necessary to effectuate the purposes of the Rules of the Association.*

b. *The NASD Regulation Board shall appoint the National Arbitration and Mediation Committee by resolution. The members of the National Arbitration and Mediation Committee shall be equally balanced between Industry and Non-Industry committee members.*

III. Delegation to Nasdaq

A. Delegation of Functions and Authority

1. The NASD hereby delegates to Nasdaq and Nasdaq assumes the following responsibilities and functions as a registered securities association:

a. To operate The Nasdaq Stock Market, automated systems supporting The Nasdaq Stock Market, and other markets or systems for non-Nasdaq securities.

b. To provide and maintain a telecommunications network infrastructure linking market participants for the efficient processing

and handling of quotations, orders, transaction reports, and comparisons of transactions.

c. To collect, process, consolidate, and provide to [NASDR] *NASD Regulation* the information requisite to operation of the surveillance audit trail.

d. To develop and adopt rule changes

(i) applicable to the collection, processing, and dissemination of quotation and transaction information for securities traded on The Nasdaq Stock Market, on other markets operated by The Nasdaq Stock Market, in the third market for securities listed on a registered exchange, and in the over[-]-the[-]-counter market, (ii) for Nasdaq[-]-operated trading systems for these securities, and (iii) establishing trading practices with respect to these securities.

e. To develop and adopt rules, interpretations, policies, and procedures to maintain and enhance the integrity, fairness, efficiency, and competitiveness of The Nasdaq Stock Market and other markets operated by The Nasdaq Stock Market.

f. To act as a Securities Information Processor for quotations and transaction information related to securities traded on The Nasdaq Stock Market and other markets operated by The Nasdaq Stock Market.

g. To act as processor under the Nasdaq/Unlisted Trading Privileges Plan to collect, consolidate, and disseminate quotation and transaction reports in eligible securities from all Plan Participants in a fair and non[-]-discriminatory manner.

h. To administer the Association's involvement in National Market System Plans related to Nasdaq/Unlisted Trading Privileges or the trading in the third market for securities listed on a registered exchange.

i. To develop, adopt, and administer rules governing listing standards applicable to securities traded on The Nasdaq Stock Market and the issuers of those securities.

j. To establish standards for participation in The Nasdaq Stock Market[,] and other markets or systems operated by Nasdaq, and determine in accordance with Association and Nasdaq procedures if: (i) persons seeking to participate in any of such markets and systems have met the standards established for participants; and (ii) persons participating in any of the markets or systems continue to meet the standards established for participants.

k. To establish and assess listing fees upon issuers and fees for the products and services offered by Nasdaq.

l. To establish the annual budget and business plan for Nasdaq.

m. To determine allocation of Nasdaq resources.

n. To manage external relations on matters related to trading on and the operation and functions of The Nasdaq Stock Market, other markets operated by The Nasdaq Stock Market and systems operated by the Nasdaq Stock Market with Congress, the [SEC] *Commission*, state regulators, other self-regulatory organizations, business groups, and the public.

o. To operate Stockwatch in conjunction with NASD Regulation pursuant to Section IV.

2. All action taken pursuant to authority delegated pursuant to (1) shall be subject to the review, ratification, or rejection by the NASD Board in accordance with procedures established by the NASD Board.

[B. Board of Directors

1. Composition—As of January of 1997 the Nasdaq Board of Directors ("Nasdaq Board") shall be composed of at least Eleven (11) and not more than Fifteen (15) Directors. The President of Nasdaq shall be a member of the Nasdaq Board and the remaining Members shall be equally balanced between Industry and Non-industry Directors, including at least two (2) Public Directors. If at any time there shall be an odd number of Directors, excluding the President, a majority of the Directors other than the President shall be Non-industry. In the event that the Nasdaq Board shall consist of more than Twelve (12) Members, at least Three (3) shall be Public Directors. The CEO of NASD shall be an ex-officio non-voting member of the Nasdaq Board.

2. Election Procedures

a. The National Nominating Committee shall propose to the NASD Board nominees for each position on the Nasdaq Board.

b. Terms of Office and Vacancies: The terms of office of Directors and the procedures for the filling of vacancies shall be the same as those set forth under I.C.4. and 5. above.]

[C.] B. Nasdaq Board Procedures

1. Listing/Delisting Decisions—Any initial decision of Nasdaq staff concerning the listing or delisting of securities on The Nasdaq Stock Market may be appealed to the Nasdaq Listing and Hearing Review Committee ("Listing Committee") within 15 calendar days, or called for review by any member of the Listing Committee within 45 days, as set forth in the Code of Procedure. A decision of the Listing

Committee may be called for review by any member of the Nasdaq Board not later than its meeting next following the Listing Committee's decision. A decision of the Nasdaq Board may be called for review by any member of the NASD Board not later than its meeting next following the Nasdaq Board's decision but which is 15 calendar days or more following the decision of the Listing Committee or the Nasdaq Board. Any decision not appealed or called for review shall become the final action of the Association upon expiration of the time allowed for appeal or call for review. An issuer has the right to appeal a final action of the Association taken by the Listing Committee, Nasdaq Board or NASD to the SEC.

2. Rule Filings—Any rule change adopted by the Nasdaq Board that imposes fees or other charges on persons or entities other than NASD members or issuers or that the Nasdaq Board determines to refer to the NASD Board because in the view of the Nasdaq Board it raises significant policy issues shall be reviewed and ratified by the NASD Board before becoming the final action of the Association. If the Nasdaq Board does not refer a rule change to the NASD Board for review, the Nasdaq Board action will become the final action of the Association unless called for review by any member of the NASD Board not later than its meeting next following the Nasdaq Board's action but which is 15 calendar days or more following the action of the Nasdaq Board. During the process of developing rule proposals, Nasdaq staff shall consult with and seek the advice of NASDR staff before presenting any rule proposal to the Nasdaq Board.

3. Notwithstanding the requirements set forth in paragraphs 1 and 2 of this Section, the NASD Board may determine it is advisable to call for review any listing/delisting decision or rule change within the 15 calendar day period following the decision of the Listing Committee or the Nasdaq Board, as applicable.

[D.] C. Supplemental Delegation Regarding [the Formation of Committees] *Committees*

[The Nasdaq Board may designate one or more committees and delegate to such committees such powers and authority, as necessary and appropriate, to act on behalf of the Nasdaq Board in carrying out the functions and authority delegated to Nasdaq by the NASD. Such delegations shall be in conformance with law, the charter and the by-laws and the requirements as set forth below as part of this Plan of Allocation and Delegation. Any action taken by a

committee pursuant to delegated authority shall be subject to review, ratification or rejection by the Nasdaq Board.

1. Specific Committees

a.] 1. Quality of Markets Committee ("QOMC")

[(1)](a) The QOMC shall be a committee appointed by the Nasdaq Board and shall have the following functions:

[(i)](1) To provide advice and guidance to the Nasdaq Board on issues relating to the fairness, integrity, efficiency, and competitiveness of the information, order handling and execution mechanisms of The Nasdaq Stock Market, other markets operated by The Nasdaq Stock Market, and systems operated by The Nasdaq Stock Market from the perspective of investors, both individual and institutional, retail firms, market making firms, Nasdaq[-]listed companies, and other participants in The Nasdaq Stock Market.

[(ii)](2) To advise the Nasdaq Board with respect to national market systems plans and linkages between the facilities of Nasdaq and registered exchanges.

[(2)](b) The QOMC will have broad representation that is equally balanced between [industry] *Industry* and [non-industry] *Non-Industry* committee members. The committee members shall include broad representation of participants in The Nasdaq Stock Market, including investors, market makers, integrated retail firms, and order entry firms.

[b] 2. Market Operations Review Committee ("MORC")

[(1)](a) The MORC shall be a committee appointed by the Nasdaq Board and shall exercise the functions contained in [Section 70] *Rule 11890* of the [Uniform Practice Code ("UPC"),] *Rules of the Association* in accordance with the procedures specified therein. [NASDR] *NASD Regulation* shall receive weekly reports of all determinations made by the staff or MORC under [Section 70 of the UPC] *Rule 11890* for regulatory review.

[(2)](b) The MORC shall be appointed by resolution of the Nasdaq Board and shall have no more than [Fifty (50)] 50 percent of its members directly engaged in market making activity or employed by a member firm whose revenues from market making activity exceed 10 [%] percent of its total revenues.

[c] 3. Firm Operations and Clearance Committee ("FOCC")

[(1)](a) The FOCC shall be a committee appointed by the Nasdaq

Board and shall have the following functions:

[(i)](1) To issue interpretations or rulings with respect to [Sections 4–10, 12, 46, 67–68 and 71 of the UPC] *Rules 11130–11180, 11200–11220, 11320, 11620, 11830, 11880 of the Rules of the Association*, as well as any other provision of the [UPC] *Rule 11000 Series* pertaining to transactions and post execution processing.

[(ii)](2) To advise the Nasdaq Board with respect to modifications to the [UPC] *Rule 11000 Series* dealing with the transactions and post execution processing.

[d] 4. Nasdaq Listing and Hearing Review Committee ("Listing Committee")

[(1)](a) The Listing Committee shall be a committee appointed by the Nasdaq Board and shall have the following functions:

[(i)](1) To advise the Nasdaq Board on the formulation or modification of initial or maintenance eligibility criteria and fees applicable to securities listed on The Nasdaq Stock Market or traded on other markets operated by The Nasdaq Stock Market.

[(ii)](2) To exercise the functions set forth in [Article IX] *the Rules* of the [Code of Procedure] *Association*, in accordance with the procedures specified therein.

[(2)](b) The Listing Committee shall be appointed by resolution of the Nasdaq Board and shall have no more than [Fifty (50)] 50 percent of its members directly engaged in market making activity or employed by a member firm whose revenues from market making activity exceed 10[%] percent of its total revenues.

[2. Other Committees

With respect to any other committees that may be formed pursuant to this Section D for purposes other than those set forth in (1) above, such committee shall be created in accordance with the By-laws by resolution or resolutions adopted by a majority of the whole Nasdaq Board.

E.] IV. Stockwatch

The Stockwatch section handles the trading halt functions for The Nasdaq Stock Market and exchange-listed securities traded in the over-the-counter market (i.e., the Third Market). Review of all questionable market activity, possible rule infractions or any other matters that require any type of investigative or regulatory follow-up will be referred to and conducted by [NASDR] *NASD Regulation*, which will assume sole responsibility for the matter

until resolution. This responsibility will include examinations, investigations, document requests, and any enforcement actions that [the NASDR] *NASD Regulation* may deem necessary. [NASDR] *NASD Regulation* staff at all times will have access to all records and files of the Stockwatch function.

* * * * *

Restated Certificate of Incorporation of National Association of Securities Dealers, Inc.

The present name of the corporation is National Association of Securities Dealers, Inc. [(the "Corporation"). The Corporation] ("*NASD*"). *The NASD* was originally incorporated as a nonstock corporation under the name of Investment Bankers Conference, Inc., and its original Certificate of Incorporation was filed with the Secretary of State of the State of Delaware on September 3, 1936. This Restated Certificate of Incorporation of the [Corporation] *NASD*, which both restates and further amends the provisions of the [Corporation's] *NASD's* Certificate of Incorporation as heretofore amended, was duly adopted in accordance with the provisions of Sections 242 and 245 of the General Corporation Law of the State of Delaware.

Name

First: The name of the [Corporation] *corporation* is National Association of Securities Dealers, Inc.

Delaware Office and Agent

Second: The registered office of the [Corporation] *NASD* in the State of Delaware is located at 1209 Orange Street, in the City of Wilmington, County of New Castle. The name and address of its registered agent is the Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware.

Objects or Purposes

Third: The nature of the business or purposes to be conducted or promoted is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware, and, without limiting the generality of the foregoing, the business or purposes to be conducted or promoted shall include the following:

(1) To promote through cooperative effort the investment banking and securities business, to standardize its principles and practices, to promote therein high standards of commercial honor, and to encourage and promote among members observance of Federal and [State] *state* securities laws;

(2) To provide a medium through which its membership may be enabled to confer, consult, and cooperate with governmental and other agencies in the solution of problems affecting investors, the public, and the investment banking and securities business;

(3) To adopt, administer, and enforce rules of fair practice and rules to prevent fraudulent and manipulative acts and practices, and in general to promote just and equitable principles of trade for the protection of investors;

(4) To promote self-discipline among members, and to investigate and adjust grievances between the public and members and between members;

(5) To establish, and to register with the Securities and Exchange Commission as, a national securities association pursuant to Section 15A of the Securities Exchange Act of 1934, as amended, and thereby to provide a medium for effectuating the purposes of said [section;] *Section*; and

(6) To transact business and to purchase, hold, own, lease, mortgage, sell, and convey any and all property, real and personal, necessary, convenient, or useful for the purposes of the [Corporation;] *NASD*.

The objects and purposes specified in the foregoing clauses shall, except where otherwise expressed, not be limited or restricted by reference to, or inference from, the terms of any other clause in this [certificate of incorporation] *Restated Certificate of Incorporation*, but the objects and purposes specified in each of the foregoing clauses of this [article] *Article* shall be regarded as independent objects and purposes.

Form of Organization

Fourth: [This Corporation] *The NASD* shall be a membership corporation and shall have no capital stock. The [Corporation] *NASD* is not organized and shall not be conducted for profit, and no part of its net revenues or earnings shall inure to the benefit of any individual, subscriber, contributor, or member.

Except as may be otherwise provided by [applicable law] *the General Corporation Law of the State of Delaware* or this Restated Certificate of Incorporation, the members of the [Corporation] *NASD* shall have no voting rights. Notwithstanding the foregoing, the members shall be entitled to vote for the election of Governors and on any amendment to the By-Laws of the [Corporation] *NASD* in accordance with the procedures for such a vote as provided in the By-Laws.

Except as may be otherwise provided by *the General Corporation Law of the*

State of Delaware, other applicable law or this Restated Certificate of Incorporation, the conditions, method of admission, qualifications and classifications of membership, the limitations, rights, powers and duties of members, the dues, assessments, and contributions of members, the method of expulsion from and termination of membership, and all other matters pertaining to the membership and the conduct, management, and control of the business, property, and affairs of the [Corporation] *NASD* shall be as provided from time to time in the By-Laws of the [Corporation] *NASD* and the *Rules of the Association*.

Indemnification; Governor Liability

Fifth: (a) [To] *The NASD shall indemnify, and hold harmless, to the fullest extent permitted by [applicable law] the General Corporation Law of the State of Delaware as it presently exists or may [hereafter be amended, the Corporation shall indemnify any person who was or is made] thereafter be amended, any person (and the heirs, executors, and administrators of such person) who, by reason of the fact that he or she is or was a Governor, officer, or employee of the NASD, or is or was a Governor, officer, or employee of the NASD who is or was serving at the request of the NASD as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or non-profit entity, including service with respect to employee benefit plans, is or was a party, or is threatened to be made a party [or is otherwise involved in any]to:*

(i) *any threatened, pending, or completed action, suit, or proceeding, whether civil, criminal, administrative [or investigative,], or investigative (other than an action by or in the right of the NASD) against expenses (including attorneys' fees and disbursements), judgments, fines, and amounts paid in settlement actually and reasonably incurred by such person in connection with any such action, suit, or proceeding; or*

(ii) *any threatened, pending, or completed action or suit by or in the right of the NASD to procure a judgment in its favor against expenses (including attorneys' fees and disbursements) actually and reasonably incurred by such person in connection with the defense or settlement of such action or suit.*

[(b) A Governor of the Corporation shall not be liable to the Corporation or its members for monetary damages for breach of fiduciary duty as a Governor, except to the extent such exemption

from liability or limitation thereof is not permitted under the General Corporation Law as the same exists or may hereafter be amended.]

(b) *The NASD shall advance expenses (including attorneys' fees and disbursements) to persons described in Article Fifth (a); provided, however, that the payment of expenses incurred by such person in advance of the final disposition of the matter shall be conditioned upon receipt of a written undertaking by that person to repay all amounts advanced if it should be ultimately determined that the person is not entitled to be indemnified under this Article Fifth or otherwise.*

(c) *The NASD may, in its discretion, indemnify and hold harmless, to the fullest extent permitted by the General Corporation Law of the State of Delaware as it presently exists or may thereafter be amended, any person (and the heirs, executors, and administrators of such persons) who, by reason of the fact that he[, or a person for whom he is the legal representative, is or was a Governor or officer of the Corporation or] or she is or was an agent of the NASD or is or was an agent of the NASD who is or was serving at the request of the [Corporation] NASD as a director, officer, employee, or agent of another corporation [or of a], partnership, [joint venture,] trust, enterprise, or non-profit entity, including service with respect to employee benefit plans, [against all expenses, liability, and loss reasonably incurred or suffered by such person, and the Corporation shall advance expenses (including attorneys' fees) to such person.] was or is a party, or is threatened to be made a party to any action or proceeding described in Article Fifth (a).*

(d) *The NASD may, in its discretion, pay the expenses (including attorneys' fees and disbursements) reasonably and actually incurred by an agent in defending any action, suit, or proceeding in advance of its final disposition; provided, however, that the payment of expenses incurred by such person in advance of the final disposition of the matter shall be conditioned upon receipt of a written undertaking by that person to repay all amounts advanced if it should be ultimately determined that the person is not entitled to be indemnified under this Article Fifth or otherwise.*

(e) Notwithstanding the foregoing[, the Corporation shall be required to indemnify a person and advance expenses to such person in connection with a proceeding (or part thereof) commenced by such person only if the commencement of such proceeding (or part thereof) was authorized by the

Board of Governors. The Board of Governors may indemnify and/or advance expenses to any employee or agent of the Corporation to the extent it deems appropriate and to the extent permitted by applicable law. The rights conferred on any person by this Article Fifth(a) shall not be] or any other provision of these By-Laws, no advance shall be made by the NASD to an agent or non-officer employee if a determination is reasonably and promptly made by the Board by a majority vote of those Governors who have not been named parties to the action, even though less than a quorum, or, if there are no such Governors or if such Governors so direct, by independent legal counsel, that, based upon the facts known to the Board or such counsel at the time such determination is made: (1) The person seeking advancement of expenses (i) acted in bad faith, or (ii) did not act in a manner that he or she reasonably believed to be in or not opposed to the best interests of the NASD; (2) with respect to any criminal proceeding, such person believed or had reasonable cause to believe that his or her conduct was unlawful; or (3) such person deliberately breached his or her duty to the NASD.

(f) The indemnification provided by this Article Fifth in a specific case shall not be deemed exclusive of any other rights [which such person may have or hereafter acquire under any statute, provision of this Restated Certificate of Incorporation, By-Law, agreement, vote of members or disinterested Governors or otherwise.] to which a person seeking indemnification may be entitled, both as to action in his or her official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be a Governor, officer, employee, or agent and shall inure to the benefit of such person's heirs, executors, and administrators.

(g) Notwithstanding the foregoing, but subject to Article Fifth (j), the NASD shall be required to indemnify any person identified in Article Fifth (a) in connection with a proceeding (or part thereof) initiated by such person only if the initiation of such proceeding (or part thereof) by such person was authorized by the Board.

(h) The NASD's obligation, if any, to indemnify or advance expenses to any person who is or was serving at its request as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or non-profit entity shall be reduced by any amount such person may collect as indemnification or advancement from such other

corporation, partnership, joint venture, trust, enterprise, or non-profit entity.

(i) Any repeal or modification of the [first sentence] foregoing provisions of this Article Fifth[(b)] shall not adversely affect any right or protection [of a Governor of the Corporation existing hereunder with respect to] hereunder of any person respecting any act or omission occurring prior to the time of such repeal or modification.

(j) If a claim for indemnification or advancement of expenses under this Article Fifth is not paid in full within 60 days after a written claim therefore by an indemnified person has been received by the NASD, the indemnified person may file suit to recover the unpaid amount of such claim and, if successful in whole or in part, shall be entitled to be paid the expense of prosecuting such claim. In any such action, the NASD shall have the burden of proving that the indemnified person is not entitled to the requested indemnification or advancement of expenses under the General Corporation Law of the State of Delaware.

(k) The NASD shall have power to purchase and maintain insurance on behalf of any person who is or was a Governor, officer, employee, or agent of the NASD, or is or was serving at the request of the NASD as a director, officer, employee, or agent of another corporation, partnership, joint venture, trust, enterprise, or non-profit entity against any liability asserted against such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the NASD would have the power to indemnify such person against such liability hereunder.

(l) A Governor shall not be liable to the NASD or its members for monetary damages for breach of fiduciary duty as a Governor, except to the extent such exemption from liability or limitation thereof is not permitted under the General Corporation Law of the State of Delaware as it presently exists or may hereafter be amended.

Perpetual Existence

Sixth: The [Corporation] NASD shall have perpetual existence.

Members' Liability

Seventh: The private property of the members shall not be subject to the payment of corporate debts to any extent whatever.

Governors

Eighth: To the fullest extent permitted by Sections 141(a), 141(j), and 215 of the General Corporation Law of the State of Delaware and other applicable law, the

business and affairs of the [Corporation] NASD shall be managed and the election of Governors shall be conducted in the manner provided in this Restated Certificate of Incorporation and the By-Laws of the [Corporation] NASD. To the extent there is any inconsistency between the provisions of this Restated Certificate of Incorporation and the By-Laws relating to such matters and the General Corporation Law, the provisions of this Restated Certificate of Incorporation and the By-Laws shall govern to the fullest extent permitted by the General Corporation Law and other applicable law. To the fullest extent permitted by the General Corporation Law of the State of Delaware and other applicable law, the Board of Governors may delegate such powers, authority, and functions as it shall determine from time to time, in a manner not inconsistent with the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries," approved by the Securities and Exchange Commission, as amended from time to time.

The [Corporation] NASD shall be managed under the direction of a Board of Governors having such powers and duties as shall be provided from time to time in this Restated Certificate of Incorporation or the By-Laws of the [Corporation] NASD. The Board of Governors shall be the governing body of the [Corporation] NASD. The members of the Board of Governors shall be elected by a plurality of the votes of the members of the [Corporation] NASD present in person or represented by proxy at the annual meeting of the members of the [Corporation] NASD and entitled to vote thereat. Elections shall be by written ballot. Any Governor so elected must be nominated by the National Nominating Committee or certified by the Secretary of the NASD (as provided in the By-[laws]) Laws) and must satisfy the other qualifications for Governors set forth in the By-Laws or established by resolution of the Board of Governors from time to time, which qualifications shall be consistent with the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries[]" as approved by the Securities and Exchange Commission, as amended from time to time.]. "The By-Laws may also provide for such assistants to the Board of Governors, and such officers, agents, and employees, as may be deemed necessary to administer affairs of the [Corporation] NASD.

The Board of Governors shall be divided into three classes. Each Governor shall hold office for a term of not more than three years, such term to

be fixed by the Board at the time of the nomination or certification of such Governor, or until [his] a successor is duly elected and qualified, or until [his] death, resignation, disqualification, or removal. Except for the Chief Executive Officer, no Governor may serve more than two consecutive terms, provided, however, that if a Governor is appointed to fill a term of less than one year, such Governor may serve up to two consecutive terms following the expiration of such Governor's [current] initial term. The Chief Executive Officer of the [Corporation] NASD shall serve as a member of the Board until [his] a successor is selected and qualified, or until [his] death, resignation, disqualification, or removal.

In furtherance and not in limitation of the powers granted by [applicable law] the *General Corporation Law of the State of Delaware*, the Board of Governors is expressly authorized unless the By-Laws otherwise provide, to make, alter, or repeal the By-Laws of the [Corporation] NASD.

In the event of the refusal, failure, neglect, or inability of any member of the Board of Governors to discharge [his] such member's duties, or for any cause affecting the best interest of the [Corporation] NASD the sufficiency of which the Board of Governors shall be the sole judge, the Board shall have the power, by the affirmative vote of two-thirds of the Governors then in office, to remove such member and declare [his] such member's position vacant and that it shall be filled in accordance with the provisions of the By-Laws.

The [Corporation] NASD may, in its By-Laws, confer powers upon its Board of Governors in addition to the foregoing and in addition to the powers and authorities expressly conferred upon them by [applicable law.] the *General Corporation Law of the State of Delaware*.

Meetings and Offices

Ninth: Both members and the Board of Governors shall have power, if the By-Laws so provide, to hold their meetings and to have one or more offices within or without the State of Delaware and to keep the books of the [Corporation] NASD (subject to the provision of the statutes), outside the State of Delaware at such places as may be from time to time designated by the Board of Governors.

Right to Amend Certificate of Incorporation

Tenth: The [Corporation] NASD reserves the right to amend, alter, change, or repeal any provisions contained in this [certificate of

incorporation] *Restated Certificate of Incorporation*, in the manner now or hereafter prescribed by statute, and all rights conferred upon members herein are granted subject to this reservation.

IN WITNESS WHEREOF, this Restated Certificate of Incorporation has been signed under the seal of the [Corporation] NASD this _____ day of[, 1996] _____, 1997.

NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC.

By: _____
[signature]

[printed name]

[title]

Attest: _____

[title]

* * * * *

Restated Certificate of Incorporation of NASD Regulation, Inc.

The undersigned, Mary Schapiro, President of NASD Regulation, Inc. ("NASD Regulation"), a Delaware corporation, does hereby certify:

FIRST: That [The] the name of the corporation is NASD Regulation, Inc. The date of filing of its original Certificate of Incorporation with the Secretary of State of the State of Delaware was January 25, 1996. The name under which NASD Regulation was originally incorporated was NASD Regulation, Inc.

SECOND: [The address of the Corporation's] That the Certificate of Incorporation of NASD Regulation has been amended and restated in its entirety as follows:

Article First

The name of the corporation is NASD Regulation, Inc.

Article Second

The address of NASD Regulation's registered office in the State of Delaware is 1209 Orange Street, City of Wilmington, County of New Castle, 19801. The name of [the Corporation's] NASD Regulation's registered agent at such address is The Corporation Trust Company.

Article Third

[THIRD:] The purpose of [the Corporation] NASD Regulation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware[.], and, without limiting the generality of the foregoing business or purposes to be conducted or promoted, shall include the

responsibilities and functions set forth in the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries," as approved by the Securities and Exchange Commission, as amended from time to time. NASD Regulation [The Corporation] is not organized for profit and no part of the net earnings of [the Corporation] NASD Regulation shall inure to the benefit of any private stockholder or individual.

Article Fourth

[FOURTH:] The total number of shares of stock which [the Corporation] NASD Regulation shall have authority to issue is 2,000, par value \$0.01 per share, all of which shall be shares of common stock.

Article Fifth

[FIFTH:] (a) The business and affairs of [the Corporation] NASD Regulation shall be managed by or under the direction of the Board of Directors. The qualifications, number, tenure, powers, and duties of the members of the Board of Directors shall be provided in the By-Laws. Except as otherwise provided in this Restated Certificate of Incorporation, the By-Laws shall specify the manner by which directors of [the Corporation] NASD Regulation shall be nominated and elected.

(b) Unless and except to the extent that the By-Laws of NASD Regulation [the Corporation] shall so require, the election of directors of [the Corporation] NASD Regulation need not be by written ballot.

[SIXTH:] To the fullest extent permitted by applicable law as it presently exists or may hereafter be amended, the Corporation shall indemnify any person who was or is made or is threatened to be made a party or is otherwise involved in any action, suit, or proceeding, whether civil, criminal, administrative or investigative, by reason of the fact that he, or a person for whom he is the legal representative, is or was a director or officer of the Corporation or is or was serving at the request of the Corporation as a director, officer, employee or agent of another corporation or of a partnership, joint venture, trust, enterprise or non-profit entity, including service with respect to employee benefit plans, against all expenses, liability, and loss reasonably incurred or suffered by such person, and the Corporation shall advance expenses (including attorneys' fees) to such person. Notwithstanding the foregoing, the Corporation shall be required to indemnify a person and advance expenses to such person in connection with a proceeding (or part thereof)

commenced by such person only if the commencement of such proceeding (or part thereof) was authorized by the Board of Directors. The rights conferred on any person by this Article SIXTH shall not be exclusive of any other rights which such person may have or hereafter acquire under any statute, provision of this Certificate of Incorporation, By-Law, agreement, vote of stockholders or disinterested directors or otherwise.]

Article Sixth

[SEVENTH:] A director of [the Corporation] *NASD Regulation* shall not be liable to [the Corporation] *NASD Regulation* or its [stockholders] *stockholder* for monetary damages for breach of fiduciary duty as a director, except to the extent such exemption from liability or limitation thereof is not permitted under the General Corporation Law as the same exists or may hereafter be amended. Any repeal or modification of the first sentence of this Article [SEVENTH] *SIXTH* shall not adversely affect any right or protection of a director of [the Corporation] *NASD Regulation* existing hereunder with respect to any act or omission occurring prior to such repeal or modification.

Article Seventh

[EIGHTH:] In furtherance and not in limitation of the powers conferred by the laws of the State of Delaware, the Board of Directors is expressly authorized and empowered to make, alter, and repeal the By-Laws of [the Corporation] *NASD Regulation*, subject to the power of the [stockholders of the Corporation] *stockholder of NASD Regulation* to alter or repeal any By-Law made by the Board of Directors.

Article Eighth

[NINTH: The Corporation] *NASD Regulation* reserves the right [at any time, and from time to time,] to amend, alter, change, or repeal any provision contained in this *Restated Certificate of Incorporation*, [and other provisions authorized by the laws of the State of Delaware at the time in force may be added or inserted,] in the manner now or hereafter prescribed by [law; and all rights, preferences and privileges of whatsoever nature conferred upon stockholders, directors or any other persons whomsoever by and pursuant to this Certificate of Incorporation in its present form or as hereafter amended] *statute, and all rights conferred herein* are granted subject to [the rights reserved in this Article NINTH.] *this reservation*.

Article Ninth

[TENTH: The Corporation] *NASD Regulation* shall have perpetual existence.

[ELEVENTH: The name and mailing address of the incorporator is Joseph R. Hardiman, c/o National Association of Securities Dealers, Inc., 1735 K Street, N.W., Washington, D.C. 20006.

[TWELFTH: The powers of the Incorporator shall terminate upon the filing of this] *THIRD: That such Restated Certificate of Incorporation*]. The names and mailing addresses of the persons who are to serve as the directors of the Corporation until the first annual meeting of the stockholders of the Corporation, or until their successors are elected and qualified are Joseph R. Hardiman, c/o National Association of Securities Dealers, Inc., 1735 K Street, N.W., Washington, D.C. 20006, Richard G. Ketchum, c/o National Association of Securities Dealers, Inc., 1735 K Street, N.W., Washington, D.C. 20006 and Mary Schapiro, c/o National Association of Securities Dealers, Inc., 1735 K Street, N. W., Washington, D. C. 20006.] *has been duly adopted by the stockholder of NASD Regulation in accordance with the applicable provisions of Sections 242 and 245 of the General Corporation Law of the State of Delaware.*

IN WITNESS WHEREOF, [I, the undersigned, being the sole incorporator hereinabove named, hereby acknowledge that the foregoing Certificate of Incorporation is my act and deed and further certify that the facts hereinabove stated are truly set forth, and accordingly I have hereunto set my hand this _____ day of January, 1996.] *the undersigned have executed this certificate this _____ day of _____, 1997.*

[Incorporator] *Mary Schapiro*
President

Attest: _____
Alden S. Adkins
General Counsel

* * * * *

Restated Certificate of Incorporation of the NASDAQ Stock Market, Inc.

[Adopted in accordance with the provisions of Section 242 and Section 245 of the General Corporation Law of the State of Delaware]

[The undersigned, Joseph R. Hardiman] *The undersigned, Alfred Berkeley*, President of The Nasdaq Stock Market, Inc. ("*Nasdaq*"), a Delaware corporation [(the "*Corporation*")], does hereby certify:

FIRST: That the name of the [Corporation] *corporation* is The Nasdaq Stock Market, Inc. The date of filing of

its original Certificate of Incorporation with the Secretary of State of the State of Delaware was November 13, 1979. The name under which [the Corporation] *Nasdaq* was originally incorporated was "NASD Market Services, Inc."

SECOND: That the Certificate of Incorporation of [the Corporation] *Nasdaq* has been amended and restated in its entirety as follows:

Article First

The name of the [Corporation] *corporation* is The Nasdaq Stock Market, Inc.

Article Second

The address of [the Corporation's] *Nasdaq's* registered office in the State of Delaware is 1209 Orange Street, *City of Wilmington, [Delaware 19801,] County of New Castle, Delaware 19801*. The name of [its] *Nasdaq's* registered agent at such address is The Corporation Trust Company.

Article Third

The nature of the business or purposes to be conducted or promoted is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of the State of Delaware, and, without limiting the generality of the foregoing business or purposes to be conducted or promoted, *shall include the responsibilities and functions set forth in the "Plan of Allocation and Delegation of Functions by NASD to Subsidiaries," as approved by the Securities and Exchange Commission, as amended from time to time.* [shall include the following:

(a) to investigate, study, organize, develop, maintain and operate, and to assist and contract with others for the investigation, study, organization, development, maintenance and operation of systems for collecting, processing, and preparing for distribution and publication, and otherwise assisting, participating in, and coordinating the distribution and publication of information with respect to transactions in and quotations for securities by means of an electronic data processing system or systems, as such may be required or permitted by federal statute and regulation (in particular the Securities Exchange Act of 1934 ("Exchange Act") and the regulations thereunder, as either may be amended from time to time) on a current and continuing basis, consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets in securities, and the removal if impediments to and

perfection of the mechanism of a national market system;

(b) to organize, develop, operate and maintain securities markets and related systems that assure: (i) economically efficient execution, clearance and settlement of securities transactions; (ii) fair competition among brokers and dealers, and among exchange markets and markets other than exchange markets; (iii) the practicability of broker/dealers executing inventors' orders in the best market; (iv) the linking of all markets for qualified securities through communications and data processing facilities; and (v) appropriate regulatory oversight;

(c) to develop, organize, operate and maintain securities markets and related systems that will assist the National Association of Securities Dealers, Inc. in carrying out its regulatory responsibilities under the Exchange Act, particularly Sections 11A and 15A and all applicable rules promulgated under the Exchange Act;

(d) to establish terms, conditions, rules, regulations, orders, and schedules for the operation, maintenance, and regulation of methods, means and systems established by the Corporation; and

(e) to offer consulting services respecting the organization, development, operation, and maintenance of securities market systems and facilities, including systems and procedures for regulatory oversight of trading in securities markets.]

Article Fourth

[The Corporation] *Nasdaq* shall be authorized to issue a total of 2,000 shares of common stock with no par value.

Article Fifth

[The Corporation] *Nasdaq* shall be governed by the Board of Directors of such number and having such qualifications, powers, and duties[,] as shall be provided in the By-Laws. The Board shall be selected in such manner, and shall serve for such term, as shall be stated in the By-Laws. The Board of Directors shall have the power to adopt, alter, or repeal the By-Laws of [the Corporation] *Nasdaq* at any meeting at which a quorum is present by the affirmative vote of the majority of the whole Board of Directors.

A [Director of this Corporation] *director of Nasdaq* shall not be liable to [the Corporation] *Nasdaq* or its stockholders for monetary damages for breach of fiduciary duty as a director, except to the extent that such exemption from liability or limitation thereof is not

permitted under the General Corporation Law of the State of Delaware as the same exists or may hereafter be amended.

Any repeal or modification of the foregoing paragraph shall not adversely affect any right or protection of a director of [the Corporation] *Nasdaq* existing hereunder with respect to any act or omission occurring prior to such repeal or modification.

Article Sixth

Nasdaq reserves the right to amend, alter, change, or repeal any provisions contained in this Restated Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred herein are granted subject to this reservation.

Article Seventh

Nasdaq [The Corporation] shall have perpetual existence.

THIRD: That such Restated Certificate of Incorporation has been duly adopted by the [stockholders of the Corporation] *stockholder of Nasdaq* in accordance with the applicable provisions of Sections 242 and 245 of the General Corporation Law of the State of Delaware.

IN WITNESS WHEREOF, the undersigned have executed this certificate this _____ day of __, 199__.

[Joseph R. Hardiman] *Alfred Berkeley*
President

Attest:

Robert E. Aber
[Secretary] *General Counsel*

* * * * *

Rule 0120

0120. Definitions

When used in these Rules, unless the context otherwise requires:

(a) "Act"

The term "Act" means the Securities Exchange Act of 1934, as amended.

(b) "Association"

The term "Association" means, *collectively, the NASD, NASD Regulation, and Nasdaq*. [National Association of Securities Dealers, Inc., (NASD) a nonprofit membership corporation organized under the laws of the State of Delaware.]

(c) "By-Laws"

The term "By-Laws" means the By-Laws of the Corporation.

(d) "Code of Procedure"

The term "Code of Procedure" means the procedural rules contained in the Rule 9000 Series.

(e) "Commission"

The term "Commission" means the Securities and Exchange Commission (SEC), established pursuant to the Act.

(f) "Completion of the Transaction"

The term "the completion of the transaction" means:

(1) In the case of a customer who purchases a security through or from a member, except as provided in subparagraph (2), the time when such customer pays the member any part of the purchase price, or, if payment is effected by a bookkeeping entry, the time when such bookkeeping entry is made by the member for any part of the purchase price;

(2) In the case of a customer who purchases a security through or from a member and who makes payment therefor prior to the time when payment is requested or notification is given that payment is due, the time when such member delivers the security to or into the account of such customer;

(3) In the case of a customer who sells a security through or to a member, except as provided in subparagraph (4), if any security is not in the custody of the member at the time of sale, the time when the security is delivered to the member, and if the security is in the custody of the member at the time of sale, when the member transfers the security from the account of such customer;

(4) In the case of a customer who sells a security through or to a member and who delivers such security to such member prior to the time when delivery is requested or notification is given that delivery is due, the time when such member makes payment to or into the account of such customer.

(g) "Customer"

The term "customer" shall not include a broker or dealer.

(h) "Fixed Price Offering"

The term "fixed price offering" means the offering of securities at a stated public offering price or prices, all or part of which securities are publicly offered in the United States or any territory thereof, whether or not registered under the Securities Act of 1933, except that the term does not include offerings of "exempted securities" or "municipal securities" as those terms are defined in Sections 3(a)(12) and 3(a)(29), respectively, of the Act or offerings of redeemable securities of investment companies registered pursuant to the Investment Company Act of 1940 which are offered at prices determined by the net asset value of the securities.

(i) "Member"

The term "member" means any individual, partnership, corporation or other legal entity admitted to

membership in the Association under the provisions of Articles II and III of the By-Laws.

(j) "NASD"

The term "NASD" means NASD, Inc.

(k) "Nasdaq"

The term "Nasdaq" means The Nasdaq Stock Market, Inc.

(l) "NASD Regulation"

The term "NASD Regulation" means NASD Regulation, Inc.

(m) "National Business Conduct Committee"

The term "National Business Conduct Committee" means the committee of the Board of Directors of NASD Regulation which may be authorized and directed to act for the Board of Directors of NASD Regulation in a manner consistent with the By-Laws of NASD Regulation, the Rules of the Association, and the Delegation Plan with respect to (1) an appeal or review of a disciplinary proceeding; (2) a statutory disqualification decision; (3) a review of a membership proceeding; (4) a review of an offer of settlement, a letter of acceptance, waiver, and consent, and a minor rule violation plan letter; (5) the exercise of exemptive authority; and (6) such other proceedings or actions authorized by the Rules of the Association.

(n)(j) "Person"

The term "person" shall include any natural person, partnership, corporation, association, or other legal entity.

(o)(k) "Rules" or "Rules of the Association"

The term "Rules" or "Rules of the Association" means the numbered rules set forth in the NASD Manual beginning with the Rule 0100 Series, as adopted by the Board of Governors of the NASD pursuant to the By-Laws of the NASD, as hereafter amended or supplemented. [means the Rules as adopted pursuant to Article VII of the By-laws, as the same may be hereafter amended or supplemented, as provided in the By-Laws.]

(p)(l) "Selling Group"

The term "selling group" means any group formed in connection with a public offering, to distribute all or part of an issue of securities by sales made directly to the public by or through members of such selling group, under an agreement which imposes no financial commitment on the members of such group to purchase any such securities except as they may elect to do so.

(q)(m) "Selling Syndicate"

The term "selling syndicate" means any syndicate formed in connection with a public offering, to distribute all or part of an issue of securities by sales made directly to the public by or

through participants in such syndicate under an agreement which imposes a financial commitment upon participants in such syndicate to purchase any such securities.

* * * * *

Proposed Rule 0121

0121. Definitions in NASD By-Laws

Unless the context otherwise requires, or unless otherwise defined in these Rules, terms used in the Rules and interpretive material, if defined in the NASD By-Laws, shall have the meaning as defined in the NASD By-Laws.

* * * * *

Proposed Rule IM-2210-4

M-2210-4. Limitations on Use of Association's Name

(a) Use of Association Name

Members may indicate membership in the Association in conformity with Article XVI, Section 2 of the NASD By-Laws in one or more of the following ways:

(1) A member may indicate membership in the Association in recognized trade directories or other similar types of business listings.

(2) A member may indicate membership in the Association in the member's advertisements and sales literature if such use is:

(A) separate from the regular text of the advertisement or sales literature;

(B) in a smaller type size and with less emphasis than that used for the member's name; and

(C) carries no direct or implied indication of Association approval of any security or service discussed in the advertisement or sales literature.

(3) A confirmation form for an over-the-counter transaction may include the following statement: "This transaction has been executed in conformity with the Uniform Practice Code of the National Association of Securities Dealers, Inc."

(4) A member may indicate membership in the Association on the door or entrance way of a member's principal office or a registered branch office in the following manner: "Member, National Association of Securities Dealers, Inc." or "Member of the National Association of Securities Dealers, Inc."

(b) Certification of Membership

Upon request to the Association, a member shall be entitled to receive an appropriate certification of membership, which may be displayed in the principal office or a registered branch office of the member. The certification shall remain the property of the Association and shall be returned by

the member upon request of the NASD Board or the Chief Executive Officer of the Association.

(c) Fraudulent or Misleading Use Prohibited

A member or person associated with a member shall not use the name of the Association in a fraudulent or misleading manner in connection with the promotion or sale of any security or in connection with any other aspect of the member's business or imply orally, visually, or in writing that the Association endorses, indemnifies, or guarantees a member's business practices, selling methods, or class or type of securities offered.

(d) Violation of Rule 2110

An improper, fraudulent, or misleading use of the Association's name by a member or person associated with a member shall be deemed conduct inconsistent with high standards of commercial honor and just and equitable principles of trade in violation of Rule 2110.

* * * * *

Membership and Registration Rules¹³⁰

The Tables of Contents

1000. MEMBERSHIP, REGISTRATION AND QUALIFICATION REQUIREMENTS

IM-1000-1. Filing of Misleading Information as to Membership or Registration

IM-1000-2. Status of Sole Proprietors and Registered Representatives Serving in the Armed Forces

IM-1000-3. Failure to Register Personnel

IM-1000-4. Appointment of Executive Representative

1010. Application for Membership

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1012. General Provisions

1013. Application and Membership Interview

1014. Department Decision

1015. Review by the National Business Conduct Committee

1016. Discretionary Review by Boards

1017. Application to Commission for Review

1018. Removal or Modification of Business Restrictions

1019. Change in Ownership, Control, or Operations

* * * * *

¹³⁰The Tables of Contents for the proposed Rule 1010 Series, the proposed Rule 8000 Series, and the proposed Rule 9000 Series are included as a convenience to guide the reader through a lengthy document, but are not part of the proposed rule change.

Rule 1010 Series**1010. Membership Proceedings****1011. Definitions**

Unless otherwise provided, terms used in the Rule 1010 Series shall have the meaning as defined in Rule 0120.

(a) "Applicant"

The term "Applicant" means a person or entity that applies for membership in the Association in accordance with Rule 1013 or seeks to remove or modify a restriction in accordance with Rule 1018.

(b) "Associated Person"

The term "Associated Person" means a sole proprietor, partner, officer, director, branch manager, or natural person occupying a similar status or performing similar functions who will be or is anticipated to be associated with the Applicant, or any natural person engaged in the investment banking or securities business who will be or is anticipated to be directly or indirectly controlling or controlled by the Applicant, whether or not any such person is registered or exempt from registration under the NASD By-Laws or the Rules of the Association.

(c) "Department"

The term "Department" means the Department of Member Regulation of NASD Regulation, Inc.

(d) Director

The term "Director" means a member of the NASD Regulation Board, excluding the Chief Executive Officer of the NASD.

(e) "district"

The term "district" means a district established by the NASD Regulation Board under Article VIII, Section 8.1 of the NASD Regulation By-Laws.

(f) "district office"

The term "district office" means an office of NASD Regulation, Inc. located in a district.

(g) "Governor"

The term "Governor" means a member of the NASD Board.

(h) "Interested Association Staff"

The term "Interested Association Staff" means an employee who directly participates in a decision on a membership application or in a decision under Rule 1018 or 1019, an employee who directly supervises an employee with respect to such decision, an employee who conducted an investigation or examination of a member that files an application under Rule 1018 or a notice under Rule 1019, the District Director for the relevant district, and the head of the Department.

(i) "NASD Board"

The term "NASD Board" means the Board of Governors of the NASD.

(j) "NASD Regulation Board"

The term "NASD Regulation Board" means the Board of Directors of NASD Regulation.

(k) "sales practice violations"

The term "sales practice violations" means any conduct directed at or involving a customer that would constitute a violation of any Rule in the Rule 2000 or 3000 Series, any provision of the Act, or any state statute prohibiting fraudulent conduct in connection with the offer, sale, or purchase of a security or in connection with the rendering of investment advice.

(l) "Subcommittee"

The term "Subcommittee" means a subcommittee of the National Business Conduct Committee that is constituted pursuant to Rule 1015 to conduct a review of a Department decision issued under the Rule 1010 Series.

1012. General Provisions**(a) Service of Notices and Decisions; Filing by Applicant**

Except as provided in Rules 1013 and 1015, a notice or a decision issued by the Association under the Rule 1010 Series with respect to an application shall be served promptly by first-class mail on the Applicant or its counsel. Service by the Association or filing by an Applicant by mail shall be deemed complete upon mailing. Service by the Association or filing by an Applicant by commercial courier or facsimile shall be deemed complete on the date specified in the written confirmation of receipt.

(b) Ex Parte Communications

(1) Unless on notice and opportunity for an Applicant and Interested Association Staff to participate, or to the extent required for the disposition of ex parte matters as authorized by the Rules of the Association:

(A) an Applicant, a counsel or representative of an Applicant, or an Interested Association Staff shall not make or knowingly cause to be made an ex parte communication relevant to the merits of a membership proceeding under the Rule 1010 Series to a Governor, a Director, a member of the National Business Conduct Committee or a Subcommittee thereof, or an Association employee who is participating or advising in a decision of such a person with respect to that proceeding; and

(B) a Governor, a Director, a member of National Business Conduct Committee or a Subcommittee thereof, or an Association employee who is participating or advising in the decision of such a person with respect to a membership proceeding shall not make or knowingly cause to be made to an Applicant, a counsel or representative

of the Applicant, or an Interested Association Staff an ex parte communication relevant to the merits of that proceeding.

(2) A Governor, a Director, a member of the National Business Conduct Committee or a Subcommittee thereof, or an Association employee participating or advising in the decision of such a person, who receives, makes, or knowingly causes to be made a communication prohibited by this paragraph shall place in the record of the membership proceeding:

(A) all such written communications;

(B) memoranda stating the substance of all such oral communications; and

(C) all written responses and memoranda stating the substance of all oral responses to all such communications.

(3) The prohibitions against ex parte communications shall become effective when Association staff has knowledge that an Applicant intends to file a written request for review by the National Business Conduct Committee under Rule 1015.

(c) Recusal or Disqualification

A Governor, a Director, or a member of the National Business Conduct Committee or a Subcommittee thereof shall not participate in a matter governed by the Rule 1010 Series as to which that person has a conflict of interest or bias, or if circumstances otherwise exist where his or her fairness might reasonably be questioned. In such a case, the person shall recuse himself or shall be disqualified as follows:

(1) The Chair of the NASD Board shall have authority to direct the disqualification of a Governor, and the Vice Chair of the NASD Board shall have authority to direct the disqualification of the Chair of the NASD Board.

(2) The Chair of the NASD Regulation Board shall have authority to direct the disqualification of a Director, and the Vice Chair of the NASD Regulation Board shall have authority to direct the disqualification of the Chair of the NASD Regulation Board.

(3) The Chair of the National Business Conduct Committee shall have authority to direct the disqualification of a member of the Committee or a member of a Subcommittee appointed pursuant to Rule 1015, and the Vice Chair of the Committee shall have authority to direct the disqualification of the Chair of the National Business Conduct Committee.

(d) Separation of Review Functions

A Director shall not participate or advise in the decision of a Governor with respect to the review of a membership proceeding under the Rule 1010 Series, and a Governor shall not

participate or advise in the decision of a Director with respect to the review of a membership proceeding under the Rule 1010 Series.

(e) Computation of Time

(1) Calendar Day

In the Rule 1010 Series, "day" means calendar day.

(2) Formula

In computing a period of time under the Rule 1010 Series, the day of the act, event, default, or lapse from which the period of time designated begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays shall be excluded from the computation when the period prescribed is ten days or less.

(f) Membership Application Docket

The Department shall promptly record in the Association's membership application docket each request for review filed with the National Business Conduct Committee under Rule 1015 and each subsequent event, filing, and change in the status of a membership proceeding.

1013. Application and Membership Interview

(a) Filing of Application

(1) Each Applicant for Association membership shall file a written application with the Membership Department, which shall transmit the application to the Department staff at the district office in the district in which the Applicant has or intends to have its principal place of business. An application shall include the following information and documents:

(A) a detailed business plan, in a form prescribed by the Association, that describes all material aspects of the business that will be, or are reasonably anticipated to be, performed at and after the initiation of business operations, and includes:

(i) a trial balance, balance sheet, supporting schedules, and computation of net capital, each of which has been prepared as of a date that is within 30 days before the date of application;

(ii) a monthly projection of income and expenses, with a supporting rationale, for the first twelve months of operations;

(iii) an organizational chart;

(iv) a list of the intended locations of all offices, whether or not such offices would be required to be registered under the Rules of the Association, and the

names of the persons who will be in charge of each office;

(v) a list of the types of securities to be offered and sold and the types of retail or institutional customers to be solicited;

(vi) a description of the methods and media to be employed to develop a customer base and to offer and sell products and services to customers, including the use of the Internet, telephone solicitation, seminars, or mailings;

(vii) a description of the business facilities and a copy of any proposed or final lease;

(viii) the number of markets to be made, if any, the type and volatility of the products, and the anticipated maximum inventory positions;

(ix) any plan to enter into contractual commitments, such as underwritings or other securities-related activities;

(x) any plan to distribute or maintain securities products in proprietary positions, and the risks, volatility, degree of liquidity, and speculative nature of the products; and

(xi) any other activity that the Applicant may engage in that reasonably could have a material impact on capital within the first six months of business operations;

(B) a copy of the Applicant's most recent Form BD;

(C) evidence of all registrations and licenses required by the Commission, state securities authorities, the Municipal Securities Rulemaking Board, the National Securities Clearing Corporation, and self-regulatory organizations, and a copy of any decision by a federal or state authority or self-regulatory organization taking permanent or temporary adverse action with respect to a registration or licensing determination regarding the Applicant or an Associated Person;

(D) a list of all Associated Persons, the most recent Form U-4 and Form U-5 for each Associated Person, any other document that discloses the disciplinary history of each Associated Person, and a list of any other persons or entities that will exercise control with respect to the Applicant's business;

(E) documentation of any:

(i) regulatory action against or investigation of the Applicant or an Associated Person by the Commission, the Commodity Futures Trading Commission, a federal, state, or foreign regulatory agency, or a self-regulatory organization that is pending, adjudicated, or settled;

(ii) investment-related civil action for damages or an injunction against the Applicant or an Associated Person that is pending, adjudicated, or settled;

(iii) investment-related customer complaint or arbitration involving sales practice violations, theft, misappropriation, conversion, or breach of fiduciary duty, against the Applicant or an Associated Person that is pending, settled, or has resulted in an award or judgement; and

(iv) criminal action (other than a minor traffic violation) against the Applicant or an Associated Person that is pending, adjudicated, or that has resulted in a guilty or no contest plea;

(F) a copy of any document evidencing a termination for cause or a permitted resignation after investigation of an alleged violation of a federal or state securities law, a rule or regulation thereunder, a self-regulatory organization rule, or an industry standard of conduct;

(G) a description of any remedial action, such as special training or continuing education requirements or heightened supervision, imposed on an Associated Person by a state or federal authority or self-regulatory organization;

(H) a written acknowledgment that heightened supervisory procedures and special educational programs may be required for an Associated Person whose records reflect: (i) disciplinary actions involving sales practice violations; (ii) customer complaints; or (iii) arbitrations that were resolved adversely to the Associated Person;

(I) a copy of final or proposed contracts with banks, clearing entities, or service bureaus, and a general description of any other final or proposed contracts;

(J) a description of the nature and source of Applicant's capital, including a list of all persons or entities that have contributed or plan to contribute financing to the Applicant's business, the terms and conditions of such financing arrangements, the risk to capital presented by the Applicant's proposed business activities, and any arrangement for additional capital should a business need arise;

(K) a description of the financial controls to be employed by the Applicant;

(L) a description of the Applicant's supervisory system and a copy of its written supervisory procedures, internal operating procedures (including operational and internal controls), compliance procedures, internal inspections plan, written approval process, and qualifications investigations required by Rule 3010;

(M) a description of the number, experience, and qualifications of supervisors and principals and the number, experience, and qualifications of persons to be supervised by such

personnel, the other responsibilities of the supervisors and principals with the Applicant, their full-time or part-time status, any business activities that the supervisors or principals may engage in outside of their association with the Applicant, the hours per week devoted to such activities, and an explanation of how a part-time supervisor or principal will be able to discharge his or her designated functions on a part-time basis;

(N) a description of Applicant's proposed recordkeeping system; and

(O) a copy of the Applicant's written training plan to comply with Firm Element continuing education requirements described in Rule 1120(b), including the name of the Associated Person responsible for implementation.

(2) Within 30 days after the receipt of an application, the Department shall determine whether the application is complete and, if not, shall request additional information or documents. The Department may request additional information or documents at any time during the membership application process.

(3) Unless otherwise agreed by the Department and the Applicant, the Applicant shall file any additional information and documents with the Department within 60 days after the Department's initial request and 30 days after any subsequent request.

(b) Lapse of Application

(1) Absent a showing of good cause, an application for membership shall lapse if an Applicant fails to:

(A) respond fully within 60 days after an initial request for information or documents, within 30 days after any subsequent request, or within such other time period agreed to by the Department and the Applicant; or

(B) appear at or otherwise participate in a scheduled membership interview pursuant to paragraph (c).

(2) The lapse of an application shall require an Applicant continuing to seek membership to submit a new application under paragraph (a).

(c) Membership Interview

(1) Requirement for Interview

Before the Department issues a decision on an application for membership in the Association, the Department shall conduct a membership interview with a representative or representatives of the Applicant.

(2) Service of Notice

At least seven days before the membership interview, the Department shall serve on the Applicant a written notice that specifies the date and time of the interview and the representative or representatives of the Applicant who

are required to participate in the interview. The Department shall serve the notice by facsimile or commercial courier.

(3) Time

Unless the Department directs otherwise for good cause shown, a membership interview shall be scheduled to occur within 90 days after the receipt of an application or within 60 days after the receipt of all additional information or documents requested, whichever is later.

(4) Place

Unless the Department and the Applicant otherwise agree, the membership interview shall be conducted in the district office for the district in which the Applicant has or intends to have its principal place of business.

(5) Review of Standards for Admission

During the membership interview, the Department shall review the standards for admission to membership with the Applicant's representative or representatives and inform them of the Department's preliminary decision, if any, as to whether the Applicant meets each standard.

(6) Information From Other Sources

During the membership interview, the Department shall provide to the Applicant's representative or representatives any information or document that the Department has obtained from the Central Registration Depository or a source other than the Applicant and upon which the Department intends to base its decision under Rule 1014. If the Department receives such information or document after the membership interview or decides to rely on such information after the membership interview, the Department shall promptly serve the information or document and an explanation thereof on the Applicant.

1014. Department Decision

(a) Standards for Admission

After considering the application, the membership interview, other information and documents provided by the Applicant, other information and documents obtained by the Department, and the public interest and the protection of investors, the Department shall determine whether the Applicant meets each of the following standards:

(1) The application and all supporting documents are complete and accurate.

(2) The Applicant and its Associated Persons have all licenses and registrations required by state and federal authorities and self-regulatory organizations.

(3) The Applicant and its Associated Persons are capable of complying with

the federal securities laws, the rules and regulations thereunder, and the Rules of the Association, including observing high standards of commercial honor and just and equitable principles of trade. In determining whether this standard is met, the Department may take into consideration whether:

(A) a state or federal authority or self-regulatory organization has taken permanent or temporary adverse action with respect to a registration or licensing determination regarding the Applicant or an Associated Person;

(B) an Applicant's or Associated Person's records reflect: (i) disciplinary actions involving sales practice violations; (ii) customer complaints; or (iii) arbitrations that were resolved adversely to the Applicant or Associated Person;

(C) an Applicant or Associated Person is the subject of a pending, adjudicated, or settled regulatory action or investigation by the Commission, the Commodity Futures Trading Commission, a federal, state, or foreign regulatory agency, or a self-regulatory organization; a pending, adjudicated, or settled investment-related civil action for damages or an injunction; an investment-related customer complaint or arbitration alleging sales practice violations, theft, misappropriation, conversion, or breach of fiduciary duty that is pending, settled, or has resulted in an award or judgment; or a criminal action (other than a minor traffic violation) that is pending, adjudicated, or that has resulted in a guilty or no contest plea;

(D) an Associated Person was terminated for cause or permitted to resign after an investigation of an alleged violation of a federal or state securities law, a rule or regulation thereunder, a self-regulatory organization rule, or industry standard of conduct;

(E) a state or federal authority or self-regulatory organization has imposed a remedial action, such as special training or continuing education requirements or heightened supervision, on an Associated Person; and

(F) a state or federal authority or self-regulatory organization has provided information indicating that the Applicant or an Associated Person otherwise poses a threat to public investors.

(4) The Applicant has established all contractual or other arrangements and business relationships with banks, clearing corporations, service bureaus, or others necessary to: (i) initiate the operations described in the Applicant's business plan, considering the nature and scope of operations and the number

of personnel; and (ii) comply with the federal securities laws, the rules and regulations thereunder, and the Rules of the Association.

(5) The Applicant has or has adequate plans to obtain facilities that are sufficient to: (i) initiate the operations described in the Applicant's business plan, considering the nature and scope of operations and the number of personnel; and (ii) comply with the federal securities laws, the rules and regulations thereunder, and the Rules of the Association.

(6) The Applicant is capable of maintaining a level of capital in excess of the minimum net capital requirements set forth in SEC Rule 15c3-1 adequate to support the Applicant's intended business operations on a continuing basis, based on information that is current within 30 days before the membership interview. The Department may impose a reasonably determined higher capital requirement for the initiation of operations after considering:

(A) the amount of the capital sufficient to avoid early warning level reporting requirements, such as SEC Rule 17a-11;

(B) the amount of capital necessary to meet expenses net of revenues for at least twelve months, based on reliable projections agreed to by the Applicant and the Department;

(C) any planned market making activities, the number of markets to be made, the type and volatility of products, and the anticipated maximum inventory positions;

(D) any plan to enter into other contractual commitments, such as underwritings or other securities-related activities;

(E) any plan to distribute or maintain securities products in proprietary positions, and the risks, volatility, degree of liquidity, and speculative nature of the products; and

(F) any other activity that the Applicant will engage in that reasonably could have a material impact on capital within the first six months of business operations.

(7) The Applicant has financial controls to ensure compliance with the federal securities laws, the rules and regulations thereunder, and the Rules of the Association.

(8) The Applicant has compliance, supervisory, operational, and internal control practices and standards that are consistent with practices and standards regularly employed in the investment banking or securities business, taking into account the nature and scope of Applicant's proposed business.

(9) The Applicant has a supervisory system, including written supervisory procedures, internal operating procedures (including operational and internal controls), and compliance procedures designed to prevent and detect, to the extent practicable, violations of the federal securities laws, the rules and regulations thereunder, and the Rules of the Association. In evaluating the adequacy of a supervisory system, the Department shall consider the overall nature and scope of the Applicant's intended business operations and shall consider whether:

(A) the number, experience, and qualifications of supervisory personnel are adequate in light of the number, experience, and qualifications of persons to be supervised; the disciplinary history of such persons; any criminal, civil, administrative, or arbitration actions or written customer complaints against such persons; and the number and locations of the offices that the Applicant intends to open;

(B) the Applicant has identified specific Associated Persons to supervise and discharge: (i) each of the functions in Applicant's business plan; and (ii) each of the Applicant's intended offices, whether or not such offices are required to be registered under the Rules of the Association;

(C) each Associated Person identified to discharge a supervisory function in the business plan has at least one year of direct experience or two years of related experience in the subject area;

(D) the Applicant will solicit retail or institutional business;

(E) the Applicant will recommend securities to customers;

(F) the part-time status of a supervisor or principal will affect such person's ability to be an effective supervisor;

(G) the records of an Associated Person reflect: (i) disciplinary actions involving sales practice violations; (ii) customer complaints; or (iii) arbitrations that were resolved adversely to the Associated Person;

(H) any remedial action, such as special training or continuing education requirements or heightened supervision, has been imposed on an Associated Person by a state or federal authority or self-regulatory organization; and

(I) any other condition that will have a material impact on the Applicant's ability to detect and prevent violations of the federal securities laws, the rules and regulations thereunder, and the Rules of the Association.

(10) The Applicant has a recordkeeping system that enables Applicant to comply with federal, state, and self-regulatory organization

recordkeeping requirements and a staff that is sufficient in qualifications and numbers to prepare and preserve required records.

(11) The Applicant has completed a training needs assessment and has a written training plan that complies with the continuing education requirements imposed by the federal securities laws, the rules and regulations thereunder, and the Rules of the Association.

(12) The Association does not possess any information indicating that the Applicant may circumvent, evade, or otherwise avoid compliance with the federal securities laws, the rules and regulations thereunder, or the Rules of the Association.

(13) The application and all supporting documents otherwise are consistent with the federal securities laws, the rules and regulations thereunder, and the Rules of the Association.

(b) Granting or Denying Application

(1) If the Department determines that the Applicant meets each of the standards in paragraph (a), the Department shall grant the application for membership.

(2) If the Department determines that the Applicant does not meet one or more of the standards in paragraph (a) in whole or in part, the Department may:

(A) grant the application subject to one or more restrictions reasonably designed to address a specific financial, operational, supervisory, disciplinary, investor protection, or other regulatory concern based on the standards for admission in Rule 1014(a); or

(B) deny the application.

(c) Submission of Membership Agreement

If the Department grants an application, with or without restriction, the Applicant's approval for membership shall be contingent upon the Applicant's submission of a written membership agreement, satisfactory to the Department, undertaking to:

(1) engage only in the business set forth in the business plan and the membership agreement;

(2) abide by any restriction specified in the Department's decision;

(3) obtain the Department's prior approval of the removal or modification of such a restriction pursuant to Rule 1018; and

(4) notify and obtain the Department's approval of a change in ownership or control or a material change in business operations pursuant to Rule 1019.

The Applicant shall not waive the right to file a written request for review under Rule 1015 by executing a membership agreement under this paragraph.

(d) Decision**(1) Time**

The Department shall issue a written decision on the membership application within 30 days after the conclusion of the membership interview or after the submission of additional information or documents, whichever is later.

(2) Content

If the Department denies the application, the decision shall explain the reason for denial, referencing the applicable standard or standards in paragraph (a). If the Department grants the application subject to restrictions, the decision shall explain the reason for each restriction, referencing the applicable standard or standards in paragraph (a) upon which the restriction is based and identify the specific financial, operational, supervisory, disciplinary, investor protection, or other regulatory concern that the restriction is designed to address and the manner in which the restriction is reasonably designed to address the concern.

(3) Failure to Issue Decision

If the Department fails to issue a decision within 180 days after receipt of an application or such later date as the Department and the Applicant have agreed in writing, the Applicant may file a written request with the NASD Board requesting that the NASD Board direct the Department to issue a decision. Within seven days after receipt of such a request, the NASD Board shall direct the Department to serve its written decision immediately or to show good cause for an extension of time. If the Department shows good cause for an extension of time, the NASD Board may extend the 180 day time limit by not more than 90 days.

(e) Service and Effectiveness of Decision

The Department shall serve its decision on the Applicant in accordance with Rule 1012. The decision shall become effective upon service and shall remain in effect during the pendency of any review until a decision constituting final action of the Association is issued under Rule 1015 or 1016, unless otherwise directed by the National Business Conduct Committee, the NASD Regulation Board, the NASD Board, or the Commission.

(f) Effectiveness of Restriction

A restriction imposed under this Rule shall remain in effect and bind the Applicant and all successors to the ownership or control of the Applicant unless:

- (1) removed or modified by the Department under Rule 1018;
- (2) removed or modified by a decision constituting final action of the

Association issued under Rule 1015 or 1016; or

(3) stayed by the National Business Conduct Committee, the NASD Regulation Board, the NASD Board, or the Commission.

(g) Final Action

Unless the Applicant files a written request for a review under Rule 1015, the Department's decision shall constitute final action by the Association.

1015. Review by National Business Conduct Committee**(a) Request**

Within 25 days after service of a decision under Rule 1014, an Applicant may file a written request for review with the National Business Conduct Committee. A request for review shall state with specificity why the Applicant believes that the Department's decision is inconsistent with the membership standards set forth in Rule 1014, or otherwise should be set aside, and state whether a hearing is requested. The Applicant simultaneously shall send by first-class mail a copy of the request to the district office where the Applicant filed its membership application.

(b) Transmission of Documents

Within ten days after receipt of a request for review, the Department shall:

(1) transmit to the National Business Conduct Committee copies of all documents that were considered in connection with the Department's decision and an index to the documents; and

(2) serve on the Applicant a copy of such documents (other than those documents originally submitted by Applicant) and a copy of the index.

(c) Appointment of Subcommittee

The National Business Conduct Committee shall appoint a Subcommittee to participate in the review. The Subcommittee shall be composed of at least two members. One member shall be a current member of the National Business Conduct Committee. The remaining member or members shall be current or past members of the NASD Regulation Board or past members of the NASD Board.

(d) Powers of Subcommittee

If a hearing is requested, the Subcommittee shall conduct the hearing. If a hearing is not requested, the Subcommittee may serve a notice directing that a hearing be held. If a hearing is not requested or directed, the Subcommittee shall conduct its review on the basis of the record developed before the Department and any written submissions made by the Applicant or the Department in connection with the request for review.

(e) Hearing**(1) Notice**

If a hearing is requested or directed, the hearing shall be held within 45 days after the receipt of the request or service of the notice by the National Business Conduct Committee. The National Business Conduct Committee shall send written notice of the date and time of the hearing to the Applicant by facsimile or commercial courier not later than 14 days before the hearing.

(2) Counsel

The Applicant and the Department may be represented by counsel at a hearing conducted pursuant to this Rule.

(3) Evidence

Formal rules of evidence shall not apply to a hearing under this Rule. Not later than five days before the hearing, the Applicant and the Department shall exchange copies of their proposed hearing exhibits and witness lists and provide copies of the same to the National Business Conduct Committee. If the Applicant or the Department fails to provide copies of its proposed hearing exhibits or witness list within such time, the Subcommittee shall exclude the evidence or witnesses from the proceeding, unless the Subcommittee determines that good cause is shown for failure to comply with the production date of this subparagraph.

(4) Transcript

The hearing shall be recorded and a transcript prepared by a court reporter. A transcript of the hearing shall be available for purchase from the court reporter at prescribed rates. The Applicant, the Department, or a witness may seek to correct its transcript. A proposed correction of the transcript shall be submitted to the Subcommittee within a reasonable period of time prescribed by the Subcommittee. Upon notice to the Applicant and the Department, the Subcommittee may direct the correction to the transcript as requested or sua sponte.

(5) Failure to Appear at Hearing

If an Applicant fails to appear at a hearing for which it has notice, the National Business Conduct Committee may dismiss the request for review as abandoned, and the decision of the Department shall become the final action of the Association. Upon a showing of good cause, the National Business Conduct Committee may withdraw a dismissal entered pursuant to this subparagraph.

(f) Additional Information, Briefs

At any time during its consideration, the Subcommittee or the National Business Conduct Committee may direct the Applicant or the Department to submit additional information and to

file briefs. Any additional information or brief submitted shall be provided to all parties before the National Business Conduct Committee renders its decision.

(g) Subcommittee Recommendation

The Subcommittee shall present a recommended decision in writing to the National Business Conduct Committee and all other Directors within 60 days after the date of the hearing held pursuant to paragraph (e), and not later than seven days before the meeting of the National Business Conduct Committee at which the membership proceeding shall be considered.

(h) Decision

(1) Proposed Written Decision

After considering all matters presented in the review and the Subcommittee's recommended written decision, the National Business Conduct Committee may affirm, modify, or reverse the Department's decision or remand the membership proceeding with instructions. The National Business Conduct Committee shall prepare a proposed written decision pursuant to subparagraph (2).

(2) Contents

The decision shall include:

(A) a description of the Department's decision, including its rationale;

(B) a description of the principal issues raised in the review;

(C) a summary of the evidence on each issue; and

(D) a statement whether the Department's decision is affirmed, modified, or reversed, and a rationale therefor that references the applicable standards in Rule 1014.

(3) Issuance of Decision After Expiration of Call for Review Periods

The National Business Conduct Committee shall provide its proposed written decision to the NASD Regulation Board, and, if such decision is not called for review by the NASD Regulation Board, to the NASD Board. The NASD Regulation Board may call the membership proceeding for review pursuant to Rule 1016(a). The NASD Board may call the membership proceeding for review pursuant to Rule 1016(b). If neither the NASD Regulation Board nor the NASD Board calls the membership proceeding for review, the proposed written decision of the National Business Conduct Committee shall become final. The National Business Conduct Committee shall serve the Applicant with a written notice specifying the date on which the call for review period expired and stating that the final written decision will be served within 15 days after such date. The National Business Conduct Committee shall serve its final written decision within 15 days after the date on which

the call for review period expired. The decision shall constitute the final action of the Association for purposes of SEC Rule 19d-3, unless the National Business Conduct Committee remands the membership proceeding.

(4) Failure to Issue Decision

If the National Business Conduct Committee fails to serve its final written decision within the time prescribed in subparagraph (3), the Applicant may file a written request with the NASD Board requesting that the NASD Board direct the National Business Conduct Committee to serve its decision immediately or to show good cause for an extension of time. Within seven days after receipt of such a request, the NASD Board shall direct the National Business Conduct Committee to serve its written decision immediately or to show good cause for an extension of time. If the National Business Conduct Committee shows good cause for an extension of time, the NASD Board may extend the 15 day time limit by not more than 15 days.

1016. Discretionary Review by Boards

(a) Discretionary Review by the NASD Regulation Board

(1) Call For Review By Director

A Director may call a membership proceeding for review by the NASD Regulation Board if the call for review is made within the period prescribed in paragraph (2).

(2) Seven Day Period, Waiver

After receiving the proposed written decision of the National Business Conduct Committee pursuant to Rule 1015, a Director shall have not less than seven days to determine if the membership proceeding should be called for review. A Director shall call a membership proceeding for review by notifying the General Counsel of NASD Regulation. By a unanimous vote of the NASD Regulation Board, the NASD Regulation Board may shorten the period to less than seven days. By an affirmative vote of the majority of the NASD Regulation Board then in office, the NASD Regulation Board may, during the seven day period, vote to extend the period to more than seven days.

(3) Review at Next Meeting

If a Director calls a membership proceeding for review within the time prescribed in subparagraph (2), the NASD Regulation Board shall review the membership proceeding not later than the next meeting of the NASD Regulation Board. The NASD Regulation Board may direct the Applicant and the Department to file briefs in connection with review proceedings pursuant to this paragraph.

(4) Decision of NASD Regulation Board, Including Remand

After review, the NASD Regulation Board may affirm, modify, or reverse the proposed written decision of the National Business Conduct Committee. Alternatively, the NASD Regulation Board may remand the membership proceeding with instructions. The NASD Regulation Board shall prepare a proposed written decision that includes all of the elements described in Rule 1015(h)(2).

(5) Issuance of Decision After Expiration of Call for Review Period

The NASD Regulation Board shall provide its proposed written decision to the NASD Board. The NASD Board may call the membership proceeding for review pursuant to paragraph (b). If the NASD Board does not call the membership proceeding for review, the proposed written decision of the NASD Regulation Board shall become final. The NASD Regulation Board shall serve the Applicant with a written notice specifying the date on which the call for review period expired and stating that a final written decision will be served within 15 days after such date. The NASD Regulation Board shall serve its final written decision within 15 days after the date on which the call for review period expired. The decision shall constitute the final action of the Association for purposes of SEC Rule 19d-3, unless the NASD Regulation Board remands the membership proceeding.

(6) Failure to Issue Decision

If the NASD Regulation Board fails to serve its final written decision within the time prescribed in subparagraph (5), the Applicant may file a written request with the NASD Board requesting that the NASD Board direct the NASD Regulation Board to serve its decision immediately or to show good cause for an extension of time. Within seven days after receipt of such a request, the NASD Board shall direct the NASD Regulation Board to serve its written decision immediately or to show good cause for an extension of time. If the NASD Regulation Board shows good cause for an extension of time, the NASD Board may extend the 15 day time limit by not more than 15 days.

(b) Discretionary Review by the NASD Board

(1) Call for Review by Governor

A Governor may call a membership proceeding for review by the NASD Board if the call for review is made within the period prescribed in subparagraph (2).

(2) Seven Day Period; Waiver

(A) Membership Proceeding Called for Review by NASD Regulation Board

If the NASD Regulation Board reviewed the membership proceeding under paragraph (a), a Governor shall make his or her call for review at the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the NASD Regulation Board.

(B) Membership Proceeding Not Called For Review By NASD Regulation Board

If no Director of the NASD Regulation Board called the membership proceeding for review under paragraph (a), a Governor shall make his or her call for review at the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the National Business Conduct Committee.

(C) Waiver

By unanimous vote of the NASD Board, the NASD Board may shorten the period in subparagraph (1) or (2) to less than seven days. By an affirmative vote of the majority of the NASD Board then in office, the NASD Board may, during the seven day period in subparagraph (1) or (2), vote to extend the period in subparagraph (1) or (2) to more than seven days.

(3) Review At Next Meeting

If a Governor calls a membership proceeding for review within the time prescribed in subparagraph (2), the NASD Board shall review the membership proceeding not later than the next meeting of the NASD Board. The NASD Board may order the Applicant and the Department to file briefs in connection with review proceedings pursuant to this paragraph.

(4) Decision of NASD Board, Including Remand

After review, the NASD Board may affirm, modify, or reverse: (1) the proposed written decision of the NASD Regulation Board, or (2) if the NASD Regulation Board did not call the membership proceeding for review under paragraph (a), the proposed written decision of the National Business Conduct Committee. Alternatively, the NASD Board may remand the membership proceeding with instructions. The NASD Board shall prepare a written decision that includes all of the elements described in Rule 1015(h)(2).

(5) Issuance of Decision

The NASD Board shall serve its written decision on the Applicant within 15 days after the meeting at which it conducted its review. The decision shall constitute the final action of the Association for purposes of SEC

Rule 19d-3, unless the NASD Board remands the membership proceeding.

1017. Application to Commission for Review

A person aggrieved by final action of the Association under Rule 1015 or 1016 may apply for review by the Commission pursuant to Section 19(d)(2) of the Act. The filing of an application for review shall not stay the effectiveness of a decision constituting final action of the Association, unless the Commission otherwise orders.

1018. Removal or Modification of Business Restrictions

(a) Application

(1) A member of the Association may seek modification or removal of a restriction on its business activities imposed pursuant to the Rule 1010 Series by filing a written application with the Department at the district office for the district in which the member's principal place of business is located. The application shall present facts showing that the circumstances that gave rise to the restriction have changed and state with specificity why the restriction should be modified or removed in light of the standards set forth in Rule 1014 and the articulated rationale for the imposition of the restriction. A copy of the decision pertaining to such restriction shall be appended to the application.

(2) Within 30 days after the receipt of an application to remove or modify a restriction, the Department shall determine whether the application is complete and, if not, shall request additional information or documents. Unless otherwise agreed to by the Department and the Applicant, the Applicant shall file any additional information or documents with the Department within 30 days after the Department's request. The Department may require the Applicant to participate in a membership interview pursuant to Rule 1013 within 30 days after the receipt of the application or within 30 days after the filing of any additional documents or information requested by the Department.

(3) Absent a showing of good cause, an application to modify or remove a restriction shall lapse if an Applicant fails to respond within 30 days after a request for information or documents. A lapse shall require the Applicant to submit a new application to modify or remove a restriction.

(b) Department Decision

(1) In evaluating an application submitted under paragraph (a), the Department shall consider whether

maintenance of the restriction is appropriate in light of:

(A) the standards set forth in Rule 1014;

(B) the circumstances that gave rise to the imposition of the restrictions;

(C) the Applicant's operations since the restrictions were imposed;

(D) a change in ownership or control or supervisors and principals; and

(E) any new evidence submitted in connection with the application.

(2) Within 30 days after receipt of an application under paragraph (a), or within 30 days after the submission of additional information or documents, whichever is later, the Department shall issue a written decision. The decision shall state whether the application to modify or remove the restriction is granted or denied in whole or in part, and shall provide a rationale for the Department's decision, referencing the applicable standard in Rule 1014. If the Department fails to issue a decision within the such time, the Applicant may file a written request with the NASD Board requesting that the NASD Board direct the Department to issue a decision. Within seven days after receipt of such a request, the NASD Board shall direct the Department to issue a written decision immediately or to show good cause for an extension of time. If the Department shows good cause for an extension of time, the NASD Board may extend the 30 day time limit by not more than 30 days.

(3) If the Department modifies or removes a restriction on the Applicant's business activities, the membership agreement submitted under Rule 1014 shall be modified accordingly.

(c) Request for Review

An Applicant may file a written request for review of the Department's decision with the National Business Conduct Committee pursuant to Rule 1015. The procedures set forth in Rule 1015 shall apply to such a review, and the National Business Conduct Committee's decision shall be subject to discretionary review by the NASD Regulation Board and the NASD Board pursuant to Rule 1016.

(d) Removal or Modification of Restriction on Department's Initiative

The Department shall modify or remove a restriction on its own initiative if the Department determines such action is appropriate in light of the considerations set forth in paragraph (b)(1). The Department shall notify the member in writing of the Department's determination and inform the member that it may apply for further modification or removal of a restriction by filing an application under paragraph (a).

1019. Change in Ownership, Control, or Operations

(a) Notice

At least 30 days prior to the occurrence of any of the following changes in ownership, control, or operations, a member shall file a written notice of the change with the Department at the district office in the district in which the member's principal place of business is located:

- (1) a merger of the member with another member;
- (2) an acquisition by the member of another member;
- (3) an acquisition of substantially all of the member's assets;
- (4) a change in the equity ownership or partnership capital of the member that results in one person or entity owning or controlling 25 percent or more of the equity or partnership capital; or
- (5) a material change in the member's business operations.

(b) Review

The Department shall review a change in ownership, control, or operations described in paragraph (a) prior to the change taking effect. The Department may maintain existing restrictions on the member's business activities and place new interim restrictions on the member based on the standards in Rule 1014, pending final Department action. The Department may condition continued membership on the submission of additional information or documents and participation in a membership interview pursuant to Rule 1013 and on prompt compliance with the standards and requirements in Rule 1014, in which case all procedural protections under the Rule 1010 Series shall apply, including the time limits required for issuance of a decision.

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Complaints, Investigations and Sanctions

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Rule 8000 Series

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8000. [Complaints,] Investigations and Sanctions

8100. [Complaints] General Provisions

8110. Availability [of Certificate, By-Laws and Rules] of Manual to Customers

Every member of the Association shall keep in [each branch office maintained by him, in the form to be supplied by the Board of Governors, a copy of the Certificate of Incorporation, By-Laws and Rules of the Association, and of all additions and amendments from time to time made thereto, and of all published interpretive rulings made by the Board of Governors, all of which shall be available for the examination of any customer who makes requests therefor] *its main office and each of its branch offices a current copy of the Association's Manual and all amendments to it. Upon request, a member shall make the Manual and amendments available to any customer for examination.*

[8120. Complaints by Public Against Members for Violations of Rules]

[Any person feeling aggrieved by any act, practice or omission of any member or any person associated with a member of the Association, which such person believes to be in violation of the Act, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or any of the Rules of the Association, may, on the form to be supplied by the Board of Governors, file a complaint against such member or such persons associated with a member in regard thereto with any District Business Conduct Committee of the Association, and any such complaint shall be handled in accordance with the Code of Procedure, as set forth in the Rule 9000 Series.]

8120. Definitions

(a) *Unless otherwise provided, terms used in the Rule 8000 Series shall have the meaning as defined in Rule 0120.*

(b) *The term "Adjudicator" shall have the meaning as defined in Rule 9120.*

[8130. Complaints by District Business Conduct Committees]

[Any District Business Conduct Committee which, on information and belief, is of the opinion that any act, practice, or omission of any member of the Association or any person associated with a member is in violation of the Act, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or any of the Rules of the Association, may, on the form to be supplied by the Board of Governors, file a complaint against such member or such person associated with a member in regard thereto with itself or with any other District Business Conduct Committee of the Association, as the necessities of the complaint may require, and any such complaint shall be handled in accordance with the Rule 9000 Series and in the same manner as if it had been filed by an individual or member.]

[8140. Complaints by the Board of Governors]

[The Board of Governors shall have authority when on the basis of information and belief it is of the opinion that any act, practice or omission of any member of the Association or of any person associated with a member is in violation of the Act, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or any Rule of the Association to file a complaint against such member or such person associated with a member in respect thereto or to instruct any District Business Conduct Committee to do so, and any such complaint shall be handled in accordance with the Rule 9000 Series.]

8200. Investigations

8210. [Reports] Provision of Information and Testimony and Inspection of Books [for Purpose of Investigating Complaints]

[(a) For the purpose of any investigation, or determination as to filing of a complaint or any hearing of any complaint against any member of the Association or any person associated with a member made or held in accordance with the Rule 9000 Series, or made or held by another domestic or foreign self-regulatory organization, association, securities or contract market or regulator of such markets,

with whom the Association has entered into an agreement providing for the exchange of information and other forms of material assistance solely for market surveillance, investigative, enforcement or other regulatory purposes, any District Business Conduct Committee, the Market Surveillance Committee, or the Board of Governors, or any duly authorized member or members of any such Committees or Board or any duly authorized agent or agents of any such Committee or Board]

(a) Authority of Adjudicator and Association Staff

For the purpose of an investigation, complaint, examination, or proceeding authorized by the NASD By-Laws or the Rules of the Association, an Adjudicator or Association staff shall have the right to:[:]

(1) [to] require [any] a member [of the Association], person associated with a member, or person [no longer associated with a member when such person is] subject to the Association's jurisdiction to [report, either informally or on the record, orally or in writing with regard] provide information orally, in writing, or electronically (if the requested information is, or is required to be, maintained in electronic form) and to testify, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in [any such investigation or hearing, and] the investigation, complaint, examination, or proceeding; and

[(2) to investigate the books, records and accounts of any such member or person with relation to any matter involved in any such investigation or hearing.

(b) No such member or person shall fail to make any report as required in this Rule, or fail to permit any inspection of books, records and accounts as may be validly called for under this Rule. Any notice requiring an oral or written report or calling for an inspection of books, records and accounts pursuant to this Rule shall be deemed to have been received by the member or person to whom it is directed by the mailing thereof to the last known address of such member or person as reflected on the Association's records.]

(2) inspect the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding.

(b) Other SRO's and Regulators

Association staff also may exercise the authority set forth in paragraph (a) for the purpose of an investigation, complaint, examination, or proceeding

conducted by another domestic or foreign self-regulatory organization, association, securities or contract market, or regulator of such markets with which the Association has entered into an agreement providing for the exchange of information and other forms of material assistance solely for market surveillance, investigative, enforcement, or other regulatory purposes.

(c) Requirement to Comply

No member or person shall fail to provide information or testimony or to permit an inspection of books, records, or accounts pursuant to this Rule.

(d) Receipt of Notice

A notice under this Rule shall be deemed to have been received by the member or person to whom it is directed by the mailing thereof to the last known address of such member or person as reflected on the Association's records, unless the Adjudicator or Association staff responsible for serving the member or associated person has actual knowledge that the address is out of date. In such case, a copy of the notice shall be served on the member at its last known address, or in the case of an associated person, at the associated person's last known residential address and the business address in the Central Registration Depository of the member with which the person is employed or affiliated.

(e) Electronic Interface

In carrying out its responsibilities under this Rule, the Association may, as appropriate, establish programs for the submission of information to the Association on a regular basis through a direct or indirect electronic interface between the Association and members.

8220. Suspension [of Members] for Failure to [Furnish] Provide Requested Information [Duly Requested]

[(a) The President is hereby directed and authorized to notify members of the Association who fail to provide information with respect to their business practices and/or who fail to keep membership applications and supporting documents current and/or who fail to furnish such other information or reports or other material or data duly requested by the Association pursuant to the powers duly vested in it by its Certificate of Incorporation, By-Laws and such other duly authorized resolutions and directives as are necessary in the conduct of the business of the Association, that the continued failure to furnish duly requested information, reports, data or other material, constitutes grounds for suspension from membership.]

[(b) After fifteen (15) days' notice in writing thereof, and continued failure to furnish the information, reports, data or other material as described in paragraph (a), the President is hereby directed and authorized to suspend the membership of any such member on behalf of the Board of Governors, and to cause notification thereof in the next following membership supplement, to the effect that the membership has been suspended for failure to furnish such duly requested information.]

[(c) Prior to such notice, in writing to the member, the Executive Committee of the Board of Governors shall be notified in writing of such contemplated action by the President.]

[(d) The President shall advise the member concerned, in writing, of the suspension.]

[(e) It is essential for the promotion of the Association's welfare, object and purposes and more particularly for the administration and enforcement of its Rules:

(1) that any District Business Conduct Committee, any Market Surveillance Committee, or any duly authorized member or members of any such Committees, or any duly authorized agent or agents of any such Committees, or any Association examiner duly authorized by the President shall have the right, in order to and solely for the purpose of determining whether any member is complying with the Rules of the Association:

(A) to require any such member to submit a report in writing with regard to any matter connected with such member's business or business practices, and

(B) to inspect the books, records and accounts of any such member; and

(2) that any such Committee or any such member or members thereof, or any such agent or agents thereof, or any such examiner, be and hereby is granted such rights.]

8221. Notice

(a) Notice to Member

If a member fails to provide any information, report, material, data, or testimony requested pursuant to the NASD By-Laws or the Rules of the Association, or fails to keep its membership application or supporting documents current, the National Business Conduct Committee shall provide written notice to such member specifying the nature of the failure and stating that the failure to take such action within 20 days after service of the notice constitutes grounds for suspension from membership.

(b) Notice to Person Associated with Member

If a person associated with a member fails to provide any information, report, material, data, or testimony requested pursuant to the NASD By-Laws or the Rules of the Association, the National Business Conduct Committee shall provide written notice to such person specifying the nature of the failure and stating that the failure to take such action within 20 days after service of the notice constitutes grounds for suspending the association of the person with the member.

(c) Service of Notice

The National Business Conduct Committee shall serve the member or associated person with such notice via personal service or commercial courier.

8222. Hearing

(a) Request for Hearing

Within five days after the date of service of a notice issued under Rule 8221, a member or associated person may file with the National Business Conduct Committee a written request for an expedited hearing before a subcommittee of the National Business Conduct Committee. The request shall state with specificity why the member or associated person believes that there are insufficient grounds for suspension or any other reason for setting aside the notice issued by the National Business Conduct Committee.

(b) Hearing Procedures

(1) Appointment of Subcommittee

If a hearing is requested, the National Business Conduct Committee shall appoint a subcommittee to conduct the hearing and decide whether the member or associated person should be suspended. The subcommittee shall be composed of a member of the National Business Conduct Committee and one or more current or past members of the NASD Regulation Board.

(2) Time of Hearing

The hearing shall be held within 20 days after the date of service of the notice issued under Rule 8221. Not later than seven days before the hearing, the subcommittee shall serve the member or associated person with written notice of the date and time of the hearing via commercial courier or facsimile and notify the appropriate department or office of NASD Regulation of the date and time of the hearing. The appropriate department or office of NASD Regulation (hereinafter "appropriate department or office" in the Rule 8220 Series) shall be the department or office that issued the request for the information, report, material, data, or testimony that the member or associated person failed to provide, or in the case of a member that failed to keep its membership

application or supporting documents current, the Department of Member Regulation.

(3) Transmission of Documents

Within seven days before the hearing, the subcommittee shall serve the member or associated person via commercial courier with all documents that were considered in connection with the National Business Conduct Committee's decision to issue a notice under Rule 8221.

(4) Counsel

The member or associated person and the appropriate department or office may be represented by counsel at a hearing conducted under this Rule.

(5) Evidence

Formal rules of evidence shall not apply to a hearing under this Rule. Not later than four days before the hearing, the member or associated person and the appropriate department or office shall exchange copies of proposed hearing exhibits and witness lists and provide copies of the same to the subcommittee.

(6) Witnesses

A person who is subject to the jurisdiction of the Association shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter or a notary public.

(7) Additional Information

At any time during its consideration, the subcommittee may direct the member or associated person or the appropriate department or office to submit additional information. Any additional information submitted shall be provided to all parties before the subcommittee renders its decision.

(8) Transcript

The hearing shall be recorded and a transcript prepared by a court reporter. The member or associated person may purchase a copy of the transcript from the court reporter.

(9) Record

The record shall consist of all documents that were considered in connection with the National Business Conduct Committee's decision to issue a notice under Rule 8221, the notice issued under Rule 8221, the request for hearing filed under Rule 8222, the transcript of the hearing, and each document or other item of evidence presented to or considered by the Subcommittee. The Office of the General Counsel of NASD Regulation shall be the custodian of the record.

(10) Failure to Appear at Hearing

If a member or associated person fails to appear at a hearing for which it has notice, the subcommittee may dismiss the request for a hearing as abandoned, and the notice of the National Business

Conduct Committee issued under Rule 8221 shall become the final action of the Association. Upon a showing of good cause, the subcommittee may withdraw a dismissal entered pursuant to this subparagraph.

8223. Decision

(a) Subcommittee

(1) Proposed Written Decision

The subcommittee may suspend the membership of a member or suspend the association of a person with a member for failure to take the action required by the notice issued under Rule 8221. The subcommittee shall prepare a proposed written decision, and if the subcommittee determines that a suspension should be imposed, the proposed written decision shall state the grounds for the suspension and the conditions for terminating the suspension. The subcommittee shall provide its proposed written decision to the NASD Board of Governors.

(2) Issuance of Decision After Expiration of Call for Review Period

If no Governor calls the suspension proceeding for review within the time prescribed in paragraph (b)(1), the subcommittee's proposed written decision shall become final, and the subcommittee shall serve the final written decision on the member or associated person via commercial courier or facsimile.

(b) NASD Board of Governors

(1) Call For Review by Governor

A Governor may call the suspension proceeding for review if the call for review is made not later than ten days after the Governor receives the subcommittee's proposed written decision. By a unanimous vote of the NASD Board of Governors, the NASD Board of Governors may shorten the call for review period to less than ten days. By an affirmative vote of the majority of the NASD Board of Governors then in office, the NASD Board of Governors may, during the ten day period, vote to extend the period to more than ten days.

(2) Review and Decision

If a Governor calls the suspension proceeding for review within the time prescribed in subparagraph (1), the NASD Board of Governors shall conduct a review not later than its next meeting. The NASD Board of Governors may affirm, modify, or reverse the decision of the subcommittee. Not later than seven days after the NASD Board of Governors meeting, the NASD Board of Governors shall serve a final written decision on the member or associated person via commercial courier or facsimile. The decision shall state the disposition of the suspension proceeding, and if a suspension is imposed, state the

grounds for the suspension and the conditions for terminating the suspension.

(c) Effective Date.

A final written decision served under this Rule shall become effective upon service and shall constitute final action of the Association.

8224. Notice to Membership

The Association shall provide notice of a suspension under the Rule 8220 Series and the grounds therefor in the next membership supplement.

8225. Termination of Suspension

A suspended member or associated person may file a written request for termination of the suspension on the ground of full compliance with the notice issued under Rule 8221 or, if applicable, the conditions of a decision under Rule 8223, with the head of the appropriate department or office. The head of the appropriate department or office shall respond to the request in writing within five days after receipt of the request. If the head of the appropriate department or office grants the request, he or she shall serve the member or associated person with written notice of the termination of the suspension via commercial courier or facsimile. If the head of the department or office denies the request, the suspended member or associated person may file a written request for relief with the National Business Conduct Committee. The National Business Conduct Committee shall respond to the request in writing within ten days after receipt of the request. The National Business Conduct Committee's response shall be served on the member or associated person via commercial courier or facsimile.

8226. Copies of Notices and Decisions to Member

A copy of a notice or decision under the Rule 8220 Series that is served on a person associated with a member shall be served on such member.

8227. Other Action Not Foreclosed

Action by the Association under the Rule 8220 Series shall not foreclose action by the Association under any other Rule.

8300. Sanctions

8310. Sanctions for Violation of the Rules

[Any District Business Conduct Committee, Market Surveillance Committee, the National Business Conduct Committee (NBCC), any other committee exercising powers assigned by the Board, or the Board, in the

administration and enforcement of these Rules, the Act, the rules and regulations there under, or the rules of the Municipal Securities Rulemaking Board, and after compliance with the Rule 9000 series, may:]

(a) Imposition of Sanction

After compliance with the Rule 9000 Series, the Association may impose one or more of the following sanctions on a member or associated person for each violation of the federal securities laws, rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or Rules of the Association, or may impose one or more of the following sanctions on a member or associated person for any neglect or refusal to comply with an order, direction, or decision issued under the Rules of the Association:

[(a)](1) censure [any] member or person associated with a member [, and/or];

[(b)](2) impose a fine upon [any] a member or person associated with a member [, and/or];

[(c)](3) suspend the membership of [any] a member or suspend the registration of a person associated with a member [, if any,] for a definite period [, and/or for] or a period contingent on the performance of a particular act[, and/or];

[(d)](4) expel [any] a member, cancel the membership of a member, or revoke or cancel the registration of [any] a person associated with a member [, if any, and/or];

[(e)](5) suspend or bar a member or person associated with a member from association with all members [, and/or]; or

[(f)](6) impose any other fitting sanction [deemed appropriate under the circumstances,].

[for each or any violation of any of these Rules by a member or person associated with a member or for any neglect or refusal to comply with any orders, directions or decisions issued by any such committee or by the Board in the enforcement of these Rules, including any interpretative ruling made by the Board, as any such committee or the Board, in its discretion, may deem to be just; provided, however, that no such sanction imposed by any such committee shall take effect until the period for appeal therefrom or review thereof by the National Business Conduct Committee or the Board, as applicable, has expired and any such appeal or review has been completed in accordance with the Rule 9000 Series; and provided, further, that all parties to any]

(b) Assent to Sanction

Each party to a proceeding resulting in a sanction shall be deemed to have assented to [or to have acquiesced in] the imposition of [such] the sanction unless [any party aggrieved thereby shall have made] such party files a written application for appeal, review [thereof], or relief pursuant to the Rule 9000 Series[, within fifteen (15) days after the date of the decision rendered in such proceeding].

IM-8310-1. Effect of a Suspension, Revocation, Cancellation, or Bar

If the Association or the Commission issues an order [which] that imposes a suspension, revocation, or cancellation of the registration[, if any,] of a person associated with a member or bars [that] a person from further association with any member, a member shall not allow [that] such person to remain associated with [that member] it in any capacity [whatever], including a clerical or ministerial [functions. When an individual is suspended, a member, in addition to the above,] capacity. If the Association or the Commission suspends a person associated with a member, the member also shall not pay or credit any salary, or any commission, profit, or other remuneration [which] that results directly or indirectly from any security transaction [which], that [individual] the associated person might have earned during the period of suspension.

IM-8310-2. Release of Disciplinary Information

[No change.]

8320. Payment of Fines, Other Monetary Sanctions, or Costs; Summary Action for Failure to Pay

(a) Payment to Treasurer

All fines and other monetary sanctions shall be paid to the Treasurer of the Association and shall be used for the general corporate purposes.

(b) Summary Suspension or Expulsion

[Any member who fails promptly to pay any] After seven days notice in writing, the Association may summarily suspend or expel from membership a member that fails to:

(1) pay promptly a fine or other monetary sanction imposed pursuant to Rule 8310[,] or [any costs] cost imposed pursuant to Rule 8330 [after] when such fine, monetary sanction, or [costs have become] cost becomes finally due and payable[, may after seven (7) days' notice in writing be summarily suspended or expelled from membership in the Association. A member may also be summarily suspended or expelled from membership in the Association if the

member fails to immediately terminate the association of any person who fails promptly to pay any]; or

(2) terminate immediately the association of a person who fails to pay promptly a fine or other monetary sanction imposed pursuant to Rule 8310[,] or [any costs] a cost imposed pursuant to Rule 8330 [after] when such fine, monetary sanction, or cost [has become] becomes finally due and payable [after seven (7) days' notice in writing. The].

(c) **Summary Revocation of Registration**

After seven days notice in writing, the Association may summarily revoke the registration of a person associated with a member[, if any, may be summarily revoked] if such person fails [promptly] to pay [any] promptly a fine or other monetary sanction imposed pursuant to Rule 8310[, or any costs] or a cost imposed pursuant to Rule 8330 [after] when such fine, monetary sanction, or cost [has become] becomes finally due and payable [after seven (7) days' notice in writing].

8330. Costs of Proceedings

[Any] A member or [any] person associated with a member disciplined pursuant to Rule 8310 shall bear such [part of the costs of the proceedings as any committee referred to in such Rule or the Board] costs of the proceeding as the Adjudicator deems fair and appropriate [in] under the circumstances.

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Code of Procedure

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Rule 9000 Series

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9000. *Code of Procedure*9100. *Application and Purpose*9110. *Application**(a) Proceedings*

The Rule 9000 Series is the Code of Procedure and includes proceedings for disciplining a member or person associated with a member; proceedings for regulating the activities of a member experiencing financial or operational difficulties; proceedings for approving or disapproving a change in business operations that will result in a change in exemptive status under SEC Rule 15c3-3; proceedings for summary suspension of a member or person associated with a member; proceedings for the non-summary suspension, cancellation or bar of a member or a person; and proceedings for obtaining relief from the eligibility requirements of the NASD By-Laws and the Rules of the Association. The Rule 9100 Series is of general applicability to all proceedings set forth in Rule 9000 Series, except the proceedings set forth in the Rule 9700 Series and the Rule 9800 Series, unless a Rule in the Rule 9200 Series, the Rule 9300 Series, the Rule 9400 Series, or the Rule 9500 Series specifically provides otherwise.

(b) Rights, Duties and Obligations of Members and Associated Persons

Unless otherwise specified, a person associated with a member shall have the same rights as a member and shall be subject to the same duties and obligations under the Code.

(c) Incorporation of Defined Terms and Cross References

Unless otherwise provided, terms used in the Rule 9000 Series shall have the meaning as defined in Rule 0120 and Rule 9120. References within the Rule 9000 Series to Association offices or departments refer to offices so designated by the NASD, NASD Regulation or Nasdaq.

9120. *Definitions**(a) "Adjudicator"*

The term "Adjudicator" means: (1) a body, board, committee, other group, or

natural person that presides over a proceeding and renders a decision; (2) a body, board, committee, other group, or natural person that presides over a proceeding and renders a recommended or proposed decision which is acted upon by an Adjudicator described in (1); or (3) a natural person who serves on a body, board, committee, or other group described in (1) or (2). The term includes a Subcommittee as defined in paragraph (z), an Extended Proceeding Committee as defined in paragraph (k), and a Statutory Disqualification Committee as defined in paragraph (y).

(b) "Chief Hearing Officer"

The term "Chief Hearing Officer" means the Hearing Officer designated by the President of NASD Regulation to manage the Office of Hearing Officers, or his or her delegatee.

(c) "Code"

The term "Code" refers to this Code of Procedure.

(d) "Complainant"

The term "Complainant" means, in the Rule 9200 Series, a person who files a complaint to initiate a disciplinary proceeding governed by the Rule 9200 Series and, in the Rule 9300 Series, the person who initiated the disciplinary proceeding.

(e) "Director"

The term "Director" means a member of the Board of Directors of NASD Regulation, excluding the Chief Executive Officer of the NASD.

(f) "District Committee"

The term "District Committee" means a district committee elected pursuant to Article VIII of the NASD Regulation By-Laws.

(g) "Document"

The term "Document" means a writing, drawing, graph, chart, photograph, recording, or any other data compilation, including data stored by computer, from which information can be obtained.

(h) "Extended Hearing"

The term "Extended Hearing" means a disciplinary proceeding described in Rule 9231(c).

(i) "Extended Hearing Panel"

The term "Extended Hearing Panel" means a decisional body that is constituted under Rule 9231(c) to conduct a disciplinary proceeding that is classified as an "Extended Hearing" and is governed by the Rule 9200 Series.

(j) "Extended Proceeding"

The term "Extended Proceeding" means a disciplinary proceeding described in Rule 9331(a)(2).

(k) "Extended Proceeding Committee"

The term "Extended Proceeding Committee" means an appellate body that is appointed by the National Business Conduct Committee and

constituted under Rule 9331(a)(2) to participate in the National Business Conduct Committee's consideration of a disciplinary proceeding that is classified as an "Extended Proceeding" and governed by the Rule 9300 Series.

(l) "Governor"

The term "Governor" means a member of the Board of Governors of the NASD.

(m) "Head of Enforcement"

The term "Head of Enforcement" means the individual designated by the President of NASD Regulation to manage the Department of Enforcement, or his or her delegatee.

(n) "Hearing Officer"

The term "Hearing Officer" means an employee of NASD Regulation who is an attorney and who is appointed by the Chief Hearing Officer to act in an adjudicative role and fulfill various adjudicative responsibilities and duties described in the Rule 9200 Series regarding disciplinary proceedings brought against members and associated persons.

(o) "Hearing Panel"

The term "Hearing Panel" means a decisional body that is constituted under Rule 9231 to conduct a disciplinary proceeding governed by the Rule 9200 Series or that is constituted under the Rule 9500 Series to conduct a proceeding.

(p) "Interested Association Staff"

The term "Interested Association Staff" means, in the context of:

(1) a disciplinary proceeding under the Rule 9200 Series and the Rule 9300 Series:

(A) the Head of Enforcement;

(B) a Department of Enforcement employee who reports, directly or indirectly, to the Head of Enforcement;

(C) an Association employee who directly participated in the authorization of the complaint; or

(D) an Association employee who directly participated in an examination, investigation, prosecution, or litigation related to a specific disciplinary proceeding, and a district director or department head to whom such employee reports;

(2) a proceeding under the Rule 9400 Series or the Rule 9530 Series:

(A) the head of the Department of Member Regulation;

(B) a Department of Member Regulation employee who reports, directly or indirectly, to the head of the Department of Member Regulation;

(C) an Association employee who directly participated in the authorization of or the initial decision in the proceeding; or

(D) an Association employee who directly participated in an examination,

investigation, prosecution, or litigation related to a specific proceeding, and a district director or department head to whom such employee reports; or

(3) a proceeding under the Rule 9510 or 9520 Series:

(A) the head of the department or office that issues the notice;

(B) an Association employee who reports, directly or indirectly, to such person;

(C) an Association employee who directly participated in the initiation of the proceeding; or

(D) a participant in an examination, investigation, prosecution, or litigation related to a specific proceeding, and a district director or department head to whom such employee reports.

(q) **"Market Regulation Committee"**
The term "Market Regulation Committee" means the committee of NASD Regulation designated to consider the federal securities laws and the rules and regulations adopted thereunder and various Rules of the Association and policies relating to:

(1) the quotations of securities;
(2) the execution of transactions;
(3) the reporting of transactions; and
(4) trading practices, including rules prohibiting manipulation and insider trading, and those Rules designated as Trading Rules (Rule 3300 Series), the Nasdaq Stock Market Rules (Rule 4000 Series), other Nasdaq and NASD Market Rules (Rule 5000 Series), NASD Systems and Programs Rules (Rule 6000 Series), and Charges for Services and Equipment Rules (Rule 7000 Series).

(r) **"NASD Board"**

The term "NASD Board" means the Board of Governors of the NASD.

(s) **"NASD Regulation Board"**

The term "NASD Regulation Board" means the Board of Directors of NASD Regulation.

(t) **"Panelist"**

The term "Panelist," as used in the Rule 9200 Series, means a member of a Hearing Panel or Extended Hearing Panel who is not a Hearing Officer. As used in the Rule 9300 Series, the term means a current or former Director or a former Governor who is appointed to serve on a Subcommittee or an Extended Proceeding Committee.

(u) **"Party"**

With respect to a particular proceeding, the term "Party" means:

(1) a Complainant or a Respondent;
(2) in the Rule 9400 Series and the Rule 9530 Series, the Department of Member Regulation and:

(A) a member that is the subject of a notice under Rule 9412;

(B) a member that submits an application under Rule 9422; or

(3) in the Rule 9510 Series and the Rule 9520 Series, the department or office that issues the notice and:

(A) a member or person that is the subject of a notice under Rule 9512;

(B) a member or person that is the subject of a notice under Rule 9522; or

(C) a member that is the subject of a notice or files an application under Rule 9532.

(v) **"Practicing Before the Association"**

The term "practicing before the Association" means representing one or more other persons in any proceeding incorporated in Rule 9110, but shall not include appearing pro se.

(w) **"Primary District Committee"**

The term "Primary District Committee" means, in a disciplinary proceeding under the Rule 9200 Series, the District Committee designated by the Chief Hearing Officer pursuant to Rule 9232 to provide one or more of the Panelists to a Hearing Panel or, if applicable, to an Extended Hearing Panel, for such disciplinary proceeding.

(x) **"Respondent"**

The term "Respondent" means, in a disciplinary proceeding governed by the Rule 9200 Series and in an appeal or review governed by the Rule 9300 Series, an NASD member or associated person against whom a complaint is issued.

(y) **"Statutory Disqualification Committee"**

The term "Statutory Disqualification Committee" means a Subcommittee of the National Business Conduct Committee that is composed of current members of the NASD Regulation Board that makes a recommended decision to grant or deny an application for relief from the eligibility requirements of the Association to the National Business Conduct Committee pursuant to the Rule 9530 Series.

(z) **"Subcommittee"**

The term "Subcommittee" means an appellate body that is appointed by the National Business Conduct Committee:

(1) constituted by Rule 9331(a) to participate in the National Business Conduct Committee's consideration of a disciplinary proceeding pursuant to the Rule 9300 Series; or

(2) constituted under the Rule 9400 Series or the Rule 9500 Series to conduct a review proceeding.

9130. Service; Filing of Papers

9131. Service of Complaint and Document Initiating a Proceeding

(a) Service on Each Party

A complaint shall be served on each Party by the Complainant or Complainant's counsel or other person the Complainant designates to represent

him or her in a proceeding. A document initiating a proceeding shall be served on each Party by the Party initiating such proceeding or his or her counsel or representative.

(b) How Served

A complaint or document initiating a proceeding shall be served pursuant to Rule 9134.

(c) Filing Requirement

A complaint that is served upon a Respondent and each document initiating a proceeding that is served upon a Party, along with the certificate of service executed in connection with the service upon such Respondent or Party, shall be filed with the Association pursuant to Rule 9135.

9132. Service of Orders, Notices and Decisions by Adjudicator

(a) Service on Each Party

An order, notice, or decision issued by a Hearing Officer, Hearing Panel or Extended Hearing Panel under the Rule 9200 Series shall be served on each Party, or each Party's counsel, or other person the Party designates to represent him or her in a proceeding by the Office of Hearing Officers. An order, notice, or decision issued by any other Adjudicator shall be served by that Adjudicator.

(b) How Served

An order, notice, or decision shall be served pursuant to Rule 9134.

(c) Service Upon Counsel or Other Person Acting In Representative Capacity

Whenever service is required to be made upon a person represented by counsel or a representative who has filed a notice of appearance pursuant to Rule 9141, service shall be made upon counsel or the representative. The Adjudicator, at its discretion, may also order that service be made upon the person.

9133. Service of Papers Other Than Complaints, Orders, Notices, or Decisions

(a) Service on Each Party

Other than a complaint, order, notice, or decision, any paper, including an answer and a motion, shall be served on each Party by the Party on whose behalf such paper was prepared or by his or her counsel or representative.

(b) How Served

The paper shall be served pursuant to Rule 9134.

(c) Filing Requirement

The paper that is served upon a Party, along with the certificate of service executed in connection with the service upon such Party, shall be filed with the Association pursuant to Rule 9135.

(d) Service upon Counsel or Other Person Acting in Representative Capacity

Whenever service is required to be made upon a person represented by

counsel or a representative who has filed a notice of appearance pursuant to Rule 9141, service shall be made upon counsel or the representative. The Adjudicator, at its discretion, may also order that service be made upon the person.

9134. Methods of, Procedures for Service

(a) Methods

The following methods of service are permitted:

(1) Personal Service

Personal service may be accomplished by handing a copy of the papers to the person required to be served; leaving a copy at the person's office with an employee or other person in charge thereof; or leaving a copy at the person's dwelling or usual place of abode with a person of suitable age and discretion then residing therein;

(2) Service by Mail by U.S. Postal Service

Service by mail may be accomplished by mailing the papers through the U.S. Postal Service by using first class mail, first class certified mail, first class registered mail, or Express Mail, except that a complaint shall be served upon a Respondent by U.S. Postal Service first class certified mail or Express Mail; or

(3) Service by Commercial Courier

Service by commercial courier may be accomplished by sending the papers through a commercial courier service that generates a written confirmation of receipt or of attempts at delivery.

(b) Procedures

(1) Service on Natural Persons

Papers served on a natural person may be served at the natural person's residential address, as reflected in the Central Registration Depository, if applicable. When a Party or other person responsible for serving such person has actual knowledge that the natural person's Central Registration Depository address is out of date, duplicate copies shall be served on the natural person at the natural person's last known residential address and the business address in the Central Registration Depository of the entity with which the natural person is employed or affiliated. Papers may also be served at the business address of the entity with which the natural person is employed or affiliated, as reflected in the Central Registration Depository, or at a business address, such as a branch office, at which the natural person is employed, or at which the natural person is physically present during a normal business day. If a natural person is represented by counsel or a representative, papers served on the natural person, excluding a complaint or a document initiating a proceeding,

shall be served on the counsel or representative.

(2) Service on Entities

Papers served on an entity shall be made by service on an officer, partner of a partnership, managing or general agent, or any other agent authorized by appointment or by law to accept service. Such papers shall be served at the entity's business address as reflected in the Central Registration Depository, if applicable; provided, however, that when the Party or other person responsible for serving such entity has actual knowledge that an entity's Central Registration Depository address is out of date, duplicate copies shall be served at the entity's last known address. If an entity is represented by counsel or a representative, papers served on such entity, excluding a complaint or document initiating a proceeding, shall be served on such counsel or representative.

(3) When Service Is Complete

Personal service and service by commercial courier or express delivery are complete upon delivery. Service by mail is complete upon mailing.

9135. Filing of Papers with Adjudicator: Procedure

(a) When to File

Papers that are required to be filed with an Adjudicator within a time limit specified by the Adjudicator or within a time limit specified by the Rules shall be deemed timely if received within the time limit specified, unless otherwise ordered by an Adjudicator. Other papers that are required to be filed shall be deemed timely if, on the same day such papers are served, they are also hand-delivered, mailed via U.S. Postal service first class mail, or sent by courier to the Association.

(b) Where to File

All papers required to be filed pursuant to the Rule 9200 Series and any notice of appeal or review required to be filed pursuant to the Rule 9300 Series shall be filed with the Office of Hearing Officers. All other papers required to be filed pursuant to the Rule 9000 Series shall be filed where specified in the Rule, or if not specified in the Rule, with the Adjudicator, unless the Adjudicator orders otherwise.

(c) Certificate of Service

Papers filed with an Adjudicator or the Office of Hearing Officers shall be accompanied by a certificate of service stating the name of the person or persons served, the date on which service is made, the method of service and, if service is not made in person, the address to which service is made. Such certificate shall be executed by the person who made the service. If the

method of service on a Party is different from the method of service on any other Party, the certificate shall state why such different method was used.

9136. Filing of Papers: Form

(a) Specifications

Papers filed in connection with any proceeding under the Rule 9200 Series and the Rule 9300 Series shall:

- (1) be on unglazed white paper measuring $8\frac{1}{2} \times 11$ inches, but to the extent that the reduction of a larger document would render it illegible, such document may be filed on larger paper;
- (2) be typewritten or printed in either 10 or 12 point typeface or otherwise reproduced by a process that produces a permanent and plainly legible copy;
- (3) include at the head of the paper, or on a title page, the title of the proceeding, the names of the Parties, the subject of the particular paper or pleading, and the number assigned to the proceeding;

(4) be paginated at the bottom of the page and with all margins at least one inch wide;

(5) be double-spaced, with double-spaced footnotes and single-spaced indented quotations; and

(6) be stapled, clipped, or otherwise fastened in the upper left corner, but not bound.

(b) Signature Required

All papers shall be signed and dated pursuant to Rule 9137.

(c) Number of Copies

A signed original and three copies of all papers shall be filed with the Adjudicator.

(d) Form of Briefs

A brief containing more than ten pages shall include a table of contents, and an alphabetized table of cases, statutes, and other authorities cited, with references to the pages of the brief wherein they are cited.

(e) Scandalous or Impertinent Matter

Any scandalous or impertinent matter contained in any brief, pleading, or other filing, or in connection with any oral presentation in a proceeding may be stricken on order of an Adjudicator. Any matter stricken by an Adjudicator by this Rule shall be marked "Stricken" and preserved. Matters stricken in a proceeding governed by the Rule 9200 Series shall be preserved under Rule 9267(b).

9137. Filing of Papers: Signature Requirement and Effect

(a) General Requirements

Following the issuance of a complaint in a disciplinary proceeding, or the initiation of another proceeding, every filing of a Party represented by counsel or a representative shall be signed by at

least one counsel or representative of record in his or her name and shall state the business address and telephone number of such counsel or representative. A Party who appears on his or her own behalf shall sign his or her individual name and state his or her address and telephone number on every filing.

(b) Effect of Signature

(1) The signature of a counsel, representative or Party shall constitute a certification that:

(A) the person signing the filing has read the filing;

(B) to the best of his or her knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(C) the filing is not made for any improper purpose, such as to harass, cause unnecessary delay, or needlessly to increase the cost of adjudication.

(2) If a filing is not signed, an Adjudicator may strike the filing, unless it is signed promptly after the omission is called to the attention of the person making the filing.

9138. Computation of Time

(a) Calendar Day

In the Rule 9000 Series, "day" means calendar day.

(b) Formula

In computing any period of time, the day of the act, event, or default from which the period of time designated in the Code begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays shall be excluded from the computation when the period prescribed is ten days or less, not including any additional time for service by mail allowed by paragraph (c).

(c) Additional Time For Service by Mail

If service is made by U.S. Postal Service first class, certified, or registered mail, three days shall be added to the prescribed period for response.

9140. Proceedings

9141. Appearance and Practice; Notice of Appearance

(a) Representing Oneself

In any proceeding, a person may appear on his or her own behalf. When a person first makes any filing or otherwise appears on his or her own

behalf before an Adjudicator in a proceeding, he or she shall file with the Adjudicator, or otherwise state on the record, and keep current, an address at which any notice or other written communication required to be served upon or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours.

(b) Representing Others

A person shall not be represented before an Adjudicator, except as provided in this paragraph. Subject to the prohibitions of Rules 9150 and 9280, a person may be represented in any proceeding by an attorney at law admitted to practice before the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association. When a person first makes any filing or otherwise appears in a representative capacity before an Adjudicator in a proceeding, that person shall file with the Adjudicator, and keep current, a written notice stating the name of the proceeding; the representative's name, business address, and telephone number; and the name and address of the person or persons represented. Any individual appearing or practicing in a representative capacity before an Adjudicator may be required to file a power of attorney with the Adjudicator showing his or her authority to act in such capacity.

9142. Withdrawal by Attorney or Representative

An attorney for a Party or other person authorized to represent others by Rule 9141 shall withdraw by giving notice not later than 30 days before the date of withdrawal. The notice shall set forth the good cause for withdrawal.

9143. Ex Parte Communications

(a) Prohibited Communications

Unless on notice and opportunity for all Parties to participate, or to the extent required for the disposition of ex parte matters as authorized by the Rule 9000 Series:

(1) No Party, or counsel to or representative of a Party, or Interested Association Staff shall make or knowingly cause to be made an ex parte communication relevant to the merits of a proceeding to a Governor, a Director, or an Adjudicator who is participating in a decision with respect to that proceeding, or to an Association employee who is participating or

advising in the decision of a Governor, a Director, or an Adjudicator with respect to that proceeding; and

(2) No Governor, Director, or Adjudicator who is participating in a decision with respect to a proceeding, or no Association employee who is participating or advising in the decision of a Governor, a Director, or an Adjudicator with respect to a proceeding shall make or knowingly cause to be made to a Party, a counsel or representative to a Party, or Interested Association Staff an ex parte communication relevant to the merits of that proceeding.

(b) Disclosure of Prohibited Communication

A Governor, a Director, or an Adjudicator who is participating in a decision with respect to a proceeding, or an Association employee who is participating or advising in the decision of a Governor, a Director, or an Adjudicator, who receives, makes, or knowingly causes to be made a communication prohibited by this Rule shall place in the record of the proceeding:

- (1) all such written communications;
- (2) memoranda stating the substance of all such oral communications; and
- (3) all written responses and memoranda stating the substance of all oral responses to all such communications.

(c) Remedies

Upon receipt of a communication made or knowingly caused to be made by any Party, any counsel or representative to a Party, or any Interested Association Staff in violation of subparagraphs (a)(1) or (a)(2), the Association or an Adjudicator may, to the extent consistent with the interests of justice, the policies underlying the Act, and the Association's Rules, order the Party responsible for the communication, or the Party who may benefit from the ex parte communication made, to show cause why the Party's claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by reason of such ex parte communication.

(d) Timing

In a disciplinary proceeding governed by the Rule 9200 Series and the Rule 9300 Series, the prohibitions of this Rule shall apply beginning with the authorization of a complaint as provided in Rule 9211, unless the person responsible for the communication has knowledge that the complaint shall be authorized, in which case the prohibitions shall apply beginning at the time of his or her acquisition of such knowledge.

(e) Waiver of Ex Parte Prohibition**(1) Offer of Settlement**

If a Respondent submits an offer of settlement under Rule 9270, the submission constitutes a waiver by such Respondent of any claim that the prohibitions against ex parte communications were violated by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of acceptance, including acceptance or rejection of such offer of settlement and order of acceptance.

(2) Letter of Acceptance, Waiver, and Consent

If a member or a person associated with a member submits an executed letter of acceptance, waiver, and consent under Rule 9216(a), the submission constitutes a waiver by such member or person associated with a member of any claim that the prohibitions against ex parte communications were violated by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent.

(3) Minor Rule Violation Plan Letter

If a member or a person associated with a member submits an executed minor rule violation plan letter under Rule 9216(b), the submission constitutes a waiver by such member or person associated with a member of any claim that the prohibitions against ex parte communications by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter, or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule plan violation letter.

9144. Separation of Functions**(a) Interested Association Staff**

Except as counsel or a witness in a proceeding or as provided in the Rule 9400 Series, Interested Association Staff is prohibited from advising an Adjudicator regarding a decision or otherwise participating in a decision of an Adjudicator. An Adjudicator is prohibited from advising Interested Association Staff regarding a decision or otherwise participating in a decision of Interested Association Staff, including

the decision to issue a complaint and a decision whether to appeal or cross-appeal a disciplinary proceeding to the National Business Conduct Committee.

(b) Separation of Adjudicators

A Hearing Officer, including the Chief Hearing Officer, or a Panelist of a Hearing Panel or an Extended Hearing Panel, is prohibited from participating in: a decision whether to issue a complaint pursuant to Rule 9211; a decision whether to appeal a disciplinary proceeding, or to file a cross-appeal with, the National Business Conduct Committee pursuant to Rule 9311; and a discussion or decision relating to a call for review, a review, or an appeal pursuant to the Rule 9300 Series. A Director is prohibited from participating in a discussion or decision relating to the above referenced acts with the Adjudicators referenced above, or a Governor or the NASD Board. A Governor is prohibited from participating in a discussion or a decision relating to the above referenced acts with the Adjudicators referenced above, or a Director or the NASD Regulation Board.

(c) Waiver of Prohibitions of Separation of Functions**(1) Offer of Settlement**

If a Respondent submits an offer of settlement under Rule 9270, the submission constitutes a waiver by such Respondent of any claim of violation of paragraph (a) or (b) by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of acceptance, including acceptance or rejection of such offer of settlement and order of acceptance.

(2) Letter of Acceptance, Waiver, and Consent

If a member or a person associated with a member submits an executed letter of acceptance, waiver, and consent under Rule 9216(a), the submission constitutes a waiver by such member or person associated with a member of any claim of violation of paragraph (a) or (b) by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the proposed letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent.

(3) Minor Rule Violation Plan Letter

If a member or a person associated with a member submits an executed

minor rule violation plan letter under Rule 9216(b), the submission constitutes a waiver by such member or person associated with a member of any claim of violation of paragraph (a) or (b) by a person or body in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule violation plan letter.

9145. Rules of Evidence; Official Notice**(a) Rules of Evidence**

The formal rules of evidence shall not apply in a proceeding brought under the Rule 9000 Series.

(b) Official Notice

In a proceeding governed by the Rule 9000 Series, an Adjudicator may take official notice of such matters as might be judicially noticed by a court, or of other matters within the specialized knowledge of the Association as an expert body. Before an Adjudicator proposes to take official notice of a matter, it shall permit a Party the opportunity to oppose or otherwise comment upon the proposal to take official notice.

9146. Motions**(a) General Requirement for Motions**

A Party may make a written or oral motion, subject to limitations set forth below.

(b) Adjudicator May Require a Written Motion

If a Party makes an oral motion, an Adjudicator may order that such motion be set forth in writing, after considering the facts and circumstances, including whether:

(1) the hearing or conference in which the Party makes such motion is being recorded; and

(2) the opposing Parties shall be fully informed and shall have adequate notice and opportunity to respond to such motion.

(c) Specificity

All motions shall state the specific relief requested and the basis therefor.

(d) Time For Filing Opposition or Other Response to Motion

Unless otherwise ordered by an Adjudicator, any Party may file an opposition or other response to a written motion; the opposition or response shall be filed within 14 days after service of the motion. If no response is filed within the response period, the Party failing to respond shall be deemed to have waived any objection to the granting of the motion. A Party shall be afforded an opportunity to respond to an oral motion at the time the oral motion is

made, unless the Adjudicator orders that the Party shall be granted additional time to respond.

(e) Oral Argument

An Adjudicator may allow oral argument on motions. Oral argument may take place in person or by telephone.

(f) Frivolous Motions

An Adjudicator may deny dilatory, repetitive, or frivolous motions without awaiting a response.

(g) No Stay

Unless otherwise ordered by an Adjudicator, the filing of a motion does not stay a proceeding.

(h) Reply

The moving Party shall have no right to reply to the opposition or other response of the other Parties. An Adjudicator may permit a reply to be filed. When permitted, a movant's reply submission shall be filed within five days after service of the opposition or other response.

(i) Page Limit, Format Requirements

Unless otherwise ordered by an Adjudicator, submissions in support of or in opposition to motions shall not exceed ten double-spaced pages, including double-spaced footnotes, exclusive of pages containing any table of contents, table of authorities, or addenda.

(j) Disposition of Procedural Motions; Disposition of Motions for Summary Disposition

In the Rule 9200 Series, a motion on a procedural matter may be decided by a Hearing Officer; a motion for summary disposition of a cause of action set forth in a complaint shall be decided by a majority vote of the Hearing Panel or, if applicable, the Extended Hearing Panel. In the Rule 9300 Series, a motion on a procedural matter may be decided by a Subcommittee, an Extended Proceeding Committee, or the National Business Conduct Committee; a motion for summary disposition of a cause of action shall be decided by the National Business Conduct Committee. In the Rule 9400 Series and the Rule 9500 Series, a motion shall be decided by an Adjudicator.

(k) General

All motions, oppositions or responses, replies, and any other filings made by a Party in a proceeding shall comply with Rules 9133, 9134, 9135, 9136 and 9137.

9147. Rulings on Procedural Matters

The NASD Board, the NASD Regulation Board, the National Business Conduct Committee, a Hearing Officer or any other Adjudicator shall have full authority, except as otherwise provided by this Code, to rule on a procedural motion and other procedural and

administrative matters arising during the course of a proceeding conducted pursuant to this Code, subject to the rights of review or appeal provided by this Code.

9148. Interlocutory Review

Except as provided in Rule 9280, there shall be no interlocutory review of a ruling or order issued by any Adjudicator in a proceeding governed by this Code. If an Adjudicator grants interlocutory review of a ruling or order, such review shall not stay a proceeding, except under Rule 9280 or as otherwise ordered by the Adjudicator.

9150. Exclusion of Person from Rule 9000 Proceeding

(a) Exclusion

An Adjudicator may exclude an attorney for a Party or other person authorized to represent others by Rule 9141 from acting as counsel, acting in any representative capacity, or otherwise appearing in a particular Rule 9000 Series proceeding for contemptuous conduct under Rule 9280 or unethical or improper professional conduct in that proceeding. A person excluded under Rule 9280 may seek review of such exclusion under Rule 9280.

(b) Other Proceedings Not Precluded

Prohibiting an attorney or other person authorized to represent others by Rule 9141 from practicing or appearing in an Association proceeding shall not preclude the Association from initiating other proceedings against such person.

9160. Recusal or Disqualification

No person shall participate as an Adjudicator in a matter governed by this Code as to which he or she has a conflict of interest or bias, or circumstances otherwise exist where his or her fairness might reasonably be questioned. In any such case the person shall recuse himself or herself, or shall be disqualified as follows:

(a) NASD Board

The Chair of the NASD Board shall have authority to order the disqualification of a Governor or a member of a Hearing Panel appointed under Rule 9513, and the Vice Chair of the NASD Board shall have authority to order the disqualification of the Chair of the NASD Board;

(b) NASD Regulation Board

The Chair of the NASD Regulation Board shall have authority to order the disqualification of a Director or a member of a Hearing Panel appointed under Rule 9523, and the Vice Chair of the NASD Regulation Board shall have authority to order the disqualification of

the Chair of the NASD Regulation Board;

(c) National Business Conduct Committee or Certain Subcommittees

The Chair of the National Business Conduct Committee shall have authority to order the disqualification of a member of the National Business Conduct Committee, a Subcommittee appointed pursuant to the Rule 9400 Series, and the Statutory Disqualification Committee; and the Vice Chair of the National Business Conduct Committee shall have authority to order the disqualification of the Chair of the National Business Conduct Committee;

(d) Rule 9331 Subcommittee or Extended Proceeding Committee

Disqualification of a Panelist of a Subcommittee or Extended Proceeding Committee appointed pursuant to Rule 9331 shall be governed by Rule 9332;

(e) Panelist of Hearing Panel or Extended Hearing Panel

Disqualification of a Panelist of a Hearing Panel or Extended Hearing Panel shall be governed by Rule 9234;

(f) Hearing Officer

Disqualification of a Hearing Officer of a Hearing Panel or an Extended Hearing Panel shall be governed by Rule 9233; and

(g) NASD Regulation Staff As Adjudicator

The President of NASD Regulation shall have authority to order the disqualification of a member of the staff of the Department of Member Regulation participating in a Rule 9400 Series decision.

9200. Disciplinary Proceedings

9210. Complaint and Answer

9211. Issuance of Complaints

(a) Complaints Initiated and Filed by Department of Enforcement

If the Department of Enforcement believes that any NASD member or associated person is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and the regulations thereunder, which the Association has jurisdiction to enforce, the Department of Enforcement may authorize and issue a complaint as set forth in Rule 9212. At the time of authorization and issuance of a complaint, the Department of Enforcement may propose: (1) an appropriate location for the hearing; and (2) if the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120(q), that the Chief Hearing Officer select as a Panelist for the Hearing Panel, a current or former member of the Market Regulation Committee who is associated with a member of the

Association, or, if applicable, select as a Panelist for an Extended Hearing Panel, a current or former member of the Market Regulation Committee who is or was associated with a member of the Association.

(b) Complaints Initiated by the NASD Regulation Board or the NASD Board

The NASD Regulation Board and the NASD Board each shall have the authority to direct the Department of Enforcement to issue a complaint when, on the basis of information and belief, either of such boards is of the opinion that any NASD member or associated person is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and the regulations thereunder, which the Association has jurisdiction to enforce. The Department of Enforcement shall authorize and issue the complaint as set forth in Rule 9212. At the time of authorization and issuance of a complaint, the Department of Enforcement may propose: (1) An appropriate location for the hearing; and (2) if the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120(q), that the Chief Hearing Officer select as a Panelist for the Hearing Panel, a current or former member of the Market Regulation Committee who is associated with a member of the Association, or, if applicable, select as a Panelist for an Extended Hearing Panel, a current or former member of the Market Regulation Committee who is or was associated with a member of the Association.

(c) Commencement of Disciplinary Proceeding

A disciplinary proceeding shall begin when the complaint is served and filed.

9212. Complaints—Requirements, Service, Amendment, Withdrawal, and Docketing

(a) Form, Content, Notice, Docketing, and Service

Each complaint shall be in writing and signed by a Complainant. The complaint shall specify in reasonable detail the conduct alleged to constitute the violative activity and the rule, regulation, or statutory provision the Respondent is alleged to be violating or to have violated. If the complaint consists of several causes of action, each cause shall be stated separately. Complaints shall be served by the Complainant on each Party pursuant to Rules 9131 and 9134, and filed at the time of service with the Office of Hearing Officers pursuant to Rules 9135, 9136, and 9137.

(b) Amendments to Complaints

Upon motion by a Complainant, the Hearing Officer may, at any time after

considering good cause shown by a Complainant and any unfair prejudice to any Respondent, permit a Complainant to amend a complaint to include new matters of fact or law.

(c) Withdrawal of Complaints

With prior leave of the Hearing Officer, a Complainant may withdraw a complaint. If a Complainant withdraws the complaint before the earlier of (1) The Hearing Panel's or, if applicable, the Extended Hearing Panel's, issuance of a ruling on a motion for summary disposition, or (2) the start of the hearing on the merits, the Complainant's withdrawal of the complaint shall be without prejudice and such Complainant shall be permitted to refile a case based on allegations concerning the same facts and circumstances that are set forth in the withdrawn complaint. If the Complainant filing the complaint requests to withdraw such complaint after the occurrence of either of the two events set forth in (1) and (2) in this paragraph, the Hearing Panel or, if applicable, the Extended Hearing Panel, after considering the facts and circumstances of the request, shall determine whether the withdrawal shall be granted with prejudice.

(d) Disciplinary Proceeding Docket

The Office of Hearing Officers shall promptly record each complaint filed with it in the Association's disciplinary proceeding docket, and record in the disciplinary proceeding docket each event, filing, and change in the status of a disciplinary proceeding.

9213. Assignment of Hearing Officer and Appointment of Panelists to Hearing Panel or Extended Hearing Panel

(a) Assignment of Hearing Officer

As soon as practicable after a Complainant has filed his or her complaint with the Office of Hearing Officers, the Chief Hearing Officer shall assign a Hearing Officer to preside over the disciplinary proceeding and shall serve the Parties with notice of the Hearing Officer's assignment pursuant to Rule 9132.

(b) Appointment of Panelists

As soon as practicable after assigning a Hearing Officer to preside over a disciplinary proceeding, the Chief Hearing Officer shall appoint Panelists pursuant to Rules 9231 and 9232 to a Hearing Panel or, if the Chief Hearing Officer determines that an Extended Hearing Panel should be appointed, to an Extended Hearing Panel.

9214. Consolidation of Disciplinary Proceedings

(a) Initiated by Chief Hearing Officer

The Chief Hearing Officer may order the consolidation of two or more disciplinary proceedings, upon his or her own motion, under circumstances where such consolidation would further the efficiency of the disciplinary process, and where the subject complaints involve common questions of law or fact, or one or more of the same Respondents. In determining whether to order the consolidation of such disciplinary proceedings, the Chief Hearing Officer shall consider: (1) Whether the same or similar evidence reasonably would be expected to be offered at each of the hearings; (2) whether the proposed consolidation would conserve the time and resources of the Parties; and (3) whether any unfair prejudice would be suffered by one or more Parties as a result of the consolidation. If the Chief Hearing Officer proposes to consolidate two or more disciplinary proceedings, the Chief Hearing Officer shall serve upon the Parties notice of the proposed consolidation of disciplinary proceedings, together with a copy of each relevant complaint and any answer that has been filed thereto, pursuant to Rule 9132. The Parties shall have 14 days after service to file a response, stating any arguments in favor of or opposition to consolidation.

(b) Initiated by a Party

A Party may file a motion to request the consolidation of two or more disciplinary proceedings if such consolidation would further the efficiency of the disciplinary process, if the subject complaints involve common questions of law or fact or one or more of the same Respondents, or if one or more of the factors favoring consolidation set forth in paragraph (a) exist. If a Party moves to consolidate two or more disciplinary proceedings, the Party shall file such motion, together with a copy of each relevant complaint and any answer thereto that has been filed, with the Office of Hearing Officers, and shall serve the same upon the Parties pursuant to Rule 9133. The Parties shall have 14 days after service to file a response, stating any arguments in favor of or opposition to consolidation.

(c) Impact on Hearing Panel or Extended Hearing Panel

If the Chief Hearing Officer issues an order to consolidate two or more disciplinary proceedings for which Hearing Panels or, if applicable, Extended Hearing Panels, have been appointed, the Chief Hearing Officer's order shall specify which Hearing Panel or, if applicable, Extended Hearing Panel, shall preside over the consolidated disciplinary proceeding, or

shall appoint a new Hearing Panel or, if applicable, Extended Hearing Panel, to preside, based on the criteria set forth in Rules 9231 and 9232.

9215. Answers to Complaints

(a) Form, Service, Notice

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

(b) Content, Affirmative Defenses

Unless otherwise ordered by the Hearing Officer, an answer shall specifically admit, deny, or state that the Respondent does not have and is unable to obtain sufficient information to admit or deny, each allegation in the complaint. When a Respondent intends to deny only part of an allegation, the Respondent shall specify so much of it as is admitted and deny only the remainder. A statement of lack of information shall be deemed a denial. Any allegation not denied shall be deemed admitted. Any affirmative defense shall be asserted in the answer.

(c) Motion for More Definite Statement

A Respondent may file with an answer a motion for a more definite statement of specified matters of fact or law to be considered or determined. Such motion shall state why each such matter of fact or law should be required to be made more definite. If the motion is granted, the order granting such motion shall set the periods for filing such a statement and any answer thereto.

(d) Amendments to Answer

Upon motion by a Respondent, the Hearing Officer may, after considering good cause shown by the Respondent and any unfair prejudice which may result to any other Party, permit an answer to be amended.

(e) Extension of Time to Answer Amended Complaint

If a complaint is amended pursuant to Rule 9212(b), the time for filing an answer or amended answer shall be extended to 14 days after service of the amended complaint. If any Respondent has already filed an answer, such Respondent shall have 15 days after service of the amended complaint, unless otherwise ordered by the Hearing

Officer, within which to file an amended answer.

(f) Failure to Answer, Default

If the Respondent does not file an answer with the Office of Hearing Officers within the time required, the Hearing Officer shall order the Department of Enforcement to send a second notice to such Respondent requiring an answer within 14 days after service of the second notice, or within such longer period as the Hearing Officer in his or her discretion may order. The second notice shall state that failure of the Respondent to reply within the period specified shall allow the Hearing Officer, in the exercise of his or her discretion, to: (1) treat as admitted by the Respondent the allegations in the complaint; and (2) enter a default decision against the Respondent pursuant to Rule 9269. If no answer is filed with the Office of Hearing Officers within the time required by the second notice, the allegations of the complaint may be considered admitted by such Respondent and a default decision may be issued by the Hearing Officer. A Respondent may, for good cause shown, move to set aside a default pursuant to Rule 9146.

9216. Acceptance, Waiver, and Consent; Plan Pursuant to SEC Rule 19d-1(c)(2)

(a) Acceptance, Waiver, and Consent Procedures

(1) Notwithstanding Rule 9211, if the Department of Enforcement has reason to believe a violation has occurred and the member or associated person does not dispute the violation, the Department of Enforcement may prepare and request that the member or associated person execute a letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive such member's or associated person's right to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, and any right of appeal to the National Business Conduct Committee, the Commission, and the courts, or to otherwise challenge the validity of the letter, if the letter is accepted. The letter shall describe the act or practice engaged in or omitted, the rule, regulation, or statutory provision violated, and the sanction or sanctions to be imposed.

(2) If a member or person associated with a member submits an executed letter of acceptance, waiver, and consent, by the submission such member or person associated with a member also waives:

(A) any right of such member or person associated with a member to claim bias or prejudgment of the

General Counsel of NASD Regulation, or his or her delegatee, the National Business Conduct Committee, or any member of the National Business Conduct Committee, in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent; and

(B) any right of such member or person associated with a member to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of the letter of acceptance, waiver, and consent, or other consideration of the letter of acceptance, waiver, and consent, including acceptance or rejection of such letter of acceptance, waiver, and consent.

If a letter of acceptance, waiver, and consent is rejected, the member or associated person shall be bound by the waivers made under subparagraphs (a)(1) and (2) for conduct by persons or bodies occurring during the period beginning on the date the letter of acceptance, waiver, and consent was executed and submitted and ending upon the rejection of the letter of acceptance, waiver, and consent.

(3) If the member or associated person executes the letter of acceptance, waiver, and consent, it shall be submitted to the National Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified) or by the General Counsel of NASD Regulation, or his or her delegatee, may accept such letter or refer it to the National Business Conduct Committee for acceptance or rejection by the National Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified) may reject such letter or refer it to the National Business Conduct Committee for acceptance or rejection by the National Business Conduct Committee.

(4) If the letter is accepted by the National Business Conduct Committee, the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified), or

the General Counsel of NASD Regulation, or his or her delegatee, it shall be deemed final and shall constitute the complaint, answer, and decision in the matter. If the letter is rejected by the Chair and Vice Chair of the National Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified) or the National Business Conduct Committee, NASD Regulation may take any other appropriate disciplinary action with respect to the alleged violation or violations. If the letter is rejected, the member or associated person shall not be prejudiced by the execution of the letter of acceptance, waiver, and consent under subparagraph (a)(1) and the letter may not be introduced into evidence in connection with the determination of the issues set forth in any complaint or in any other proceeding.

(b) Procedure for Violation Under Plan Pursuant to SEC Rule 19d-1(c)(2)

(1) Notwithstanding Rule 9211, NASD Regulation or the National Business Conduct Committee may, subject to the requirements set forth in subparagraphs (b)(2) through (b)(4) and in SEC Rule 19d-1(c)(2), impose a fine (not to exceed \$2,500) and/or a censure on any member or associated person with respect to any rule listed in IM-9216. If the Department of Enforcement has reason to believe a violation has occurred and if the member or associated person does not dispute the violation, the Department of Enforcement may prepare and request that the member or associated person execute a minor rule violation plan letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive such member's or associated person's right to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, and any right of appeal to the National Business Conduct Committee, the Commission, and the courts, or to otherwise challenge the validity of the letter, if the letter is accepted. The letter shall describe the act or practice engaged in or omitted, the rule, regulation, or statutory provision violated, and the sanction or sanctions to be imposed.

(2) If a member or person associated with a member submits an executed minor rule violation plan letter, by the submission such member or person associated with a member also waives:

(A) any right of such member or person associated with a member to claim bias or prejudice of the General Counsel of NASD Regulation, or his or her delegatee, the National Business Conduct Committee, or any

member of the National Business Conduct Committee, in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule violation plan letter; and

(B) any right of such member or person associated with a member to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussions regarding the terms and conditions of the minor rule violation plan letter or other consideration of the minor rule violation plan letter, including acceptance or rejection of such minor rule violation plan letter.

If a minor rule violation plan letter is rejected, the member or person associated with a member shall be bound by the waivers made under subparagraphs (b) (1) and (2) for conduct by persons or bodies occurring during the period beginning on the date the minor rule violation plan letter was executed and submitted and ending upon the rejection of the minor rule violation plan letter.

(3) If the member or associated person executes the minor rule violation plan letter, it shall be submitted to the National Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified) or the General Counsel of NASD Regulation, or his or her delegatee, may accept such letter or refer it to the National Business Conduct Committee for acceptance or rejection by the National Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified) may reject such letter or refer it to the National Business Conduct Committee for acceptance or rejection by the National Business Conduct Committee.

(4) If the letter is accepted by the National Business Conduct Committee, the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified), or the General Counsel of NASD Regulation, or his or her delegatee, it shall be deemed final and the Association shall report the violation to the Commission as required by the Commission pursuant to a plan approved under SEC Rule 19d-1(c)(2). If

the letter is rejected by the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified), or by the National Business Conduct Committee, NASD Regulation may take any other appropriate disciplinary action with respect to the alleged violation or violations. If the letter is rejected, the member or associated person shall not be prejudiced by the execution of the minor rule violation plan letter under subparagraph (b)(1) and the letter may not be introduced into evidence in connection with the determination of the issues set forth in any complaint or in any other proceeding.

IM-9216. Violations Appropriate for Disposition Under Plan Pursuant to SEC Rule 19d-1(c)(2)

- Rule 2210 (b) and (c) and Rule 2220 (b) and (c)—Failure to have advertisements and sales literature approved by a principal prior to use; failure to maintain separate files of advertisements and sales literature containing required information; and failure to file advertisements with the Association within the required time limits.

- Rule 3360—Failure to timely file reports of short positions on Form NS-1.

- Rule 3110—Failure to keep and preserve books, accounts, records, memoranda, and correspondence in conformance with all applicable laws, rules, regulations and statements of policy promulgated thereunder, and with the Rules of the Association.

9220. Request for Hearing; Appointment of Hearing Panel or Extended Hearing Panel; Extensions of Time, Postponements, Adjournments

9221. Request for Hearing

(a) **Respondent Request for Hearing**
With the filing of any Respondent's answer, such Respondent may: (1) request a hearing; (2) propose an appropriate location for the hearing; and (3) propose, if the complaint alleges at least one cause of action involving a violation of a statute or rule described in Rule 9120(q), that the Chief Hearing Officer select as a Panelist for a Hearing Panel a current or former member of the Market Regulation Committee who is associated with a member of the Association or, if applicable, select as a Panelist for an Extended Hearing Panel, a current or former member of the Market Regulation Committee who is or was associated with a member of the Association. If a Respondent requests a hearing, a hearing shall be granted. A

Respondent who fails to request a hearing with the filing of his or her answer waives the right to a hearing unless a Hearing Officer, Hearing Panel, or, if applicable, an Extended Hearing Panel, grants, for good cause shown, a later filed motion by such Respondent requesting a hearing.

(b) Hearing Officer Order Requiring Hearing

In the absence of a request for a hearing from any Respondent, the Hearing Officer may order any complaint set down for hearing.

(c) Authority of Hearing Panel, Extended Hearing Panel to Order Hearing

If all Respondents waive a hearing, and the Hearing Officer does not order a hearing on his or her own motion, the Hearing Panel or, if applicable, the Extended Hearing Panel, may order a hearing or may consider the matter on the record, as defined in Rule 9267. If fewer than all Respondents waive a hearing, the Hearing Officer, the Hearing Panel, or, if applicable, the Extended Hearing Panel, may, in the exercise of its discretion, order that a hearing be held as to all Respondents. Alternatively, the Hearing Officer, the Hearing Panel, or, if applicable, the Extended Hearing Panel, may conduct a hearing as to only those Respondents who requested a hearing and consider the matter on the record as to those Respondents who waived a hearing.

(d) Notice of Hearing

The Hearing Officer shall issue a notice stating the date, time, and place of the hearing, and whether the hearing shall be held before a Hearing Panel or an Extended Hearing Panel, and shall serve such notice on the Parties at least 28 days before the hearing, unless (1) in the discretion of the Hearing Officer, he or she determines that extraordinary circumstances require a shorter notice period, or (2) the Parties waive the notice period.

9222. Extensions of Time, Postponements, and Adjournments

(a) Availability

At any time prior to the issuance of the decision of the Hearing Panel or, if applicable, the Extended Hearing Panel, the Hearing Officer may, for good cause shown, extend or shorten any time limits prescribed by the Code for the filing of any papers and may, consistent with paragraph (b), postpone or adjourn any hearing.

(b) Limitations on Postponements, Adjournments, and Extensions

A hearing shall begin at the time and place ordered, unless the Hearing Officer, for good cause shown, changes the place of the hearing, postpones the commencement of the hearing, or

adjourns a convened hearing for a reasonable period of time, subject to the limitations in subparagraph (b)(2).

(1) Additional Considerations

In considering a motion for the postponement of the start of a hearing or, adjournment once a hearing has begun, the Hearing Officer shall consider:

(A) the length of the proceeding to date;

(B) the number of postponements, adjournments, or extensions already granted;

(C) the stage of the proceedings at the time of the request;

(D) potential harm to the investing public if an extension of time, adjournment, or postponement is granted; and

(E) such other matters as justice may require.

(2) Time Limit

Postponements, adjournments, or extensions of time for filing papers shall not exceed 28 days unless the Hearing Officer states on the record or provides by written order the reasons a longer period is necessary.

9230. Appointment of Hearing Panel, Extending Hearing Panel

9231. Appointment by the Chief Hearing Officer of Hearing Panel or Extended Hearing Panel

(a) Appointment

The Chief Hearing Officer shall appoint a Hearing Panel or an Extended Hearing Panel to conduct the disciplinary proceeding and issue a decision.

(b) Hearing Panel

The Hearing Panel shall be composed of a Hearing Officer and two Panelists, except as provided in Rule 9234 (a), (c), (d), or (e). The Hearing Officer will serve as the chair of the Hearing Panel. Each Panelist shall be associated with a member of the Association.

(1) Except as provided in (2), a person shall be eligible to be selected as a Panelist only if the person is:

(A) a current member of a District Committee;

(B) a person who previously served on a disciplinary hearing panel;

(C) a former member of the National Business Conduct Committee;

(D) a person who previously served on a disciplinary subcommittee of the National Business Conduct Committee, including a Subcommittee, an Extended Proceeding Committee, or their predecessor subcommittees; or,

(E) a person who previously was a Director, a member of the Nasdaq Board of Directors, or a Governor, but does not sit currently on any of the boards.

(2) If the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120(q), the Chief Hearing Officer may select as a Panelist a current member of the Market Regulation Committee or a former member of the Market Regulation Committee who previously served on a disciplinary hearing panel.

(c) Extended Hearing Panel

Upon consideration of the complexity of the issues involved, the probable length of the hearing, or other factors that the Chief Hearing Officer deems material, the Chief Hearing Officer may determine that a matter shall be designated an Extended Hearing, and that such matter shall be considered by an Extended Hearing Panel. The Extended Hearing Panel shall be composed of a Hearing Officer and two Panelists, except as provided in Rule 9234 (a), (c), (d), or (e). The Hearing Officer will serve as the chair of the Extended Hearing Panel. The Panelists shall be associated with a member of the Association, or retired therefrom. A person retired from employment with a member of the Association shall have retired from such employment not earlier than four years before the date the complaint was filed. The Chief Hearing Officer shall have discretion to compensate any or all Panelists of an Extended Hearing Panel at the rate then in effect for arbitrators appointed under the Rule 10000 Series.

(1) Except as provided in (2), a person shall be eligible to be selected as a Panelist only if the person is:

(A) a current member of a District Committee;

(B) a person who previously served on a disciplinary hearing panel;

(C) a former member of the National Business Conduct Committee;

(D) a person who previously served on a disciplinary subcommittee of the National Business Conduct Committee, including a Subcommittee, an Extended Proceeding Committee, or their predecessor subcommittees; or,

(E) a person who previously was a Director, a member of the Nasdaq Board of Directors, or a Governor, but does not sit currently on any of the boards.

(2) If the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120(q), the Chief Hearing Officer may select as a Panelist a current member of the Market Regulation Committee, or a former member of the Market Regulation Committee, who, at the time of his or her membership on the Market Regulation Committee, was associated with a member of the Association. In order to be eligible to sit as a Panelist on an Extended Hearing Panel, a former

member of the Market Regulation Committee shall have served previously on a disciplinary hearing panel.

9232. Criteria for Selection of Panelists and Replacement Panelists

(a) Chief Hearing Officer Selection Alternatives

Following a determination of whether a Hearing Panel or an Extended Hearing Panel should be appointed, the Chief Hearing Officer shall determine:

(1) which District Committee shall be the Primary District Committee from which Panelists may be selected; and

(2) whether one of the Panelists may be selected from the Market Regulation Committee.

(b) Criteria for Selection of Panelist from Market Regulation Committee

The Chief Hearing Officer may select a Panelist from the Market Regulation Committee, as provided in Rule 9231, to serve in a disciplinary proceeding if the complaint alleges at least one cause of action involving a violation of a statute or a rule described in Rule 9120(q).

(c) Criteria for Designation of Primary District Committee

The Chief Hearing Officer shall designate a District Committee as the Primary District Committee based upon relevant facts and circumstances of the case, including but not limited to:

(1) the location of a Respondent's principal office if the Respondent is or was a member firm;

(2) the location of a Respondent's office at the time of the alleged misconduct if the Respondent is or was an associated person;

(3) the location of the office of a member or an associated person, or a former member or associated person, where the alleged misconduct occurred;

(4) the location of witnesses at the time of the filing of the complaint, especially the location of witnesses who are or were customers of a Respondent;

(5) the location, at the time of the alleged misconduct, of the main, branch, or other office in which supervisory personnel, who are or were responsible for the supervision of a Respondent, were employed; and

(6) the location, at the time of the alleged misconduct, of the main, branch, or other office in which supervisory personnel, who are or were responsible for the supervision of the office, division, function, or segment of the member where the alleged misconduct occurred, were employed.

(d) Criteria for Appointment of a Panelist

After the Chief Hearing Officer designates the Primary District Committee, the Chief Hearing Officer shall select Panelists from the current members of the Primary District

Committee, the other categories of persons eligible to serve as Panelists as set forth in Rule 9231(b)(1) (A) through (E) or, if applicable, in Rule 9231(c)(1) (A) through (E), who are located in the same geographic area as the Primary District Committee, and, if applicable, from the current or former members of the Market Regulation Committee, based upon the following criteria:

(1) expertise;

(2) the absence of any conflict of interest or bias, and any appearance thereof;

(3) availability; and,

(4) the frequency with which a person has served as a Panelist on Hearing Panels or Extended Hearing Panels during the past two years.

(e) Appointment of Panelists from Other than Primary District Committee.

Designation of the Primary District Committee does not preclude the Chief Hearing Officer from selecting one or more Panelists from other categories of eligible Panelists if the Chief Hearing Officer determines that one or more persons from other categories of eligible Panelists more clearly meet the criteria of paragraph (d) (1) through (4) and the public interest or the administration of NASD Regulation's regulatory and enforcement program would be enhanced by the selection of one or more Panelists from other categories of eligible Panelists other than Panelists from the Primary District Committee.

9233. Hearing Panel or Extended Hearing Panel: Recusal and Disqualification of Hearing Officers

(a) Recusal, Withdrawal of Hearing Officer

If at any time a Hearing Officer determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned, the Hearing Officer shall notify the Chief Hearing Officer and the Chief Hearing Officer shall issue and serve on the Parties a notice stating that the Hearing Officer has withdrawn from the matter. In the event that a Hearing Officer withdraws, is incapacitated, or otherwise is unable to continue service after being appointed, the Chief Hearing Officer shall appoint a replacement Hearing Officer.

(b) Motion for Disqualification

A Party may move for the disqualification of a Hearing Officer. A motion shall be based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Hearing Officer's fairness might reasonably be questioned, and shall be accompanied by an affidavit setting

forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the Party learned of those facts. Such motions shall be filed not later than 15 days after the later of:

(1) when the Party learned of the facts believed to constitute the disqualification; or

(2) when the Party was notified of the assignment of the Hearing Officer.

(c) Disposition of Disqualification Motion

A motion for disqualification of a Hearing Officer shall be decided by the Chief Hearing Officer who shall promptly investigate whether disqualification is required and issue a written ruling on the motion. In the event of a disqualification of the Hearing Officer, the Chief Hearing Officer shall appoint a replacement Hearing Officer.

9234. Hearing Panel or Extended Hearing Panel: Recusal and Disqualification of Panelists

(a) Recusal, Withdrawal of Panelist

If at any time a Panelist of a Hearing Panel or an Extended Hearing Panel determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned, the Panelist shall notify the Hearing Officer and the Hearing Officer shall issue and serve on the Parties a notice stating that the Panelist has withdrawn from the matter. In the event that a Panelist withdraws, is incapacitated, or otherwise is unable to continue service after being appointed, the Chief Hearing Officer may, in the exercise of discretion, determine whether to appoint a replacement Panelist. In the event that both Panelists withdraw, are incapacitated, or otherwise are unable to continue service after being appointed, the Chief Hearing Officer shall appoint two replacement Panelists.

(b) Disqualification: Motion of Party; Order of Chief Hearing Officer

(1) A Party may file a motion to disqualify a Panelist of a Hearing Panel or an Extended Hearing Panel. A motion shall be based upon a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Panelist's fairness might reasonably be questioned, and shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification, and (2) the dates on which the Party learned of those facts.

(2) Such motions shall be filed not later than 15 days after the later of:

(A) when the Party learned of the facts believed to constitute the disqualification; or

(B) when the Party was notified of the appointment of the Panelist.

(3) The Chief Hearing Officer may order the disqualification of a Panelist of a Hearing Panel or an Extended Hearing Panel if the Chief Hearing Officer determines that a conflict of interest or bias or circumstances otherwise exist where the Panelist's fairness might reasonably be questioned, and shall state the facts constituting the grounds for disqualification.

(c) *Disposition of Disqualification Motion: Challenge to Single Member of Hearing Panel*

If a Party files a motion to disqualify a Panelist of a Hearing Panel or an Extended Hearing Panel, the Hearing Officer shall promptly investigate whether disqualification is required and shall issue a written ruling on the motion. In the event a Panelist is disqualified, the Chief Hearing Officer may, in the exercise of discretion, appoint a replacement Panelist.

(d) *Disposition of Disqualification Motion: Challenge to Both Panelists of Hearing Panel or Extended Hearing Panel*

If a Party files a motion to disqualify both Panelists of a Hearing Panel or an Extended Hearing Panel, the Hearing Officer shall promptly investigate whether disqualification is required and shall issue a written ruling on the motion. In the event one Panelist is disqualified, the Chief Hearing Officer may, in the exercise of discretion, appoint a replacement Panelist. In the event both Panelists are disqualified, the Chief Hearing Officer shall promptly appoint two persons as replacement Panelists.

(e) *Disposition of Disqualification Motion: Challenge to Both Panelists of Hearing Panel or Extended Hearing Panel and Hearing Officer*

If a Party files a motion to disqualify both Panelists of a Hearing Panel or an Extended Hearing Panel, and the Hearing Officer, the Chief Hearing Officer shall promptly investigate whether disqualification is required and shall issue a written ruling on the motion. In the event a Panelist is disqualified, the Chief Hearing Officer may, in the exercise of discretion, appoint a replacement Panelist. In the event both Panelists are disqualified, the Chief Hearing Officer shall promptly appoint two persons as replacement Panelists. In the event a Hearing Officer and a Panelist are disqualified, the Chief Hearing Officer shall promptly appoint a Hearing Officer. In the event both Panelists and the Hearing Officer

are disqualified, the Chief Hearing Officer shall promptly appoint a Hearing Officer and two persons as replacement Panelists.

(f) *Criteria for Replacement Panelist*

If the Chief Hearing Officer appoints a replacement Panelist by operation of this Rule, the Chief Hearing Officer shall do so using the criteria set forth in Rule 9232.

9235. *Hearing Officer Authority*

(a) *Hearing Officer Authority*

The Hearing Officer shall be selected by the Chief Hearing Officer and shall have authority to do all things necessary and appropriate to discharge his or her duties. In addition to the powers exercised by all members of the Hearing Panel or, if applicable, the Extended Hearing Panel, the powers of the Hearing Officer include, but are not limited to:

(1) holding pre-hearing and other conferences and requiring the attendance at any such conference of at least one representative of each Party who has authority to negotiate the resolution of issues in controversy;

(2) regulating the course of the hearing;

(3) ordering the Parties to present oral arguments at any stage of the disciplinary proceeding;

(4) resolving any and all procedural and evidentiary matters, discovery requests, and other non-dispositive motions, subject to any limitations set forth elsewhere in this Code;

(5) reopening any hearing, upon notice to all Parties, prior to the issuance of the decision of the Hearing Panel or, if applicable, the Extended Hearing Panel;

(6) creating and maintaining the official record of the disciplinary proceeding; and

(7) drafting a decision that represents the views of the majority of the Hearing Panel or, if applicable, the Extended Hearing Panel.

9240. *Pre-hearing Conferences and Submissions*

9241. *Pre-hearing Conferences*

(a) *Purposes of Conferences*

The purposes of pre-hearing conferences include, but are not limited to:

(1) expediting the disposition of the proceeding;

(2) establishing procedures to manage the proceeding efficiently; and

(3) improving the quality of the hearing through more thorough preparation.

(b) *Procedure*

On his or her own motion or at the request of a Party, the Hearing Officer

may, in his or her discretion, order counsel or any Party to meet for a pre-hearing conference. Such conferences also may be held with one or more persons participating by telephone or other remote means.

(c) *Subjects to be Discussed*

At a pre-hearing conference, the Hearing Officer may consider and take action with respect to any or all of the following:

(1) simplification and clarification of the issues;

(2) exchange of witness and exhibit lists and copies of exhibits;

(3) stipulations, admissions of fact, and stipulations concerning the contents, authenticity, or admissibility into evidence of documents;

(4) matters of which official notice may be taken;

(5) the schedule for exchanging pre-hearing motions or briefs, if any;

(6) the method of service and filing of papers by the Parties;

(7) determination of hearing dates;

(8) amendments to the complaint or answers thereto;

(9) production of documents as set forth in Rule 9251; and

(10) such other matters as may aid in the orderly and expeditious disposition of the proceeding.

(d) *Scheduling of Pre-hearing Conferences*

An initial pre-hearing conference, unless determined by the Hearing Officer to be unnecessary or premature, shall be held within 21 days after service of an answer, or after the expiration of the second period provided for filing an answer as set forth in Rule 9215(f). When a complaint names multiple Respondents, the 21-day period shall commence from the later of (i) the date on which the last timely answer was filed, or (ii) if one or more Respondents have failed to answer, from the expiration of the second period provided for filing an answer under Rule 9215(f).

(e) *Pre-hearing Orders*

At or following the conclusion of any conference held pursuant to this Rule, the Hearing Officer shall enter a ruling or order that recites any agreements reached and any procedural determinations made by the Hearing Officer.

(f) *Failure to Appear: Default*

A Party who fails to appear, in person or through counsel or a representative, at a pre-hearing conference of which he or she has been duly notified, may be deemed in default pursuant to Rule 9269. A Party may, for good cause shown, file a motion to set aside the default.

9242. Pre-hearing Submissions

(a) **Requirement to Furnish Information**
Prior to a hearing before a Hearing Panel or, if applicable, an Extended Hearing Panel, the Hearing Officer, in the exercise of his or her discretion, may order Parties to furnish such information as deemed appropriate, including any or all of the following:

(1) an outline or narrative summary of their case or defense;

(2) the legal theories upon which they shall rely;

(3) a list and copies of documents that they intend to introduce at the hearing;

(4) a list of witnesses who shall testify on their behalf, including the witnesses' names, occupations, addresses, and a brief summary of their expected testimony; and,

(5) if a witness shall be called to testify as an expert, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, a list of the expert's publications, and copies of those publications that are not readily available to the other Parties and the Hearing Panel or, if applicable, the Extended Hearing Panel.

9250. Discovery**9251. Inspection and Copying of Documents in Possession of Staff**

(a) **Documents to be Available for Inspection and Copying**

(1) Unless otherwise provided by this Rule, or by order of the Hearing Officer, the Department of Enforcement shall make available for inspection and copying by any Respondent Documents prepared or obtained by Interested Association Staff in connection with the investigation that led to the institution of proceedings. Such Documents include but are not limited to:

(A) requests for information issued pursuant to Rule 8210;

(B) every other written request directed to persons not employed by the Association to provide documents or to be interviewed;

(C) the Documents provided in response to any such requests described in (A) and (B) above;

(D) all transcripts and transcript exhibits; and

(E) all other Documents obtained from persons not employed by the Association.

(2) The Department of Enforcement shall promptly inform the Hearing Officer and each other Party if, after the issuance of a complaint, requests for information under Rule 8210 are issued under the same investigative file number under which the investigation leading to the institution of disciplinary

proceedings was conducted. If Interested Association Staff receives Documents pursuant to a request for information under Rule 8210 after Documents have been made available to a Respondent for inspection and copying as set forth in paragraph (a), and if such Documents are material and relevant to the disciplinary proceeding in which such Respondent is a Party, the additional Documents shall be made available to the Respondent not later than 14 days after the Interested Association Staff receives such Documents. If a hearing on the merits is scheduled to begin, Interested Association Staff shall make the additional Documents available to the Respondent not less than ten days before the hearing. If Interested Association Staff receives such Documents ten or fewer days before a hearing on the merits is scheduled to begin or after such hearing begins, Interested Association Staff shall make the additional Documents available immediately to the Respondent.

(3) Nothing in subparagraph (a)(1) shall limit the discretion of the Department of Enforcement to make available any other Document or the authority of the Hearing Officer to order the production of any other Document.

(b) **Documents That May Be Withheld**

(1) The Department of Enforcement may withhold a Document if:

(A) the Document is privileged or constitutes attorney work product;

(B) the Document is an examination or inspection report, an internal memorandum, or other note or writing prepared by an Association employee that shall not be offered in evidence;

(C) the Document would disclose the identity of a confidential source or Association examination or investigatory techniques; or

(D) the Hearing Officer grants leave to withhold a Document or category of Documents as not relevant to the subject matter of the proceeding, or for other good cause shown.

(2) Nothing in subparagraph (b)(1) authorizes the Department of Enforcement to withhold a Document, or a part thereof, that contains material exculpatory evidence.

(c) **Withheld Document List**

The Hearing Officer may require the Department of Enforcement to submit to the Hearing Officer a list of Documents withheld pursuant to subparagraphs (b)(1)(A) through (b)(1)(D) or to submit to the Hearing Officer any Document withheld. Upon review, the Hearing Officer may order the Department of Enforcement to make the list or any Document withheld available to the other Parties for inspection and copying.

(d) **Timing of Inspection and Copying**

The Hearing Officer shall determine the schedule of production of documents pursuant to this Rule. Unless otherwise ordered by the Hearing Officer, the Department of Enforcement shall commence making Documents available to a Respondent for inspection and copying pursuant to this Rule not later than 21 days after service of the Respondent's answer or, if there are multiple Respondents, not later than 21 days after the last timely answer is filed. If a Respondent in a multi-Respondent case fails to answer, the Department of Enforcement shall make Documents available to all other Respondents not later than the later of:

(1) 21 days after the filing date of the last timely answer, or

(2) the expiration of the second period provided for filing an answer as set forth in Rule 9215(f).

(e) **Place and Time of Inspection and Copying**

Documents subject to inspection and copying pursuant to this Rule shall be made available to the Respondent for inspection and copying at the Association office where they are ordinarily maintained, or at such other Association office as the Hearing Officer, in his or her discretion, shall designate, or as the Parties otherwise agree. A Respondent shall be given access to the Documents at the Association's offices during normal business hours. A Respondent shall not be given custody of the Documents or be permitted to remove the Documents from the Association's offices.

(f) **Copying Costs**

A Respondent may obtain a photocopy of all Documents made available for inspection. A Respondent shall be responsible for the cost of photocopying. Unless otherwise ordered, charges for copies made at the request of a Respondent shall be at a rate to be established by the NASD Regulation Board.

(g) **Failure to Make Documents Available—Harmless Error**

In the event that a Document required to be made available to a Respondent pursuant to this Rule is not made available by the Department of Enforcement, no rehearing or amended decision of a proceeding already heard or decided shall be required unless the Respondent establishes that the failure to make the Document available was not harmless error. The Hearing Officer shall determine whether the failure to make the document available was not harmless error, applying applicable Association, Commission, and federal judicial precedent.

9252. Requests for Information**(a) Content and Timing of Requests**

A Respondent who requests that the Association invoke Rule 8210 to compel the production of Documents or testimony at the hearing shall do so in writing and serve copies on all Parties. Such request shall: be submitted to the Hearing Officer no later than 21 days before the scheduled hearing date; describe with specificity the Documents, the category or type of Documents, or the testimony sought; state why the Documents, the category or type of Documents, or the testimony are material; describe the requesting Party's previous efforts to obtain the Documents, the category or type of Documents, or the testimony through other means; and state whether the custodian of each Document, or the custodian of the category or type of Documents, or each proposed witness is subject to the Association's jurisdiction.

(b) Standards for Issuance

A request that the Association compel the production of Documents or testimony shall be granted only upon a showing that: the information sought is relevant, material, and non-cumulative; the requesting Party has previously attempted in good faith to obtain the desired Documents and testimony through other means but has been unsuccessful in such efforts; and each of the persons from whom the Documents and testimony are sought is subject to the Association's jurisdiction. In addition, the Hearing Officer shall consider whether the request is unreasonable, oppressive, excessive in scope, or unduly burdensome, and whether the request should be denied, limited, or modified.

(c) Limitations on Requests

If, after consideration of all the circumstances, the Hearing Officer determines that a request submitted pursuant to this Rule is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she shall deny the request, or grant it only upon such conditions as fairness requires. In making the foregoing determination, the Hearing Officer may inquire of the other Parties whether they shall stipulate to the facts sought to be proved by the Documents or testimony sought. If the Hearing Officer grants the request, the Hearing Officer shall order that requested Documents be produced to all Parties not less than ten days before the hearing, and order that witnesses whose testimony was requested appear and testify at the hearing. If the Hearing Officer grants the request ten or fewer days before a hearing on the merits is scheduled to begin or after such hearing

begins, the Documents or testimony shall be produced immediately to all Parties.

9253. Production of Witness Statements**(a) Availability**

A Respondent in a disciplinary proceeding may file a motion requesting that the Department of Enforcement produce for inspection and copying a statement of any person called or to be called as a witness by the Department of Enforcement that pertains, or is expected to pertain, to his or her direct testimony, including statements that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500. The production shall be made at a time and place fixed by the Hearing Officer and shall be made available to all Parties. Such production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) Failure to Produce—Harmless Error

In the event that a statement required to be made available for inspection and copying by a Respondent is not provided by the Department of Enforcement, there shall be no rehearing of a proceeding already heard, or issuance of an amended decision in a proceeding already decided, unless the Respondent establishes that the failure to provide the statement was not harmless error. The Hearing Officer shall determine whether the failure to provide any statement was not harmless error, applying applicable Association, Commission, and federal judicial precedent.

9260. Hearing and Decision**9261. Evidence and Procedure in Hearings****(a) Submission of Documentary Evidence and List of Witnesses Before Hearing**

No later than ten days before the hearing, or at such earlier date as may be specified by the Hearing Officer, each Party shall submit to all other Parties and to the Hearing Officer copies of documentary evidence and the names of the witnesses each Party intends to present at the hearing.

(b) Party's Right to Be Heard

If a hearing is held, a Party shall be entitled to be heard in person, by counsel, or by the Party's representative.

(c) Request to Submit Additional Evidence

Notwithstanding paragraph (a), a Party, for good cause shown, may seek to submit any additional evidence at the hearing as the Hearing Officer, in his or her discretion, determines may be relevant and necessary for a complete record.

9262. Testimony

A person who is subject to the jurisdiction of the Association shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter or a notary public.

9263. Evidence: Admissibility**(a) Criteria for Receiving and Excluding Evidence**

A Hearing Officer shall receive relevant evidence, and may exclude all evidence that is irrelevant, immaterial, unduly repetitious, or unduly prejudicial.

(b) Objections

Objections to the admission or exclusion of evidence shall be made on the record and shall succinctly state the grounds relied upon. Excluded material shall be deemed a supplemental document, which shall be attached to the record and retained under Rule 9267.

9264. Motion for Summary Disposition**(a) Pre-hearing**

After a Respondent's answer has been filed and Documents have been made available to that Respondent for inspection and copying pursuant to Rule 9251, the Respondent or the Complainant, without leave of the Hearing Officer, may make a motion for summary disposition of any or all the causes of action in the complaint with respect to that Respondent. All pre-hearing motions for summary disposition and supporting papers shall be filed at least 21 days before the time set for the hearing, or at such earlier time as ordered by the Hearing Officer. Notwithstanding the provisions of Rule 9146(d), any opposition or response to a pre-hearing motion for summary disposition shall be filed at least seven days before the time set for the hearing.

(b) After Commencement of Hearing on Merits

After the Complainant has completed presentation of its case in chief as to a Respondent, that Respondent or the Complainant, without leave of the Hearing Officer, may make a motion for summary disposition as to any or all of the causes of action in the complaint with respect to that Respondent. If the Complainant has not completed its case in chief, the Complainant or Respondent may move for summary disposition only with leave of the Hearing Officer.

(c) Form of Papers

A motion for summary disposition pursuant to paragraph (a) shall be accompanied by the following: a statement of undisputed facts; a

supporting memorandum of points and authorities; and affidavits or declarations that set forth such facts as would be admissible at the hearing and show affirmatively that the affiant is competent to testify to the matters stated therein. A memorandum of points and authorities in support or opposition shall not exceed 35 pages.

(d) Rulings on Motion

Pursuant to Rule 9146, the Hearing Panel or, if applicable, the Extended Hearing Panel, shall promptly grant or deny the motion for summary disposition or shall defer decision on the motion. The Hearing Panel or, if applicable, the Extended Hearing Panel, may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the Party making the motion is entitled to summary disposition as a matter of law. With respect to motions pursuant to paragraph (a), the facts alleged in the pleadings against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by the non-moving Party, uncontested affidavits or declarations, or facts officially noticed pursuant to Rule 9145. If a Party opposing a motion for summary disposition made pursuant to paragraph (a) cannot present, for reasons stated in that Party's affidavit or declaration before hearing, facts essential to justify that Party's opposition, the Hearing Panel or, if applicable, the Extended Hearing Panel, may deny the motion for summary disposition or defer the decision on the motion.

9265. Record of Hearings

(a) Recordation

A hearing shall be recorded by a court reporter and a transcript shall be prepared. Unless otherwise ordered by a Hearing Officer, a pre-hearing conference shall be recorded by a court reporter and a transcript shall be prepared.

(b) Availability of a Transcript

A transcript of a pre-hearing conference and a transcript of a hearing shall be available to a Party for purchase from the court reporter at prescribed rates. A witness may purchase from the court reporter a transcript of his or her own testimony.

(c) Transcript Correction

Prior to the filing of post-hearing briefs or proposed findings and conclusions, or within such earlier time as ordered by the Hearing Officer, a Party or witness may seek to correct his or her transcript. A proposed correction of the transcript shall be submitted to the Hearing Officer by affidavit. Upon notice to all Parties to the disciplinary

proceeding, the Hearing Officer may order the correction to the transcript as requested or sua sponte.

9266. Proposed Findings of Fact, Conclusions of Law, and Post-Hearing Briefs

(a) Discretion of Hearing Officer to Require Proposed Findings of Fact, Conclusions of Law, and Post-Hearing Briefs

At the discretion of the Hearing Officer, the Parties may be ordered to file proposed findings of facts and conclusions of law, or post-hearing briefs, or both. The Hearing Officer may order that such proposed findings and conclusions be filed together with, or as part of, post-hearing briefs.

(b) Reference to Record Required

Proposed findings of fact or other statements of fact in briefs shall be supported by specific references to the record.

(c) Period for Filing

In any case in which the Hearing Officer ordered the filing of proposed findings or conclusions of law, or post-hearing briefs, the Hearing Officer shall, after consultation with the Parties, prescribe the period within which proposed findings and conclusions of law and post-hearing briefs are to be filed. Such period shall be reasonable under all the circumstances but the total period allowed for the filing of post-hearing submissions shall not exceed 60 days after the conclusion of the hearing unless the Hearing Officer, for good cause shown, permits a different period and sets forth in an order the reasons why a longer period is necessary.

(d) Form, Length of Papers

Unless the Hearing Officer orders otherwise, each post-hearing submission shall not exceed 25 pages, exclusive of cover sheets, tables of contents, and tables of authorities.

9267. Record; Supplemental Documents Attached to Record; Retention of Record and Supplement Documents Attached To Record; Copies

(a) Contents of the Record, Retention Of
The record shall consist of:

- (1) the complaint, answers, each notice of hearing, pre-hearing order, and any amendments thereto;
- (2) each application, motion, submission, and other paper, and any amendments, motions, objections, and exceptions to or regarding them;
- (3) each transcript of a pre-hearing conference and of a hearing, and each stipulation, transcript of testimony, Document, and other item admitted into evidence;
- (4) each written communication accepted at the discretion of the Hearing Officer;

(5) with respect to a motion to disqualify a Hearing Officer under Rule 9233 or a Panelist under Rule 9234, each affidavit or transcript of testimony taken and the ruling made in connection with the request;

(6) all proposed findings and conclusions;

(7) each written ruling, order, and decision issued by the Chief Hearing Officer, Hearing Officer, Hearing Panel or, if applicable, Extended Hearing Panel; and

(8) any other document or item accepted into the record by the Hearing Officer, Hearing Panel or, if applicable, Extended Hearing Panel.

(b) Supplemental Documents Attached To Record; Retention Of

A supplemental Document attached to the record shall be a Document not admitted by the Hearing Officer, Hearing Panel or, if applicable, the Extended Hearing Panel, and any matter stricken from any filing or stricken during an oral presentation, including any matter stricken from any filing or stricken during any oral presentation because the Adjudicator determined it was scandalous or impertinent as provided in Rule 9136(e). Such Documents shall not constitute part of the record, but shall be retained until the date upon which the Association's decision becomes final disciplinary action or, if applicable, upon the conclusion of any review by the Commission or the federal courts.

(c) Substitution of Copies

Parties may submit to the Hearing Officer for substitution a true copy of a Document in the record.

9268. Decision of the Hearing Panel or Extended Hearing Panel

(a) Majority Decision

Within 60 days after the final date allowed for filing findings of fact, conclusions of law, and post-hearing briefs, or by a date established at the discretion of the Chief Hearing Officer, the Hearing Officer shall prepare a written decision that reflects the views of the Hearing Panel or, if applicable, the Extended Hearing Panel, as determined by majority vote.

(b) Contents of Decision; Signature

Each member of the Hearing Panel or, if applicable, the Extended Hearing Panel, shall sign the decision. Members of the Hearing Panel or, if applicable, the Extended Hearing Panel, may indicate next to their signatures whether they dissent from the decision. The decision shall include:

- (1) a statement describing the investigative or other origin of the disciplinary proceeding;

(2) the specific statutory or rule provisions that were alleged to have been violated;

(3) a statement setting forth the findings of fact with respect to any act or practice the Respondent was alleged to have committed or omitted;

(4) the conclusions of the Hearing Panel, or Extended Hearing Panel, as to whether the Respondent violated any provision alleged in the complaint;

(5) a statement of the Hearing Panel, or the Extended Hearing Panel, in support of the disposition of the principal issues raised in the proceeding; and

(6) a statement describing any sanction imposed, the reasons therefor, and the date upon which such sanction shall become effective.

(c) Dissenting Opinion

Within 65 days after the final date allowed for filing findings of fact and conclusions of law, and post-hearings briefs, or by a date established at the discretion of the Chief Hearing Officer, the Hearing Officer or any Panelist may prepare a written dissenting opinion.

(d) Service, Notice, And Dissemination Requirements

The Office of Hearing Officers shall promptly serve the decision of the Hearing Panel, or the Extended Hearing Panel, and any dissenting opinion on the Parties; publish notice of the decision and any dissenting opinion in the Central Registration Depository; and provide a copy of the decision and any dissenting opinion to each member of the Association with which a Respondent is associated.

(e) Appeal or Review

If not timely appealed pursuant to Rule 9311 or timely called for review pursuant to Rule 9312, the majority decision shall constitute final disciplinary action of the Association for purposes of SEC Rule 19d-1(c)(1).

9269. Failure to Appear at Hearings; Default

(a) Failure to Appear May Result in Default Decision

A Party who fails to appear at a hearing of which he or she has been duly notified may be deemed to be in default. As a consequence of the default, the allegations against a non-appearing Respondent may be deemed admitted and a default decision entered by the Hearing Officer. If the non-appearing Party is the Department of Enforcement, the Hearing Officer may order that the complaint be dismissed with prejudice. In addition, the Hearing Officer may order that the non-appearing Party pay the costs incurred by other Parties in connection with their appearance at the hearing.

(b) Request to Set Aside Default

A Party may, for good cause shown, file a motion to set aside a default, dismissal, and the imposition of costs.

9270. Settlement Procedure

(a) When Offer Allowed; No Stay of Proceeding

A Respondent who is notified that a proceeding has been instituted against him or her, or a Respondent to a proceeding already instituted, may propose in writing an offer of settlement at any time. If a Respondent proposes an offer of settlement 30 or fewer days before the hearing on the merits is scheduled to begin, or after the hearing on the merits has begun, the making of an offer of settlement shall not stay the proceeding, unless otherwise decided by the Hearing Panel or, if applicable, the Extended Hearing Panel.

(b) Settlement Offer Shall Conform to Rule

A Respondent who makes an offer of settlement shall do so in conformity with the provisions of this Rule and shall not make such an offer of settlement frivolously or propose a sanction inconsistent with the seriousness of the violations to be found.

(c) Content and Signature Requirements

An offer of settlement shall be in writing and signed by the person making the offer, and, if the person is represented by counsel or a representative, signed also by the counsel or representative. The offer of settlement shall contain in reasonable detail:

(1) a statement describing the investigative or other origin of the disciplinary action;

(2) the specific statutory or rule provisions that the member or associated person is alleged to have violated;

(3) a statement containing the acts or practices which the member or associated person is alleged to have engaged in or omitted;

(4) a statement consenting to findings of fact and violations consistent with the statements contained in the offer of settlement required by subparagraphs (c)(2) and (c)(3); and,

(5) a proposed sanction to be imposed that is consistent with the Association's then current sanction guidelines or, if inconsistent with the sanction guidelines, a detailed statement supporting the proposed sanction.

(d) Waiver

If a Respondent submits an offer of settlement, by the submission such Respondent waives:

(1) any right of such Respondent to a hearing before a Hearing Panel or, if

applicable, an Extended Hearing Panel, and any right of appeal to the National Business Conduct Committee, the Commission, and the courts, or any right otherwise to challenge or contest the validity of the order issued, if the offer of settlement and order of acceptance are accepted;

(2) any right of such Respondent to claim bias or prejudice of the Chief Hearing Officer, Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, a Panelist on a Hearing Panel, or, if applicable, an Extended Hearing Panel, the General Counsel of NASD Regulation, or his or her delegatee, the National Business Conduct Committee, or any member of the National Business Conduct Committee, in connection with such person's or body's participation in discussions regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of acceptance, including acceptance, or rejection of such offer of settlement and order of acceptance; and

(3) any right of such Respondent to claim that a person or body violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144, in connection with such person's or body's participation in discussion regarding the terms and conditions of the offer of settlement and the order of acceptance, or other consideration of the offer of settlement and order of settlement, including acceptance or rejection of such offer of settlement and order of acceptance.

If an offer of settlement and an order of acceptance are rejected, the Respondent shall be bound by the waivers made in this paragraph (d) for conduct by persons or bodies occurring during the period beginning from date the offer of settlement was submitted and ending upon the rejection of the offer of settlement and order of acceptance.

(e) Uncontested Offers of Settlement

If a Respondent makes an offer of settlement and the Department of Enforcement does not oppose it, the offer of settlement is uncontested. If an offer of settlement is determined to be uncontested by the Department of Enforcement before a hearing on the merits has begun, the Department of Enforcement shall transmit the uncontested offer of settlement and a proposed order of acceptance to the National Business Conduct Committee with its recommendation. If an offer of settlement is determined to be uncontested by the Department of Enforcement after a hearing on the merits has begun, the Department of

Enforcement shall transmit the offer of settlement and a proposed order of acceptance to the Hearing Panel or, if applicable, the Extended Hearing Panel for acceptance or rejection. If accepted by the Hearing Panel or, if applicable, Extended Hearing Panel, the offer of settlement and the order of acceptance shall be forwarded to the National Business Conduct Committee to accept or reject.

(1) A proposed order of acceptance shall make findings of fact, including a statement of the rule, regulation, or statutory provision violated, and impose sanctions consistent with the terms of the offer of settlement.

(2) Before an offer of settlement and an order of acceptance shall become effective, they shall be submitted to and accepted by the National Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified) or the General Counsel of NASD Regulation, or his or her delegatee, may accept such offer of settlement and order of acceptance or refer them to the National Business Conduct Committee for acceptance or rejection by the National Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified) may reject such offer of settlement and order of acceptance or refer them to the National Business Conduct Committee for acceptance or rejection by the National Business Conduct Committee.

(3) If the offer of settlement and order of acceptance are accepted by the National Business Conduct Committee, the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified), or the General Counsel of NASD Regulation, or his or her delegatee, they shall become final and the National Business Conduct Committee, the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified), or the General Counsel of NASD Regulation, or his or her delegatee, shall communicate the acceptance to the Hearing Officer who shall thereafter issue the order.

(f) Contested Offers of Settlement

If a Respondent makes an offer of settlement and the Department of Enforcement opposes it, the offer of settlement is contested. When the Department of Enforcement opposes an offer of settlement, the Respondent's written offer and the Department of

Enforcement's written opposition shall be submitted to a Hearing Panel or, if applicable, an Extended Hearing Panel. The Hearing Panel or, if applicable, the Extended Hearing Panel, may order the Department of Enforcement and the Respondent to attend a settlement conference.

(1) If a contested offer of settlement is approved by the Hearing Panel or, if applicable, Extended Hearing Panel, the Hearing Officer shall draft an order of acceptance of the offer of settlement. The order of acceptance shall make findings of fact, including a statement of the rule, regulation, or statutory provision violated, and impose sanctions consistent with the terms of the offer of settlement. The offer of settlement, any written opposition thereto, and the order of acceptance shall be forwarded to the National Business Conduct Committee to accept or reject.

(2) Before an offer of settlement and order of acceptance shall become effective, they shall be submitted to, and accepted by, the National Business Conduct Committee. The Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified) may accept or reject such offer of settlement and order of acceptance or refer them to the National Business Conduct Committee for acceptance or rejection by the National Business Conduct Committee.

(3) If the offer of settlement and order of acceptance are accepted by the National Business Conduct Committee or the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified), the National Business Conduct Committee or the Chair or the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified) shall communicate the acceptance to the Hearing Officer who shall thereafter issue the order.

(g) Final Disciplinary Action of Association

The proceeding shall conclude as of the date the order of acceptance is issued. The order of acceptance shall constitute final disciplinary action of the Association. The sanction shall take effect as set forth in the order.

(h) Rejection of Offer of Settlement

If an uncontested offer of settlement or an order of acceptance is rejected by the Hearing Panel or, if applicable, the Extended Hearing Panel, the Chair and Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is

recused or disqualified), or the National Business Conduct Committee, the Respondent shall be notified in writing and the offer of settlement and proposed order of acceptance shall be deemed withdrawn. If a contested offer of settlement or an order of acceptance is rejected by the Hearing Panel or, if applicable, the Extended Hearing Panel, the Chair and Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified), or the National Business Conduct Committee, the Respondent shall be notified in writing and the offer of settlement and proposed order of acceptance shall be deemed withdrawn. The rejected offer and proposed order of acceptance shall not constitute a part of the record in any proceeding against the Respondent making the offer.

(i) Disciplinary Proceeding With Multiple Respondents

When a disciplinary proceeding names multiple Respondents, settlement offers may be accepted or rejected as to any one or all of the Respondents submitting offers. The proceedings shall thereafter be terminated as to those Respondents whose offers of settlement are accepted, but such Respondents may be required to participate in any hearing conducted as to those Respondents that did not submit offers of settlement or whose offers of settlement were rejected.

(j) No Prejudice from Rejected Offer of Settlement

If an offer of settlement is rejected by a Hearing Panel or, if applicable, an Extended Hearing Panel, the Chair and the Vice Chair of the National Business Conduct Committee (or either one, acting alone, in the event the other is recused or disqualified), or the National Business Conduct Committee, the Respondent shall not be prejudiced by the offer, which may not be introduced into evidence in connection with the determination of the issues involved in the pending complaint or in any other proceeding.

9280. Contemptuous Conduct

(a) Persons Subject to Sanctions

If a Party, attorney for a Party, or other person authorized to represent others by Rule 9141, engages in conduct in violation of an order of a Hearing Officer, a Hearing Panel or, if applicable, an Extended Hearing Panel, or other contemptuous conduct during a proceeding, a Hearing Officer, Hearing Panel or, if applicable, an Extended Hearing Panel, may:

(1) subject the Party, attorney for a Party, or other person authorized to represent others by Rule 9141, to the

sanctions set forth in paragraph (b); and,

(2) exclude an attorney for a Party, or other person authorized to represent others by Rule 9141, under Rule 9150.

(b) Sanctions Other Than Exclusion

A Hearing Officer, Hearing Panel or, if applicable, an Extended Hearing Panel, may make such orders as are just in regard to a Party, an attorney for a Party, or other person authorized to represent others by Rule 9141.

(1) Such orders may include:

(A) an order providing that the matters on which the order is made or any other designated facts shall be taken to be established for the purposes of the disciplinary proceeding in accordance with the claim of the Party obtaining the order;

(B) an order providing that the disobedient Party may not support or oppose designated claims or defenses, or may not introduce designated matters in evidence;

(C) an order providing that pleadings or a specified part of the pleading shall be stricken, or an order providing that the proceeding shall be stayed until the Party subject to the order obeys it;

(D) in lieu of any of the foregoing orders or in addition thereto, an order providing that contemptuous conduct includes the failure to obey any order; and

(E) an order as provided in subparagraphs (A), (B), and (C) where a Party has failed to comply with an order to produce a person for examination, unless the Party failing to comply shows that such Party is unable to produce such person for examination.

(2) A Party that without substantial justification fails to disclose information required by the Rule 9250 Series or otherwise required by order of the Hearing Officer, Hearing Panel or, if applicable, the Extended Hearing Panel, shall not, unless such failure is harmless, be permitted to use as evidence at a hearing, in a motion or in any other filing of papers, or in oral argument, any witness or information not so disclosed. In addition to, or in lieu of this sanction, the Hearing Officer, Hearing Panel or, if applicable, the Extended Hearing Panel, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. These sanctions may include any of the sanctions provided for in subparagraphs (A), (B), and (C) of subparagraph (b)(1).

(c) National Business Conduct Committee Review of Exclusions

If an attorney for a Party, or other person authorized to represent others by Rule 9141, is excluded from a disciplinary hearing or conference, or

any portion thereof, such attorney or other person may seek review of the exclusion by filing a motion to vacate with the National Business Conduct Committee. Such motion to vacate shall be filed and served on all Parties within five days after service of the exclusion order. Any response shall be filed with the National Business Conduct Committee and served on all Parties within five days after the service of the motion to vacate. The National Business Conduct Committee shall consider such motion on an expedited basis and promptly issue a written decision. The filing of a motion to vacate shall stay all aspects of the disciplinary proceeding until at least seven days after service of the decision of the National Business Conduct Committee. The National Business Conduct Committee review proceedings shall be conducted on the basis of the written record without oral argument.

(d) Adjournment

The hearing, conferences, or other activities relating to the disciplinary proceeding shall be stayed pending the National Business Conduct Committee's review of an exclusion order in paragraph (c). In the event that the National Business Conduct Committee upholds an exclusion of an attorney or other person authorized to represent others by Rule 9141, the Hearing Officer may, upon motion by a Party represented by an attorney or other person subject to an order of exclusion, grant an adjournment to allow the retention of new counsel or selection of a new representative. In determining whether to grant an adjournment or the length of an adjournment, the Hearing Officer shall consider whether there are other counsel or representatives of record on behalf of the Party, the availability of other counsel or other members of an excluded attorney's firm, or the availability of other representatives for the Party, and any other relevant factors.

9300. Review of Disciplinary Proceedings by the National Business Conduct Committee, NASD Regulation and NASD Boards, and Application for SEC review

9310. Appeal to or Review by National Business Conduct Committee

9311. Appeal by Any Party; Cross-Appeal

(a) Time to File Notice of Appeal

A Respondent or Complainant may file a written notice of appeal within 15 days after service of a decision issued pursuant to Rule 9268 or Rule 9269.

(b) Effect

An appeal to the National Business Conduct Committee from a decision issued pursuant to Rule 9268 or Rule

9269 shall operate as a stay of that decision until the National Business Conduct Committee issues a decision pursuant to Rule 9349 or, in cases called for discretionary review by the NASD Regulation or NASD Boards, until a decision is issued pursuant to Rule 9351 or Rule 9352.

(c) Notice of Appeal Content and Signature Requirements

A Party appealing pursuant to this Rule shall file a written notice of appeal with the Office of Hearing Officers and serve the notice on the Parties. The notice of appeal shall be signed by the appealing Party, or his or her counsel or representative, and shall contain:

(1) the name of the disciplinary proceeding;

(2) the disciplinary proceeding docket number;

(3) the name of the Party on whose behalf the appeal is made;

(4) a statement on whether oral argument before the National Business Conduct Committee is requested; and,

(5) a brief statement of the findings, conclusions, or sanctions as to which exceptions are taken.

(d) Notice of Cross-Appeal

A Party who is served with a notice of appeal may file a written notice of cross-appeal and serve the notice of cross-appeal on the Parties. The notice of cross-appeal shall be filed within five days after service of the notice of appeal. The notice of cross-appeal shall be signed by the Party cross-appealing, or his or her counsel, and shall contain the information set forth in subparagraphs (c)(1)-(2) and (c)(4)-(5), and the name of the Party on whose behalf the cross-appeal is made.

(e) Waiver of Issues Not Raised

The National Business Conduct Committee may, in its discretion, deem waived any issue not raised in the notice of appeal or cross-appeal.

(f) Withdrawal of Notice of Appeal or Cross-Appeal

A Party may withdraw a notice of appeal or a notice of cross-appeal filed by him or her at any time by filing a written notice of withdrawal of appeal or cross-appeal with the Office of Hearing Officers and serving notice thereof on the Parties. The notice of withdrawal of appeal or cross-appeal shall contain: the name of the disciplinary proceeding; the disciplinary proceeding docket number; and the name of the Party on whose behalf the notice of appeal or cross-appeal was filed previously. The notice of withdrawal of appeal or cross-appeal shall be signed by the Party, or his or her counsel or representative. Upon the withdrawal of a notice of appeal, any outstanding cross-appeal shall be

treated as an appeal unless it is withdrawn.

9312. Review Proceedings Initiated by the National Business Conduct Committee

(a) Call for Review

(1) Rule 9268 Decision

A decision issued pursuant to Rule 9268 may be subject to a call for review by any member of the National Business Conduct Committee or, pursuant to authority delegated from the National Business Conduct Committee, by any member of the Review Subcommittee of the National Business Conduct Committee. The Review Subcommittee shall be composed of two to four persons who are current members of the National Business Conduct Committee. At least 50 percent of the persons making up the Review Subcommittee shall be Non-Industry Directors, as defined in Article I of the NASD Regulation By-Laws. A decision issued pursuant to Rule 9268 shall be subject to a call for review within 45 days after the date of service of the decision. If called for review, such decision shall be reviewed by the National Business Conduct Committee.

(2) Rule 9269 Decision

A default decision issued pursuant to Rule 9269 shall be subject to a call for review by the General Counsel of NASD Regulation, or his or her delegatee, on his or her own motion within 45 days after the date of service of the decision. If called for review, such decision shall be reviewed by the National Business Conduct Committee.

(b) Effect

Institution of review by a member of the National Business Conduct Committee on his or her own motion, a member of the Review Subcommittee on his or her own motion, or the General Counsel of NASD Regulation, or his or her delegatee, on his or her own motion shall operate as a stay of a final decision issued pursuant to Rule 9268 or Rule 9269 as to all Parties subject to the notice of review, until the National Business Conduct Committee issues a decision pursuant to Rule 9349, or, in cases called for discretionary review by the NASD Regulation or NASD Boards, until a decision is issued pursuant to Rule 9351 or Rule 9352.

(c) Requirements

If a member of the National Business Conduct Committee, a member of the Review Subcommittee, or the General Counsel of NASD Regulation, or his or her delegatee, determines to call a case for review, a written notice of review shall be served promptly on each Party to the proceeding and filed with the Office of Hearing Officers. Such notice of review shall contain:

(1) the name of the disciplinary proceeding;

(2) the disciplinary proceeding docket number; and,

(3) a brief statement of the findings, conclusions, or sanctions with respect to which the National Business Conduct Committee, the Review Subcommittee, or the General Counsel of NASD Regulation, or his or her delegatee, determined that a call for review was necessary.

The statement contained in the notice of review shall not limit the scope of the National Business Conduct Committee's authority under Rule 9346 to review any issues raised in the decision rendered pursuant to Rule 9268 or Rule 9269. The National Business Conduct Committee shall provide the Parties with notice of, and an opportunity to submit briefs on, any issue not set forth in the notice of review that shall be considered by the National Business Conduct Committee.

(d) Effect of Withdrawal of Notice of Appeal, Cross-Appeal

If the review of a disciplinary proceeding by the National Business Conduct Committee is terminated before the National Business Conduct Committee issues a decision on the merits because all appealing Parties file a notice of withdrawal of appeal and no Party previously filed a notice of cross-appeal, or all Parties who previously filed a notice of cross-appeal file a notice of withdrawal of cross-appeal:

(1) a member of the National Business Conduct Committee or of the Review Subcommittee shall have the right to call for review a decision issued pursuant to Rule 9268 in accordance with Rule 9312(a)(1), except that the 45 day period during which a call for review may be made shall begin on the day the Association receives the last filed notice of withdrawal of appeal or, if applicable, the last filed notice of withdrawal of cross-appeal; and,

(2) the General Counsel of NASD Regulation, or his or her delegatee, shall have the right to call for review a decision issued pursuant to Rule 9269 in accordance with Rule 9312(a)(2), except that the 45 day period during which a call for review may be made shall begin on the day the Association receives the last filed notice of withdrawal of appeal or, if applicable, the last filed notice of withdrawal of cross-appeal.

9320. Transmission of Record; Extensions of Time, Postponements, Adjournments

9321. Transmission of Record

Within 21 days after the filing of a notice of appeal or notice of review, or at such later time as the National

Business Conduct Committee may designate, the Office of Hearing Officers shall assemble and prepare an index to the record, transmit the record and the index to the National Business Conduct Committee, and serve copies of the index upon all Parties. The Hearing Officer who participated in the disciplinary proceeding, or the Chief Hearing Officer, shall certify that the record transmitted to the National Business Conduct Committee is complete.

9322. Extensions of Time, Postponements, and Adjournments

(a) Availability

At any time prior to the issuance of a decision pursuant to Rule 9349, the National Business Conduct Committee may, for good cause shown, extend or shorten any time limits prescribed by the Code for the filing of any papers and may, consistent with paragraph (b), postpone or adjourn any hearing.

(b) Limitations on Postponements, Adjournments, and Extensions

Oral argument shall begin at the time and place ordered, unless the National Business Conduct Committee, for good cause shown, postpones or changes the location of the oral argument, subject to the limitations in paragraph (b)(2).

(1) Additional Considerations

In considering a motion for postponement of oral argument, the National Business Conduct Committee shall consider, in addition to any other relevant factors:

(A) the length of time the disciplinary proceeding has been pending to date;

(B) the number of postponements, adjournments, or extensions already granted;

(C) the stage of the proceedings at the time of the request; and

(D) potential harm to the investing public if an extension of time, adjournment, or postponement is granted; and

(E) any other such matters that justice may require.

(2) Time Limit

Postponements, adjournments, or extensions of time for filing papers shall not exceed 28 days, unless the National Business Conduct Committee determines otherwise.

9330. Appointment of Subcommittee or Extended Proceeding Committee; Disqualification and Recusal

9331. Appointment by National Business Conduct Committee of Subcommittee or Extended Proceeding Committee

(a) Appointment by National Business Conduct Committee

Following the filing of a notice of appeal pursuant to Rule 9311 or a

notice of review pursuant to Rule 9312, the National Business Conduct Committee shall designate a Subcommittee or an Extended Proceeding Committee to participate, subject to Rule 9345, in a disciplinary proceeding appealed or called for review.

(1) Subcommittee

Except as provided in subparagraph (2), for each disciplinary proceeding appealed or called for review, the National Business Conduct Committee shall appoint a Subcommittee to participate, subject to Rule 9345, in the appeal or review. A Subcommittee shall be composed of two or more persons who shall be current or former Directors, or former Governors.

(2) Extended Proceeding Committee

Upon consideration of the volume and complexity of the certified record, or other factors the National Business Conduct Committee deems material, the National Business Conduct Committee may determine that a disciplinary proceeding appealed or called for review shall be designated an Extended Proceeding and shall appoint an Extended Proceeding Committee to participate, subject to Rule 9345, in the appeal or review. The Extended Proceeding Committee shall be composed of two or more persons who shall be current or former Directors, or former Governors. The Chair of the National Business Conduct Committee shall have discretion to compensate any or all Panelists of an Extended Proceeding Committee at the rate then in effect for arbitrators appointed under the Rule 10000 Series.

(b) Function

If a hearing is held, the Subcommittee or, if applicable, the Extended Proceeding Committee, shall hear oral arguments and consider, if allowed, any new evidence. Based on the hearing and the record on appeal or review, the Subcommittee or, if applicable, the Extended Hearing Committee, shall make a recommendation to the National Business Conduct Committee regarding the disposition of all matters on appeal, cross-appeal, or review. The recommendation shall be in the form of a written recommended decision.

9332. Disqualification and Recusal

(a) Recusal, Withdrawal of Member or Panelist

If at any time a member of the National Business Conduct Committee, or a Panelist of a Subcommittee or an Extended Proceeding Committee, determines that he or she has a conflict of interest or bias or circumstances otherwise exist where his or her fairness might reasonably be questioned, the

member or the Panelist shall notify the Chair or the Vice-Chair of the National Business Conduct Committee, and the Chair or the Vice-Chair of the National Business Conduct Committee shall issue and serve on the Parties a notice stating that the member or Panelist has withdrawn from the matter. In the event that a Panelist withdraws, is incapacitated, or is otherwise unable to continue his or her service after a hearing has been convened, the Chair or Vice-Chair of the National Business Conduct Committee shall appoint a replacement Panelist.

(b) Motion for Disqualification

A Party may move for the disqualification of a member of the National Business Conduct Committee, or a Panelist of a Subcommittee or an Extended Proceeding Committee. All such motions shall be based upon a reasonable, good faith belief that a conflict of interest or bias exists, or circumstances otherwise exist where his or her fairness might reasonably be questioned, and shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification, and the dates on which the Party learned of those facts. Such motions shall be filed not later than 15 days after the later of:

(1) when the Party learned of the facts believed to constitute the disqualification; or

(2) when the Party was notified of the composition of the Subcommittee or, if applicable, the Extended Proceeding Committee.

(c) Disposition of Disqualification Motions: Challenges to Single Member of National Business Conduct Committee or Single Panelist of Subcommittee or Extended Hearing Committee

Motions for disqualification of a member of the National Business Conduct Committee, or a Panelist of a Subcommittee or an Extended Proceeding Committee shall be decided by the Chair or Vice-Chair of the National Business Conduct Committee, who shall promptly determine whether disqualification is required, and issue a written ruling on the motion. If a Panelist is disqualified, the Chair or the Vice-Chair of the National Business Conduct Committee shall appoint a replacement Panelist.

(d) Disposition of Disqualification

Motions: Challenges to Multiple Panelists

(1) National Business Conduct Committee

If a Party files a motion to disqualify more than one member of the National Business Conduct Committee, the Chair or the Vice-Chair of the National Business Conduct Committee shall promptly determine whether disqualification is required, and shall

issue a written ruling on the matter. In the event of such disqualification, the remaining members of the National Business Conduct Committee shall consider the review or appeal of the disciplinary matter.

(2) Subcommittee; Extended Proceeding Committee

If a Party files a motion to disqualify more than one Panelist of a Subcommittee or an Extended Proceeding Committee, the Chair or the Vice-Chair of the National Business Conduct Committee shall promptly determine whether disqualification is required, and shall issue a written ruling on the motion. If multiple Panelists are disqualified, the Chair or the Vice-Chair of the National Business Conduct Committee shall appoint replacement Panelists.

9340. Proceedings

9341. Oral Argument

(a) Request for Oral Argument

A Party may request oral argument before the Subcommittee or, if applicable, the Extended Proceeding Committee. Oral argument shall be requested in writing either in the Party's notice of appeal or cross-appeal, or within 15 days after service of the National Business Conduct Committee's notice of review. Subject to the limitations of Rules 9342 and 9344, oral argument shall be granted if timely requested. The right to oral argument set forth in this Rule is unaffected by a Party's waiver of, or failure to request, a hearing pursuant to the Rule 9200 Series.

(b) Discretion to Proceed With or Without Oral Argument

In the absence of a request for oral argument, the Subcommittee or, if applicable, the Extended Proceeding Committee, in its discretion, may order that a matter be set down for oral argument, or may consider the matter on the basis of the record.

(c) Notice Regarding Oral Argument

If oral argument is held, a notice stating the date, time, and place of the argument shall be served on the Parties at least 21 days before the hearing. The Parties may agree in writing to waive the notice period or, in extraordinary circumstances, the Subcommittee or, if applicable, the Extended Proceeding Committee, may provide for a shorter notice period.

(d) Attendance Required

The Parties shall make oral arguments before the Subcommittee or, if applicable, the Extended Proceeding Committee. Unless otherwise agreed to by all of the Parties, all Panelists comprising the Subcommittee or, if

applicable, the Extended Proceeding Committee, shall be present for the oral argument.

(e) Time Limits

Unless the Subcommittee or, if applicable, the Extended Proceeding Committee, orders otherwise for good cause shown, each Party's oral argument before the Subcommittee or, if applicable, the Extended Proceeding Committee, shall be limited to a total of 30 minutes.

(f) Recordation; Transcript Correction

Oral arguments shall be recorded and a written transcript prepared by a court reporter. Parties may purchase copies of the transcript from the court reporter. Any corrections that a Party believes necessary to a transcript shall be submitted by motion to the Subcommittee or, if applicable, the Extended Proceeding Committee, within 21 days after the hearing date or within five days after receipt of the transcript, whichever date is later.

9342. Failure to Appear at Oral Argument

A Party who requests oral argument but fails to appear after being duly notified, shall be deemed to have waived any opportunity for oral argument provided under the Rule 9300 Series. The Subcommittee or, if applicable, the Extended Proceeding Committee, shall permit argument to go forward as to those Parties who appear. The Subcommittee or, if applicable, the Extended Proceeding Committee, in the exercise of its discretion, may consider the matter on the basis of the record without oral argument as to those Parties who failed to appear.

9343. Disposition Without Oral Argument

If an oral argument is not held, the matter shall be considered by a Subcommittee or, if applicable, an Extended Proceeding Committee, on the basis of the record, as defined in Rule 9267, and supplemented by any written materials submitted to or issued by the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National Business Conduct Committee in connection with the appeal, cross-appeal, or call for review.

9344. Failure to Participate Below; Abandonment of Appeal

(a) Failure to Participate Below

When an appealing Party did not participate in the disciplinary proceeding before a Hearing Officer, Hearing Panel or, if applicable, Extended Hearing Panel, but shows good cause for the failure to participate, the National Business Conduct Committee may dismiss the appeal and remand the matter for further

proceedings, or may hear evidence and consider the matter. If the appealing Party did not participate in the disciplinary proceeding before a Hearing Officer, Hearing Panel or, if applicable, Extended Hearing Panel, and fails to show good cause for the failure to participate, the matter shall be considered by the Subcommittee or, if applicable, Extended Proceeding Committee, and the National Business Conduct Committee on the basis of the record and other documents, as provided in Rules 9346 and 9347. For purposes of this paragraph, failure to participate shall include failure to file an answer or otherwise respond to a complaint, or failure to appear at a scheduled hearing, but shall not include failure to request a hearing pursuant to Rule 9221.

(b) Abandonment of Appeal

If an appealing Party fails to advise the National Business Conduct Committee of the basis for seeking review, or otherwise fails to provide information or submit a written brief in response to a request pursuant to Rules 9346 and 9347, the National Business Conduct Committee may dismiss the appeal as abandoned, and the decision of the Hearing Officer, Hearing Panel or, if applicable, Extended Hearing Panel, shall become the final disciplinary action of the Association. If a cross-appealing Party fails to advise the National Business Conduct Committee of the basis for seeking review, or otherwise fails to provide information or submit a written brief in response to a request pursuant to Rules 9346 and 9347, the National Business Conduct Committee may dismiss the cross-appeal as abandoned. Upon a showing of good cause, the National Business Conduct Committee may withdraw any dismissal entered pursuant to this Rule.

9345. Subcommittee or Extended Proceeding Committee Recommendation to National Business Conduct Committee

A Subcommittee or, if applicable, an Extended Proceeding Committee, shall present a recommended decision in writing to the National Business Conduct Committee and all other Directors not later than seven days before the meeting of the National Business Conduct Committee at which the disciplinary proceeding shall be considered.

9346. Evidence in National Business Conduct Committee Proceedings

(a) Scope of Review

Except as otherwise set forth in this paragraph, the National Business Conduct Committee's review shall be limited to consideration of: (i) the

record, as defined in Rule 9267, supplemented by briefs and other papers submitted to the Subcommittee or, if applicable, the Extended Proceeding Committee, and the National Business Conduct Committee; and (ii) any oral argument permitted under this Code. A Party may introduce additional evidence only with prior approval of the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National Business Conduct Committee, upon a showing that extraordinary circumstances exist under paragraph (b). If an appealing Party shows good cause for failure to participate in the disciplinary proceeding below, the National Business Conduct Committee may hear evidence and consider the disciplinary proceeding pursuant to Rule 9344(a).

(b) Leave to Introduce Additional Evidence

A Party may apply to the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National Business Conduct Committee for leave to introduce additional evidence by motion filed not later than 30 days after service of such Party's notice of appeal or cross-appeal, or not later than 35 days after service upon the Party by the National Business Conduct Committee of a notice of review. The motion shall describe each item of proposed new evidence, demonstrate that there was good cause for failing to introduce it below, and demonstrate why the evidence is material to the proceeding, and be filed and served. By a motion filed in accordance with Rule 9146, a Party may request an extension of the period during which a Party may file a motion for leave to introduce additional evidence. A Party shall demonstrate that there was good cause for failing to file the motion for leave to introduce additional evidence during the period prescribed.

(c) Motion In Opposition; Motion to Introduce Rebuttal Evidence

A Party may file an opposition to a motion, as provided in Rule 9146(d), for leave to introduce new evidence, and may move for leave to introduce rebuttal evidence in response to the proposed new evidence. A Party who moves to introduce rebuttal evidence in response to the proposed new evidence of another Party shall describe each item of proposed rebuttal evidence and explain why the evidence is material to the proceeding, and shall file and serve such motion.

(d) Discretion Regarding Review of Additional Evidence

Upon consideration of any motion to introduce additional evidence and any opposition thereto, the Subcommittee

or, if applicable, the Extended Proceeding Committee, or the National Business Conduct Committee may permit the evidence to be introduced into the record on review, or the National Business Conduct Committee may remand the disciplinary proceeding for further proceedings consistent with its ruling or for further fact finding.

(e) Requirements for Submitting Additional Documentary Evidence

A Party that is permitted to introduce additional documentary evidence before the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National Business Conduct Committee pursuant to paragraph (d) shall make copies of the evidence available to the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National Business Conduct Committee, and to all Parties at such time as the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National Business Conduct Committee may specify.

(f) Subcommittee or Extended Proceeding Committee Order Requiring Additional Evidence

On its own motion, the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National Business Conduct Committee may order that the record be supplemented with such additional evidence as it may deem relevant. Among other things, the Subcommittee, or if applicable, the Extended Proceeding Committee, or the National Business Conduct Committee may order a Respondent who asserts his or her inability to pay a monetary sanction to file a sworn financial statement and to keep such statement current as ordered by the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National Business Conduct Committee.

(g) Rules of Evidence Not Applicable
Formal rules of evidence shall not apply.

(h) Testimony

A person who is subject to the jurisdiction of the Association shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter or a notary public.

9347. Filing of Papers in National Business Conduct Committee Proceedings

(a) Briefs; Reply Briefs; Requirements
Parties may file briefs in connection with proceedings governed by the Rule 9300 Series. Briefs shall be confined to the particular matters at issue. An exception to findings, conclusions, or sanctions shall be supported by citation to the relevant portions of the record, including references to specific pages

relied upon, and by concise argument, including citation of such statutes, decisions, and other authorities as may be relevant. If an exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, an appendix thereto, or by citation to the record. Parties may file reply briefs. If a Party files a reply brief, such brief shall be limited to matters in reply. All briefs shall conform to the requirements of the Rule 9130 Series, and, except with advance leave of the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National Business Conduct Committee, exclusive of pages containing tables of contents or tables of authorities, a brief other than a reply brief shall not exceed 25 double-spaced pages, and a reply brief shall not exceed 12 double-spaced pages.

(b) Timely Filing of Briefs

Briefs shall be due upon dates established by the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National Business Conduct Committee in a scheduling order. Unless the Subcommittee or, if applicable, the Extended Proceeding Committee, or the National Business Conduct Committee specifies otherwise, opening briefs shall be submitted not less than 21 days from the date of the scheduling order, and answering briefs shall be submitted 21 days thereafter. When reply briefs are submitted, such briefs shall be filed not later than ten days after service of the answering brief.

9348. Powers of the National Business Conduct Committee on Review

In any appeal or review proceeding pursuant to the Rule 9300 Series, the National Business Conduct Committee may affirm, dismiss, modify, or reverse with respect to each finding, or remand the disciplinary proceeding with instructions. The National Business Conduct Committee may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction.

9349. National Business Conduct Committee Formal Consideration; Decision

(a) Decision of National Business Conduct Committee, Including Remand

In an appeal or review of a disciplinary proceeding governed by the Rule 9300 Series that is not withdrawn or dismissed prior to a decision on the merits, the National Business Conduct Committee, after considering all matters presented in the appeal or review, and the written recommended decision of the Subcommittee or, if applicable, the Extended Proceeding Committee, may affirm, dismiss, modify or reverse the

decision of the Hearing Panel or, if applicable, Extended Hearing Panel, with respect to each Respondent who has appealed or cross-appealed or is subject to a call for review. The National Business Conduct Committee may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the National Business Conduct Committee may remand the disciplinary proceeding with instructions. The National Business Conduct Committee shall prepare a proposed written decision pursuant to paragraph (b).

(b) Contents of Decision

The decision shall include:

- (1) a statement describing the investigative or other origin of the disciplinary proceeding;
- (2) the specific statutory or rule provisions that were alleged to have been violated;
- (3) a statement setting forth the findings of fact with respect to any act or practice the Respondent was alleged to have committed or omitted;
- (4) the conclusions as to whether the Respondent violated any provision alleged in the complaint;
- (5) a statement in support of the disposition of the principal issues raised in the proceeding; and
- (6) a statement describing any sanction imposed, the reasons therefor, and, pursuant to Rule 9360, the date upon which such sanction shall become effective.

(c) Issuance of Decision After Expiration of Call for Review Period

The National Business Conduct Committee shall provide its proposed written decision to the NASD Regulation Board, and, if the disciplinary proceeding is not called for review by the NASD Regulation Board, to the NASD Board. The NASD Regulation Board may call the disciplinary proceeding for review pursuant to Rule 9351. The NASD Board may call the disciplinary proceeding for review pursuant to Rule 9352. If neither the NASD Regulation Board nor the NASD Board calls the disciplinary proceeding for review, the proposed written decision of the National Business Conduct Committee shall become final, and the National Business Conduct Committee shall serve its written decision on the Parties and provide a copy to each member of the Association with which a Respondent is associated. The decision shall constitute the final disciplinary action of the Association for purposes of SEC Rule 19-1(c)(1), unless the National Business Conduct Committee remands the proceeding.

9350. Discretionary Review by Boards**9351. Discretionary Review by the NASD Regulation Board****(a) Call for Review by Director**

A Director may call a disciplinary proceeding for review by the NASD Regulation Board, if the call for review is made within the period prescribed in paragraph (b).

(b) Seven Day Period; Waiver

After receiving the proposed written decision of the National Business Conduct Committee pursuant to Rule 9349, a Director shall have not less than seven days to determine if the disciplinary proceeding should be called for review. A Director shall call a disciplinary proceeding for review by notifying the General Counsel of NASD Regulation. By a unanimous vote of the NASD Regulation Board, the NASD Regulation Board may shorten the period to less than seven days. By an affirmative vote of the majority of the NASD Regulation Board then in office, the NASD Regulation Board may, during the seven day period, vote to extend the period to more than seven days.

(c) Review at Next Meeting

If a Director calls a disciplinary proceeding for review within the period prescribed in paragraph (b), the NASD Regulation Board shall review the disciplinary proceeding not later than the next meeting of the NASD Regulation Board. The NASD Regulation Board may order the Parties (excluding any Respondent who did not appeal or cross-appeal, or as to whom the issues appealed or called for review do not apply), to file briefs in connection with the NASD Regulation Board review proceedings pursuant to this Rule.

(d) Decision of NASD Regulation Board, Including Remand

After review, the NASD Regulation Board may affirm, modify, or reverse the proposed written decision of the National Business Conduct Committee. The NASD Regulation Board may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the NASD Regulation Board may remand the disciplinary proceeding with instructions. The NASD Regulation Board shall prepare a proposed written decision that includes all of the elements described in Rule 9349(b) (1)-(6).

(e) Issuance of Decision After Expiration of Call for Review Period

The NASD Regulation Board shall provide its proposed written decision to the NASD Board. The NASD Board may call the disciplinary proceeding for

review pursuant to Rule 9352. If the NASD Board does not call the disciplinary proceeding for review, the proposed written decision of the NASD Regulation Board shall become final, and the NASD Regulation Board shall serve its written decision on the Parties and provide a copy to each member of the Association with which a Respondent is associated. The decision shall constitute the final disciplinary action of the Association for purposes of SEC Rule 19d-1(c)(1), unless the NASD Regulation Board remands the proceeding.

9352. Discretionary Review by the NASD Board**(a) Call for Review by Governor**

A Governor may call a disciplinary proceeding for review by the NASD Board if the call for review is made within the period prescribed in paragraph (b).

(b) Seven Day Period; Waiver**(1) Disciplinary Proceeding Called for Review by NASD Regulation Board**

If the NASD Regulation Board reviewed the disciplinary proceeding under Rule 9351, a Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the NASD Regulation Board.

(2) Disciplinary Proceeding Not Called for Review by NASD Regulation Board

If no Director of the NASD Regulation Board called the disciplinary proceeding for review under Rule 9351, a Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the National Business Conduct Committee.

(3) Waiver

By a unanimous vote of the NASD Board, the NASD Board may shorten the period in subparagraph (1) or (2) to less than seven days. By an affirmative vote of the majority of the NASD Board then in office, the NASD Board may, during the seven day period in subparagraph (1) or (2), vote to extend the period in subparagraph (1) or (2) to more than seven days.

(c) Review at Next Meeting

If a Governor calls a disciplinary proceeding for review within the period prescribed in paragraph (b), the NASD Board shall review the disciplinary proceeding not later than the next meeting of the NASD Board. The NASD Board may order the Parties (excluding any Respondent who did not appeal, cross-appeal, or as to whom the issues appealed or called for review do not

apply) to file briefs in connection with review proceedings pursuant to this Rule.

(d) Decision of NASD Board, Including Remand

After review, the NASD Board may affirm, modify, or reverse: (1) the proposed written decision of the NASD Regulation Board; or (2) if the NASD Regulation Board did not call a disciplinary proceeding for review under Rule 9351, the proposed written decision of the National Business Conduct Committee. The NASD Board may affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction. Alternatively, the NASD Board may remand the disciplinary proceeding with instructions. The NASD Board shall prepare a written decision that includes all of the elements described in Rule 9349(b)(1)-(6).

(e) Issuance of Decision

The NASD Board shall issue and serve its written decision on the Parties and provide a copy to each member of the Association with which a Respondent is associated. The decision shall constitute the final disciplinary action of the Association for purposes of SEC Rule 19d-1(c)(1), unless the NASD Board remands the proceeding.

9360. Effectiveness of Sanctions

A sanction (other than a bar or an expulsion) specified in a decision constituting final disciplinary action of the Association for purposes of SEC Rule 19d-1(c)(1) shall become effective on a date established by the Chief Hearing Officer, which shall not be earlier than 30 days after the date of service of the decision constituting final disciplinary action. A bar or an expulsion shall become effective upon service of the decision constituting final disciplinary action of the Association for purposes of SEC Rule 19d-1(c)(1), unless otherwise specified therein.

9370. Application to Commission for Review**(a) Appeal to Commission; Effect**

A person aggrieved by final disciplinary action pursuant to the Rule 9300 Series may apply for review by the Commission pursuant to Section 19(d)(2) of the Act. The filing with the Commission of an application for review by the Commission shall stay the effectiveness of any sanction, other than a bar or an expulsion, imposed in a decision constituting final disciplinary action of the Association for purposes of SEC Rule 19d-1(c)(1).

(b) Association Notification to Member

The Association shall promptly notify any Association member with which a Respondent is associated if the

Respondent files an application for review to the Commission.

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9536. Application to Commission for Review

9400. Limitations and Approval Procedures Under Rules 3130, 3131, and 3140

9410. Procedures for Regulating Activities of a Member Experiencing Financial or Operational Difficulties

9411. Purpose

The Rule 9410 Series sets forth procedures for regulating the activities of a member that is experiencing the financial or operational difficulties specified in Rule 3130 or 3131.

9412. Notice of Limitations

The Department of Member Regulation (hereinafter "Department" in the Rule 9410 Series) may issue a notice directing a member to limit its business activities if the Department has reason to believe that any condition specified in Rule 3130 or 3131 exists. The notice shall specify the grounds on which action is being taken, the nature of the limitations to be imposed, the effective date of the limitations, and a fitting sanction that will be imposed if the member fails to comply with the limitations set forth in the notice. The effective date of the limitations shall be at least seven days after the date of service of the notice. The notice also shall inform the member that it may request a hearing before the Department under Rule 9413. The Department shall serve the notice pursuant to Rules 9131 and 9134.

9413. Department Consideration

(a) Request for Hearing

A member aggrieved by a notice issued under Rule 9412 may file a written request for a hearing before the Department. The request shall state the specific grounds for withdrawing or modifying the limitations specified in the notice. The request shall be filed pursuant to Rules 9135, 9136, and 9137 within five days after service of the notice under Rule 9412.

(b) Hearing

If a member requests a hearing under paragraph (a), the Department shall conduct a hearing within 14 days after service of the notice under Rule 9412. The member shall be entitled to be heard in person, to be represented by an attorney, and to submit any relevant evidence. The hearing shall be recorded and a transcript prepared by a court reporter. The member may purchase a copy of the transcript from the court

reporter. Any corrections to the transcript shall be submitted within three days after the hearing or within three days after receipt of the transcript, whichever is later.

(c) Decision

Within seven days after the hearing, the Department shall issue a decision approving, modifying, or withdrawing the limitations specified in the notice. If the decision imposes limitations, the decision shall provide for a fitting sanction to be imposed under Rule 9417 if the member fails to comply with the limitations. The Department shall promptly serve the decision pursuant to Rules 9132 and 9134. The decision shall become effective upon service.

(d) Failure to Request Hearing

If a member does not request a hearing under paragraph (a), the limitations specified in the notice shall become effective on the date specified in the notice. Unless the National Business Conduct Committee calls the notice for review under Rule 9414, the limitations specified in the notice shall remain in effect until the Department removes or modifies the limitations pursuant to Rule 9418.

9414. National Business Conduct Committee Review

(a) Initiation of a Review

(1) Application by Member

A member aggrieved by a decision issued under Rule 9413 may file a written application for review by the National Business Conduct Committee. The application shall state the specific grounds for the review and whether oral argument is requested. The application shall be filed pursuant to Rules 9135, 9136, and 9137 within seven days after service of the decision. The member may withdraw its application for review at any time by filing a written notice with the National Business Conduct Committee pursuant to Rules 9135, 9136, and 9137.

(2) Motion of National Business Conduct Committee

A decision issued under Rule 9413 shall be subject to a call for review by any member of the National Business Conduct Committee or the Review Subcommittee described in Rule 9312(a)(1) within 30 days after service of the decision. If a member that receives a notice under Rule 9412 does not request a hearing under Rule 9413, the notice shall be subject to a call for review by any member of the National Business Conduct Committee or the Review Subcommittee, within 30 days after the effective date of the notice. If the National Business Conduct Committee or the Review Subcommittee calls a decision or notice for review, a

written notice of review shall be served promptly on the member pursuant to Rules 9132 and 9134. The notice of review shall state the specific grounds for the review and whether an oral argument is ordered. If a decision is called for review by a member of the National Business Conduct Committee or the Review Subcommittee, the decision shall be reviewed by the National Business Conduct Committee.

(3) Stay

Unless otherwise ordered by the National Business Conduct Committee, the initiation of a review under this paragraph shall stay the decision of the Department or an uncontested notice until a decision constituting final action of the Association is issued.

(4) Ex Parte Communications

The prohibitions against ex parte communications in Rule 9143 shall become effective under the Rule 9410 Series when Association staff has knowledge that a member intends to file a written application for review or that the National Business Conduct Committee intends to review a decision on its own motion under this Rule.

(b) Subcommittee Consideration

(1) Appointment of Subcommittee

The National Business Conduct Committee shall appoint a Subcommittee to participate in the review. The Subcommittee shall be composed of two or more members. One member shall be a member of the National Business Conduct Committee, and the remaining member or members shall be current or former Directors of the NASD Regulation Board or former Governors of the NASD Board.

(2) Oral Argument

If oral argument is requested by the member, oral argument shall be held before the Subcommittee within 14 days after service of the decision under Rule 9413. If oral argument is ordered by the Subcommittee, oral argument shall be held before the Subcommittee within seven days after service of the order. The member shall be entitled to be represented by an attorney. The oral argument shall be recorded and a transcript prepared by a court reporter. The member may purchase a copy of the transcript from the court reporter. Any corrections to the transcript shall be submitted within three days after the oral argument or within three days after receipt of the transcript, whichever is later.

(3) Review on Record

If oral argument is not requested or ordered, the Subcommittee shall conduct its review on the basis of the record and any written submissions by the Parties.

(4) Additional Evidence

The Subcommittee may consider additional evidence if the member shows good cause for not previously submitting such evidence.

(5) Recommendation

The Subcommittee shall present a recommended decision in writing to the National Business Conduct Committee and all other Directors not later than seven days before the meeting of the National Business Conduct Committee at which the proceeding shall be considered.

(c) Decision

(1) Decision of National Business Conduct Committee, Including Remand

After considering all matters presented in the review and the written recommended decision of the Subcommittee, the National Business Conduct Committee may affirm, modify, or reverse the Department's decision or remand the proceeding with instructions. The National Business Conduct Committee shall prepare a proposed written decision pursuant to subparagraph (2).

(2) Contents of Decision

The decision shall include:

(A) a description of the Department's decision, including its rationale;

(B) a description of the principal issues regarding the imposition of limitations raised in the review and a statement supporting the disposition of such issues;

(C) a summary of the evidence on each issue;

(D) a statement of whether the Department's decision is affirmed, modified, or reversed, and a rationale therefor; and

(E) if any limitations are imposed, a description of the limitations and a statement describing a fitting sanction that will be imposed under Rule 9417 if the member fails to comply with any of the limitations.

(3) Issuance of Decision After Expiration of Call for Review Period

The National Business Conduct Committee shall provide its proposed written decision to the NASD Regulation Board, and, if the proceeding is not called for review by the NASD Regulation Board, to the NASD Board. The NASD Regulation Board may call the proceeding for review pursuant to Rule 9415. The NASD Board may call the proceeding for review pursuant to Rule 9416. If neither the NASD Regulation Board nor the NASD Board calls the proceeding for review, the proposed written decision of the National Business Conduct Committee shall become final, and the National Business Conduct Committee shall serve its written decision pursuant to Rules 9132 and 9134. The decision shall

constitute the final action of the Association, unless the National Business Conduct Committee remands the proceeding.

9415. Discretionary Review by the NASD Regulation Board

(a) Call for Review by Director

A Director may call a proceeding for review by the NASD Regulation Board if the call for review is made within the period prescribed in paragraph (b).

(b) Seven Day Period; Waiver

After receiving the proposed written decision of the National Business Conduct Committee pursuant to Rule 9414, a Director shall have not less than seven days to determine if the proceeding should be called for review. A Director shall call a proceeding for review by notifying the General Counsel of NASD Regulation. By a unanimous vote of the NASD Regulation Board, the NASD Regulation Board may shorten the period to less than seven days. By an affirmative vote of the majority of the NASD Regulation Board then in office, the NASD Regulation Board may, during the seven day period, vote to extend the period to more than seven days.

(c) Review at Next Meeting

If a Director calls a proceeding for review within the period prescribed by paragraph (b), the NASD Regulation Board shall review the proceeding not later than the next meeting of the NASD Regulation Board. The NASD Regulation Board may order the filing of briefs in connection with its review proceedings pursuant to this Rule.

(d) Decision of NASD Regulation Board, Including Remand

After review, the NASD Regulation Board may affirm, modify, or reverse the proposed written decision of the National Business Conduct Committee or remand the proceeding with instructions. The NASD Regulation Board shall prepare a proposed written decision that includes all of the elements described in Rule 9414(c)(2).

(e) Issuance of Decision After Expiration of Call for Review Period

The NASD Regulation Board shall provide its proposed written decision to the NASD Board. The NASD Board may call the proceeding for review pursuant to Rule 9416. If the NASD Board does not call the proceeding for review, the proposed written decision of the NASD Regulation Board shall become final, and the NASD Regulation Board shall serve its written decision pursuant to Rules 9132 and 9134. The decision shall constitute the final action of the Association, unless the NASD Regulation Board remands the proceeding.

9416. Discretionary Review by the NASD Board**(a) Call for Review by Governor**

A Governor may call a proceeding for review by the NASD Board if the call for review is made within the period prescribed in paragraph (b).

(b) Seven Day Period; Waiver

(1) Proceeding Called for Review by NASD Regulation Board
If the NASD Regulation Board reviewed the proceeding under Rule 9415, a Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the NASD Regulation Board.

(2) Proceeding Not Called for Review by NASD Regulation Board

If no Director of the NASD Regulation Board called the proceeding for review under Rule 9415, a Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the National Business Conduct Committee.

(3) Waiver

By a unanimous vote of the NASD Board, the NASD Board may shorten the period in subparagraph (1) or (2) to less than seven days. By an affirmative vote of the majority of the NASD Board then in office, the NASD Board may, during the seven day period in subparagraph (1) or (2), vote to extend the period in subparagraph (1) or (2) to more than seven days.

(c) Review at Next Meeting

If a Governor calls a proceeding for review within the period prescribed in paragraph (b), the NASD Board shall review the proceeding not later than the next meeting of the NASD Board. The NASD Board may order the filing of briefs in connection with its review proceedings pursuant to this Rule.

(d) Decision of NASD Board, Including Remand

After review, the NASD Board may affirm, modify, or reverse: (1) the proposed written decision of the NASD Regulation Board, or (2) if the NASD Regulation Board did not call a proceeding for review under Rule 9415, the proposed written decision of the National Business Conduct Committee. Alternatively, the NASD Board may remand the proceeding with instructions. The NASD Board shall prepare a written decision that includes all of the elements described in Rule 9414(c)(2).

(e) Issuance of Decision

The NASD Board shall issue and serve its written decision pursuant to

Rules 9132 and 9134. The decision shall constitute the final action of the Association, unless the NASD Board remands the proceeding.

9417. Enforcement of Sanctions**(a) Order**

If the Department determines that a member has failed to comply with any limitations imposed by a decision under Rule 9413, 9414, 9415, or 9416, or an effective notice under Rule 9413(d), the Department shall issue an order to be served pursuant to Rules 9132 and 9134 imposing the sanctions set forth in the decision or notice and specifying the effective date and time of such sanctions.

(b) Hearing

A member aggrieved by an order issued under paragraph (a) may file a written request for a hearing before the Department. The request shall be filed pursuant to Rules 9135, 9136, and 9137 within four days after service of the order. The member shall be entitled to be heard in person, to be represented by an attorney, and to submit any relevant evidence. The hearing shall be recorded and a transcript prepared by a court reporter. The member may purchase a copy of the transcript from the court reporter. Any corrections to the transcript shall be submitted within two days after the hearing or within two days after receipt of the transcript, whichever is later.

(c) Decision

Within four days after the hearing, the Department shall affirm, modify, or reverse the order issued under paragraph (a). The Department shall serve the decision on the member pursuant to Rules 9132 and 9134. The decision shall become effective upon service and shall constitute final action of the Association.

9418. Additional Limitations; Modification or Removal of Limitations**(a) Additional Limitations**

If a member continues to experience financial or operational difficulty specified in Rule 3130 or 3131, notwithstanding an effective notice or decision under the Rule 9410 Series, the Department may impose additional limitations by issuing a notice under Rule 9412.

(b) Modification of Limitations

If the Department determines that any limitations previously imposed under the Rule 9410 Series should be modified or removed, the Department shall serve a written notice on the member pursuant to Rules 9132 and 9134.

9419. Application to Commission for Review; Other Action Not Foreclosed

(a) Any person aggrieved by final action pursuant to the Rule 9410 Series may apply for review by the Commission under Section 19 of the Act. The filing of an application for review shall not stay the effectiveness of final action by the Association, unless the Commission otherwise orders.

(b) Action by the Association under the Rule 9410 Series shall not foreclose action by the Association under any other Rule.

9420. Approval of Change in Business Operations That Will Result in a Change in Exemptive Status under SEC Rule 15c3-3**9421. Purpose**

The Rule 9420 Series sets forth procedures for Rule 3140, which requires the Association's approval of a change in a member's business activities that will result in a change in the member's exemptive status under SEC Rule 15c3-3.

9422. Department of Member Regulation Consideration**(a) Application**

A member shall apply for approval of a change in its business operation that will result in a change in its exemptive status under SEC Rule 15c3-3 by filing a written application with the Department of Member Regulation (hereinafter "Department" in the 9420 Rule Series) at the district office in the district in which it has its principal place of business. The application shall address the criteria set forth in Rule 3140 and shall be filed pursuant to Rules 9135, 9136, and 9137.

(b) Decision

Within 21 days after receipt of the application, the Department shall issue a decision approving or denying the application in whole or in part. If the decision denies the application in whole or in part, the decision shall set forth the specific grounds for such action. The decision shall provide a fitting sanction to be imposed in accordance with Rule 9426 if the member fails to comply with any limitations imposed. The Department shall serve the decision pursuant to Rules 9132 and 9134.

9423. National Business Conduct Committee Review**(a) Initiation of Review****(1) Application by Member**

A member aggrieved by a decision issued under Rule 9422 may file a written application for review by the National Business Conduct Committee. The application shall state the specific grounds for the review and whether oral

argument is requested. The application shall be filed pursuant to Rules 9135, 9136, and 9137 within seven days after service of the decision. The member may withdraw its application at any time by filing a written notice with the National Business Conduct Committee pursuant to Rules 9135, 9136, and 9137.

(2) Motion of National Business Conduct Committee

A decision issued under Rule 9422 shall be subject to a call for review by any member of the National Business Conduct Committee or the Review Subcommittee described in Rule 9312(a)(1) within 30 days after service of the decision. If the National Business Conduct Committee or the Review Subcommittee calls a decision for review, a written notice of review shall be served promptly on the member pursuant to Rules 9132 and 9134. The written notice of review shall state the specific grounds for the review and whether oral argument is ordered. If a decision is called for review by any member of the National Business Conduct Committee or the Review Subcommittee, the decision shall be reviewed by the National Business Conduct Committee.

(3) No Stay of Action

Unless otherwise ordered by the National Business Conduct Committee, the initiation of a review under this paragraph shall not stay the decision of the Department.

(4) Ex Parte Communications

The prohibitions against ex parte communications in Rule 9143 shall become effective under the Rule 9420 Series when Association staff has knowledge that a member intends to file a written application for review or that the National Business Conduct Committee intends to review a decision on its own motion under this Rule.

(b) Subcommittee Consideration

(1) Appointment of Subcommittee

The National Business Conduct Committee shall appoint a Subcommittee to participate in the review. The Subcommittee shall be composed of two or more members. One member shall be a member of the National Business Conduct Committee, and the remaining member or members shall be current or former Directors of the NASD Regulation Board or former Governors of the NASD Board.

(2) Oral Argument

If oral argument is requested by the member, oral argument shall be held before the Subcommittee within 14 days after service of the decision under Rule 9422. If oral argument is ordered by the Subcommittee, oral argument shall be held before the Subcommittee within seven days after service of the order.

The oral argument shall be recorded and a transcript prepared by a court reporter. The member may purchase a copy of the transcript from the court reporter. Any corrections to the transcript shall be submitted within three days after the oral argument or within three days after receipt of the transcript, whichever is later.

(3) Review on Record

If oral argument is not requested or ordered, the Subcommittee shall conduct its review on the basis of the record and any written submissions by the Parties.

(4) Additional Evidence

The Subcommittee may consider additional evidence if the member shows good cause for not previously submitting such evidence.

(5) Recommendation

The Subcommittee shall present a recommended decision in writing to the National Business Conduct Committee and all other Directors not later than seven days before the meeting of the National Business Conduct Committee at which the proceeding shall be considered.

(c) Decision

(1) Decision of National Business Conduct Committee, Including Remand

After considering all matters presented in the review and the written recommended decision of the Subcommittee, the National Business Conduct Committee may affirm, modify, or reverse the Department's decision or remand the proceeding with instructions. The National Business Conduct Committee shall prepare a proposed written decision pursuant to subparagraph (2).

(2) Contents of Decision

The decision shall include:

(A) a description of the Department's decision, including its rationale;

(B) a description of the principal issues regarding the change in the member's exemptive status raised in the review and a statement supporting the disposition of such issues;

(C) a summary of the evidence on each issue;

(D) a statement of whether the Department's decision is affirmed, modified, or reversed, and a rationale therefore; and

(E) if any limitations are imposed, a description of the limitations and a statement describing a fitting sanction that will be imposed under Rule 9426 if the member fails to comply with any of the limitations.

(3) Issuance of Decision After Expiration of Call for Review Period

The National Business Conduct Committee shall provide its proposed written decision to the NASD Regulation

Board, and, if the proceeding is not called for review by the NASD Regulation Board, to the NASD Board. The NASD Regulation Board may call the proceeding for review pursuant to Rule 9424. The NASD Board may call the proceeding for review pursuant to Rule 9425. If neither the NASD Regulation Board nor the NASD Board calls the proceeding for review, the proposed written decision of the National Business Conduct Committee shall become final, and the National Business Conduct Committee shall serve its written decision pursuant to Rules 9132 and 9134. The decision shall constitute the final action of the Association, unless the National Business Conduct Committee remands the proceeding.

9424. Discretionary Review by the NASD Regulation Board

(a) Call for Review by Director

A Director may call a proceeding for review by the NASD Regulation Board if the call for review is made within the period prescribed in paragraph (b).

(b) Seven Day Period; Waiver

After receiving the proposed written decision of the National Business Conduct Committee pursuant to Rule 9423, a Director shall have not less than seven days to determine if the proceeding should be called for review. A Director shall call a proceeding for review by notifying the General Counsel of NASD Regulation. By a unanimous vote of the NASD Regulation Board, the NASD Regulation Board may shorten the period to less than seven days. By an affirmative vote of the majority of the NASD Regulation Board then in office, the NASD Regulation Board may, during the seven day period, vote to extend the period to more than seven days.

(c) Review at Next Meeting

If a Director calls a proceeding for review within the period prescribed by paragraph (b), the NASD Regulation Board shall review the proceeding not later than the next meeting of the NASD Regulation Board. The NASD Regulation Board may order the filing of briefs in connection with its review proceedings pursuant to this Rule.

(d) Decision of NASD Regulation Board, Including Remand

After review, the NASD Regulation Board may affirm, modify, or reverse the proposed written decision of the National Business Conduct Committee or remand the proceeding with instructions. The NASD Regulation Board shall prepare a proposed written decision that includes all of the elements described in Rule 9423(c)(2).

(e) Issuance of Decision After Expiration of Call for Review Period

The NASD Regulation Board shall provide its proposed written decision to the NASD Board. The NASD Board may call the proceeding for review pursuant to Rule 9425. If the NASD Board does not call the proceeding for review, the proposed written decision of the NASD Regulation Board shall become final, and the NASD Regulation Board shall serve its written decision pursuant to Rules 9132 and 9134. The decision shall constitute the final action of the Association, unless the NASD Regulation Board remands the proceeding.

9425. Discretionary Review by NASD Board

(a) Call for Review by Governor

A Governor may call a proceeding for review by the NASD Board if the call for review is made within the period prescribed in paragraph (b).

(b) Seven Day Period; Waiver

(1) Proceeding Called for Review by NASD Regulation Board

If the NASD Regulation Board reviewed the proceeding under Rule 9424, a Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the NASD Regulation Board.

(2) Proceeding Not Called for Review by NASD Regulation Board

If no Director of the NASD Regulation Board called the proceeding for review under Rule 9424, a Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the National Business Conduct Committee.

(3) Waiver

By a unanimous vote of the NASD Board, the NASD Board may shorten the period in subparagraph (1) or (2) to less than seven days. By an affirmative vote of the majority of the NASD Board then in office, the NASD Board may, during the seven day period in subparagraph (1) or (2), vote to extend the period in subparagraph (1) or (2) to more than seven days.

(c) Review at Next Meeting

If a Governor calls a proceeding for review within the period prescribed in paragraph (b), the NASD Board shall review the proceeding not later than the next meeting of the NASD Board. The NASD Board may order the filing of briefs in connection with its review proceedings pursuant to this Rule.

(d) Decision of NASD Board, Including Remand

After review, the NASD Board may affirm, modify, or reverse: (1) the proposed written decision of the NASD Regulation Board, or (2) if the NASD Regulation Board did not call a proceeding for review under Rule 9424, the proposed written decision of the National Business Conduct Committee. Alternatively, the NASD Board may remand the proceeding with instructions. The NASD Board shall prepare a written decision that includes all of the elements described in Rule 9423(c)(2).

(e) Issuance of Decision

The NASD Board shall issue and serve its written decision pursuant to Rules 9132 and 9134. The decision shall constitute the final action of the Association, unless the NASD Board remands the proceeding.

9426. Enforcement of Sanctions

(a) Order

If the Department determines that a member has failed to comply with limitations imposed by a decision under Rule 9422, 9423, 9424, or 9425, the Department shall issue an order to be served pursuant to Rules 9132 and 9134 imposing the sanctions set forth in the decision and specifying the effective date and time of such sanctions.

(b) Hearing

A member aggrieved by an order issued under paragraph (a) may file a written request for a hearing before the Department. The request shall be filed pursuant to Rule 9135, 9136, and 9137 within four days after service of the order. The member shall be entitled to be heard in person, to be represented by an attorney, and to submit any relevant evidence. The hearing shall be recorded and a transcript prepared by a court reporter. The member may purchase a copy of the transcript from the court reporter. Any corrections to the transcript shall be submitted within two days after the hearing or within two days after receipt of the transcript, whichever is later.

(c) Decision

Within four days after the hearing, the Department shall affirm, modify, or reverse the order issued under paragraph (a). The Department shall serve the decision on the member pursuant to Rule 9132 and 9134. The decision shall become effective upon service and shall constitute final action of the Association.

9427. Application to Commission for Review

Any person aggrieved by final action pursuant to the Rule 9420 Series may apply for review by the Commission under Section 19 of the Act. The filing of an application for review shall not

stay the effectiveness of final action by the Association, unless the Commission otherwise orders.

9500. Suspension, Cancellation, Bar, and Eligibility Procedures

9510. Procedures for Summary Suspension by NASD

9511. Purpose

Section 15A(h)(3) of the Act authorizes a registered securities association to summarily (1) suspend a member or person associated with a member who has been and is expelled or suspended from any self-regulatory organization or barred or suspended from being associated with a member of any self-regulatory organization, (2) suspend a member who is in such financial or operating difficulty that the association determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors, creditors, other members, or the association, or (3) limit or prohibit any person with respect to access to services offered by the association if (1) or (2) applies to such person or, in the case of a person who is not a member, if the association determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, members, or the association.

Summary suspension procedures for the grounds listed in Section 15A(h)(3) of the Act are set forth in the Rule 9510 Series. Other procedures for suspending the membership of a member, suspending the registration of an associated person, or suspending a person from association with any member are found in Rules 8220, 8320, and 9520.

9512. Notice

(a) Authorization

The NASD Board may authorize the President of NASD Regulation or Nasdaq to issue a written notice that:

(1) summarily suspends a member or person associated with a member who has been and is expelled or suspended from any self-regulatory organization or barred or suspended from being associated with a member of any self-regulatory organization;

(2) summarily suspends a member who is in such financial or operating difficulty that the Association determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors,

creditors, other members, or the Association; or

(3) limits or prohibits any person with respect to access to services offered by the Association if subparagraph (1) or (2) applies to such person or, in the case of a person who is not a member, if the NASD Board determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, members, or the Association.

(b) Contents and Service of Notice

A notice issued under this Rule shall state the specific grounds for the summary suspension and state that the member or associated person may file a written request for a hearing under Rule 9513. The notice shall be served by facsimile or pursuant to Rules 9131 and 9134. A copy of a notice served on a person who is associated with a member shall be served on such member pursuant to Rule 9134.

(c) Effective Date

A summary suspension shall be effective on the date and time specified in the notice.

9513. Hearing and Decision

(a) Request

(1) Request by Member or Associated Person

A member or associated person subject to a summary suspension may file a written request for a hearing with the NASD Board. The request shall state the specific grounds for reversing the summary suspension. The request shall be filed pursuant to Rules 9135, 9136, and 9137 within ten days after service of the notice under Rule 9512. The member or associated person may withdraw its request for a hearing by filing a written notice with the NASD Board pursuant to Rules 9135, 9136, and 9137.

(2) Failure to File Request

If the member or associated person subject to a summary suspension does not file a written request for a hearing under subparagraph (1), the notice of summary suspension shall constitute final action by the Association.

(3) No Stay of Summary Suspension

A request for a hearing shall not stay the effectiveness of a summary suspension under Rule 9512.

(b) Hearing Panel Consideration

(1) Appointment of Hearing Panel

If a member or associated person subject to a summary suspension files a written request for a hearing, a hearing shall be held before a Hearing Panel within 15 days after service of the notice under Rule 9512. The Hearing Panel shall be composed of two or more

members. One member shall be a Governor of the NASD Board, and the remaining member or members shall be current or former members of the NASD Regulation Board, the Nasdaq Board, or the NASD Board.

(2) Rights of Member or Associated Person

A member or associated person subject to a summary suspension shall be entitled to be heard in person, to be represented by an attorney, and to submit any relevant evidence.

(3) Witnesses

A person who is subject to the jurisdiction of the Association shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter.

(4) Recordation of Hearing

The hearing shall be recorded and a transcript prepared by a court reporter. The member or associated person may purchase a copy of the transcript from the court reporter. Any corrections to the transcript shall be submitted within three days after the hearing or within three days after receipt of the transcript, whichever is later.

(c) Decision

(1) Decision of the Hearing Panel

The Hearing Panel shall affirm, modify, or reverse the summary suspension. The Hearing Panel shall prepare a proposed written decision pursuant to subparagraph (2).

(2) Contents of Decision

The decision shall include a statement describing the investigative or other origin of the proceeding, the grounds for issuing the notice under Rule 9512, and a rationale for the disposition of the proceeding, and, if a suspension continues to be imposed, the specific grounds for imposing such sanction and the terms of the suspension.

(3) Issuance of Decision After Expiration of Call for Review Period

The Hearing Panel shall provide its proposed written decision to the NASD Board. The NASD Board may call the proceeding for review pursuant to Rule 9514. If the NASD Board does not call the proceeding for review, the proposed written decision of the Hearing Panel shall become final, and the Hearing Panel shall serve its written decision pursuant to Rules 9132 and 9134. The decision shall constitute final action of the Association.

9514. Discretionary Review by the NASD Board

(a) Call for Review by Governor

A Governor may call a proceeding for review by the NASD Board if the call for review is made within the period prescribed by paragraph (b).

(b) Seven Day Period; Waiver

After receiving the proposed written decision of the Hearing Panel pursuant to Rule 9513, a Governor shall have not less than seven days to determine if the decision should be called for review. A Governor shall call the proceeding for review by notifying the General Counsel of the NASD. By a unanimous vote of the NASD Board, the NASD Board may shorten the period to less than seven days. By an affirmative vote of the majority of the NASD Board then in office, the NASD Board may, during the seven day period, vote to extend the period in to more than seven days.

(c) Review at Next Meeting

If a Governor calls a proceeding for review within the period prescribed by paragraph (b), the NASD Board shall review the decision not later than the next meeting of the NASD Board. The NASD Board may order the filing of briefs in connection with its review proceedings pursuant to this Rule.

(d) Decision of the NASD Board, Including Remand

After review, the NASD Board may affirm, modify, or reverse the proposed written decision of the Hearing Panel. Alternatively, the NASD Board may remand the proceeding with instructions. The NASD Board shall prepare a written decision that includes all of the elements of Rule 9513(c)(2).

(e) Issuance of Decision

The NASD Board shall issue and serve its decision pursuant to Rules 9132 and 9134. The decision shall constitute the final action of the Association, unless the NASD Board remands the proceeding.

9515. Application to Commission for Review

Any person aggrieved by final action pursuant to the Rule 9510 Series may apply for review by the Commission under Section 19 of the Act. The filing of an application for review by the Commission shall not stay the effectiveness of final action by the Association, unless the Commission otherwise orders.

9516. Other Action Not Foreclosed

Action by the Association under the Rule 9510 Series shall not foreclose action by the Association under any other Rule.

9520. Non-Summary Suspension, Cancellation, and Bar Procedures

9521. Purpose

(a) The Rule 9520 Series sets forth procedures for the Association to:

(1) cancel the membership of a member that becomes ineligible for continuance in membership, or that continues to be associated with an ineligible person, or suspend or bar a

person from continuing to be associated with a member because such person is or becomes ineligible for association under Article III, Section 3 of the NASD By-Laws;

(2) suspend or cancel the membership of a member or the registration of a person for failure to pay fees, dues, assessments, or other charges; failure to submit a required report or information related to such payment; or failure to comply with an arbitration award or a settlement agreement related to an arbitration or mediation under Article VI, Section 3 of the NASD By-Laws; and

(3) cancel the membership of a member for failure to file or submit on request any report, document, or other information required to be filed with or requested by the Association under Article VII, Section 2 of the NASD By-Laws.

(b) Procedures for summarily suspending a member or associated person on grounds set forth in Section 15A(h)(2) of the Act are found in the Rule 9510 Series. Other procedures for suspending a member or associated person for failure to submit required information or failure to pay fines, monetary sanctions, or costs are found in Rules 8220 and 8320, respectively.

9522. Initiation of Proceeding

(a) Notice

Association staff shall initiate a proceeding authorized under Section 3 of Article III, Section 3 of Article VI, or Section 2 of Article VII of the NASD By-Laws by sending a written notice to the member or associated person. The notice shall specify the grounds for and effective date of the cancellation, suspension, or bar and shall state that the member or associated person may file a written request for a hearing. The notice shall be served by facsimile or pursuant to Rule 9131 and 9134.

(b) Copy of Notice to Member

A copy of a notice served on a person associated with a member shall be served on such member pursuant to Rule 9134.

(c) Effective Date

For any cancellation, suspension, or bar under Section 3 of Article III of the NASD By-Laws, the effective date shall be at least seven days after service of the notice on the member or associated person. For any cancellation or suspension under Section 3 of Article VI or Section 2 of Article VII of the NASD By-Laws, the effective date shall be at least 15 days after service of the notice on the member or associated person.

9523. Hearing Panel Consideration

(a) Request for Hearing

A member or associated person who receives a notice under Rule 9522(a) may file a written request for a hearing with the NASD Regulation Board. The request shall be filed pursuant to Rules 9135, 9136, and 9137 before the effective date set forth in the notice. The request shall state the grounds for opposing the cancellation, suspension, or bar. The member or associated person may withdraw its request at any time by filing a written notice with the NASD Regulation Board pursuant to Rules 9135, 9136, and 9137.

(b) Stay of Action

Unless otherwise ordered by the NASD Regulation Board, a request for a hearing under paragraph (a) shall stay the notice issued under Rule 9522.

(c) Appointment of Hearing Panel

If a member or associated person files a request for a hearing, the NASD Regulation Board shall appoint a Hearing Panel to conduct a hearing. The Hearing Panel shall be composed of two or more current or former Directors of the NASD Regulation Board.

(d) Rights of Member

The member or associated person shall be entitled to be heard in person, to be represented by an attorney, and to submit any relevant evidence.

(e) Witnesses

A person who is subject to the jurisdiction of the Association shall testify under oath or affirmation. The oath or affirmation shall be administered by a court reporter.

(f) Recordation of Hearing

The hearing shall be recorded and a transcript prepared by a court reporter. The member or associated person may purchase a copy of the transcript from the court reporter. Any corrections to the transcript shall be submitted within three days after the hearing or within three days after receipt of the transcript, whichever is later.

(g) Decision

(1) Decision of Hearing Panel

The Hearing Panel shall decide whether a cancellation, suspension, or bar shall be imposed. The Hearing Panel shall prepare a proposed written decision pursuant to subparagraph (2).

(2) Contents of Decision

The decision shall include:

(A) an identification of the article of the NASD By-Laws that authorizes the proceeding;

(B) a statement describing the origin of the proceeding;

(C) a statement of the nature of the ineligibility or the failure to take action that is at issue;

(D) a statement of findings of fact and conclusions as to any violations of the By-Laws;

(E) a rationale for the disposition of the proceeding; and, F) if a suspension,

cancellation, or bar is imposed, the effective date and time and the terms of the sanction.

(3) Issuance of Decision After Expiration of Call for Review Period

The Hearing Panel shall provide its proposed written decision to the NASD Board. The NASD Board may call the proceeding for review pursuant to Rule 9524. If the NASD Board does not call the proceeding for review, the proposed written decision of the Hearing Panel shall become final, and the Hearing Panel shall serve its written decision pursuant to Rules 9132 and 9134. The decision shall constitute final action of the Association.

9524. Discretionary Review by NASD Board

(a) Call for Review by Governor

A Governor may call a proceeding for review by the NASD Board if the call for review is made within the period prescribed by paragraph (b).

(b) Seven Day Period; Waiver

After receiving the proposed written decision of the Hearing Panel pursuant to Rule 9523, a Governor shall have not less than seven days to determine if the decision should be called for review. A Governor shall call a proceeding for review by notifying the General Counsel of the NASD. By a unanimous vote of the NASD Board, the NASD Board may shorten the period to less than seven days. By an affirmative vote of the majority of the NASD Board then in office, the NASD Board may, during the seven day period, vote to extend the period to more than seven days.

(c) Review at Next Meeting

If a Governor calls a proceeding for review within the period prescribed by paragraph (b), the NASD Board shall review the proceeding not later than the next meeting of the NASD Board. The NASD Board may order the filing of briefs in connection with its review proceedings pursuant to this Rule.

(d) Decision and Final Action of the Association

After review, the NASD Board may affirm, modify, or reverse the decision of the Hearing Panel or remand the proceeding with instructions. The NASD Board shall prepare a written decision that includes all of the elements of Rule 9523(g)(2).

(e) Issuance of Decision After Expiration of Call for Review Period

The NASD Board shall issue and serve its decision pursuant to Rules 9132 and 9134. The decision shall constitute final action of the Association, unless the NASD Board remands the proceeding.

9525. Application to Commission for Review

Any person aggrieved by final action pursuant to the Rule 9520 Series may

apply for review by the Commission under Section 19 of the Act. The filing of an application for review shall not stay the effectiveness of final action by the Association, unless the Commission otherwise orders.

9526. Other Action Not Foreclosed

Action by the Association under the Rule 9520 Series shall not foreclose action by the Association under any other Rule.

9530. Eligibility Proceedings

9531. Purpose

The Rule 9530 Series sets forth procedures for a person to become associated with a member, notwithstanding the existence of a statutory disqualification as defined in Section 3(a)(39) of the Act and for a current member or person associated with any member to obtain relief from the eligibility or qualification requirements of the NASD By-Laws and the Rules of the Association. Such actions hereinafter are referred to as "eligibility proceedings."

9532. Initiation of Eligibility Proceedings

(a) Notice of Disqualification or Ineligibility

(1) Issuance

If the Department of Member Regulation (hereinafter "Department" in the Rule 9530 Series) has reason to believe that a statutory disqualification exists or that a member or person associated with a member otherwise fails to meet the eligibility requirements of the Association, the Department shall issue a written notice to the member or associated person. The notice shall specify the grounds for such disqualification or ineligibility.

(2) Notice to Member

A notice issued to a member that is subject to a statutory disqualification or is otherwise ineligible for membership shall state that the member may apply for relief by filing a written application for relief with the Department within seven days after service of the notice.

(3) Notice to Associated Person

A notice issued to an associated person who is subject to a statutory disqualification or is otherwise ineligible for association shall state that the member with which the person is or may become associated may apply for relief on behalf of itself and such person by filing a written application for relief with the Department within seven days after service of the notice.

(4) Service

A notice issued under this section shall be served by facsimile or pursuant to Rules 9131 and 9134.

(b) Application by Member

A member shall file a written application for relief from the eligibility requirements of the Association with the Department if the member:

(1) determines that it is subject to a statutory disqualification or otherwise is no longer eligible for membership;

(2) determines that a person associated with it is subject to a statutory disqualification or otherwise is no longer eligible for association with the member; or

(3) wishes to sponsor the association of a person who is subject to a statutory disqualification or otherwise is ineligible for association with a member.

(c) Form of Application for Relief

A written application for relief shall be submitted on Form MC400 and shall include a detailed statement demonstrating why the requested relief should be granted.

(d) Withdrawal of Application

A member may withdraw its application for relief at any time by filing a written notice with the Department pursuant to Rules 9135, 9136, and 9137.

(e) Ex Parte Communications

The prohibitions against ex parte communications set forth in Rule 9143 shall become effective under the Rule 9530 Series when the Department of Member Regulation has initiated the eligibility proceeding and Association staff has knowledge that a member intends to file written application for relief with the Department.

9533. National Business Conduct Committee Consideration

(a) Hearing Panel Consideration

(1) Appointment of Hearing Panel

If a member files an application for relief, the National Business Conduct Committee shall appoint a Hearing Panel composed of two or more members, who shall be current or former Directors of the NASD Regulation Board or former Governors of the NASD Board. The Hearing Panel shall conduct a hearing and recommend a decision on the request for relief.

(2) Rights of Member

The member and its current or prospective associated person, as applicable, shall be entitled to be heard in person, to be represented by an attorney, and to submit any relevant evidence.

(3) Recordation of Hearing

The hearing shall be recorded and a transcript prepared by a court reporter. The member may purchase a copy of the transcript from the court reporter. Any corrections to the transcript shall be submitted within three days after the hearing or within three days after receipt of the transcript, whichever is later.

(4) Recommendation

The Hearing Panel shall present a recommended decision in writing on the request for relief to the Statutory Disqualification Committee. After considering the recommendation of the Hearing Panel, the Statutory Disqualification Committee shall present its recommended decision in writing to the National Business Conduct Committee and all other Directors not later than seven days before the meeting of the National Business Conduct Committee at which the eligibility proceeding shall be considered.

(b) Decision

(1) Decision of the National Business Conduct Committee.

After considering all matters presented in the request for relief, the Statutory Disqualification Committee's recommended decision, the public interest, and the protection of investors, the National Business Conduct Committee may grant or deny the request for relief, and, if relief is granted, impose conditions on the matter and its current or prospective associated person. Alternatively, the National Business Conduct Committee may remand the eligibility proceeding. The National Business Conduct Committee shall prepare a proposed written decision pursuant to subparagraph (2).

(2) Contents of Decision

The decision shall include:

(A) a description of the origin of the eligibility proceeding and the nature of disqualification;

(B) a description of the prospective business or employment requested to be engaged in; and

(C) a statement in support of the disposition of the request for relief, which, if granted, includes any of the applicable elements under SEC Rule 19h-1(e) and a description of any conditions that are imposed on the member and current or prospective associated person.

(3) Issuance of Decision After Expiration of Call for Review Period

The National Business Conduct Committee shall provide its proposed written decision to the NASD Regulation Board, and, if the eligibility proceeding is not called for review by the NASD Regulation Board, to the NASD Board. The NASD Regulation Board may call the eligibility proceeding for review pursuant to Rule 9534. The NASD Board may call the eligibility proceeding for review pursuant to Rule 9535. If neither the NASD Regulation Board nor the NASD Board calls the eligibility proceeding for review, the proposed written decision of the National

Business Conduct Committee shall become final, and the National Business Conduct Committee shall serve its written decision pursuant to Rules 9132 and 9134. The decision shall constitute final action of the Association, unless the National Business Conduct Committee remands the eligibility proceeding.

9534. Discretionary Review by the NASD Regulation Board

(a) Call for Review by Director

A Director may call an eligibility proceeding for review by the NASD Regulation Board, if the call for review is made within the period prescribed in paragraph (b).

(b) Seven Day Period; Waiver

After receiving the proposed written decision of the National Business Conduct Committee pursuant to Rule 9533, a Director shall have not less than seven days to determine if the eligibility proceeding should be called for review. A Director shall call an eligibility proceeding for review by notifying the General Counsel of NASD Regulation. By a unanimous vote of the NASD Regulation Board, the NASD Regulation Board may shorten the period to less than seven days. By an affirmative vote of the majority of the NASD Regulation Board then in office, the NASD Regulation Board may, during the seven day period, vote to extend the period to more than seven days.

(c) Review at Next Meeting

If a Director calls the eligibility proceeding for review within the period prescribed by paragraph (b), the NASD Regulation Board shall review the eligibility proceeding not later than the next meeting of the NASD Regulation Board. The NASD Regulation Board may order the filing of briefs in connection with its review proceedings pursuant to this Rule.

(d) Decision of NASD Regulation Board, Including Remand

After review, the NASD Regulation Board may affirm, modify, or reverse the proposed written decision of the National Business Conduct Committee. Alternatively, the NASD Regulation Board may remand the eligibility proceeding with instructions. The NASD Regulation Board shall prepare a proposed written decision that includes

all of the elements described in Rule 9533(b)(2).

(e) Issuance of Decision After Expiration of Call for Review Period

The NASD Regulation Board shall provide its proposed written decision to the NASD Board. The NASD Board may call the eligibility proceeding for review pursuant to Rule 9535. If the NASD Board does not call the eligibility proceeding for review, the proposed written decision of the NASD Regulation Board shall become final, and the NASD Regulation Board shall serve its written decision pursuant to Rules 9132 and 9134. The decision shall constitute the final action of the Association, unless the NASD Regulation Board remands the eligibility proceeding.

9535. Discretionary Review by the NASD Board

(a) Call for Review by Governor

A Governor may call an eligibility proceeding for review by the NASD Board if the call for review is made within the period prescribed in paragraph (b).

(b) Seven Day Period; Waiver

(1) Eligibility Proceeding Called for Review by NASD Regulation Board
If the NASD Regulation Board reviewed the eligibility proceeding under Rule 9534, a Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the NASD Regulation Board.

(2) Eligibility Proceeding Not Called for Review by NASD Regulation Board

If no Director of the NASD Regulation Board called the eligibility proceeding for review under Rule 9534, a Governor shall make his or her call for review not later than the next meeting of the NASD Board that is at least seven days after the date on which the NASD Board receives the proposed written decision of the National Business Conduct Committee.

(3) Waiver

By a unanimous vote of the NASD Board, the NASD Board may shorten the period in subparagraph (1) or (2) to less than seven days. By an affirmative vote of the majority of the NASD Board then in office, the NASD Board may, during the seven day period in subparagraph

(1) or (2), vote to extend the period in subparagraph (1) or (2) to more than seven days.

(c) Review at Next Meeting

If a Governor calls a eligibility proceeding for review within the period prescribed in paragraph (b), the NASD Board shall review the eligibility proceeding not later than the next meeting of the NASD Board. The NASD Board may order the filing of briefs in connection with its review proceedings pursuant to this Rule.

(d) Decision of NASD Board, Including Remand

After review, the NASD Board may affirm, modify, or reverse: (1) the proposed written decision of the NASD Regulation Board, or (2) if the NASD Regulation Board did not call an eligibility proceeding for review under Rule 9534, the proposed written decision of the National Business Conduct Committee. Alternatively, the NASD Board may remand the eligibility proceeding with instructions. The NASD Board shall prepare a written decision that includes all of the elements described in Rule 9533(b)(2).

(e) Issuance of Decision

The NASD Board shall issue and serve its written decision pursuant to Rules 9132 and 9134. The decision shall constitute the final action of the Association, unless the NASD Board remands the proceeding.

9536. Application to Commission for Review

Any person aggrieved by final action pursuant to the Rule 9530 Series may apply for review by the Commission under Section 19 of the Act. The filing of an application for review shall not stay the effectiveness of final action by the Association, unless the Commission otherwise orders.

9600. [Reserved]

9700. PROCEDURES ON GRIEVANCES CONCERNING THE AUTOMATED SYSTEMS

[No change.]

9800. CORPORATE FINANCING AND DIRECT PARTICIPATION PROGRAM MATTERS

[No change.]

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