

imposition of a cease and desist order by the NASD.⁴¹ In addition, the NASD does not believe that respondents will be collaterally estopped from contesting issues in customer disputes because arbitrators are not required to apply the same legal standards as the courts. Finally, the NASD stated that it would work with other regulators in coordinating the use of the cease and desist authority as an enforcement tool to help prevent regulators from “piling” sanctions on respondents.

III. Discussion

The Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)⁴² of the Act, in general, and furthers the objectives of Section 15A(b)(6),⁴³ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.⁴⁴ The Commission believes that the proposed rule change will protect investors and the public interest by improving the NASD's capability to prevent fraudulent and manipulative acts and practices, such as unauthorized trading in a customer's account.

The Commission further finds that the proposed rule change is a “fitting sanction” under Section 15A(b)(7) of the Act. One commenter's argument that temporary cease and desist orders are “quasi-judicial powers primarily intended to preserve the status quo” and are “not designed to function as sanctions” is not accurate in this context. For the Commission to issue a temporary cease and desist order under Section 21C of the Act, it must only find that an alleged or threatened violation specified in the permanent cease-and-desist complaint is likely to result in significant dissipation or conversion of assets, significant harm to investors, or substantial harm to the public interest before completion of the permanent cease-and-desist proceeding. Thus, unlike a NASD issued temporary cease and desist order, the Commission does not have to find an actual violation before issuing a temporary cease and desist order.

The NASD's proposal requires the NASD to prove its case by finding an actual violation by a preponderance of the evidence; in other words, there is a

ruling on the merits. Accordingly, the imposition of a temporary cease and desist order can be a “sanction” for the finding of wrongdoing under Section 15A(b)(7) of the Act.

The Commission further finds that the proposed rule change is consistent with Section 15A(b)(8) of the Act in that it provides for a fair procedure for disciplining members and persons associated with members. Temporary cease and desist proceedings are designed to occur on an expedited basis to help stop ongoing violations that are likely to result in a significant dissipation or conversion of assets or other significant harm to investors. In response to a commenter's concerns that there was inadequate time to prepare for a hearing, however, the NASD extended the minimum amount of time between service of notice of a hearing and the hearing date from four to seven days. This should give respondents sufficient time to prepare a response to the NASD's detailed allegations set forth in the notice.

Commenters also believe that the “preponderance of evidence” standard, alone, is an inadequate basis for granting a temporary cease and desist order. The preponderance of the evidence standard, however, is consistent with the standard in civil actions generally, including Commission actions.⁴⁵

With respect to the ability of the NASD to impose a permanent cease and desist order, the NASD has articulated the factors it will consider before imposing an order. The Commission notes in *In Re KPMG* that, in determining whether a cease and desist order is appropriate, it would consider factors that provide some showing of risk of future violation, although such showing need not be as great as that required for the imposition of an injunction.⁴⁶

IV. Accelerated Approval of Amendment Nos. 3, 4 and 5

The Commission finds good cause for approving Amendment Nos. 3, 4 and 5 prior to the thirtieth day after publication in the **Federal Register**. The Commission believes that NASD has responded adequately to commenters' concerns and suggestions by incorporating certain commenters' recommendations into the proposed rule language and discussion in Amendment Nos. 3, 4 and 5, and by explaining why it was not incorporating

others. Further, the Commission notes that there were no language changes to the rule in Amendment Nos. 3 and 5, and the only substantive changes to the rule language in Amendment No. 4 are the implementation of the proposal relating to the temporary cease and desist orders as a two-year pilot program and the extension of the minimum amount of time between the notice of the hearing and the hearing date. Both of these changes were made in response to commenters' concerns. Thus, the substance of the proposed rule change was provided in the Notice and has been the subject of a full comment period. Accordingly, the Commission believes that there is good cause, consistent with Section 19(b) of the Act,⁴⁷ to approve Amendment Nos. 3, 4 and 5 to the proposal on an accelerated basis.

V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment Nos. 3, 4 and 5, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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 the filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File No. SR-NASD-98-80 and should be submitted by June 25, 2003.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NASD-98-80) as amended by Amendment No. 1 be, and it hereby is, approved, and that Amendment Nos. 3, 4 and 5 to the proposed rule change be, and they hereby are, approved on an accelerated basis. With respect to the NASD's authority to issue a temporary cease and desist order, it is hereby approved on an accelerated basis as a two-year pilot

⁴¹ See Amendment No. 3.

⁴² 15 U.S.C. 78o-3(b).

⁴³ 15 U.S.C. 78o-3(b)(6).

⁴⁴ In approving this rule, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁴⁵ See *Steadman v. Securities and Exchange Commission*, 450 U.S. 91 (1981); *Seaton v. Securities and Exchange Commission*, 670 F.2d 309 (D.C. Cir. 1982).

⁴⁶ See also footnote 18.

⁴⁷ 15 U.S.C. 78f(b) and 78s(b).