

Hearing Officers—with little justification. This practice has proven to be cumbersome. Under the proposed amendments, respondents file a written request for a hearing with OHO. For actions involving a failure to pay an arbitration award or NASD fees, a Hearing Officer from OHO will act as the sole adjudicator, as is the current practice. For all other matters involving expedited proceedings, an OHO-appointed hearing panel, consisting of a hearing officer and two hearing panelists, will act as the adjudicative body.¹⁹ Second, the amendments allow adjudicators to conduct hearings by telephone. Third, the proposed rule series will allow various expedited actions to be consolidated, eliminating the need for parties to litigate related matters in separate venues.²⁰ In brief, the NASD believes that the fairness of the process will not be impaired—and the efficiency will be improved—by these changes.

Furthermore, the NASD believes that the proposed NASD Rule 9550 Series provides respondents with greater protection by mandating that the action be stayed while the matter is pending, save for limited circumstances. The current rules with expedited components take different approaches as to whether a request for a hearing stays the action.²¹ In general, under the proposed NASD Rule 9550 Series, a request for a hearing automatically stays the action, unless the Hearing Officer orders otherwise (e.g., where there is a threat of harm to the public or other members if the suspension or limitation is not immediately effective). In the ordinary case, this provision will allow respondents to be heard before the suspension, bar or expulsion takes effect. However, the streamlined procedures for final NASD action, discussed below, ensure that the action will not be stayed for a prolonged period (as can now happen due, in part, to the infrequency of NAC and NASD

Board meetings and the difficulty of using special mailing ballots). The NASD believes that the rule change strikes an appropriate balance between the need to ensure fairness to respondents and the need for swift action in appropriate cases.

As indicated above, the NASD believes that the proposed NASD Rule 9550 Series streamlines the procedures for final NASD action. In general, hearings must be conducted and matters resolved within a specified, shortened timeframe once a respondent requests a hearing.²² The NASD believes that the use of such deadlines is consistent with the Commission's recent adoption of amendments to its Rules of Practice that impose binding completion dates in certain Commission administrative proceedings.²³ The NASD believes that the deadlines also are consistent with both the Commission's and the NASD's emphasis on "real-time enforcement."

Once the hearing panel or Hearing Officer issues the initial decision, the NAC's Review Subcommittee has the ability to call the matter for review in a condensed timeframe. As is currently the case with most expedited rules, respondents will not have the right to

appeal the matter to the NAC,²⁴ and the NASD Board will not have the ability to call the matter for review. Thus, the hearing panel or Hearing Officer decision, if not called for review by the NAC, is the NASD's final action. However, the respondent would have the ability to appeal a hearing panel or Hearing Officer decision to the Commission.²⁵ The NASD believes that these provisions ensure that respondents have a right to a full and fair hearing before OHO and that the NAC has the ability to call matters for review when appropriate, while eliminating time-consuming review that can significantly delay the effectiveness of the subject action without necessarily adding benefit to the decision-making process in these uncomplicated matters.²⁶

Finally, NASD no longer refers to itself or its subsidiary, NASD Regulation, Inc., using its full corporate name, "the Association," "the NASD"

²⁴ Under many of the existing rules with expedited components, respondents may not appeal the matter to an NASD appellate body, such as the NAC. For example, the NAC appoints the original, "trial level" hearing panel in actions under the NASD Rule 8220 Series (failure to provide information). The NASD Board appoints the hearing panel in actions under the NASD Rule 9510 Series (summary and non-summary proceedings). Under neither rule series does a respondent have any right of appeal to an internal, NASD appellate body. Similarly, an OHO appointed hearing panel's decision in actions under the NASD Rule 9410 Series (member experiencing financial or operational difficulties) and NASD Rule 9530 (failure to pay fees) is not appealable to the NAC or any other internal, NASD appellate body under the existing system.

²⁵ As is currently the case, a respondent's appeal of an expedited action to the Commission would be governed by Section 19(f) of the Act. See *William J. Gallagher*, Securities Exchange Act Release No. 47501, 2003 SEC LEXIS 599, at *5 (March 14, 2003) (reviewing appeal involving failure to pay arbitration award under Section 19(f) of the Act and explaining that the Commission need only to find that "the 'specific grounds' on which the SRO based its action 'exist in fact'"). Of course, an adjudicator's determination regarding a request for extraordinary relief (e.g., a motion for leave to file a late request for a hearing) is not appealable to the Commission. See *Warren B. Minton, Jr.*, Securities Exchange Act Release No. 46709, 2002 SEC LEXIS 2712, at *9–10 (October 23, 2002) ("[W]e do not have jurisdiction to review the NASD's denial of Minton's motion to vacate the default. * * * [T]he NASD merely rejected Minton's collateral attack on the NASD's [previous] action. * * * [E]ven if an applicant is adversely affected by the NASD's denial of a motion to set aside a default, that fact 'does not transform the denial into a reviewable NASD order.'"); *Gary A. Fox*, Securities Exchange Act Release No. 46511, 2002 SEC LEXIS 2381, at *3–5 (September 18, 2002) ("[W]e are precluded from considering an applicant's application for review if that applicant failed to follow the NASD's procedures. * * * Fox failed to respond to NASD requests for information, failed to respond to the * * * notice of his suspension, and failed to apply for reinstatement within the time required". [W]e are [thus] precluded from considering Fox's application for review.").

²⁶ See *supra* note 5 and accompanying text.

¹⁹ The Chief Hearing Officer will select as Panelists persons who meet the qualifications delineated in NASD Rule 9231(b).

²⁰ It is not uncommon for a firm to experience multiple, related problems, for example, a financial crisis, issues about the qualifications of the Financial Operations Principal, and a failure to provide information in response to NASD staff's queries about the problems. Under the current rules, NASD staff would be required to initiate multiple proceedings to address the issues.

²¹ Compare NASD Rule 8220 Series (request for a hearing does not stay the action); NASD Rule 9514(c)(1) (request for a hearing does not stay the action); with NASD Rule 9413(c) (request for a hearing does stay the action); NASD Rule 9514(c)(2) (request for a hearing does stay action as to certain alleged violations but does not as to others); NASD Rule 9532(a) (request for a hearing does stay the action); NASD Rule 9542(a) (request for a hearing does stay the action).

²² For instance, proposed NASD Rule 9559(f) requires that hearings for failure to comply with cease and desist orders, summary proceedings and members experiencing financial or operational difficulties be held within 14 days, and hearings for all other actions be held within 60 days of a request for a hearing. In addition, under proposed NASD Rule 9559(o), OHO must issue a decision in cases involving a failure to comply with cease and desist orders, a summary proceeding or a member experiencing financial or operational difficulty within 21 days and in all other cases within 60 days of the date of the close of the hearing. However, the Hearing Officer or, if applicable, hearing panel is given flexibility to manage the progress of the case. In some instances, parties legitimately may need more time to explore the issues in the case, gather and provide detailed documentation, make preparations for witnesses, draft and file motions, etc. For good cause shown, or with the consent of all of the parties to a proceeding, the Hearing Officer or, if applicable, the hearing panel may extend or shorten any time limits prescribed by the rule. The proposed rule change thus gives adjudicators the discretion to adapt to the circumstances of each case.

²³ See Release Nos. 33–8240, 34–48018, 35–27686, 39–2408 (June 11, 2003), 68 FR 35787 (June 17, 2003) (Commission Adoption of Amendments to Rules of Practice). In the release, the Commission stated, "Based upon [our] experience with non-binding completion dates, the Commission has determined that timely completion of proceedings can be achieved more successfully through the adoption of mandatory deadlines and procedures designed to meet these deadlines." *Id.* The Commission also stated, "Any and all deadlines and timelines established by these amendments to the Commission's Rules of Practice confer no substantive rights on respondents." *Id.* at 35788. As with the Commission's amendments, the deadlines and timelines established by the NASD's proposed amendments for hearing panels and the NAC to hold hearings and issue decisions confer no substantive rights on respondents.