

Regulatory Information Circular			
Circular number:	2005-03	Contact:	Michael J. Simon
Date:	February 14, 2005	Telephone:	212-897-0230

Subject: Rule Change Notice – Changes to NASD Arbitration Rules

Pursuant to ISE Rule 1800, which in part states that the NASD's Code of Arbitration shall govern ISE arbitrations, this Regulatory Information Circular informs Members of proposed rule changes to the NASD Code of Arbitration published by the Securities and Exchange Commission, attached.

- In the January 14, 2005 *Federal Register*, the Commission published notice of filing of a proposed rule change (SR-NASD-2004-180) by NASD to extend the pilot rule in IM-10100(f) of the NASD Code of Arbitration Procedure until September 30, 2005. The pilot rule requires all industry parties (member firms and associated persons) in arbitration to waive application of California arbitrator disclosure standards if all the parties in the case who are customers, associated persons with claims against industry parties, member firms with claims against other member firms, or member firms with claims against associated persons that relate exclusively to promissory notes, have done so.
(Securities Exchange Act Release No. 34-50971 (January 6, 2005))
- In the February 3, 2005 *Federal Register*, the Commission published notice of filing of a proposed rule change (SR-NASD-2004-042) by NASD to amend rule 10315 to permit arbitrations to occur in a foreign hearing location and to amend IM-10104 to allow the Director of Arbitration to authorize a higher or additional honorarium for the use of a foreign hearing location.
(Securities Exchange Act Release No. 34-51082 January 26, 2005))
- In the February 3, 2005 *Federal Register*, the Commission published notice of filing of a proposed rule change (SR-NASD-2005-007) by NASD to adopt a new Interpretive Material ("IM")-10308 to clarify that (1) fees for service as a mediator are not included in determining whether an attorney, accountant, or other professional derives 10% of his or her annual revenue from industry-related parties; and (2) service as a mediator is not included in determining whether an attorney, accountant, or other professional devotes 20% or more of his or her professional work to securities industry clients.
(Securities Exchange Act Release No. 34-51097 January 28, 2005))

A copy of each notice is attached for reference.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50971; File No. SR-NASD-2004-180]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc., Regarding Waiver of California Arbitrator Disclosure Standards

January 6, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 9, 2004, the National Association of Securities Dealers, Inc., ("NASD") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III, below, which NASD has prepared. 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

NASD is proposing to extend the pilot rule in IM-10100(f) of the NASD Code of Arbitration Procedure ("Code"), relating to the California waiver program, until September 30, 2005. NASD is not proposing any textual changes to the By-Laws or Rules of NASD.

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

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

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

1. Purpose

Effective July 1, 2002, the California Judicial Council adopted a set of rules, "Ethics Standards for Neutral Arbitrators in Contractual Arbitration"

("California Standards"),³ which contain extensive disclosure requirements for arbitrators. According to NASD, the rules were designed to address conflicts of interest in private arbitration forums that are not part of a Federal Regulatory System overseen on a uniform, national basis by the SEC. NASD states that the California Standards impose disclosure requirements on arbitrators that conflict with the disclosure rules of NASD and the New York Stock Exchange ("NYSE"). Because NASD could not both administer its arbitration program in accordance with its own rules and comply with the new California Standards at the same time, NASD initially suspended the appointment of arbitrators in cases in California, but offered parties several options for pursuing their cases.⁴

In July 2002, NASD and the NYSE filed a lawsuit in Federal district court seeking a declaratory judgment that the California Standards are inapplicable to arbitration forums sponsored by self-regulatory organizations ("SROs").⁵ On November 12, 2002, the United States District Court for the Northern District of California dismissed the case on Eleventh Amendment grounds. In December 2002, NASD and the NYSE filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. This appeal is currently stayed pending a decision in *Credit Suisse First Boston Corp. v. Grunwald*,⁶ which is discussed below.

In another case before the United States District Court for the Northern District of California regarding the applicability of the California Standards to NASD arbitrations, Judge Jeremy Fogel denied the plaintiff's motion to vacate an order compelling arbitration.⁷ In his April 2003 decision, Judge Fogel concluded that the application of the California Standards to the NYSE and other SROs, such as NASD, is preempted by the Exchange Act and by

the Federal Arbitration Act ("FAA"). The *Mayo* decision was not appealed.

The applicability of the California Standards to SRO arbitrations was again addressed by the United States District Court for the Northern District of California in *Grunwald*. The court found that the California Standards could not apply to SRO-appointed arbitrators because such arbitrators did not fall within the definition of "neutral arbitrators" that is set forth in the California Code of Civil Procedure. Consequently, the court concluded that the Judicial Council had exceeded its authority in drafting the California Standards and thus declared them void. The *Grunwald* decision has been appealed to the United States Court of Appeals for the Ninth Circuit. Although the appeal has been briefed and argued, the Ninth Circuit has not yet issued a decision.

In *Jevne v. The Superior Court of Los Angeles County*,⁸ the California Court of Appeal, Second District found that the Judicial Council had not exceeded its authority in drafting the California Standards and that the standards are not preempted by the FAA. The court did find, however, that the California Standards are preempted by the Exchange Act. On March 17, 2004, the California Supreme Court granted review in *Jevne*. Although the case has been fully briefed, oral arguments have not yet been scheduled.

To allow arbitrations to proceed in California while the litigation regarding the applicability of the California Standards to SRO arbitrations is pending, NASD implemented a pilot rule to require all industry parties (member firms and associated persons) to waive application of the California Standards to the case, if all the parties in the case who are customers, associated persons with claims against industry parties, member firms with claims against other member firms, or member firms with claims against associated persons that relate exclusively to promissory notes, have done so.⁹ In such cases, the arbitration

³ California Rules of Court, Division VI of the Appendix.

⁴ These measures included providing venue changes for arbitration cases, using non-California arbitrators when appropriate, and waiving administrative fees for NASD-sponsored mediations.

⁵ See Motion for Declaratory Judgment, *NASD Dispute Resolution, Inc. and NYSE, Inc. v. Judicial Council of California*, filed in the United States District Court for the Northern District of California, No. C 02 3486 SBA (July 22, 2002), available on the NASD Web site at: http://www.nasd.com/stellent/groups/med_arb/documents/mediation_arbitration/nasdw_009557.pdf.

⁶ No. C 02-2051 SBA (N.D. Cal. March 31, 2003).

⁷ *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097 (N.D. Cal. 2003).

⁸ 6 Cal. Rptr. 3d 542, 113 Cal. App. 4th 486 (2d Dist. 2003).

⁹ Originally, the pilot rule applied only to claims by customers, or by associated persons asserting a statutory employment discrimination claim against a member, and required a written waiver by the industry respondents. In July 2003, NASD expanded the scope of the pilot rule to include all claims by associated persons against another associated person or a member. At the same time, the rule was amended to provide that when a customer, or an associated person with a claim against a member or another associated person, agrees to waive the application of the California Standards, all respondents that are members or associated persons will be deemed to have waived

Continued

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

proceeds under the NASD Code of Arbitration Procedure, which already contains extensive disclosure requirements and provisions for challenging arbitrators with potential conflicts of interest.¹⁰

The pilot rule, which was originally approved for six months on September 26, 2002,¹¹ has been extended and is now due to expire on March 31, 2005.¹² Because NASD believes all the pending litigation regarding the California Standards is unlikely to be resolved by March 31, 2005, NASD requests that the effectiveness of the pilot rule be extended through September 30, 2005, in order to prevent NASD from having to suspend administration of cases covered by the pilot rule.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,¹³ which requires, among other things, that the NASD's rules must be 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. NASD believes that expediting the appointment of arbitrators under the proposed waiver, at the request of customers, associated persons with claims against industry parties, member firms with claims against other member firms, or member firms with claims against associated persons that relate exclusively to promissory notes, will allow those parties to exercise their contractual rights to proceed in arbitration in California, notwithstanding the conflict between the disputed California Standards and the NASD rules.

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

NASD does not believe that the proposed rule change will impose any

the application of the standards as well. The July 2003 amendment also clarified that the pilot rule applies to terminated members and associated persons. See Securities Exchange Act Release No. 48187 (July 16, 2003), 68 FR 43553 (July 23, 2003) (SR-NASD-2003-106). In October 2003, NASD again expanded the scope of the pilot rule to include claims filed by members against other members and to claims filed by members against associated persons that relate exclusively to promissory notes. See Securities Exchange Act Release No. 48711 (October 29, 2003), 68 FR 62490 (November 4, 2003) (SR-NASD-2003-153).

¹⁰ NASD states that the NYSE has a similar rule, NYSE Rule 600(g).

¹¹ See Securities Exchange Act Release No. 46562 (September 26, 2002), 67 FR 62085 (October 3, 2002) (SR-NASD-2002-126).

¹² See Securities Exchange Act Release No. 50447 (September 24, 2004), 69 FR 58567 (September 30, 2004) (SR-NASD-2004-126).

¹³ 15 U.S.C. 78o-3(b)(6).

burden on competition not necessary or appropriate in furtherance of the Act.

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

Written comments were neither solicited nor received.

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

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

(A) by order approve such proposed rule change, or

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

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2004-180 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-180. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2004-180 and should be submitted on or before February 4, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5-134 Filed 1-13-05; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50982; File No. SR-NYSE-2004-49]

Self-Regulatory Organizations; Notice of Filing of Amendment No. 3 to Proposed Rule Change by the New York Stock Exchange, Inc., Relating to Procedures for Companies That Fail To File Annual Reports in a Timely Manner

January 6, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 21, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") Amendment No. 3 to the proposed rule change as described in Items I, II, III below, which Items have been prepared by the Exchange.³ The proposed rule change was published for public comment in the **Federal Register** on

¹⁴ 17 CFR 200.30-3(a)(12).

¹⁵ 15 U.S.C. 78s(b)(1).

¹⁷ 17 CFR 240-19b-4.

³ The Exchange filed Amendment No. 1 on October 29, 2004, which stated that the proposed rule change would apply to companies that are already late in filing their annual reports as of the date that the Commission approves the proposed rule change. On November 29, 2004, the Exchange filed Amendment No. 2, which replaced and superseded Amendment No. 1. On December 21, 2004, the Exchange withdrew Amendment No. 2.

Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of FICC and on FICC's Web site at www.ficc.com. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FICC-2004-24 and should be submitted on or before February 24.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. E5-408 Filed 2-2-05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51082; File No. SR-NASD-2004-042]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Foreign Hearing Locations

January 26, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 9, 2004, National Association of Securities Dealers, Inc. ("NASD"), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. ("Dispute Resolution"), 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 Dispute Resolution. NASD amended the proposal on September 29, 2004,³ and November 23, 2004.⁴ 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

NASD is proposing to amend NASD Rule 10315 to permit arbitrations to occur in a foreign hearing location and to amend IM-10104 to allow the Director of Arbitration to authorize a higher or additional honorarium for the use of a foreign hearing location. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

IM-10104. Arbitrators' Honorarium

All persons selected to serve as arbitrators pursuant to the Association's Code of Arbitration Procedure shall be paid an honorarium for each hearing session (including a prehearing conference) in which they participate.

The honorarium shall be \$200 for each hearing session and \$75 per day additional honorarium to the chairperson of the panel. The honorarium for a case not requiring a hearing shall be \$125.

The honorarium for travel to a canceled hearing session shall be \$50. If a hearing session other than a prehearing conference is adjourned pursuant to Rule 10319(d), each arbitrator shall receive an additional honorarium of \$100.

The Director may authorize a higher or additional honorarium for the use of a foreign hearing location.

* * * * *

10315. [Designation of Time and Place] Determination of Hearing Location

(a) Designation of Time and Place of Hearing

The Director shall determine the time and place of the first meeting of the arbitration panel and the parties, whether the first meeting is a prehearing conference or a hearing, and shall give notice of the time and place at least 15 business days prior to the date fixed for the first meeting by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this Rule. The arbitrators shall determine the time and place for all subsequent meetings, whether the meetings are prehearing conferences, hearings, or any other type of meetings, and shall give notice as the arbitrators may determine. Attendance at a meeting waives notice thereof.

(b) Foreign Hearing Location

(1) If the Director and all parties agree, parties may have their hearing in a foreign hearing location and conducted by foreign arbitrators, provided that the foreign arbitrators have:

(A) met NASD background qualifications for arbitrators;

(B) received training on NASD arbitration rules and procedures; and

(C) satisfied at least the same training and testing requirements as those arbitrators who serve in U. S. locations of NASD.

(2) The parties shall pay an additional surcharge for each day of hearings held in a foreign hearing location. The amount of the surcharge shall be determined by the Director and must be agreed to by the parties before the foreign hearing location may be used. This surcharge shall be specified in the agreement to use a foreign hearing location and shall be apportioned equally among the parties, unless they agree otherwise. The foreign arbitrators shall have the authority to apportion this surcharge as provided in Rules 10205 and 10332.

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

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

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

(a) Purpose

Background

Dispute Resolution maintains a roster of qualified neutrals (*i.e.*, arbitrators and mediators) in 51 cities in the United States and Puerto Rico. In accordance with NASD Rule 10315, the Director of Arbitration sets the hearing location for NASD arbitration cases. For cases involving public customers, the Director generally designates the hearing location that is closest to the public customer's residence at the time of the events in dispute. However, for claimants who reside outside of the United States, the Director sets the hearing in the NASD hearing location

⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Letter from Mignon McLemore, Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated September 29, 2004 ("Amendment No. 1"). Amendment No. 1 amended the proposed rule language, among other things, to clarify that the Director of Arbitration may authorize a higher or additional honorarium only for the use of a foreign hearing location.

⁴ Form 19b-4 dated November 23, 2004 ("Amendment No. 2"). Amendment No. 2 amended the proposed rule language, among other things, to add qualifications for foreign arbitrators to NASD Rule 10315(b)(1).

that is most logical for the case. Generally, in instances where the claimant resides outside the United States, the Director will consider a number of factors in determining a hearing location, including the preferences of the parties, the location of counsel or witnesses, and the availability of transportation routes to cities in the United States.

NASD's Proposal

To accommodate parties to arbitrations abroad, NASD is proposing to amend NASD Rule 10315 to permit arbitrations to occur in a foreign hearing location. NASD is also proposing to amend IM-10104 to allow the Director to authorize a higher or additional honorarium for the use of a foreign hearing location. Under the proposal, the foreign hearing location process will be voluntary.⁵ Parties seeking arbitration will still file with NASD the claim information, submission agreements, and other related documents currently required by NASD rules. Once Dispute Resolution has determined that an arbitration case can be handled using a foreign hearing location, Dispute Resolution will inform claimants residing in the United Kingdom or other European countries about the availability and the additional costs of the appropriate foreign hearing location. If the claimant wishes to use a foreign hearing location, Dispute Resolution will seek the agreement of the respondents.

Under the proposal, all foreign arbitrators selected by NASD to conduct arbitrations in foreign hearing locations must satisfy certain requirements. First, they must meet NASD background qualifications for arbitrators.⁶ Second, they must receive training on NASD arbitration rules and procedures.⁷ Finally, they must satisfy at least the same training and testing requirements as those arbitrators who serve in U. S. locations of NASD.⁸

The first foreign hearing location for NASD arbitrations will be in London. Dispute Resolution has formed a relationship with the Chartered Institute of Arbitrators ("CI Arb"), which is based in London and maintains a worldwide roster of neutrals, specializing in, among other areas, providing dispute resolution services for banking, finance, business, commercial, and international issues. NASD believes that a partnership between CI Arb and NASD will provide NASD's international constituents with

access to a local roster of experienced neutrals⁹ as well as the convenience and cost efficiency of conducting hearing sessions within a reasonable distance from their place of business or residence.

Furthermore, under the proposal, as a condition of using a foreign hearing location, the parties must agree to accept the special Foreign Hearing Location Surcharge to cover the additional daily cost for the foreign arbitrators' service in that location.¹⁰ While this surcharge will initially be apportioned equally among the parties, unless they agree otherwise, the foreign arbitrators will have the authority to apportion the surcharge as provided for in NASD Rules 10205 and 10332.¹¹

Finally, the NASD Dispute Resolution Business Development staff, with the cooperation of the administrative staff of the groups providing the foreign arbitrators, will administer all cases designated for hearing in a foreign location.¹² The Code, with the addition of the Foreign Hearing Location Surcharge, will govern all case administration.

Conclusion

The proposed rule change will provide those parties residing in foreign locations with the option of holding their arbitration hearings closer to

⁹ CI Arb's neutrals are required to complete a rigorous training program and to pass testing and interview requirements before being qualified for appointment to cases. The CI Arb's training requirements exceed any standards currently employed by a United States forum. CI Arb's neutrals must meet NASD's background qualification requirements. NASD, upon approval of its National Arbitration and Mediation Committee, agreed to accept the CI Arb training and testing requirements for arbitrators as a substitute for NASD training and testing. In addition, NASD conducted training for CI Arb neutrals on NASD arbitration rules and procedures.

¹⁰ NASD Rule 10315(b)(2). CI Arb neutrals have agreed to serve in NASD cases at daily rates that are lower than their normal charges. However, those reduced rates are still significantly higher than the arbitrator honorarium rates paid by NASD. To cover the additional cost of the foreign neutral fee, NASD will assess the daily Foreign Hearing Location Surcharge for parties agreeing to use the London hearing location. This surcharge will be used solely to pay additional honorarium to the foreign neutrals rather than to cover any other NASD expenses. The amount of the surcharge may vary depending on factors such as the daily rates for neutrals in a foreign hearing location and the currency exchange rates.

¹¹ NASD Rule 10315(b)(2). NASD Rule 10205 (Schedule of Fees for Industry and Clearing Controversies) and NASD Rule 10332 (Schedule of Fees for Customer Disputes) provide that arbitrators, in their awards, shall determine who shall pay forum fees.

¹² NASD will add information about CI Arb neutrals to the Neutral List Selection System so that the background disclosures provided to parties and the arbitrator selection process will be the same as in other hearing locations.

home, using local arbitrators, and saving the expenses of traveling to the U.S. to resolve their disputes. The voluntary aspect of the proposed rule change will allow these parties to decide in each matter whether a foreign hearing location or U.S. hearing location is preferable. NASD believes that the expenses saved by the parties will offset the Foreign Hearing Location Surcharge.

(b) Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that the Association's rules be 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 because it will expand access to its arbitration forum internationally while maintaining the same protections that apply to the process in the United States.

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

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

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

Written comments were neither solicited nor received.

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

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

A. By order approve such proposed rule change, or

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

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

⁵ NASD Rule 10315(b)(1).

⁶ NASD Rule 10315(b)(1)(A).

⁷ NASD Rule 10315(b)(1)(B).

⁸ NASD Rule 10315(b)(1)(C).

Electronic Comments

• Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

• Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2004-042.

Paper Comments

• Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. All submissions should refer to File Number SR-NASD-2004-042. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NASD-2004-042 and should be submitted on or before February 24, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5-402 Filed 2-2-05; 8:45 am]

BILLING CODE 8010-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51097; File No. SR-NASD-2005-007]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to a Proposal to Adopt a New IM-10308 on Mediators Serving as Arbitrators

January 28, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 19, 2005, the National Association of Securities Dealers, Inc. ("NASD"), through its wholly owned subsidiary, NASD Regulation, Inc. ("NASD Regulation") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III, below, which NASD has prepared. 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

NASD is proposing to adopt a new Interpretive Material ("IM")-10308 to clarify that (1) fees for service as a mediator are not included in determining whether an attorney, accountant, or other professional derives 10% of his or her annual revenue from industry-related parties; and (2) service as a mediator is not included in determining whether an attorney, accountant, or other professional devotes 20% or more of his or her professional work to securities industry clients. The text of the proposed rule change is reproduced below. Proposed new language is in *italics*.

* * * * *

*IM-10308. Arbitrators Who Also Serve as Mediators*³

Mediation services performed by mediators who are also arbitrators shall not be included in the definition of "professional work" for purposes of Rule 10308(a)(4)(C), so long as the mediator is acting in the capacity of a

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ This IM will be renumbered following Commission approval of the pending revisions of the Customer and Industry Codes, SR-NASD-2003-158, filed on October 15, 2003, and SR-NASD-2004-011, filed on January 20, 2004.

mediator and is not representing a party in the mediation.

Mediation fees received by mediators who are also arbitrators shall not be included in the definition of "revenue" for purposes of Rule 10308(a)(5)(A)(iv), so long as the mediator is acting in the capacity of a mediator and is not representing a party in the mediation.

Arbitrators who also serve as mediators shall disclose that fact on their arbitrator disclosure forms.

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

In its filing with the Commission, NASD Regulation 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. NASD Regulation 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

Several rule changes relating to arbitrator classification were approved by the SEC⁴ on April 16, 2004 and implemented by NASD on July 19, 2004. These changes amended the definitions of "public" and "non-public" arbitrators (non-public arbitrators have some current or recent connection with the securities industry, but do not necessarily work in the industry). In the course of implementing the classification rule, NASD surveyed its entire roster of arbitrators, asking questions that tracked the new definitions. In light of information contained in their responses, some arbitrators were reclassified from public to non-public or from non-public to public, and some arbitrators were dropped from the roster for various reasons.

One new part of the rule provided that arbitrators who were otherwise qualified as public could not continue to serve as public arbitrators if their firms derived more than 10% of their revenue from industry parties. Specifically, Rule 10308(a)(5)(A)(iv) of

⁴ See Exchange Act Release No. 49573 (April 16, 2004), 69 FR 21871 (April 22, 2004) (SR-NASD-2003-095).

¹³ 17 CFR 200.30-3(a)(12).

the Code of Arbitration Procedure was amended to read as follows:

The term "public arbitrator" means a person who is otherwise qualified to serve as an arbitrator and * * * (iv) is not an attorney, accountant, or other professional whose firm derived 10 percent or more of its annual revenue in the past 2 years from any persons or entities listed in paragraph (a)(4)(A) * * *.

Some arbitrators who also serve as mediators were of the opinion that the rule change encompassed income in the form of mediation fees paid by industry parties such that these individuals would no longer qualify as public arbitrators under the new rule.

The NASD Dispute Resolution Board determined that the rule could be construed broadly enough to cover revenue derived from serving as a mediator, although this was clearly not the intent of the recent rule changes, and unanimously voted to issue a clarification in an IM that would be printed in the Code following Rule 10308.

The IM also would make clear that mediation services performed by mediators who are also arbitrators is not to be included in the definition of "professional work" for purposes of the 20% test either, so long as the mediator is acting in the capacity of a mediator and is not representing a party in the mediation.

In considering this matter, the NASD Dispute Resolution Board also determined that parties may wish to know that an arbitrator on their list also serves as a mediator and may be familiar with the industry parties or their counsel. NASD staff will add this information to the disclosure forms of dual arbitrators/mediators.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁵ which requires, among other things, that the NASD's rules must be 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. NASD believes that any potential conflict is best addressed by ensuring that arbitrators who are mediators disclose this fact in the arbitrator disclosure history. NASD will prepare materials to inform arbitrators of the need to make this disclosure.

⁵ 15 U.S.C. 78a-3(b)(6).

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

NASD Regulation does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the Act.

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

Written comments were neither solicited nor received.

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

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

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2005-007 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2005-007. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent

amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2005-007 and should be submitted on or before February 24, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51085; File No. SR-NYSE-2005-10]

Self Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Voluntary Supplemental Procedures for Selecting Arbitrators

January 27, 2005.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 ("Act"),² and Rule 19b-4 thereunder, notice is hereby given that on January 18, 2005, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed amendments to its arbitration rules as described in Items I and II below, which items have been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with

⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).