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

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51856; File No. SR–NASD–2003–158]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto To Amend NASD Arbitration Rules for Customer Disputes

June 15, 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 the National Association of Securities Dealers, Inc. (''NASD''), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. (''NASD Dispute Resolution''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') on October 15, 2003, and amended on January 3, 2005, January 19, 2005, April 8, 2005, and June 10, 2005, the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD Dispute Resolution. 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 the NASD Code of Arbitration Procedure (''Code'') to reorganize the current rules, simplify the language, codify current practices, and implement several substantive changes. NASD is proposing to reorganize its current dispute resolution rules (Rules 10000 *et seq.*) into three separate procedural codes: The NASD Code of Arbitration Procedure for Customer Disputes (''Customer Code''); the NASD Code of Arbitration Procedure for Industry Disputes (''Industry Code''); and the NASD Code of Mediation Procedure (''Mediation Code''). The three new codes will replace the current NASD Code in its entirety. NASD is also proposing to make certain substantive amendments to the Code as described herein. This rule filing contains the proposed Customer Code, the text of which is available on the NASD Web site at *http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_009306&ssSourceNodeId=802*.[3] A chart comparing the current Code and the proposed Customer Code, as well as an old-to-new conversion guide, are also available at the same URL.[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, NASD has 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

In 1998, the SEC launched an initiative to encourage issuers and self-regulatory organizations (''SROs'') to use ''plain English'' in disclosure documents and other materials used by investors. Because the Code is used by investors, including investors who appear pro se in the NASD forum, NASD undertook to rewrite the current Code in ''plain English.'' Over time, the goals of the plain English initiative expanded beyond simplifying the language and sentence structure of the rules in the Code to include:

- Reorganizing the Code in a more logical, user-friendly way, including creating separate Codes for customer and industry arbitrations, and for mediations; and
- Implementing several substantive rule changes, including codifying several common practices, to provide more guidance to parties and arbitrators, and to streamline the administration of arbitrations in the NASD forum.

Plain English

When it launched its ''plain English'' initiative in 1998, the SEC published a ''Plain English Handbook,'' to provide guidance to issuers and SROs in drafting materials intended to be used by investors. The SEC's Plain English Handbook recommended using shorter, more common words; breaking long rules into shorter ones; using the active voice whenever possible; and putting lists into easy-to-read formatting, such as bullet points.

In revising the Code, NASD has implemented these guidelines wherever possible. Throughout the proposed Code, NASD has simplified language and eliminated unnecessarily legalistic or arcane terminology. Long rules, such as current Rule 10308, governing arbitrator selection, and current Rule 10321, governing filing and responding to an arbitration claim, have been broken into several shorter rules. (*See* proposed Rules 12400–12406, and proposed Rules 12300–12313, respectively.) Where appropriate, lists are presented in bullet point format, and active verbs are used.

The proposed Code also contains a new definitions rule (proposed Rule 12100) that defines commonly used terms applicable throughout the Code. In the current Code, some rules, such as Rule 10308, contain definitions applicable to that rule only, but there is not a general definitions rule that applies to the entire Code. NASD believes that a comprehensive definitions rule will make the Code easier to understand and to use, and will help eliminate confusion about the meaning and scope of frequently used terms. It will also allow NASD to use shorter phrases, or single words, in place of longer phrases. For example, the phrase ''dispute, claim, or controversy'' has been replaced by the word ''dispute,'' which has been defined in Rule 12100 to mean the longer phrase. This makes rules easier to read and understand, without changing the meaning of the Code.

Reorganization

One of the most frequent criticisms of the current Code is that it is poorly organized. Parties, particularly infrequent users of the forum, have difficulty finding the rules they are looking for, because the rules are not presented in a logical order. The confusion is compounded by the fact that certain rules in the Code apply only to customer cases, some apply only to industry cases, and still others apply to

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

[2] 17 CFR 240.19b–4.

[3] The proposed Industry Code and proposed Mediation Code have been filed separately with the Commission as SR–NASD–2004–011 and SR–NASD–2004–013, respectively.

[4] For purposes of this filing, the version of the current and proposed Codes used in the comparison and conversion charts reflects all Dispute Resolution rule filings approved by the Commission since the proposed rule change was filed on October 15, 2003.

both types of disputes. In addition, the current Code contains the NASD mediation rules, despite the fact that many matters are submitted directly to mediation, and do not arise out of an arbitration proceeding.

To address these concerns, NASD is proposing to divide the current Code into three separate Codes: The Customer Code, the Industry Code, and the Mediation Code. Although many of the rules in the Customer and Industry Codes will be identical, NASD believes that maintaining separate arbitration codes will eliminate confusion regarding which rules are applicable to which disputes. NASD also believes that maintaining a separate Mediation Code will be particularly useful to parties submitting matters directly to mediation. NASD will maintain electronic versions of each code on its Web site, *http://www.nasd.com*, and will make paper copies available upon request.

In keeping with the current NASD rule numbering system, each code will be numbered in the thousands, and major sections will be numbered in the hundreds. Individual rules within those sections will be numbered in the tens (or ones, if necessary). The current method for numbering and lettering paragraphs within individual rules will remain unchanged. For example, the Customer Code will use the Rule 12000 series, which is currently unused. The Industry Code will use the Rule 13000 series, and the Mediation Code will use the Rule 14000 series, both of which are also currently unused. NASD will reserve the Rule 10000 series, which is currently used for NASD's dispute resolution rules, for future use.

To make it easier to find specific rules, the Customer Code will be divided into the following nine parts, which are intended to approximate the chronological order of a typical arbitration:

- Part I (Rule 12100 *et seq.*) contains definitions, as well as other rules relating to the organization and authority of the forum;
- Part II (Rule 12200 *et seq.*) contains general arbitration rules, including what claims are subject to arbitration in the NASD forum;
- Part III (Rule 12300 *et seq.*) contains rules explaining how to initiate a claim, how to respond to a claim, how to amend claims, and when claims may be combined and separated;
- Part IV (12400 *et seq.*) contains rules relating to the appointment, authority and removal of arbitrators;
- Part V (Rules 12500 *et seq.*) contains rules governing the prehearing process, including proposed new rules relating to motions and discovery;
- Part VI (Rules 12600 *et seq.*) contains rules relating to hearings;
- Part VII (Rules 12700 *et seq.*) contains rules relating to the dismissal, withdrawal, or settlement of claims;
- Part VIII (Rules 12800 *et seq.*) contains rules relating to simplified (small cases) arbitrations and default proceedings; and
- Part IX (Rules 12900 *et seq.*) contains rules relating to fees and awards.

Description of Other Changes

In addition to simplifying and reorganizing the Code, the proposed rule change includes several other changes to the Customer Code that are intended to make the NASD arbitration process as simple, uniform and transparent as possible. Some of the proposed changes codify or clarify current NASD practice. Others are substantive changes that are intended to provide guidance to parties, resolve open questions, or streamline or standardize the administration of NASD arbitrations. Only proposed substantive changes are discussed in detail below. Any proposed changes to the Code that are not discussed are intended to be nonsubstantive revisions.

The proposed changes are discussed below, in the order that they appear in the Customer Code.

Agreement of the Parties (Proposed Rule 12105)

Both the current Code and proposed Customer Code permit parties to an arbitration to agree to modify certain provisions, such as the number of arbitrators on a panel, or the time to respond to a pleading. Occasionally, all active parties to an arbitration agree to modify a provision, but an inactive party does not respond to notices or participate in the decision. Under a literal reading of the current Code, the active parties to the arbitration would not be able to agree to the modification, even though the inactive party was not participating in the arbitration. This can cause unnecessary delay and frustration for the active parties.

NASD believes that the non-appearance of an inactive party should not prevent active parties to an arbitration from exercising control over the arbitration process. To address this concern, proposed Rule 12105 would provide that, when the Code allows the parties to an arbitration to modify a provision of the Code, or a decision of the Director or the panel, the agreement of all named parties is required, unless the Director or panel determines that a party is inactive in the arbitration or has failed to respond after adequate notice has been given.

Use of the Forum (Proposed Rule 12203)

Currently, Rule 10301(b) provides that the Director of Arbitration, upon approval of the National Arbitration and Mediation Committee (''NAMC'') or its Executive Committee, may decline the use of the NASD arbitration forum if the ''dispute, claim, or controversy is not a proper subject matter for arbitration.''

Occasionally, situations arise in which the Director believes that it is in the best interest of the forum to deny use of the forum for reasons other than subject matter. For example, the current rule does not specifically permit the Director to deny the forum when NASD has reason to believe that a party would present a security risk to the forum or to other parties. Furthermore, the requirement that the Director must first obtain approval of either the NAMC, or its Executive Committee, is burdensome and time-consuming, making it difficult for the Director or the forum to respond appropriately in emergency situations.

To address this concern, proposed Rule 12203(a) would provide that the Director may decline to permit the use of the NASD arbitration forum if the Director determines that, given the purposes of NASD and the intent of the Code, the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or safety of parties or their representatives, arbitrators or NASD staff. In addition, the provision requiring approval of the NAMC or its Executive Committee would be deleted. However, to ensure that the authority to deny the forum could not be delegated by the Director, the rule would provide that only the Director or the President of NASD Dispute Resolution may exercise the Director's authority under the rule. NASD believes that this rule change will give the Director limited, but crucial, flexibility to protect the integrity and the security of the NASD forum.

Shareholder Derivative Actions (Proposed Rule 12205)

Currently, the Code does not specifically address whether shareholder derivative actions may be arbitrated at NASD. Such claims are not eligible for arbitration at NASD because, by definition, they involve corporate governance disputes that do not arise out of or in connection with the business of a member firm or an associated person. Nonetheless, the question arises from time to time,

occasionally after a claimant has filed a statement of claim.

Proposed Rule 12205, which is consistent with New York Stock Exchange Rule 600(e), would clarify that shareholder derivative actions are not eligible for arbitration at NASD. NASD believes that the inclusion of this rule would help avoid confusion, provide guidance to parties, and conserve resources expended when parties seek to arbitrate such matters at NASD.

Extensions of Deadlines (Proposed Rule 12207)

Currently, Rule 10314(b)(5) provides that deadlines established by the Code for filing or serving pleadings may be extended by the Director, or with the consent of the initial claimant. This provision does not provide guidance with respect to the extension of other deadlines established by the Code, or by the panel or Director, and can also cause confusion with respect to responsive pleadings filed by the initial claimant. The current rule also provides that extensions of time for filing an answer are disfavored and will only be granted in extraordinary circumstances.

To eliminate confusion, and to provide more comprehensive guidance regarding when and under what circumstances deadlines may be extended, proposed Rule 12207 would provide that the parties may agree in writing to extend or modify any deadline for serving an answer; returning arbitrator or chairperson lists; responding to motions; or exchanging documents or witness lists. If the parties agree to extend or modify a deadline, the proposed rule would require that they notify the Director of the new deadline in writing. The proposed rule would also provide that the panel may extend or modify any deadline listed above, or any other deadline set by the panel, either on its own initiative or upon motion of a party. Finally, the rule would provide that the Director may modify or extend any deadline or time period (1) set by the Code for good cause, or (2) set by the panel in extraordinary circumstances. Although good cause is a lower standard than extraordinary circumstances, which refers to unexpected and uncontrollable events such as weather-related or security emergencies, good cause is not a negligible standard. In the context of the proposed rule, the good cause requirement means that extensions of Code deadlines by the Director are generally disfavored, and that the Director must take into account the effect of the extension on all parties before granting such a request.

Ex Parte Communications (Proposed Rule 12210)

The current Code does not address ex parte communications. To provide additional guidance to arbitrators and parties, and to further ensure the integrity of the NASD arbitration process, the revised Code would include proposed Rule 12210 expressly to prohibit ex parte communications between parties and arbitrators, except as provided in proposed Rule 12211.[5] The proposed rule is based on general ex parte rules applicable in court proceedings, and reflects current NASD practice. The NASD Arbitrators' Manual and NASD arbitrator training materials direct arbitrators to avoid ex parte communications with parties, and arbitrators receive training on how and why to do so. Materials provided to parties also advise parties to avoid ex parte communications with arbitrators. For example, NASD's 'Top Ten' Standards Of Good Practice At Arbitration Hearings (available on NASD's Web site, *http://www.nasd.com*), states that participants in NASD arbitrations ''should not engage in conversation with arbitrators in the absence of the other party(ies).''

Sanctions (Proposed Rule 12212)

Currently, Rule 10305(b), governing the dismissal of proceedings, provides that the ''arbitrators may dismiss a claim, defense, or proceeding with prejudice as a sanction for willful and intentional material failure to comply with an order of the arbitrator(s) if lesser sanctions have proven ineffective.'' In addition, the NASD Discovery Guide states that ''[t]he panel has wide discretion to address noncompliance with discovery orders. For example, the panel may make an adverse inference against a party or assess adjournment fees, forum fees, costs and expenses, and/or attorneys' fees caused by noncompliance.''

Proposed Rule 12212 would codify the sanction options available to arbitrators that are described in the Discovery Guide, and extend them beyond the discovery context to apply to non-compliance with any provision of the Code, or order of the panel or a single arbitrator authorized to act on behalf of the panel. The proposed rule would also allow the panel to dismiss a claim, defense, or arbitration under the same conditions as they may currently, although it would use the term ''prior'' rather than ''lesser'' sanctions, in order to avoid potential confusion regarding whether a prior sanction was ''lesser'' or ''greater.'' NASD believes that this rule change will encourage parties to comply with both the Code and with orders of the panel, and will also clarify the authority of arbitrators to ensure the fair and efficient administration of arbitration proceedings when parties fail to do so.

Hearing Locations (Proposed Rule 12213)

NASD currently maintains more than 55 designated hearing locations for NASD arbitrations and mediations. Generally, when a claim is filed in a case involving a customer, NASD selects the hearing location that is closest to where the customer lived at the time the events giving rise to the dispute arose. To make the arbitration process more transparent, proposed Rule 12213 would codify this practice. (The use of the term ''generally'' reflects that fact that while the default location is the one closest to where the customer lived at the time the dispute arose, the Director does have discretion to select another location that would be more appropriate or less burdensome to the parties given the specific facts of the case. For example, if the customer lived in California at the time the dispute arose, but has since moved to New York, and the firm does business in New York, the Director could select New York as the hearing location.)

The proposed rule would also clarify that before arbitrator lists are sent to the parties under Rule 12403, the parties may agree in writing to a different hearing location other than the one selected by the Director, and that the Director may change the hearing location upon motion of a party. NASD believes that the proposed rule will provide useful guidance to parties about where their arbitration will take place, which may be particularly helpful to investors who may be considering filing a claim in arbitration.

Time to Answer Counterclaims and Cross Claims (Proposed Rules 12304 and 12305)

Currently, Rule 10314 provides that claimants have only 10 days to answer a counterclaim, but a respondent answering a cross claim has 45 days to file an answer to the cross claim, even if the respondent has already answered the initial claim. This discrepancy can cause delay in the proceedings. NASD believes that parties who have already

[5] Proposed Rule 12211 (Rule 10334 in the current Code), allows direct communication between parties and arbitrators subject to certain conditions. These conditions include the representation of parties by counsel, an agreement to use direct communication by all arbitrators and parties, an agreement regarding the scope of the direct communication, and facsimile or e-mail capability by all arbitrators and parties.

filed or served a pleading should have the same amount of time to respond to subsequent pleadings. NASD also believes that 10 days is insufficient, while 45 days is too long. NASD believes that 20 calendar days is the appropriate amount of time for parties to respond to both counter and cross claims.

Therefore, proposed Rule 12304 would extend the time that a claimant has to file a response to a counterclaim from 10 to 20 days from receipt of the counterclaim. In addition, proposed Rule 12305 would shorten the time that a respondent has to respond to a cross claim from 45 days to 20 days from the date that the respondent's answer to the statement of claim is due, or from the receipt of the cross claim.

Deficient Claims (Proposed Rule 12307)

Under current NASD practice, if a claimant files a deficient, or incomplete, claim, NASD will notify the claimant, and the claimant is given 30 days to correct the deficiency. If the deficiency is not corrected within that time, the claim is dismissed without prejudice. Reasons for deficiencies include failure to include required information in the statement of claim, failure to pay required fees, and failure to properly execute the NASD Uniform Submission Agreement.

NASD's practice with respect to deficiencies is consistent with the Arbitration Procedures published by the Securities Industry Conference on Arbitration (''SICA''). However, the current Code does not expressly address what constitutes a deficiency, or explain the process for identifying and correcting deficiencies. Proposed Rule 12307 would codify NASD's deficiency practice. Specifically, it would provide that the Director will not serve a deficient, or incomplete, claim, and will enumerate the most common types of deficiencies. The proposed rule would also provide that the Director will notify the claimant in writing if the claim is deficient. If all deficiencies are not corrected within 30 calendar days from the time the claimant receives notice, the Director will close the case without serving the claim, and will not refund any filing fees paid by the claimant. The proposed rule would also make clear that the same standards apply to deficient counterclaims, cross claims and third party claims served directly by parties, and would prohibit arbitrators from considering such claims unless the deficiencies were corrected within the time allowed. NASD believes that including the deficiency standards and practice in the Code will provide useful guidance to parties, and will reduce delay in NASD arbitrations by reducing the number of deficient claims.

Amending Pleadings to Add Parties (Proposed Rule 12309)

Under the current Code, parties may amend their pleadings at any time prior to the appointment of the arbitration panel. After panel appointment, parties must obtain approval of the arbitrators before amending a pleading. If a party is added to an arbitration proceeding before the Director has consolidated the other parties' arbitrator rankings under current Rule 10308, the Director will send the arbitrator lists to the newly-added party, and the newly-added party may participate in the arbitrator selection process. However, if a party amends a pleading to add a new party to the proceeding between the time that the Director consolidates the arbitrator lists and the time the panel is appointed, the newly-added party is not able to participate in the arbitrator selection process, or to object to being added to the arbitration.

To address this issue, which has been the subject of concern among some users of the forum, proposed Rule 12309 would provide that no party may amend a pleading to add a party during the time between the date that ranked arbitrator lists are due to the Director and the panel is appointed. Proposed Rule 12309(c) would provide that the party to be added after panel appointment must be given an opportunity to be heard before the panel decides the motion to amend. This change will ensure that a party added to an arbitration by amendment either will be able to participate in the arbitrator selection process, or will have the opportunity to object to being added to the proceeding.

Time to Answer Amended Pleadings (Proposed Rule 12310)

Currently, Rule 10328 provides that parties have 10 business days to answer an amended pleading. Other rules in the current Code refer to calendar days. In the interest of uniformity, proposed Rule 12100(h) defines the term ''day'' to mean calendar day. To reflect this definition, proposed Rule 12310 would give parties 20 calendar days, rather than 10 business days, to respond to amended pleadings. Although this represents a slight extension of time, it is consistent with the time to respond to counterclaims and cross claims under proposed Rules 12304 and 12305. Because standardizing time frames is part of NASD's plain English initiative, NASD believes that 20 calendar days is an appropriate time period for responding to amended pleadings.

Neutral List Selection System and Arbitrator Rosters (Proposed Rule 12400)

Currently, NASD maintains a roster of public and non-public arbitrators. Depending on the amount in dispute, an arbitration panel in a customer dispute will consist either of one public arbitrator, or two public arbitrators and one non-public arbitrator. Parties in three-arbitrator cases receive two lists: one of non-public arbitrators and one of public arbitrators. The lists are generated by the Neutral List Selection System (''NLSS''), NASD's computerized system for generating lists of arbitrators from NASD's rosters of arbitrators for the selected hearing location. By a process of striking and ranking the listed arbitrators, the parties select one non-public and two public arbitrators from the lists generated by NLSS. Once the panel is appointed, the parties jointly select the chairperson from the panel, or, if the parties do not agree, the Director appoints the highest-ranked public arbitrator on the panel to serve as chairperson.[6]

Although NASD provides voluntary chairperson training to its arbitrators, arbitrators who serve as chairperson are not currently required to have chairperson training, to have any particular experience, or to meet any other specific criteria beyond the requirements for serving as an arbitrator. Over the years, one of the most frequent suggestions for improving the quality and efficiency of NASD arbitrations is to ensure that chairpersons, who play a vital role in the administration of cases, have some degree of arbitrator experience and training.

NASD agrees that requiring trained and experienced chairpersons would significantly enhance the quality of its arbitration forum. However, NASD also believes that the criteria or training requirements should not prevent public arbitrators of any professional or educational background from qualifying to serve as chairpersons of panels in customer cases.

To address these concerns, the proposed Customer Code would require that NASD create and maintain a third roster of public arbitrators who are qualified to serve as chairpersons. In three-arbitrator cases, parties would receive three lists of arbitrators: A non-public list, a public list and a public chair-qualified list. The parties would select the chairperson from the chair-qualified list in the same manner and at the same time that they select the other members of the panel. In single-

[6] NASD estimates that parties agree on a chairperson only about 20% of the time.

arbitrator cases, the arbitrator would be selected from a list of public chair-qualified arbitrators, unless the parties agreed otherwise.

Under proposed Rule 12400, public arbitrators would be eligible for the chairperson roster if they have completed chairperson training provided by NASD, or have substantially equivalent training or experience, and either:

- Have a law degree and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least two arbitrations administered by a SRO in which hearings were held; or
- Have served as an arbitrator through award on at least three arbitrations administered by an SRO in which hearings were held.

Substantially equivalent training or experience would include service as a judge or administrative hearing officer, chairperson training offered by another recognized dispute resolution forum, or the like. Decisions regarding whether particular training or experience other than NASD chairperson training would qualify under this provision would be in the sole discretion of the Director. NASD believes that these criteria strike the appropriate balance between ensuring that arbitrators who serve as chairpersons or single arbitrators have the requisite experience to fairly and efficiently administer their cases, and allowing arbitrators of all professional backgrounds to qualify as chairpersons. Public arbitrators who qualify under these criteria will be placed on the chairperson roster only if they agree to serve as chairpersons; otherwise, they will remain on the general public arbitrator roster. To avoid duplication of names on the lists sent to parties, arbitrators who are on the chairperson roster will not be on the general public arbitrator roster.

Number of Arbitrators (Proposed Rule 12401)

Under current Rule 10308(b), if the amount of a claim is $25,000 or less, the arbitration panel consists of one public arbitrator, unless that arbitrator requests a three-arbitrator panel. If the claim is more than $25,000 but not more than $50,000, the panel consists of one public arbitrator unless either that arbitrator, or any party in its initial pleading, requests a three-arbitrator panel. Claims of more than $50,000 are heard by a three-arbitrator panel.

To streamline the administration of smaller claims, and minimize the cost of pursuing small claims, proposed Rule 12401 would eliminate the ability of the single public arbitrator to request a three-arbitrator panel for any claim of $50,000 or less. Parties in cases involving more than $25,000, but not more than $50,000, could still request a three-arbitrator panel.

Generating and Sending Lists to the Parties (Proposed Rule 12403)

Proposed Rule 12403 would implement several changes to the operation of NLSS.[7] In addition, the proposed Code would eliminate the ability of parties to unilaterally request arbitrators with particular expertise, a practice that is an ongoing source of controversy, as well as burdensome for the NASD staff to administer.

Finally, proposed Rule 12403 would expand the number of names of proposed arbitrators provided to the parties to seven, but would limit the number of arbitrators that each party may strike from each list to five. NASD believes that expanding the lists, but limiting the number of strikes each party may exercise, will expedite panel appointment and minimize the likelihood that the Director will have to appoint an arbitrator who was not on the original lists sent to parties. Currently, parties are allowed unlimited strikes, which often results in no arbitrators being left on the consolidated list. In such cases, the administration of the arbitration is delayed, and the Director must appoint arbitrators to fill the panel.

Collectively, NASD believes that these modifications to NLSS would streamline and simplify the arbitrator selection process and enhance the quality of NASD arbitrations.

Appointment of Arbitrators (Proposed Rule 12406)

In the past, questions have occasionally arisen regarding when appointment of arbitrators occurs. To address these questions, paragraph (d) of proposed Rule 12406 would clarify that appointment of arbitrators occurs when the Director sends notice to the parties of the names of the arbitrators on the panel. In addition, as part of the chronological reorganization of the Code, the arbitrator oath requirement that is currently in Rule 10327 has been included in proposed Rule 12406.

Arbitrator Recusal (Proposed Rule 12409)

Under current NASD practice, parties may request that an arbitrator recuse himself or herself from the panel at any time. However, the current Code does not address arbitrator recusal. To provide guidance to parties, proposed Rule 12409 would provide that any party may ask an arbitrator to recuse himself or herself from the panel for good cause. The proposed rule would also clarify that requests for arbitrator recusal are decided by the arbitrator who is the subject of the request. Some users of the forum believe that recusal requests should be made to the full panel. Courts have held, however, that recusal decisions are within the discretion of the individual arbitrator, and therefore, tend to uphold these decisions on appeal.[8] However, the Director may continue to remove arbitrators for cause under proposed Rule 12410 on the same grounds as those under current Rules 10308(d), 10312(d) and 10313.

Replacement of Arbitrators (Proposed Rule 12411)

Under the current Code, the provisions regarding replacement of arbitrators are found in Rules 10308(d)(3) and 10313, which contain numerous cross-references to other rules. Proposed Rule 12411 would consolidate the various current rules. The proposed rule also would extend the option of electing to proceed with only the remaining arbitrators to all stages of the proceeding, and eliminate the 5-day limit on electing that option contained in current Rule 10313. NASD believes that parties should have the right to decide jointly to proceed with only the remaining arbitrators regardless of when the replacement occurs, and that the parties should be able to elect that option up until the time the replacement arbitrator is appointed. Otherwise, proposed Rule 12411 does not contain any substantive changes from the current rules upon which it is based.

[7] NLSS would generate arbitrator names from the NASD rosters on a random, rather than rotational, basis. Changes to NLSS were primarily driven by computer programming requirements. *See* Exchange Act Rel. No. 51339 (Mar. 9, 2005), 70 FR 12763 (Mar. 15, 2005) (Order Approving Proposed Rule Change and Amendment No. 1 Thereto by NASD Relating to the Random Selection of Arbitrators by NLSS); Exchange Act Rel. No. 51083 (Jan. 26, 2005), 70 FR 5497 (Feb. 2, 2005) (Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Random Selection of Arbitrators by NLSS).

[8] *See, e.g., Florasynth, Inc.* v. *Pickholz,* 750 F.2d 171, 174 (2d Cir. 1984); *ANR Coal Co.* v. *Cogentrix of North Carolina, Inc.,* 173 F.3d 493, 499–502 (4th Cir. 1999); *Consolidation Coal Co.* v. *Local 1643, United Mine Workers of Am.,* 48 F.3d 125, 127–130 (4th Cir. 1995); *Jason* v. *Halliburton Co.,* 2002 U.S. Dist. LEXIS 19706, 10–16 (E.D. La. 2002); *Jeereddi A. Prasad, M.D., Inc.* v. *Investors Assoc., Inc.,* 82 F. Supp. 2d 365, 370, n. 9 (D. N.J. 2000); *Arial, Inc.* v. *Ryder System, Inc.,* 913 F. Supp. 826, 834 (S.D.N.Y. 1996).

Determinations of Arbitration Panel (Proposed Rule 12414)

Under the current Code, Rule 10325 requires that all rulings and determinations of the panel be made by a majority of the arbitrators. Proposed Rule 12414 would provide that all rulings and determinations of the panel must be made by a majority of the arbitrators, unless the parties agree, or the Code or applicable law provides otherwise. The proposed rule reflects that under the Code, and applicable law, some decisions of the panel may be made by a single member of a three-arbitrator panel. For example, Proposed Rule 12503 provides that some motions may be decided by a single arbitrator. Also, applicable law may permit a single arbitrator to issue a subpoena.

Initial Prehearing Conferences (Proposed Rule 12500)

Proposed Rule 12500 would codify the portion of the NASD Discovery Guide relating to initial prehearing conferences (''IPHCs''). Since the adoption of the Discovery Guide in 1999, IPHCs have been standard practice in NASD arbitrations. The IPHC gives the panel and the parties an opportunity to organize the management of the case, set a discovery cut-off date, identify and establish a schedule for potential motions, schedule hearing dates, determine whether mediation is desirable, and resolve many other preliminary issues. Users of the forum have found the IPHC to be a valuable tool in managing the administration of arbitrations. NASD believes that the proposed rule, which provides that an IPHC will be held in every case unless the parties jointly agree on certain scheduling and other enumerated issues in advance, will provide valuable guidance to parties and arbitrators about the role of IPHCs in NASD arbitrations.

Recording Prehearing Conferences (Proposed Rule 12502)

Currently the Code is silent with respect to whether and under what circumstances a prehearing conference will be tape-recorded. Proposed Rule 12502 would provide that prehearing conferences are generally not tape-recorded as a matter of course (with the exception of prehearing conferences to decide dispositive motions, discussed below). However, the rule would permit the panel to decide to tape-record a prehearing conference on its own initiative, or at the request of a party. The rule would also provide that, if the prehearing conference is tape-recorded, the Director will provide a copy of the tape to any party upon request, for a nominal fee. The rule does not specify the fee because the fee may vary slightly depending on the rates charged by NASD's telephone service provider, which normally makes the initial recording of telephonic hearing sessions. The current fee is $15 per tape. (Because NASD must arrange in advance to have telephonic hearing sessions taped, NASD will instruct arbitrators that they should notify NASD at least 24 hours in advance when they decide that a prehearing conference should be taped.)

Motions (Proposed Rule 12503)

Although motions are increasingly common in arbitration, the current Code does not refer to motions or provide any guidance with respect to motions practice. As a result, motions practice lacks uniformity, and parties and arbitrators alike are often unsure how motions should be made, responded to or decided. To provide guidance to parties and arbitrators, and to standardize motions practice in the NASD forum, proposed Rule 12503 would establish procedures and deadlines for making, responding to and deciding motions.

Some users of the forum have expressed the concern that adopting a motions practice rule will encourage more motions. Although NASD understands this concern, NASD believes that motions have already become an inescapable part of most arbitrations. Therefore, NASD believes that the Code should provide as much guidance about motions as possible to parties, particularly infrequent users of the forum. However, in an effort to deter unnecessary motions, the rule would require that, before making a motion, a party must make an effort to resolve the matter that is the subject of the motion with the other parties. The rule would also require that every motion, whether written or oral, include a description of the efforts made by the moving party to resolve the matter before making the motion.

Another common concern about adopting a motions practice rule is that it will detract from the informal nature of arbitration. To address this concern, the rule would make clear that most motions may be made either orally or in writing, and that written motions need not take any particular form.

Paragraph (c) of the proposed rule would outline who decides what motions. Paragraph (c)(1) provides that motions relating to the use of the forum under proposed Rule 12203 and removal of an arbitrator under proposed Rule 12410 are decided by the Director, because these motions are filed and decided before a panel has been appointed. Paragraph (c)(2) would provide that motions relating to combining or separating claims or arbitrations, or changing the hearing location, are decided by the Director before a panel is appointed, and by the panel after the panel is appointed. Paragraph (c)(3) provides that discovery-related motions are decided by one arbitrator, generally the chairperson. This provision reflects that while the chairperson is usually the person to decide such motions, the chairperson may not always be available, and the parties or the Director may decide to refer the matter to one of the other arbitrators. The provision also states that the arbitrator who initially hears a discovery-related motion may refer such motions to the full panel, either at his or her own initiative or at the request of a party. The arbitrator must refer motions relating to issues of privilege to the full panel at the request of a party. Paragraph (c)(4) provides that motions relating to arbitrator recusal are decided by the arbitrator who is the subject of the motion, as provided by proposed Rule 12409. Finally, the rule provides that all other motions not covered in the preceding paragraphs of the rule are decided by the full panel, unless the Code provides or the parties agree otherwise.

Motions to Decide Claims Before a Hearing on the Merits (Proposed Rule 12504)

Another recurring question in NASD arbitrations is whether, and to what extent, arbitrators have the authority to decide dispositive motions before a hearing on the merits. In its *Follow-up Report on Matters Relating to Securities Arbitration,* the General Accounting Office (''GAO'') noted that while NASD's arbitration rules do not specifically provide for dispositive motions, case law generally supports the authority of arbitrators to grant motions to dismiss claims prior to the hearing on the merits.[9] Because the Code provides no guidance with respect to this question, arbitrator decisions with respect to it lack uniformity.

Generally, NASD believes that parties have the right to a hearing in arbitration. However, NASD also acknowledges that in certain extraordinary circumstances, it would be unfair to require a party to proceed to a hearing. Specifically, the proposed rule would:

• Provide that, except for motions relating to the eligibility of claims under

[9] U.S. General Accounting Office, *Follow-up Report on Matters Relating to Securities Arbitration* (April 11, 2003).

the Code's six year time limit, motions that would resolve a claim before a hearing on the merits are discouraged, and may only be granted in extraordinary circumstances;

- Require that a prehearing conference before the full panel must be held to discuss the motion before the panel could grant it; and
- Allow the panel to issue sanctions against a party for making a dispositive motion in bad faith.

NASD believes that this rule proposal, which was developed over several years with input from industry and public members of the NAMC, will provide necessary guidance to parties and arbitrators, and make the administration of arbitrations more uniform and transparent. NASD believes that the rule strikes the appropriate balance between allowing the dismissal of claims in limited, extraordinary circumstances and reinforcing the general principle that parties are entitled to a hearing in arbitration.

Discovery (Proposed Rules 12505—12511)

One of the most frequent comments made by users of the NASD forum is that the discovery procedures outlined in NASD's Discovery Guide are routinely ignored, resulting in significant delay and the frequent need for arbitrator intervention in the discovery process. This is partly due to the fact that the Discovery Guide establishes guidelines rather than mandatory procedures.

To address these concerns, proposed Rules 12505–12511 would codify the discovery procedures currently outlined in the NASD Discovery Guide, with certain substantive changes. The proposed Code would not contain the actual Document Production Lists, which would remain in the Discovery Guide, but it would make clear that either producing or objecting to documents on applicable lists, as well as other documents requested by parties, is mandatory. The proposed rules also would extend the time parties have to respond to Document Production Lists and other discovery requests from 30 to 60 days, but would also provide more serious consequences when parties fail to respond, or when parties frivolously object to requests to produce documents or information. In addition, proposed Rule 12512 would codify the sanctions provisions of the Discovery Guide, clarifying the authority of arbitrators to sanction parties for non-compliance with discovery rules or orders of the panel. NASD believes that, collectively, these changes will significantly minimize the number of discovery disputes in NASD arbitrations.

Because much of what is currently contained in the Discovery Guide would be incorporated into the Code, the Discovery Guide would be amended to include only the remaining information, including the Document Production Lists themselves. The proposed amended Discovery Guide is available at *http://www.nasd.com/web/idcplg?IdcService=SS_GET lowbar;PAGE&ssDocName=NASDW_009306&ssSourceNodeId=802.*

Subpoenas (Proposed Rule 12512)

Current Rule 10322 provides that the arbitrators and any counsel of record to the proceeding shall have the power of the subpoena process as provided by law, and that all parties must be given a copy of a subpoena upon its issuance. The rule also provides that parties shall produce documents and make witnesses available to each other to the fullest extent possible without resort to the subpoena process.

Proposed Rule 12512 is substantially identical to the current rule Code, but would also require that if a subpoena is issued, the issuing party must send copies to all other parties at the same time and in the same manner as the party that issued the subpoena. This modification is intended to ensure that parties receive notice of the subpoena in a timely manner.

Exchange of Documents and Witness Lists (Proposed Rule 12514)

Current Rule 10321(d) requires that at least 20 days before a hearing on the merits is scheduled to begin, all parties must exchange copies of all documents in their possession that they intend to present at the hearing, and must identify all witnesses they intend to present at the hearing. As a practical matter, many of the documents will already have been exchanged through discovery. Users of the forum have advised NASD that this rule would be less burdensome, and more useful, if it were amended to require only that parties exchange all documents they intend to use at the hearing that have not previously been exchanged. The proposed rule would make this change and would increase the consequences of failing to comply with this requirement. Under the current rule, the panel may exclude evidence not exchanged in a timely manner. Proposed Rule 12514 would create a presumption that parties could not use any documents at the hearing that were not exchanged, or call any witnesses at the hearing who were not identified, within the time provided by the rule, unless the panel determines that good cause exists. The proposed rule specifically provides that good cause includes the need to use documents or call witnesses for rebuttal or impeachment purposes based on developments at the hearing.

Postponements (Proposed Rule 12601)

In the proposed Code, hearing adjournments are referred to as hearing postponements, for plain English purposes. Paragraph (a) of proposed Rule 12601 has been amended to provide that the panel may not grant requests to postpone a hearing that are made within 10 days of a scheduled hearing session unless the panel determines that good cause exists. This provision is intended to reduce the number of last minute requests for postponements, a practice that many users of the forum believe results in unnecessary delay and unfairness to parties.

Paragraph (b) of the proposed rule provides that, except as otherwise provided, a postponement fee equal to the applicable hearing session fee, as set forth in Proposed Rule 12902, will be charged for each postponement agreed to by the parties, or granted upon request of one or more parties. Therefore, the fee would no longer increase for a second or subsequent request by the same party. This change is intended to simplify the rule and to avoid confusion when one party requesting a postponement has made a previous request, but one or more of the other parties requesting the same postponement have not made previous requests.

The proposed rule also gives the panel the authority to allocate the postponement fees among non-requesting parties if the panel determines that the non-requesting party caused or contributed to the need for the postponement.

Withdrawing Claims (Proposed Rule 12702)

The current Code does not contain any guidance with respect to withdrawing claims. This occasionally causes confusion, particularly with respect to the consequences of withdrawing a claim at a particular stage in an arbitration. To provide guidance to parties, proposed Rule 12702 would provide that before a claim has been answered by a party, a claimant may withdraw the claim against that party with or without prejudice. However, after a claim has been answered by a party, a claimant may only withdraw its claim against that party with prejudice, unless the panel decides, or the claimant and that

party agree, otherwise. NASD believes that the proposed rule strikes the appropriate balance between allowing claimants to withdraw their claims without prejudice before a respondent has expended significant resources responding to the claim, and protecting the respondent from having to respond to the same claim multiple times.

Simplified Arbitration Rule (Proposed Rule 12800)

The simplified arbitration rule would be significantly shortened. Currently, in addition to the procedures that are unique to simplified arbitrations, Rule 10302 repeats some, but not all, of the general provisions that apply to both regular and simplified cases. The proposed rule would include only those provisions that are unique to simplified cases.

The proposed rule would eliminate the current provisions establishing the special time limits or deadlines for pleadings in simplified cases, and the time limits would now be the same as those in regular cases. Frequent users of the forum report that the time limits in simplified cases are routinely extended under the current rule. To provide better guidance to parties, NASD believes that the Code should reflect that, in practice, the time to answer in simplified cases is typically the same as it is in regular cases.

Under proposed Rule 12800, the single arbitrator would be selected from the chairperson roster, unless the parties agree in writing otherwise. The single arbitrator would not be able to request a three-arbitrator panel, and the arbitrator would no longer have the option of dismissing without prejudice a counterclaim or other responsive pleading that increased the amount in dispute above the simplified case threshold. If a pleading increased the amount in dispute above the threshold, the case would be administered under the regular provisions of the Code. If an arbitrator has been appointed, that arbitrator will remain on the panel. If a three-arbitrator panel is required, the remaining arbitrators will be appointed by the Director. The proposed rule would also eliminate the ability of the single arbitrator to require a hearing. However, a hearing would still be held upon the customer's request.

NASD believes that these changes will make the simplified arbitration rule easier for parties to understand, and will also streamline and simplify the administration of small claims in the NASD forum.

Fees (Proposed Rules 12900—12903)

One of the most frequent criticisms of the current Code is that the fee schedules are difficult to understand, particularly with respect to what claimants must pay at the time of filing. Currently, claimants must pay a non-refundable filing fee, and an initial hearing session deposit that may be refundable under certain circumstances. In addition, parties also must pay hearing session fees for each hearing session. Although the filing fee and the initial hearing session deposit are both due upon filing, they are presented in the Code as separate fees, making it hard for some parties to understand the total amount due upon filing. To address this issue, and to make the fee schedules easier to read, the fee schedules have been revised in two significant ways.

First, the filing fee and the hearing session deposit have been combined into one single fee that is paid when a claim is filed. With two exceptions, described below, the amounts paid by claimants would not change. Although what is now the refundable hearing session deposit would no longer be paid separately, an amount equal to the current hearing session deposit or a portion thereof may be refunded if NASD receives notice that the case has been settled more than 10 calendar days prior to the hearing on the merits. (Under the current Code, the initial hearing session deposit may be refunded if NASD receives, prior to 8 days before the hearing on the merits, notice that the case has been settled; this has been changed to 10 days as part of the overall effort to standardize the time frames used in the Code.) The consolidation of the filing fee and the hearing session deposit is intended to make it easier for claimants to understand how much they have to pay when they file a claim and what, if any, portion of that fee may be refunded.

Second, several sets of brackets in the filing fee schedule would be condensed. Currently, there are 14 separate fee brackets in the customer filing fee schedule. Some of the fees for different brackets are the same; others are separated by amounts ranging from $25–$100. The result is a schedule that is confusing and difficult to read. To simplify the schedule, the customer filing fee brackets would be reorganized as follows: The $25,000–$30,000 bracket ($600) and the $30,000–50,000 bracket ($625) would be combined, and the filing fee for the new bracket would be $600; and the $1 million–$3 million bracket ($1,700), the $3 million–$5 million bracket ($1,800), the $5 million—$10 million bracket ($1,800) and the over $10 million bracket ($1,800) would be combined, and the filing fee for the new bracket would be $1,800.

The proposed changes would not result in an increase in the total amount of fees paid by customers or associated persons when filing a claim, except that for claims of $30,000 to $50,000, the customer's overall filing fees would decrease by $50, and for claims of $1 million to $3 million, the customer's overall filing fees would increase by $100. Corresponding changes would be made to the member filing fee schedule.

NASD believes that these changes will greatly simplify the fee schedule, eliminate three repetitive high-end brackets, and align the brackets in the filing fee schedule with the brackets in the member filing fee and surcharge schedules.

(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 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 the proposed Customer Code will protect investors and the public interest by making the arbitration process more transparent for parties, providing useful guidance to parties, arbitrators and staff, and helping to standardize and streamline the administration of NASD arbitrations. If the proposed Code is approved, NASD will offer training on the new Code to arbitrators, users of the forum, and staff.

(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, as amended, is consistent with the Act. In particular, the Commission solicits comments on whether the proposed rule change, as amended, provides for arbitration procedures that are fair to and consistent with the protection of investors for the resolution of their disputes. In addition, the Commission solicits comments on the following questions:

A. *Differences from Uniform Code of Arbitration:* Generally, where provisions in the Proposed Rules differ from their counterparts in the Uniform Code of Arbitration (''Uniform Code''), developed by SICA, which alternative is preferable? Why? With respect to specific provisions:

1. *Appointment of Arbitrators:* Section 17(d) of the Uniform Code provides that if it becomes necessary for the Director to appoint an arbitrator, then each side in the arbitration will be given one peremptory strike per case.[10]

Under Proposed NASD Rules 12406, Appointment of Arbitrators/Discretion to Appoint Arbitrators Not on List; 12410, Removal of Arbitrator by Director; and 12411, Replacement of Arbitrators, each side in the arbitration would not be given a peremptory strike automatically in the event it becomes necessary for the Director to appoint an arbitrator. Rather, a party's request to remove an arbitrator would be granted if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration.[11] The interest or bias must be direct, definite, and capable of reasonable demonstration, rather than remote or speculative, and close questions regarding challenges to an arbitrator by a customer would be resolved in favor of the customer.[12]

Where the Uniform Code differs from the Proposed NASD Rules with respect to appointment of arbitrators by the Director, which alternative is preferable? Why?

2. *Subpoenas:* Section 23(c)(1) of the Uniform Code provides that arbitrators and any counsel of record may issue subpoenas as provided by law, and that parties will produce witnesses and present proof at the hearing whenever possible without using subpoenas.[13] Similarly, Proposed NASD Rule 12512, Subpoenas, provides that subpoenas for documents or the appearance of witnesses may be issued as provided by law, and that parties should produce documents and make witnesses available to each other without the use of subpoenas. Proposed NASD Rule 12512 requires that a party issuing a subpoena send copies of the subpoena to all other parties at the same time and in the same manner in which the subpoenas was issued.

Section 23(c)(2) of the Uniform Code further requires, however, that parties seeking to issue a subpoena to non-parties send notice and a copy of the subpoena to all other parties to the arbitration at least 10 days before issuing the subpoena. Parties receiving the notice then have an opportunity to object, and the issuing party has an opportunity to respond.[14] The arbitrator shall rule on the issuance and scope of the subpoena.[15] The notice and objection procedures do not apply when the subpoena is for a non-party's appearance at a hearing before the arbitrators.[16]

Where Section 23 of the Uniform Code and Proposed NASD Rule 12512 differ, which alternative is preferable? Why?

B. *Nonsubstantive Changes:* Are any changes that are intended to be nonsubstantive actually substantive changes? If so, why are they substantive, and how will they affect the arbitration process or the rights of the parties? Are these proposed changes preferable to their counterparts in the current Code, or vice versa?

C. *Proposed Rule 12105, Agreement of the Parties:* This proposed rule provides that if the Code permits the parties to modify a provision of the Code, or a decision of the Director or the panel, the written agreement of all named parties is required for such a modification. If the Director or the panel determines that a named party is inactive in the arbitration, or has failed to respond after adequate notice has been given, however, the Director or the panel may determine that the written agreement of that party to such modification is not required while the party is inactive or not responsive.

Is it sufficiently clear what an inactive party is? If not, how could the proposed rule be clarified?

D. *Proposed Rule 12400, Neutral List Selection System and Arbitrator Rosters:* This proposed rule provides that NASD would maintain three separate rosters of arbitrators: one of non-public arbitrators, one of public arbitrators, and one of arbitrators who are eligible to serve as chairpersons. Under Proposed Rule 12400(c), chairpersons must be public arbitrators in customer disputes. NASD has stated that public arbitrators who qualify to be chairpersons will be placed on the chairperson roster only if they agree to serve as chairpersons; otherwise, they will remain on the

[10] Section 17(d) of the Uniform Code provides as follows:

(d) Appointment of Arbitrators.

The Director will appoint one or more arbitrators for the panel from the SRO's pool of arbitrators if:

- the parties do not agree on a complete panel;
- acceptable arbitrators are unable to serve; or
- arbitrators cannot be found from the lists for any other reason.

In the event the Director's appointment becomes necessary, then each side will be given one peremptory strike per case.

[11] Proposed NASD Rule 12410(a)(1).

[12] Id.

[13] Section 23(c) of the Uniform Code provides as follows:

(c) Subpoenas.

(1) Arbitrators and any counsel of record may issue subpoenas as provided by law. The party who requests or issues a subpoena must send a copy of the request or subpoena to all parties and the entity receiving the subpoena in a manner that is reasonably expected to cause the request or subpoena to be delivered to all parties and the entity receiving the subpoena on the same day. The parties will produce witnesses and present proof at the hearing whenever possible without using subpoenas.

(2) No subpoenas seeking discovery shall be issued to or served upon non-parties to an arbitration unless, at least 10 days prior to the issuance or service of the subpoena, the party seeking to issue or serve the subpoena sends notice of intention to serve the subpoena, together with a copy of the subpoena, to all parties to the arbitration.

(3) In the event a party receiving such a notice objects to the scope or propriety of the subpoena, that party shall, within the 10 days prior to the issuance or service of the subpoena, file with the Director, with copies to all other parties, written objections. The party seeking to issue or serve the subpoena may respond thereto. The arbitrator appointed pursuant to this Code shall rule promptly on the issuance and scope of the subpoena.

(4) In the event an objection to a subpoena is filed under paragraph (c)(3), the subpoena may only be issued or served prior to the arbitrator's ruling if the party seeking to issue or serve the subpoena advises the subpoenaed party of the existence of the objection at the time the subpoena is served, and instructs the subpoenaed party that it should preserve the subpoenaed documents, but not deliver them until a ruling is made by the arbitrator.

(5) Rule 23(c)(2) and (3) do not apply to subpoenas addressed to parties or non-parties to appear at a hearing before the arbitrators.

(6) The arbitrator(s) shall have the power to quash or limit the scope of any subpoena.

[14] Uniform Code, Section 23(c)(3).

[15] *Id.*

[16] Uniform Code, Section 23(c)(5).

general public arbitrator roster. NASD also has stated that to avoid duplication of names on the lists sent to parties, arbitrators who are on the chairperson roster will not be on the general public arbitrator roster. Does limiting arbitrators on the chairperson roster to service only as chairpersons limit the pool of arbitrators available to serve on panels, particularly in regions where relatively few arbitrators are available? Should chairpersons be permitted to serve in a non-chairperson capacity as well?

E. *Proposed Rule 12408, Disclosures of Arbitrators:* This proposed rule would require arbitrators to disclose any existing or past service as a mediator before they are appointed to a panel.[17] Does the proposed rule suggest that arbitrators must disclose only any service as a mediator that might preclude the arbitrator from rendering an objective and impartial determination in the proceeding? Alternatively, do commenters understand from the rule that arbitrators must disclose any existing or past service as a mediator, even it has no connection with the proceeding? Should the rule be revised to reflect more clearly one or the other of these readings? If so, which?

F. *Proposed Rule 12600(c), Required Hearings:* This proposed rule would provide that if a hearing will be held, the Director will notify the parties of the time and place of the hearing at least 10 days before the hearing begins, unless the parties agree to a shorter time. Do parties need notice of the hearing earlier than 10 days before the hearing, or is 10 days sufficient?

G. *Proposed Rule 12702, Withdrawal of Claims:* This proposed rule provides that before a claim has been answered by a party, the claimant may withdraw the claim against the party with or without prejudice. After a claim has been answered by a party, the claimant may only withdraw it against that party with prejudice unless the panel decides, or the claimant and that party agree, otherwise. Does the proposed rule appropriately address the concern of allowing claimants to withdraw claims without prejudice, while protecting the respondent from expending significant resources to respond to a claim (that is later withdrawn) or having to respond to the same claim multiple times? How prevalent are the problems of respondents (1) expending significant resources to respond to a claim that is later withdrawn, or (2) having to respond to the same claim multiple times? Are there other ways to address these competing concerns? Would the proposed rule unnecessarily deter claimants from filing claims? Would the proposed rule encourage respondents to increase the amount in controversy in the arbitration, and therefore the fees that the parties may have to bear? Should the proposed rule exclude arbitrations involving $25,000 or less, *i.e.*, those to which Proposed Rule 12800, Simplified Arbitrations, apply?

H. *Proposed Rule 12800, Simplified Arbitrations:* This proposed rule provides that all provisions of the Code apply to simplified arbitrations, unless otherwise provided under proposed rule 12800. This means that the time within which parties must answer a statement of claim in simplified arbitrations is 45 days, as in regular arbitrations. Should this time be shortened for simplified arbitrations, as they are meant to be more expedient than regular arbitrations? If so, what would be an appropriate amount of time? 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–2003–158 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR-NASD–2003–158. The 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, 100 F Street, NE., Washington, DC 20549. Copies of such filing will also 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 SR-NASD–2003–158 and should be submitted on or before July 14, 2005.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5–3268 Filed 6–22–05; 8:45 am]

BILLING CODE 8010–01–P

[17] This amendment seeks to incorporate IM–10308, relating to arbitrators who also serve as mediators, which was adopted earlier this year. *See* Exchange Act Rel. No. 51325 (Mar. 7, 2005), 70 FR 12522 (Mar. 14, 2005) (Order Approving Proposed Rule Change); Exchange Act Rel. No. 51097 (Jan. 28, 2005), 70 FR 5715 (Feb. 3, 2005) (Notice of Proposed Change).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51863; File No. SR–NYSE–2005–02]

Self-Regulatory Organizations; New York Stock Exchange, Inc., Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2 and 3 Relating to Amendments to Exchange Rule 607

June 16, 2005.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act''),[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on January 4, 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, II and III below, which items have been prepared by the NYSE. On May 12, 2005, the NYSE filed Amendment No. 1 to the proposed rule change (''Amendment No. 1'').[4] On May 13, 2005, the NYSE filed Amendment No. 2 to the proposed rule change (''Amendment No. 2).[5] On June 16, 2005, the NYSE filed Amendment No. 3 to the proposed rule change (Amendment No. 3).[6] The Commission

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

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] Amendment No. 1 was filed and withdrawn by the NYSE on May 12, 2005.

[5] *See* Amendment No. 2. Amendment No. 2 supplemented the initial filing.

[6] *See* Amendment No. 3. Amendment No. 3 supplemented the initial filing and modified certain statements in Amendment No. 2.