in disciplinary action, including potential termination of membership.

DTC, FICC, and NSCC believe that the proposed rule changes are consistent with the requirements of Section 17A of the Act [6] and the rules and regulations thereunder because the implementation of the proposals should help DTC, FICC, and NSCC to enforce compliance with their connectivity testing rules for business continuity purposes and as a result should better enable them to ensure the safeguarding of securities and funds which are in their custody or control.

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

DTC, FICC, and NSCC do not believe that the proposed rule changes will have any impact or impose any burden on competition.

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

DTC, FICC, and NSCC have not solicited or received any written comments on these proposals. DTC, FICC, and NSCC will notify the Commission of any written comments they receive.

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

Within thirty-five 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 ninety 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 changes are 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–DTC–2005–04, SR–FICC–2005-10, and SR–NSCC–2005–05 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 20549–0609.

All submissions should refer to File Number SR–DTC–2005–04, SR–FICC–2005–10, and SR–NSCC–2005–05. These file numbers 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 changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 filings also will be available for inspection and copying at the principal offices of DTC, FICC, and NSCC and on DTC's Web site at *http://www.dtc.org*, and on FICC's Web site at *http://www.ficc.com*, and on NSCC's Web site at *http://www.nscc.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–DTC–2005–04, SR–FICC–2005–10, and SR–NSCC–2005–05 and should be submitted on or before August 5, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. E5–3871 Filed 7–20–05; 8:45 am]

BILLING CODE 8010–01–P

[6] 15 U.S.C. 78q–1.

[7] 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52045; File No. SR–NASD–2005–023]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Representation in Arbitration and Mediation

July 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 February 9, 2005 and on July 8, 2005 (Amendment No. 1), 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.

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

NASD Dispute Resolution is proposing to amend Rule 10316 and to adopt Rule 10408 of the NASD Code of Arbitration Procedure (''Code''), to address attorney representation in arbitration and mediation.[3] Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

10316. Representation *in Arbitration* [by Counsel]

(a) Representation by a Party

Parties may represent themselves in an arbitration held in a United States hearing location. A member of a partnership may represent the

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

[2] 17 CFR 240.19b–4.

[3] These provisions will be renumbered as appropriate following Commission approval of the following proposed rule changes published on June 23, 2005: Revision of Customer Portion of Code of Arbitration Procedure, Exchange Act Rel. No. 51856 (June 15, 2005), 70 FR 36442 (June 23, 2005) (SR–NASD–2003–1580); Revision of Industry Portion of Code of Arbitration Procedure, Exchange Act Rel. No. 51857 (June 15, 2005), 70 FR 36430 (June 23, 2005) (SR–NASD–2004–011); and the NASD Arbitration Rules for Mediation Proceedings, Exchange Act Rel. No. 51855 (June 15, 2005), 70 FR 36440 (June 23, 2005) (SR–NASD–2004–013).

partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.

(b) Representation by an Attorney

At any stage of an arbitration proceeding held in a United States hearing location, [A]*a*ll parties shall have the right to [representation by counsel at any stage of the proceedings.] *be represented by an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.*

(c) Qualification of Representative

Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

* * * * *

10408. Representative in Mediation

(a) Representation by Party

Parties may represent themselves in mediation held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.

(b) Representation by an Attorney

At any stage of a mediation proceeding held in a United States hearing location, all parties shall have the right to be represented by an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

(c) Qualifications of Representatives

Issues regarding the qualifications of a person to represent a party in mediation are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the mediation proceeding shall not be delayed pending resolution of such issues.

* * * * *

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. NASD Dispute Resolution believes a rule is needed to address the issue of multi-jurisdictional practice of law in arbitration and mediation.[4] The multi-jurisdictional practice of law occurs when attorneys, licensed in one United States jurisdiction, practice law in a jurisdiction in which they are not licensed. In the area of arbitration, for example, it is common for an attorney licensed to practice law in one state to represent a client in an arbitration proceeding in another state in which the attorney is not licensed. Although this practice is common, it can be a violation of state unauthorized practice of law provisions. Until recently, most states had taken no action against this practice. However, recent case law developments suggest that some states may be reconsidering this position. For example, three state court rulings have found that an out-of-state attorney providing representation in an arbitration proceeding is engaging in the practice of law in the state in which the proceeding occurs, and that it is a violation of the state's unauthorized practice of law statute to participate in such a proceeding without being licensed in that jurisdiction.[5]

In light of these developments and the trend toward multi-jurisdictional practice, the American Bar Association (ABA) amended its Model Rule of Professional Conduct 5.5 (Model Rule 5.5) to permit an attorney to represent a client in a United States jurisdiction in which he or she is not licensed without violating the jurisdiction's unauthorized practice of law rules, so long as the representation is related to an arbitration or medication.[6] While Model Rule 5.5 establishes a new standard for certain types of legal activity, it can be enforced only if a state adopts it into law. Fourteen states have either adopted Model Rule 5.5 or a similar version of the rule.[7] Other states have adopted a temporary practice rule, similar to Model 5.5, which allows an attorney not licensed in a state to provide certain types of legal services in the state on a limited basis.[8] In those states where a temporary practice rule has yet to be adopted, the state bar associations appear willing to grant requests from attorney not licensed in those states to represent clients in an arbitration in those states.[9]

Representation by an Attorney in NASD Arbitration Forum. The proposed rule change would clarify that a party may be represented by an attorney admitted to practice by the United States Court, the highest court of any

[4] The proposed rule change is intended to address the issue of multi-jurisdictional practice of law by attorneys. The proposed rule change does not address the issue of representation by non-attorneys in arbitration and medication cases.

[5] *See Birbrower, Montalbano, Condo & Frank* v. *Superior Court,* 949 P.2d 1 (Cal. 1998); *see also Florida Bar* v. *Rapoport,* 845 Sα. 2d 874, 2003 Fla. LEXIS 250 (Fla. 2003) and *Disciplinary Council* v. *Alexicole, Inc.,* et al., 2004 Ohio LEXIS 3032 (Ohio 2004).

[6] Model Rule 5.5, as amended, would allow a United States lawyer, admitted in one United States jurisdiction, to engage in certain types of legal activity in another United States jurisdiction where he is not licensed to practice, without being deemed to be engaging in the unauthorized practice of law. As amended, Model Rule 5.5 states that a lawyer may provide legal services on a temporary basis in an out-of-state jurisdiction that: (1) Are undertaken in association with a lawyer who is admitted to practice in the jurisdiction and who actively participates in the matter; (2) are in or reasonably related to a pending or potential proceeding before a tribunal in the jurisdiction or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in the jurisdiction or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or (4) are not within paragraphs 2 or 3, and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. This rule is sometimes referred to as the temporary practice rule.

[7] Seven additional states have recommendations pending in their states' highest courts to adopt a rule identical or similar to Rule 5.5. American Bar Association, *Commission on Multijurisdictional Practice, State Implementation of ABA Model Rule 5.5* (visited Jan. 31, 2005) *http://www.abanet.org/cpr/mjp-home.html.*

[8] The laws of Michigan and Virginia specifically authorize occasional or incidental practice of out-of-state lawyers. *See* Mich. Comp. Law Ann. sec. 600.916 and Va. State Bar Rule, Pt. 6, sec. 1(C).

[9] *See* Philadelphia Bar Association, Ethics Opinions, Opinion 2003–13 (December 2003) (advising an attorney not licensed in Pennsylvania that he could conduct an arbitration in Philadelphia).

state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.[10] The proposed rule change also explicitly states that, as is currently permitted, parties may represent themselves in NASD arbitration proceedings.

The proposed rule change states that a party has the right to be represented by an attorney at law admitted to practice before the United States Supreme Court, the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States. Representation by an attorney is not required under this proposal. However, NASD believes that representation by an attorney will protect the public and benefit investors by ensuring that a party's representative has a minimum level of skill, training, and character to provide effective representation in arbitration.[11]

Under the proposed rule change, attorneys could represent a client in an NASD arbitration or mediation, held in any United States hearing location, regardless of the jurisdiction in which the attorneys are licensed. The attorney's qualifications to participate as representatives in a jurisdiction in which they are not licensed would be subject to the applicable law of that jurisdiction. NASD believes the proposed rule change would assist attorneys in addressing the issue of multi-jurisdictional practice without encroaching on the states' rights to determine what activities violate the states' unauthorized practice of law provisions. The proposed rule change is not intended to prevent a state from deciding that an out-of-state attorney may have violated a state's unauthorized practice of law provision by representing a party in an NASD arbitration or mediation. It is intended, however, to reflect current practice in the forum, which, based on experience, shows that the level of knowledge, training and skill of an attorney affects the outcome of an arbitration or medication proceeding more than the jurisdiction from which the attorney received his license to practice.

Further, NASD believes that the proposed rule change sets a standard of practice for the arbitration forum that is consistent with the other rules and proceedings of NASD. Rule 9141(b) of the NASD Code of Procedure states, in relevant part, that a person may be represented in any disciplinary proceeding by an attorney at law admitted to practice before the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.[12]

Moreover, the SEC (as well as other federal agencies) also has a similar practice rule. Rule 102(b) of the SEC Rules of Practice states that, in any proceeding, a person may be represented by an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any State.[13]

(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 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 rule change clarifies a standard of practice in its arbitration forum, which will foster uniformity and consistency in arbitration proceedings. As a result, NASD believes that the proposed rule change will enhance the administration and operation of the arbitration process, thereby protecting investors and the public interest.

(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. 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–2005–023 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–2005–023. 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

[10] The proposed rule change would apply only to hearing locations in the United States, which include any commonwealth, territory, or possession of the United States.

[11] While not addressed in the proposed rule change, the NASD continues to be concerned about the on-going problems that are caused by the practice of non-attorney representatives in the forum. These problems, which have been well documented, may have negative implications for parties in arbitration. *See Securities Arbitration Reform, Report of the Arbitration Policy Task Force to the Board of Governors, National Association of Securities Dealers, Inc.* (January 1996); *see also Report of the Securities Industry Conference on Arbitration on Representation of Parties in Arbitration by Non-Attorneys,* 22 Fordham Urb. L. J. 507 (1995).

[12] This rule has been enforced in NASD Enforcement proceedings. In two similar cases, a respondent's answer was stricken from the record because the respondent's representative had not indicated that he was a licensed attorney. *See* NASDR Office of the Hearing Officers, OHO Order 97–15 (C01970032); *see also* OHO Order 98–10 (C10970176).

[13] *See* SEC Rules of Practice, 17 CFR § 201.102(b) (2004).

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, 100 F Street, NE., 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 the File Number SR–NASD–2005–023 and should be submitted on or before August 11, 2005.

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

J. Lynn Taylor,

Assistant Secretary.

[FR Doc. 05–14444 7–20–05; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–52046A; File No. SR–NASD–2004–183]

Self-Regulatory Organizations; National Association of Securities Dealers; Notice of Filing of Proposed Rule and Amendment No. 1 Thereto Relating to Sales Practice Standards and Supervisory Requirements for Transactions in Deferred Variable Annuities; Corrected

July 19, 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 14, 2004, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), the proposed rule as described in Items I, II, and III below, which Items have been prepared by NASD. On July 8, 2005, NASD filed Amendment No. 1 to the proposed rule.[3] The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

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

NASD is proposing to adopt a new rule, proposed NASD Rule 2821, to create recommendation requirements (including a suitability obligation), principal review and approval requirements, and supervisory and training requirements tailored specifically to transactions in deferred variable annuities. The text of the proposed rule is available on NASD's Web site (*http://www.nasd.com*), at NASD's principal office, and at the Commission's Public Reference Room.

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

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule and discussed any comments it received on the proposed rule. 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

1. Purpose

NASD is proposing a new rule, proposed Rule 2821, that would impose specific sales practice standards and supervisory requirements on members for transactions in deferred variable annuities.[4] NASD has been concerned about deferred variable annuity transactions for some time. In part, this concern stems from the complexities of the products, which can cause confusion both for persons associated with members who sell deferred variable annuities and for customers who purchase or exchange them.

Deferred variable annuities are hybrid investments containing both securities and insurance features. They offer choices among a number of complex contract features (*e.g.*, deferred variable annuity contracts may offer various types of death benefits, rebalancing features, dollar cost averaging options, and optional riders such as a guaranteed minimum income benefit, estate protection enhancements, or long-term care insurance, in addition to a range of choices among investment options).[5] The amount that will accumulate and be paid to the investor pursuant to a deferred variable annuity will fluctuate depending on the investment options that the investor chooses. Investors also can be subject to the following fees or charges: *Surrender charges* (which the investor owes if he or she withdraws money from the annuity before a specified period); *mortality and expense risk charges* (which the insurance company charges for the insurance risk it takes under the contract); *administrative fees* (which are used for recordkeeping and other administrative expenses); *underlying fund expenses* (which relate to the investment options); and *charges for special features and riders*. Moreover, an investor's withdrawal of earnings before he or she reaches the age of 59½ is generally subject to a 10-percent penalty under the Internal Revenue Code.

In addition to the complexity of the product—and perhaps, in part, because of it—NASD examinations and investigations have uncovered various questionable sales practices. In some instances, associated persons sold deferred variable annuities to elderly customers for whom such long-term, illiquid products were not suitable. In others, associated persons sold deferred variable annuities without explaining (and, in some cases, without knowing) the characteristics of the products. On a number of occasions, associated persons recommended that customers exchange one deferred variable annuity for another without ensuring that such exchanges were beneficial for their customers or properly disclosing costs. NASD also determined that a number of firms had, in general, failed to adequately train and supervise associated persons regarding deferred variable annuity sales.

When NASD first began noticing these problems, it acted quickly and persistently to address them on several fronts. NASD issued *Notices to Members* that provided guidelines and reminders

[14] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] The amendment clarified the rule's text and provided additional explanations of that text.

[4] In general, a variable annuity is a contract between an investor and an insurance company, whereby the insurance company promises to make periodic payments to the contract owner or beneficiary, starting immediately (an immediate variable annuity) or at some future time (a deferred variable annuity). *See* Joint SEC and NASD Staff Report on Broker-Dealer Sales of Variable Insurance Products (June 2004) (''Joint Report''); NASD *Notice to Members* 99–35 (May 1999). The proposed rule focuses exclusively on transactions in *deferred* variable annuities. NASD recognizes that transactions involving immediate variable annuities have begun to increase recently, and NASD will continue to monitor sales practices relating to these products. Currently, however, deferred variable annuities make up the majority of variable annuity transactions. Moreover, to date, most of the problems associated with transactions in variable annuities that NASD has uncovered involve the purchase or exchange of deferred variable annuities.

[5] *See* Joint Report, *supra*, note 4.