

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- 51083; File No. SR-NASD-2004-164)

January 26, 2005

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto by National Association of Securities Dealers, Inc. Relating to the Random Selection of Arbitrators by the Neutral List Selection System

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 October 28, 2004, the National Association of Securities Dealers, Inc. (“NASD”), through its subsidiary, NASD Dispute Resolution, Inc. (“NASD Dispute Resolution”), filed with the Securities and Exchange Commission (“SEC” or “Commission”), the proposed rule change as described in Items I and II, below, which Items have been prepared by NASD. On January 5, 2005, NASD filed Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal on an accelerated basis.

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

NASD Dispute Resolution proposes to amend Rule 10308 of the NASD Code of Arbitration Procedure (“Code”) to change the method used by the Neutral List Selection System (“NLSS”)⁴ to select arbitrators from a rotational to a random selection function by incorporating the random selection provision of the proposed Customer and Industry

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Letter from Mignon McLemore, NASD, to Catherine McGuire, SEC (January 5, 2005).

⁴ NLSS is the computer program NASD uses to select arbitrators on a rotational basis. It has been in use since November 1998.

Code revisions.⁵ Below is the text of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in [brackets].

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10308. Selection of Arbitrators

This Rule specifies how parties may select or reject arbitrators, and who can be a public arbitrator.

(a) Unchanged.

(b) Composition of Arbitration Panel; Preparation of Lists for Mailing to Parties

(1) – (3) Unchanged.

(4) Preparation of Lists

(A) Except as provided in subparagraph (B) below, the Neutral List Selection System shall generate the lists of public and non-public arbitrators on a [rotating] random basis within a designated geographic hearing site and shall exclude arbitrators based upon conflicts of interest identified within the Neutral List Selection System database.

(B) Unchanged.

(5) – (6) Unchanged.

(c) – (f) Unchanged.

⁵ NASD Dispute Resolution has filed with the SEC a proposed rule change to the Code to reorganize the current rules, simplify the language, codify current practices, and implement several substantive changes. The rule filing was submitted in three parts: Customer Code, Industry Code, and Mediation Code. The Customer Code was filed on October 15, 2003, and amended on January 3, 2005 and January 19, 2005 (SR-NASD-2003-158); the Industry Code was filed on January 16, 2004, and amended on February 26, 2004 and January 3, 2005 (SR-NASD-2004-011). The Mediation Code was filed on January 23, 2004, and amended on January 3, 2005 (SR-NASD-2004-013). It does not contain any provisions concerning the NLSS. The three new codes will replace the current Code in its entirety. The Code revision is undergoing SEC staff review and has not yet been published for comment.

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

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

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

1. Purpose

NASD Dispute Resolution is upgrading its computer technology, in what is known as the Mediation and Arbitration Tracking and Retrieval Interactive Case System ("MATRICS"), which will replace its two case management systems: CRAFTIS⁶ and NLSS. NASD will implement MATRICS in a series of releases, in which various functions from CRAFTIS and NLSS will be adapted and programmed to operate within MATRICS.⁷ NASD has determined that the NLSS components of MATRICS are ready to be developed. Most functions of NLSS will be transferred to MATRICS.

As part of this computer technology upgrade, NASD has determined that MATRICS should select arbitrators on a random basis, instead of a rotational basis, like NLSS currently does. NASD is proposing to switch from rotational to random for

⁶ CRAFTIS is the legacy software application that NASD Dispute Resolution uses to support its case administration function. It uses an old technology platform and is not Web-based.

⁷ A new component for MATRICS, the Web-based arbitration claim filing system, has already been developed and became effective on August 5, 2004. Parties may access the online system at http://apps.nasd.com/mediation_&_arbitration/online_filing.asp. The SEC approved the final version of the system on June 16, 2004. See Securities Exchange Act Rel. No. 49876 (June 16, 2004), 69 FR 35090 (June 23, 2004).

several reasons. First, other self-regulatory organizations, governmental entities, and private alternative dispute organizations select panels for their arbitration cases by generating a random list of arbitrators. For example, the New York Stock Exchange (NYSE)⁸ and the Society of Maritime Arbitrators⁹ offer to the parties a random list selection procedure to select panels to decide claims in their respective arbitration forums. The California Department of Industrial Relations,¹⁰ the Federal Mediation and Conciliation Service,¹¹ and the Federal Emergency Management Agency¹² also use random list selection. Some state courts that provide alternative dispute resolution services also use random list selection to choose arbitrators for their hearings.¹³

Second, in order for a rotational system to operate effectively and efficiently, a large amount of computer code is required to manage and maintain the arbitrator rotation. According to NASD, a rotational selection system works best if the data that the system uses to generate the lists remain static. However, the data input into NLSS changes frequently. For example, in the last two years, NASD Dispute Resolution has added eight hearing locations, and, in that time, has added approximately 1,000 new arbitrators to the database. Once these changes to the data are input into NLSS, the rotational

⁸ The SEC approved for immediate effectiveness a NYSE request to extend its pilot program, the Voluntary Supplemental Procedures for Selecting Arbitrators (“Voluntary Procedures”), which allows parties to, among other things, select arbitrators using the Random List Selection method. See Securities Exchange Act Rel. No. 49915 (June 25, 2004), 69 FR 39993 (July 1, 2004).

⁹ Society of Maritime Arbitrators, Inc., Recreational and Small Commercial Vessel Salvage Arbitration (visited Sept. 29, 2004) <<http://www.smany.org/sma/salvrule.html>>.

¹⁰ California Department of Industrial Relations, State Mediation and Conciliation Services, *How to Request an Arbitration List* (visited Sept. 1, 2004) <<http://www.dir.ca.gov/csmcs/HowToRequestPanel.html>>.

¹¹ Federal Mediation and Conciliation Service, *Arbitration FAQs* (visited Sept. 1, 2004) <<http://www.fmcs.gov/internet/faq.asp?categoryID=133#Q16532>>.

¹² Federal Emergency Management Agency, *Arbitration Guidelines For The Cerro Grande Fires* (visited Sept. 1, 2004) <<http://www.fema.gov/cerrogrande/arbitration/guide.shtm>>.

¹³ See, e.g., U.S. Bankruptcy Court for the Middle District of Tenn. (ADR Program); Nev. Sup. Ct. Arb. R. 6; and Minn. R. 5530.0900 (2004).

system attempts to incorporate them when it generates new lists. Any attempt to modify the computer code to accommodate these changes is time-consuming and costly. Also, maintaining a selection system that is purely rotational is cumbersome because additional code is needed to track the histories of each selection to ensure that all arbitrators have an equal opportunity to appear in the rotation, which directly affects list selection.

Last, NASD understands that, under a random selection system, it is possible for a particular arbitrator to be selected for consecutive lists more frequently than another arbitrator. However, a statistical comparison of one arbitrator's selection to another, using a large sample of eligible arbitrators and lists generated, should show that one arbitrator is not being selected for lists more frequently than any other.¹⁴ While NASD acknowledges this anomaly in a random selection system, NASD believes that the benefits of such a system, such as ease of design, cost-efficient maintenance, and overall fairness of random selection (as well as the increased perception of fairness) will strengthen the operation of the forum.¹⁵

NASD Dispute Resolution believes that the proposed rule change ultimately will protect investors and benefit the public by providing parties and arbitrators with an automated system, MATRICS, which will help the forum operate more efficiently while maintaining the core goal of providing arbitrators who have an equal probability of being listed for service on any given list of proposed arbitrators. In an effort to sustain the progress made on the MATRICS upgrades, NASD proposes to amend Rule 10308(b)(4)

¹⁴ In fact, the same comparative analysis conducted under a rotational method should yield a statistically similar result.

¹⁵ NASD will hire an outside consultant to audit the random selection system after it has been operational for one year and independently verify that the random selection system is operating as described in this proposed rule change. NASD will also keep statistics on the arbitrators selected by the random selection system who appear on an arbitrator list in order to monitor the effectiveness of the random selection system. See supra note 3.

with a delayed implementation date, so that the developers can program this component for MATRICS using the random selection method of generating arbitrator lists in order to be ready when this phase of MATRICS becomes operational. NASD is, therefore, requesting accelerated review and approval for this proposed rule change to allow the programmers to begin creating the code, so that they will remain on development schedule while the Commission is reviewing the Code revisions.¹⁶ According to the technology development plan, NASD is scheduled to complete the arbitrator selection function of MATRICS in the third quarter of 2005. For the developers to meet this goal, NASD must amend the rule now to introduce the concept of random selection in order to provide the developers with the lead-time necessary to create the software and implement it on the MATRICS platform.¹⁷ While the software is being created, NLSS will continue to generate lists of arbitrators on a rotating basis. Subject to Commission approval of this rule, NASD will upgrade MATRICS with the random selection function, phase out NLSS, and replace it with MATRICS.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,¹⁸ in general, and with Section 15A(b)(6)¹⁹ of the Act, in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect

¹⁶ The proposed Customer Code and Industry Code revisions, which have already been filed with the SEC, contain a random selection provision. See supra note 4.

¹⁷ The alternative would result in duplicative effort and wasted resources, because programmers would have to develop and program MATRICS to select arbitrators under the current rules, and then discard that programming and create new software once the Code revision has been approved.

¹⁸ 15 U.S.C. 78o-3.

¹⁹ 15 U.S.C. 78o-3(b)(6).

investors and the public interest. NASD Dispute Resolution believes that the proposed rule change ultimately will protect investors and benefit the public by providing parties with an automated system that will help the forum operate more efficiently.

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. Solicitation of Comments

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

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an E-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2004-164 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NASD-2004-164. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2004-164 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission has reviewed carefully the proposed rule change as amended and finds that it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association and, in particular, the requirements of Section 15A(b)(6)²⁰ of the Act.²¹ Section 15A(b)(6) requires, among

²⁰ 15 U.S.C. 78o-3(b)(6).

²¹ The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

other things, that the rules of a national securities association are 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. The Commission believes that the proposed rule change ultimately will protect investors and benefit the public by providing parties with an automated case management system that will help the NASD Dispute Resolution arbitration forum operate more efficiently.²²

The Commission finds good cause for approving the proposed rule change as amended prior to the thirtieth day after the publication of notice of filing thereof in the Federal Register. Accelerated approval will provide NASD Dispute Resolution with the certainty it needs to upgrade its computer technology to select arbitrators on a random, rather than a rotational, basis and to ultimately replace NLSS with MATRICS.

²² See supra note 15.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NASD-2004-164) as amended be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²³

Margaret H. McFarland
Deputy Secretary

²³ 17 CFR 200.30-3(a)(12).