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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. SR - 2005 - 079
Amendment No. 4

Proposed Rule Change by National Association of Securities Dealers

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

| Initial | Amendment | Withdrawal | Section 19(b)(2) | Section 19(b)(3)(A) | Section 19(b)(3)(B) |
|---|---|---|---|---|---|
| ☐ | ☑ | ☐ | ☑ | ☐ | ☐ |

Pilot ☐

Extension of Time Period for Commission Action ☐

Date Expires

Rule

- ☐ 19b-4(f)(1)
- ☐ 19b-4(f)(2)
- ☐ 19b-4(f)(3)
- ☐ 19b-4(f)(4)
- ☐ 19b-4(f)(5)
- ☐ 19b-4(f)(6)

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

**Description**

Provide a brief description of the proposed rule change (limit 250 characters).

**Contact Information**

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

| | | | |
|---|---|---|---|
| First Name | John | Last Name | Nachmann |
| Title | Counsel | | |
| E-mail | john.nachmann@nasd.com | | |
| Telephone | (202) 728-8273 | Fax | (301) 527-4754 |

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 11/30/2006

By Jean I. Feeney
(Name)

Vice President and Chief Counsel
NASD Dispute Resolution
(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Jean Feeney, jean.feeney@nasd.com

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information**

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change**

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document ☐

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document ☐

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

On June 17, 2005, NASD filed SR-NASD-2005-079 to revise Rule 10322 of the NASD Code of Arbitration Procedure, which pertains to subpoenas and the power to direct appearances. The proposed rule change was published for comment in the Federal Register on July 13, 2005.[1] The Commission received 12 letters in response to the proposed rule change. On March 29, 2006, NASD filed with the Commission Amendment No. 1 to the proposal to address the comment letters received by the SEC and to propose certain amendments in response to the comments. On May 12, 2006, NASD filed Amendment No. 2 to clarify the process for issuing a subpoena to both parties and non-parties. On July 7, 2006, NASD filed Amendment No. 3 to clarify the current practice for deciding discovery-related motions. The Commission published the proposed rule change, as amended, for comment in the Federal Register on July 18, 2006.[2] The Commission received 24 comment letters in response to the amended proposal.[3] NASD is filing this Amendment No. 4 to respond to the issues raised in these letters.

*Who Should Pay for Subpoenaed Documents*

More than half of the commenters raised concerns regarding which party should be responsible for the costs associated with the production of documents obtained in response to a subpoena.[4] Specifically, these commenters expressed the view that the proposal inappropriately requires a party that requests such documents from another party to be responsible for the cost associated with the production of the documents.

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1 Securities Exchange Act Release No. 51981 (July 6, 2005), 70 FR 40411 (July 13, 2005).

2 Securities Exchange Act Release No. 54134 (July 12, 2006), 71 FR 40762 (July 18, 2006).

3 Comment letters were submitted by Gary M. Berne, Stoll Stoll Berne Lokting & Shlachter P.C., dated April 13, 2006 ("Berne"); Robert S. Banks, Jr., President, Public Investors Arbitration Bar Association, dated April 28, 2006 ("PIABA 1"); Bryan Lantagne, Chair, Broker-Dealer Arbitration Project Group, North American Securities Administrators Association, Inc., dated May 1, 2006 ("NASAA"); Martin L. Feinberg, dated May 5, 2006 ("Feinberg 1"); Seth E. Lipner, Deutsch Lipner, dated July 17, 2006 ("Lipner"); Philip M. Aidikoff, Aidikoff, Uhl & Bakhtiari, dated July 19, 2006 ("Aidikoff"); Martin L. Feinberg, dated July 19, 2006 ("Feinberg 2"); Thomas C. Wagner, VanDeusen & Wagner L.L.C., dated July 19, 2006 ("Wagner 1"); Steven B. Caruso, Maddox Hargett Caruso, P.C., dated July 21, 2006 ("Caruso"); Joseph C. Korsak, dated July 21, 2006 ("Korsak"); Herbert E. Pounds, Jr., dated July 21, 2006 ("Pounds"); John Miller, dated July 21, 2006 ("Miller"); Richard M. Layne, Layne Lewis LLP, dated July 21, 2006 ("Layne"); Sarah G. Anderson, dated July 21, 2006 ("Anderson"); Jay Salamon, dated July 21, 2006 ("Salamon"); Steph D. M [sic], dated July 21, 2006 ("Steph M"); Thomas C. Wagner, VanDeusen Wagner LLC, dated July 21, 2006 ("Wagner 2"); W. Scott Greco, Greco & Greco, P.C., dated July 21, 2006 ("Greco"); Carl J. Carlson, Carlson & Dennett, P.S., dated July 24, 2006 ("Carlson"); Laurence S. Schultz, Driggers, Schultz & Herbst, P.C., dated July 28, 2006 ("Schultz"); Ryan P. Smith, Vice President, Wachovia Securities, dated August 7, 2006 ("Wachovia"); Robert S. Banks, Jr., President, Public Investors Arbitration Bar Association, dated August 14, 2006 ("PIABA 2"); Jim Parker, Johnson, Rial & Parker, P.C., dated September 7, 2006 ("Parker"); and Alan S. Brodherson, Law Offices of Alan S. Brodherson, dated November 20, 2006 ("Brodherson").

4 See Feinberg 1 and 2, Caruso, Korsak, Pounds, Miller, Layne, Anderson, Salamon, Steph M, Wagner 2, Greco, Carlson, Schultz, and PIABA 2 letters.

These commenters argued that the costs associated with the production of any documents, including subpoenaed documents, should be determined and assessed by the panel in its award. The commenters stated that treating subpoenaed documents differently from other discovery-related documents could lead to gamesmanship, confusion, and delay in the discovery process. Furthermore, most of these commenters indicated that this aspect of the proposal poses a considerable burden on public customers and may prevent them from adequately preparing their cases if they are unable to reimburse the other party for copies of subpoenaed documents.[5]

NASD agrees that the panel should have the authority to determine the amount of costs incurred as a result of subpoenaed documents and by whom such costs should be borne. Since NASD Rules 10205(c) and 10332(c) of the Code already provide arbitrators with this authority, NASD does not believe that this issue needs to be addressed by the proposal. As such, NASD is amending Rule 10322(e) of the proposal as follows (deleted text is bracketed):

> Any party that receives documents in response to a subpoena served on a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 days following receipt of the request. [The party requesting the documents shall be responsible for the reasonable costs associated with the production of the copies.]

*Whether Counsel Should be Able to Issue Subpoenas*

Four commenters indicated that the proposal wrongly restricts to arbitrators exclusively the power of the subpoena process.[6] These commenters noted that they had not experienced any significant issues with the current rule (which also allows counsel of record to issue subpoenas as provided by law), and that there was therefore no reason to revise the rule in such a manner. The commenters expressed the view that limiting to arbitrators the authority to issue subpoenas will result in additional delays, costs, and gamesmanship in the discovery process. One of the commenters also suggested that arbitrators who tire of counsel making numerous requests for subpoenas may capriciously deny the issuance of a subpoena merely to limit the amount of time spent on discovery issues.[7]

NASD respectfully disagrees with these commenters. NASD believes that providing arbitrators with greater control over the issuance of subpoenas will help to protect investors, associated persons, and other parties from abuse in the discovery

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5 See Caruso, Korsak, Pounds, Miller, Layne, Anderson, Salamon, Greco, Carlson, Schultz, and PIABA 2 letters.

6 See Berne, Wachovia, Parker, and Brodherson letters.

7 See Brodherson letter.

process. In addition, the establishment of a uniform, nationwide rule will reduce potential confusion for parties and their counsel regarding whether they have the ability to issue subpoenas, minimize gamesmanship in the subpoena process, and make the rule easier to administer.

*Which Arbitrators Should Have Authority to Decide Subpoena Requests*

Two commenters stated that only public arbitrators should have the authority to decide subpoena requests and that non-public arbitrators should not be involved in resolving discovery issues in those cases where one of the parties is a public customer.[8] These commenters suggested that, at the very least, a non-public arbitrator should be able to decide a subpoena request only if all of the parties involved in the case agree.

NASD notes that, as described in the rule proposal, the Code is in accordance with the suggestions made by these commenters. In customer cases, the parties are given an opportunity to agree on their chairperson, who is almost always a public arbitrator, and if they cannot agree, then the highest-ranked public arbitrator is appointed as the chairperson.[9] The arbitrator responsible for deciding discovery-related motions typically is the chairperson of the panel.[10] Thus, the arbitrator ruling on a motion requesting a subpoena will be a public arbitrator unless the customer previously consented to a non-standard panel composition.[11]

*Necessity of Motions for Subpoenas*

Two commenters asserted that parties should not be required to include a motion as part of a subpoena request, because such a requirement adds unnecessary complexity and delay to the discovery process.[12] One of these commenters recommended that parties simply be allowed to present a proposed subpoena for the panel's consideration.[13]

NASD respectfully disagrees with these two commenters because it believes that requiring a motion does not place a significant burden on parties and may provide a

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8 See PIABA 1 and NASAA letters.

9 See NASD Rule 10308(c)(5).

10 NASD has proposed to codify this practice in the pending revisions to the NASD Code of Arbitration Procedure for Customer Disputes; see Securities Exchange Act Release No. 51856 (June 15, 2005), 70 FR 36442 (June 23, 2005) (SR-NASD-2003-158); and the NASD Code of Arbitration Procedure for Industry Disputes; see Securities Exchange Act Release No. 51857 (June 15, 2005), 70 FR 36430 (June 23, 2005) (SR-NASD-2004-011).

11 See Rule 10308(b)(1).

12 See Berne and PIABA 1 letters.

13 See PIABA 1 letter.

benefit to the panel. NASD notes that written motions are not required to be in any particular form. They may take the form of a letter, legal motion, or any other format that the panel decides is acceptable. NASD anticipates that the motion accompanying a subpoena will provide the panel with relevant information that would not be obvious from the draft subpoena itself, such as the rationale for the request.

*Automatic Exchange of Subpoenaed Documents*

Two commenters suggested that the proposal be revised to require or allow for the automatic exchange of documents received in response to all subpoenas.[14] One commenter asserted that the proposal should require copies of all documents received in response to a subpoena to be automatically provided to all other parties.[15] The other commenter suggested that the rule allow a party to make a single, standing request at any time during the arbitration proceeding for copies of all documents received in response to a subpoena.[16] Once a party made such a request, all other parties would be required to produce the documents received in response to a subpoena within ten days of receipt. Without this change, this commenter indicated that parties would be able to slow down the discovery process.

NASD respectfully disagrees with the suggestion that the proposal be revised to require or to allow for the automatic production of all documents received in response to a subpoena. NASD believes that another party may not want such documents or may not wish to be potentially responsible for the costs associated with the production of such documents. Furthermore, the proposal does not limit the ability of the parties to agree to automatically exchange all documents received in response to subpoenas. NASD also does not believe, contrary to one of the commenter's assertions, that the failure of a party to agree to automatically produce documents received in response to a subpoena will result in a delay in the discovery process due to the limited time frames for production provided for in the proposal.

*Time Frame for Ruling on Subpoena Requests*

One commenter suggested that the proposal be revised to require the panel to rule on all subpoena motions within 10 days.[17] This commenter contended that establishing such a time frame would ensure that parties are able to conduct discovery in a timely and orderly manner.

NASD respectfully disagrees with this commenter. Specifically, the proposal already requires that the panel rule promptly on a motion for a subpoena. NASD does

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[14] See Feinberg 1 and 2, and Salamon letters.

[15] See Salamon letter.

[16] See Feinberg 1 and 2 letters.

[17] See Wachovia letter.

not believe that it is appropriate to establish a specific time frame within which the panel must rule on a subpoena request, particularly since there may be occasions when a panel will need to consider several complex motions at the same time.

*Clarifications to the Proposed Rule Change*

Two commenters suggested clarifying revisions to proposed Rule 10322(c).[18] One commenter stated that the rule is potentially ambiguous regarding the time frame during which an arbitrator should rule on the issuance and scope of a subpoena.[19] Specifically, this commenter indicated that the proposal could be read to mean that an arbitrator is required to rule promptly and not consider any objections that have been raised to a subpoena. The other commenter suggested that, to avoid confusion, the rule should contain a time period within which a party must respond to any objections to its proposed subpoena.[20] This commenter also suggested that proposed Rules 10322(c) and (e) be amended to clarify whether the time periods set forth therein are based on calendar or business days.

NASD agrees with these commenters and, in order to reduce any potential ambiguities in the rule,[21] is amending Rule 10322(c) as follows (deleted text is bracketed; new text is underlined):

> If a party receiving a motion and draft subpoena objects to the scope or propriety of the subpoena, that party shall, within 10 calendar days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, [T]the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena [regardless of whether any objections are made].

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18 See Feinberg 2 and Caruso letters.

19 See Feinberg 2 letter.

20 See Caruso letter.

21 NASD notes that the pending revisions to the NASD Code of Arbitration Procedure for Customer Disputes and the NASD Code of Arbitration Procedure for Industry Disputes clarify that the term "day" means calendar day, except as otherwise provided. See Securities Exchange Act Release Nos. 51856 and 51857, supra note 10.

NASD is further proposing to amend Rule 10322(e) as follows (deleted text is bracketed; new text is underlined):

> Any party that receives documents in response to a subpoena served on a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request. [The party requesting the documents shall be responsible for the reasonable costs associated with the production of the copies.]

*Conforming the Proposal with the Federal Arbitration Act*

One commenter stated that the proposed rule should be revised to conform to the Federal Arbitration Act (FAA).[22] This commenter noted that the proposal is inconsistent with the FAA, because the FAA requires that at least a majority of the arbitrators on a panel sign a subpoena, whereas the proposed rule change allows for only one arbitrator to sign a subpoena. This commenter argued that, by allowing only one arbitrator to sign a subpoena, the proposed rule inappropriately attempts to remove protections that are granted to non-parties by the FAA.

NASD respectfully disagrees with this commenter. NASD notes that the proposal provides non-parties with more protection than current Rule 10322 as it allows only arbitrators to issue subpoenas. As previously noted, the current rule allows any counsel of record the power of the subpoena process as provided by law. Limiting the power of the subpoena process to neutral arbitrators helps to protect non-parties from abusive or harassing subpoenas that could otherwise be issued by attorneys. NASD believes that subpoenas issued by a single arbitrator are valid and notes that it has received few, if any, complaints regarding the validity of such subpoenas from participants in the NASD forum.

This commenter also expressed the view that the proposal, under the FAA, is unwieldy with respect to the service of subpoenas. Specifically, the commenter stated in his letters that the FAA provides that an arbitration subpoena "shall be served in the same manner as subpoenas to appear and testify before the court." The commenter asserted that federal courts have interpreted this provision to require the personal service of an arbitral subpoena. Consequently, the commenter contended that the proposal, under the FAA, would require personal service of all subpoenas issued in NASD's forum.

Once again, NASD respectfully disagrees with this commenter. Before a party may participate in NASD's arbitral forum, it is required to submit a Uniform Submission Agreement in which the party agrees to abide by NASD's Code of

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[22] See Feinberg 1 and 2 letters.

Arbitration Procedure.[23] Under the Code, service can be effectuated by a variety of methods, including mail, overnight mail service, hand delivery, and facsimile.[24] The United States Supreme Court has found that the FAA does not prevent the enforcement of arbitration agreements that contain different rules than those set forth in the FAA. Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989). In fact, the Supreme Court noted that:

> Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and the parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.

Volt Information Sciences, 489 U. S. at 479 (citation omitted). As such, NASD believes that service under the proposal can be accomplished by any of the various methods provided for in the Code rather than personal service exclusively.

*Issues Beyond the Scope of the Proposed Rule Change*

Lastly, NASD notes that two commenters raised issues that are beyond the scope of the rule proposal. One commenter raised issues pertaining to the composition of arbitration panels and the definition of public arbitrator.[25] The other commenter suggested revisions to the Code of Arbitration Procedure regarding the time period within which a panel must be appointed.[26] While NASD takes note of these comments, it is not responding to them herein since they are beyond the scope of the rule proposal.

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[23] The Uniform Submission Agreement provides, "The undersigned parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, and all related counterclaims and/or third-party claims which may be asserted, to arbitration in accordance with the Constitution, By-Laws, Rules, Regulations, and/or Code of Arbitration Procedure of the sponsoring organization."

[24] See NASD Rule 10314(c).

[25] See NASAA letter.

[26] See Wachovia letter.

**Exhibit 4**

**Exhibit 4 shows the full text of the rule change marking changes from Amendment No. 2 to the original rule filing, SR-NASD-2005-079, to Amendment No. 4 with the language in Amendment No. 2 shown as if adopted, and the new language in this Amendment No. 4 marked to show additions and deletions.[1]**

Proposed new language is underlined; proposed deletions are in brackets.

**10322. Subpoenas and Power to Direct Appearances**

(a) To the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas. Arbitrators shall have the authority to issue subpoenas for the production of documents or the appearance of witnesses.

(b) A party may make a written motion requesting that an arbitrator issue a subpoena to a party or a non-party. The motion must include a draft subpoena and must be filed with the Director, with an additional copy for the arbitrator. The requesting party must serve the motion and draft subpoena on each other party, at the same time and in the same manner as on the Director. The requesting party may not serve the motion or draft subpoena on a non-party.

(c) If a party receiving a motion and draft subpoena objects to the scope or propriety of the subpoena, that party shall, within 10 calendar days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. After considering all

[1] Amendment No. 3 to SR-NASD-2005-079 did not make any revisions to the rule text of the proposal.

objections, [T]the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena [regardless of whether any objections are made].

(d) If the arbitrator issues a subpoena, the party that requested the subpoena must serve the subpoena at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the subpoena.

(e) Any party that receives documents in response to a subpoena served on a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request. [The party requesting the documents shall be responsible for the reasonable costs associated with the production of the copies.]

(f) An arbitrator shall be empowered without resort to the subpoena process to direct the appearance of any person employed by or associated with any member of the Association and/or the production of any records in the possession or control of such persons or members. Unless an arbitrator directs otherwise, the party requesting the appearance of a person or the production of documents under this Rule shall bear all reasonable costs of such appearance and/or production.