

June 19, 2003

Florence Harmon
Senior Special Counsel
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-1001

Re: **File No. SR-NASD-2003-101** – Amendment to Rule 10304 of the NASD Code of Arbitration Procedure Governing Time Limits for Submission of Claims in Arbitration

Dear Ms. Harmon:

Pursuant to Rule 19b-4, enclosed please find the above-numbered rule filing. Also enclosed is a 3-1/2" disk containing the rule filing in Microsoft Word 7.0 to facilitate production of the Federal Register release.

If you have any questions, please contact Laura Gansler, NASD Dispute Resolution, Inc., at (202) 728-8275; e-mail laura.gansler@nasd.com. The fax number is (202) 728-8833.

Very truly yours,

Barbara Z. Sweeney
Senior Vice President
and Corporate Secretary

Enclosures

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C.

Form 19b-4

Proposed Rule Change

by

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”), the National Association of Securities Dealers, Inc. (“NASD”), through its wholly-owned subsidiary, NASD Dispute Resolution, Inc., is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to amend Rule 10304 of the NASD Code of Arbitration Procedure relating to time limits on the submission of claims in arbitration. Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

* * *

10000. Code of Arbitration Procedure

* * *

Rule 10304. Time Limitation Upon Submission

(a) No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. The panel will resolve any questions regarding the eligibility of a claim under this Rule. [This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.]

(b) Dismissal of a claim under this Rule does not prohibit a party from pursuing the claim in court. By requesting dismissal of a claim under this Rule, the requesting party agrees that if the panel dismisses a claim under the Rule, the party that filed the dismissed claim may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

* * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

(a) The proposed rule change was approved by the Board of Directors of NASD Dispute Resolution at its meeting on April 23, 2003, which authorized the filing of the rule change with the SEC. Counsel for The Nasdaq Stock Market and NASD Dispute Resolution have been provided an opportunity to consult with respect to the proposed rule change, pursuant to the Plan of Allocation and Delegation of Functions by NASD to its Subsidiaries. The NASD Board of Governors had an opportunity to review the proposed rule change at its meeting on April 24, 2003. No other action by NASD is necessary for the filing of the proposed rule change. Section 1(a)(ii) of Article VII of the NASD By-Laws permits the NASD Board of Governors to adopt amendments to NASD Rules without recourse to the membership for approval.

NASD will announce the effective date of the proposed rule change in a Notice to Members to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the Notice to Members announcing Commission approval.

(b) Questions regarding this rule filing may be directed to Laura Gansler, Counsel, NASD Dispute Resolution, at (202) 728-8275.

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

(a) Purpose

Rule 10304 of the NASD Code of Arbitration Procedure (“Code”) provides that a claim is ineligible for arbitration in the NASD forum if six or more years have elapsed from the occurrence or event giving rise to the claim. The rule does not provide expressly whether the eligibility of a claim is determined by arbitrators or by the courts. Under current NASD practice, arbitrators

resolve questions concerning whether a particular claim falls within the six year time limit.

However, this issue has generated a significant amount of collateral litigation, with a number of courts ruling that, in absence of more specific guidance from NASD, courts should determine the eligibility of a claim under the rule. Collateral litigation over the eligibility rule has been expensive and time-consuming, and has caused uncertainty and confusion among forum users.

In December 2002, the United States Supreme Court ruled in *Howsam v. Dean Witter Reynolds, Inc.*,¹ that the issue of whether a claim is time-barred under Rule 10304 is presumptively a matter for arbitrators to decide. To conform the Code to the Court's ruling, and to provide additional notice and guidance to parties on this issue, NASD proposes to amend Rule 10304 to state explicitly that eligibility determinations are made by the arbitrators.

Rulings that claims are ineligible under Rule 10304 have also generated significant collateral litigation. Some courts, relying on the election of remedies doctrine, have held that claims ineligible in arbitration may not be litigated in court. To make express that, under NASD rules, the ineligibility of a claim under Rule 10304 is not intended to prevent a party from filing the claim in court, NASD proposes to further amend Rule 10304 to make clear that dismissal of a claim on eligibility grounds is without prejudice to the parties' judicial rights and remedies.

In addition, the current eligibility rule provides that the rule does not apply to claims ordered to arbitration by a court. This provision is now inconsistent with the Supreme Court's decision in *Howsam* that eligibility is an issue for the arbitrators, and not the courts, to resolve, as the effect of the provision would be that the eligibility rule could not be applied either by the court

¹ 537 U.S.79 (Dec. 10, 2002)

or the arbitrators to any claims compelled to arbitration by a court. Therefore, NASD proposes to delete this provision from Rule 10304.

Finally, because this provision was intended to protect parties from having to litigate related claims in two forums at the same time, NASD also proposes to amend Rule 10304 to provide that by requesting dismissal of a claim on eligibility grounds in the NASD forum, the requesting party is agreeing that the claimant may withdraw all related claims without prejudice and may pursue all of the claims in court. This provision will provide significant protection against involuntary bifurcation of claims, but will continue to allow arbitrators to decide questions of eligibility under the Rule.

(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, by clarifying the scope and application of Rule 10304, the proposed rule change will reduce the cost and delay caused by collateral litigation, and streamline the administration of arbitrations in NASD's forum.

4. 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.

5. 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.

6. Extension of Time Period for Commission Action

NASD does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

1. Completed notice of proposed rule change for publication in the Federal Register.

Pursuant to the requirements of the Securities Exchange Act of 1934, NASD has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

NASD

BY: _____
Barbara Z. Sweeney , Senior Vice President and
Corporate Secretary

Date: June 19, 2003

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-NASD-2003-101)

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Time Limits for Submission of Claims in Arbitration

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 , 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”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. 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 Rule 10304 of the NASD Code of Arbitration Procedure governing time limits for submission of claims in arbitration. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

* * *

10000. Code of Arbitration Procedure

* * *

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Rule 10304. Time Limitation Upon Submission

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(b) Dismissal of a claim under this Rule does not prohibit a party from pursuing the claim in court. By requesting dismissal of a claim under this Rule, the requesting party agrees that if the panel dismisses a claim under the Rule, the party that filed the dismissed claim may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

* * *

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

Rule 10304 of the NASD Code of Arbitration Procedure (“Code”) provides that a claim is ineligible for arbitration in the NASD forum if six or more years have elapsed from the occurrence or event giving rise to the claim. The rule does not provide expressly whether the eligibility of a claim is determined by arbitrators or by the courts. Under current NASD practice, arbitrators resolve questions concerning whether a particular claim falls within the six year time limit.

However, this issue has generated a significant amount of collateral litigation, with a number of courts ruling that, in absence of more specific guidance from NASD, courts should determine the eligibility of a claim under the rule. Collateral litigation over the eligibility rule has been expensive and time-consuming, and has caused uncertainty and confusion among forum users.

In December 2002, the United States Supreme Court ruled in *Howsam v. Dean Witter Reynolds, Inc.*,³ that the issue of whether a claim is time-barred under Rule 10304 is presumptively a matter for arbitrators to decide. To conform the Code to the Court's ruling, and to provide additional notice and guidance to parties on this issue, NASD proposes to amend Rule 10304 to state explicitly that eligibility determinations are made by the arbitrators.

Rulings that claims are ineligible under Rule 10304 have also generated significant collateral litigation. Some courts, relying on the election of remedies doctrine, have held that claims ineligible in arbitration may not be litigated in court. To make express that, under NASD rules, the ineligibility of a claim under Rule 10304 is not intended to prevent a party from filing the claim in court, NASD proposes to further amend Rule 10304 to make clear that dismissal of a claim on eligibility grounds is without prejudice to the parties' judicial rights and remedies.

In addition, the current eligibility rule provides that the rule does not apply to claims ordered to arbitration by a court. This provision is now inconsistent with the Supreme Court's decision in *Howsam* that eligibility is an issue for the arbitrators, and not the courts, to resolve, as the effect of the provision would be that the eligibility rule could not be applied either by the court or the arbitrators to any claims compelled to arbitration by a court. Therefore, NASD proposes to delete this provision from Rule 10304.

³ 537 U.S. 79 (Dec. 10, 2002).

Finally, because this provision was intended to protect parties from having to litigate related claims in two forums at the same time, NASD also proposes to amend Rule 10304 to provide that by requesting dismissal of a claim on eligibility grounds in the NASD forum, the requesting party is agreeing that the claimant may withdraw all related claims without prejudice and may pursue all of the claims in court. This provision will provide significant protection against involuntary bifurcation of claims, but will continue to allow arbitrators to decide questions of eligibility under the Rule.

(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, by clarifying the scope and application of Rule 10304, the proposed rule change will reduce the cost and delay caused by collateral litigation, and streamline the administration of arbitrations in NASD's forum.

(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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by [insert date 21 days from the date of publication].

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

Jonathan G. Katz
Secretary