

March 22, 2002

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-2002-38 for Immediate Effectiveness – Replacement of Arbitrator  
Under Rule 10313 Upon Disqualification or Other Disability of an Arbitrator,  
Amendment No. 1

Dear Ms. Harmon:

Pursuant to Rule 19b-4, NASD Dispute Resolution is amending the above-numbered rule filing. This amendment replaces the original filing in its entirety. 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 Jean I. Feeney, Associate Vice President and Chief Counsel, NASD Dispute Resolution, Inc., at (202) 728-6959; e-mail [jean.feeney@nasd.com](mailto:jean.feeney@nasd.com). The fax number is (202) 728-8833.

Very truly yours,

Barbara Z. Sweeney  
Senior Vice President

Enclosures

File No. SR-NASD-2002-38  
Consists of 13 Pages

**SECURITIES AND EXCHANGE COMMISSION**

Washington, D. C.

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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) under the Securities Exchange Act of 1934 (“Act”), the National Association of Securities Dealers, Inc. (“NASD” or “Association”), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. (“NASD Dispute Resolution”), is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to the NASD Code of Arbitration Procedure to amend the procedure followed upon the disqualification or other disability of an arbitrator on a three-person arbitration panel. Proposed new language is underlined; proposed deletions are in brackets.

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**CODE OF ARBITRATION PROCEDURE**

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**10313. Disqualification or Other Disability of Arbitrators**

(a) In the event that any arbitrator, after the commencement of the earlier of [(a)] (1) the first pre-hearing conference or [(b)] (2) the first hearing but prior to the rendition of the award, should become disqualified, resign, die, refuse or otherwise be unable to perform as an arbitrator, [the remaining arbitrator(s) shall continue with the hearing and determination of the controversy, unless such continuation is objected to by any party within 5 days of notification of the vacancy on the panel. Upon objection,] the Director shall appoint a replacement arbitrator to fill the vacancy and the hearing shall continue. In the alternative, if all parties agree to proceed with any remaining arbitrator(s), they shall inform the Director in writing within 5 business days of notification of the vacancy, and the remaining arbitrator(s)

shall continue with the hearing and determination of the controversy.

(b) The Director shall inform the parties as soon as possible of the name and employment history of the replacement arbitrator for the past 10 years, as well as information disclosed pursuant to Rule 10312. A party may make further inquiry of the Director concerning the replacement arbitrator's background. If the arbitration proceeding is subject to Rule 10308, the party may exercise his or her right to challenge the replacement arbitrator within the time remaining prior to the next scheduled hearing session by notifying the Director in writing of the name of the arbitrator challenged and the basis for such challenge. If the arbitration proceeding is not subject to Rule 10308, within the time remaining prior to the next scheduled hearing session or the 10 day period provided under Rule 10311, whichever is shorter, a party may exercise the party's right to challenge the replacement arbitrator as provided in Rule 10311.

\* \* \*

(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 December 3, 2001, which authorized the filing of the rule change with the SEC. Counsel for The Nasdaq Stock Market, Inc. and NASD Regulation, Inc. 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 the NASD to its Subsidiaries. The NASD Board of Governors had an opportunity to review the proposed

rule change at its meeting on December 6, 2001. No other action by the 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.

The implementation date will be April 22, 2002, which is more than 30 days after the date of this filing.

(b) Questions regarding this rule filing may be directed to Jean I. Feeney, Associate Vice President and Chief Counsel, NASD Dispute Resolution, Inc., at (202) 728-6959; e-mail [jean.feeney@nasd.com](mailto:jean.feeney@nasd.com).

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

(a) Purpose

NASD Dispute Resolution proposes to amend the procedure followed upon the disqualification or other disability of an arbitrator on a three-person arbitration panel. Currently, Rule 10313 provides that, when an arbitrator becomes disqualified, resigns, dies, refuses or otherwise becomes unable to perform as an arbitrator, the arbitration proceeds with the remaining arbitrators unless a party objects within five days of notification of the vacancy.<sup>1</sup> If there is an objection, the arbitrator is replaced.

Under the proposed rule change, NASD Dispute Resolution will send the name of a replacement arbitrator along with notification of the vacancy. After having this information,

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<sup>1</sup> In very unusual circumstances, two arbitrators may have been disqualified or otherwise unable to serve at the same time, and the parties would have to decide whether to proceed with the one remaining arbitrator or seek two replacements.

parties then will have five business days in which to decide whether to continue with only the remaining two arbitrators or accept a replacement.

NASD Dispute Resolution staff has indicated that, in their experience, parties almost never want to proceed with only the two remaining arbitrators. Therefore, providing a replacement arbitrator immediately, without waiting for an objection, would save the parties time and reduce the administrative costs of producing a letter and waiting for responses when, in most cases, there will be an objection to continuing with only two arbitrators.

(b) Statutory Basis

NASD Dispute Resolution 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 Dispute Resolution believes that the proposed rule change will protect investors and the public interest by providing parties with an immediate replacement arbitrator, thereby reducing delays in the arbitration process and reducing the forum's administrative costs.

4. Self-Regulatory Organization's Statement on Burden on Competition

NASD Dispute Resolution 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 Dispute Resolution 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)

The proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Act and paragraph (f)(6) of Rule 19b-4 thereunder, in that the proposed rule change does not significantly affect the protection of investors or the public interest; does not impose any significant burden on competition; and does not become operative for 30 days after filing. In accordance with Rule 19b-4, the NASD submitted written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing. The NASD proposes to make the proposed rule change operative on April 22, 2002

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

NASD DISPUTE RESOLUTION, INC.

BY:

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Barbara Z. Sweeney  
Senior Vice President

Date: March 22, 2002

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. SR-NASD-2002-38

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Replacement of Arbitrator Upon Disqualification or Other Disability of an Arbitrator

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> 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”), and amended on March 22, 2002,<sup>3</sup> the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD Dispute Resolution. NASD Dispute Resolution has designated the proposed rule change as constituting a “non-controversial” rule change under paragraph (f)(6) of Rule 19b-4 under the Act,<sup>4</sup> which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Amendment No. 1 to SR-NASD-2002-38 replaced and superseded the original rule filing.

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

I. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

NASD Dispute Resolution is proposing to amend the procedure followed upon the disqualification or other disability of an arbitrator on a three-person arbitration panel.

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

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**CODE OF ARBITRATION PROCEDURE**

\* \* \*

**10313. Disqualification or Other Disability of Arbitrators**

(a) In the event that any arbitrator, after the commencement of the earlier of [(a)] (1) the first pre-hearing conference or [(b)] (2) the first hearing but prior to the rendition of the award, should become disqualified, resign, die, refuse or otherwise be unable to perform as an arbitrator, [the remaining arbitrator(s) shall continue with the hearing and determination of the controversy, unless such continuation is objected to by any party within 5 days of notification of the vacancy on the panel. Upon objection,] the Director shall appoint a replacement arbitrator to fill the vacancy and the hearing shall continue. In the alternative, if all parties agree to proceed with any remaining arbitrator(s), they shall inform the Director in writing within 5 business days of notification of the vacancy, and the remaining arbitrator(s) shall continue with the hearing and determination of the controversy.

(b) The Director shall inform the parties as soon as possible of the name and employment history of the replacement arbitrator for the past 10 years, as well as information disclosed pursuant to Rule 10312. A party may make further inquiry of the Director

concerning the replacement arbitrator's background. If the arbitration proceeding is subject to Rule 10308, the party may exercise his or her right to challenge the replacement arbitrator within the time remaining prior to the next scheduled hearing session by notifying the Director in writing of the name of the arbitrator challenged and the basis for such challenge. If the arbitration proceeding is not subject to Rule 10308, within the time remaining prior to the next scheduled hearing session or the 10 day period provided under Rule 10311, whichever is shorter, a party may exercise the party's right to challenge the replacement arbitrator as provided in Rule 10311.

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 Dispute Resolution 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 Dispute Resolution has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(1) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

NASD Dispute Resolution proposes to amend the procedure followed upon the disqualification or other disability of an arbitrator on a three-person arbitration panel.

Currently, Rule 10313 provides that, when an arbitrator becomes disqualified, resigns, dies,

refuses or otherwise becomes unable to perform as an arbitrator, the arbitration proceeds with the remaining arbitrators unless a party objects within five days of notification of the vacancy.<sup>5</sup> If there is an objection, the arbitrator is replaced.

Under the proposed rule change, NASD Dispute Resolution will send the name of a replacement arbitrator along with notification of the vacancy. After having this information, parties then will have five business days in which to decide whether to continue with only the remaining two arbitrators or accept a replacement.

NASD Dispute Resolution staff has indicated that, in their experience, parties almost never want to proceed with only the two remaining arbitrators. Therefore, providing a replacement arbitrator immediately, without waiting for an objection, would save the parties time and reduce the administrative costs of producing a letter and waiting for responses when, in most cases, there will be an objection to continuing with only two arbitrators.

(b) Statutory Basis

NASD Dispute Resolution 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 Dispute Resolution believes that the proposed rule change will protect investors and the public interest by providing parties with an immediate

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<sup>5</sup> In very unusual circumstances, two arbitrators may have been disqualified or otherwise unable to serve at the same time, and the parties would have to decide whether to proceed with the one remaining arbitrator or seek two replacements.

replacement arbitrator, thereby reducing delays in the arbitration process and reducing the forum's administrative costs.

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

NASD Dispute Resolution 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.

(3) 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

The proposed rule change has been filed by the Association as a "non-controversial" rule change under Rule 19b-4(f)(6) under the Act.<sup>6</sup> Consequently, because the foregoing proposed rule change: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative until April 22, 2002, more than 30 days from March 22, 2002, the date on which it was filed, and the NASD provided the Commission with written notice of its intent to file the proposed rule change at least five days prior to the filing date, it has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder. At any time within 60 days of this filing, the Commission may summarily abrogate this proposal if it appears to the Commission that such action is necessary or appropriate in the

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<sup>6</sup> 17 CFR § 240.19b-4(f)(6)

public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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