

Proposed Rule Change by National Association of Securities Dealers
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial <input checked="" type="checkbox"/>	Amendment <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) <input checked="" type="checkbox"/>	Section 19(b)(3)(A) <input type="checkbox"/>	Section 19(b)(3)(B) <input type="checkbox"/>
			Rule		
			<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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Description
Provide a brief description of the proposed rule change (limit 250 characters).

Proposed rule change to provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery.

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	<input type="text" value="John"/>	Last Name	<input type="text" value="Nachmann"/>
Title	<input type="text" value="Counsel"/>		
E-mail	<input type="text" value="john.nachmann@nasd.com"/>		
Telephone	<input type="text" value="(202) 728-8273"/>	Fax	<input type="text" value="(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	<input type="text" value="06/17/2005"/>
By	<input type="text" value="Jean I. Feeney"/>
	(Name)
	<input type="text" value="Vice President & 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.

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.

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” 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 provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery.

Below is the text of the proposed rule change.¹ Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

10322. Subpoenas and Power to Direct Appearances

(a) [Subpoenas

The arbitrators and any counsel of record to the proceeding shall have the power of the subpoena process as provided by law. All parties shall be given a copy of a subpoena upon its issuance. Parties shall produce witnesses and present proofs to the fullest extent possible without resort to the subpoena process.] To the extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas. Arbitrators and any counsel of record may issue subpoenas as provided by law.

¹ The rules proposed in this filing will be renumbered as appropriate following Commission approval of the pending revisions to the NASD Code of Arbitration Procedure for Customer Disputes filed on October 15, 2003, and amended on January 3, 2005, January 19, 2005, April 8, 2005, and June 10, 2005 (SR-NASD-2003-158); and the NASD Code of Arbitration Procedure for Industry Disputes filed on January 16, 2004, and amended on February 26, 2004, January 3, 2005, April 8, 2005, and June 10, 2005 (SR-NASD-2004-011).

(b) No subpoenas seeking discovery shall be issued to or served upon non-parties to an arbitration unless, at least 10 days prior to the issuance or service of the subpoena, the party seeking to issue or serve the subpoena sends notice of intention to serve the subpoena, together with a copy of the subpoena, to all parties to the arbitration.

(c) If a subpoena is issued, the issuing party must cause a copy of the request or subpoena to be served on the same day to all parties and the entity receiving the subpoena.

(d) In the event a party receiving such a notice objects to the scope or propriety of the subpoena, that party shall, within 10 days of service of the notice, file with the Director, with copies to all other parties, written objections. The party seeking to issue or serve the subpoena may respond thereto. The arbitrator appointed pursuant to this Code shall rule promptly on the issuance and scope of the subpoena.

(e) In the event an objection to a subpoena is filed under paragraph (d), the subpoena may only be issued or served prior to the arbitrator's ruling if the party seeking to issue or serve the subpoena advises the subpoenaed party of the existence of the objection at the time the subpoena is served, and instructs the subpoenaed party that it should preserve the subpoenaed documents, but not deliver them until a ruling is made by the arbitrator.

(f) Paragraphs (b) and (d) above do not apply to subpoenas addressed to parties or non-parties to appear at a hearing before the arbitrators.

(g) The arbitrator(s) shall have the power to quash or limit the scope of any subpoena.

[(b) Power to Direct Appearances and Production of Documents]

(h) The arbitrator(s) shall be empowered without resort to the subpoena process to direct the appearance of any person employed 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 the arbitrator(s) 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.

* * * * *

(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 20, 2005, which authorized the filing of the rule change with the SEC. Counsel for The Nasdaq Stock Market and NASD Regulatory Policy and Oversight 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 April 21, 2005. 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.

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 no later than 30 days following publication of the Notice to Members announcing Commission approval.

(b) Questions regarding this rule filing may be directed to John D. Nachmann, Counsel, NASD Dispute Resolution, at (202) 728-8273.

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

(a) Purpose

The purpose of the proposed rule change is to provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery.

Under Rule 10322(a) of the Code of Arbitration Procedure (“Code”), an arbitrator and any counsel of record to the arbitration has the power to issue a subpoena, as provided by law. In the course of preparing their cases, attorneys sometimes issue subpoenas to non-parties requesting the production of documents in advance of an arbitration hearing. For example, an investor’s attorney might subpoena account records for other investors at a broker’s firm, or a brokerage firm’s attorney might subpoena records from the investor’s cell phone company. Disputes regarding the propriety or scope of these subpoenas to non-parties occasionally arise, raising the issue of whether the subpoenaed materials should be produced. Currently, the Code does not contain any rules that specifically address the issuance of subpoenas to non-parties or the resolution of disputes involving such subpoenas.

In order to make the pre-hearing discovery process more orderly and efficient, NASD is proposing to revise the Code to provide for a 10-day notice requirement before

a party issues a subpoena to a non-party for pre-hearing discovery.² Specifically, the rule will require parties seeking to subpoena discovery-related documents from a non-party to send, at least 10 days prior to the issuance or service of the subpoena, notice of their intention to serve the subpoena, along with a copy of the subpoena, to all parties to the arbitration. If any party receiving the notice objects to the scope or propriety of the subpoena, that party may, within 10 days of service of the notice, file a written objection with the Director of Arbitration and provide copies of the written objection to all other parties at the same time. Thereafter, the arbitrator responsible for deciding discovery-related motions will rule promptly on the issuance and scope of the subpoena. The arbitrator will have the authority to approve the issuance of a subpoena as well as to quash or limit the scope of any subpoena. In those situations where a panel has not yet been appointed, the rule will allow parties to issue a subpoena only if they advise a subpoenaed party of the existence of the objection at the time the subpoena is served and instruct the subpoenaed party to preserve, but not deliver, the subpoenaed documents until directed to do so by an arbitrator.

Lastly, the proposed rule will clarify the requirements regarding the service of subpoenas. Currently, Rule 10322(a) provides only that all parties are to be given a copy of a subpoena upon its issuance. The proposed rule will require a party that issues a subpoena to serve a copy of the subpoena to all parties and the entity receiving the subpoena on the same day.³

² The subpoena notice and objections provisions of the proposed rule will apply only to pre-hearing discovery and not to subpoenas pertaining to appearances before the panel.

³ Rule 10314(c) describes how service may be effected.

(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 NASD'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 will make the arbitration pre-hearing discovery process more orderly and efficient, thereby improving the forum for all parties.

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

The proposed rule is based on Rule 23(c) of the Uniform Code of Arbitration ("Uniform Code") adopted by the Securities Industry Conference on Arbitration

(“SICA”).⁴ The proposed rule differs from Rule 23(c) of the Uniform Code in two ways.

First, Rule 23(c)(1) of the Uniform Code requires that a party who issues a subpoena must send a copy of the subpoena to all parties and the entity receiving the subpoena in a “manner that is reasonably expected to cause” the subpoena to be delivered to everyone on the same day. NASD believes that the term “reasonably expected” provides too much discretion and could create ambiguity and an opportunity for gamesmanship. Therefore, proposed Rule 10322(c) requires service of a subpoena on all parties and the entity receiving the subpoena on the same day.

Second, Rule 23(c)(3) of the Uniform Code requires a party to object to the scope or propriety of a subpoena within the 10 days prior to the issuance or service of the subpoena. Proposed Rule 10322(d), however, requires that an objection to a subpoena be made within 10 days of service of the notice of intention to serve the subpoena so as to provide greater clarity and certainty regarding the timeframe within which such an objection must be made.

9. Exhibits

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

⁴ SICA was formed in 1977 to develop nationwide uniform rules governing the arbitration of disputes between broker/dealers and customers in forums operated by the self-regulatory organizations for the securities industry. SICA’s voting members include representatives of the self-regulatory organizations that administer arbitration forums, the Securities Industry Association, and three members of the public. In addition, staff of the SEC, the Commodity Futures Trading Commission, the American Arbitration Association, the North American Securities Administrators Association, and the former public members of SICA are invited to attend meetings.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- ; File No. SR-NASD-2005-079)

SELF-REGULATORY ORGANIZATIONS

Proposed Rule Change by National Association of Securities Dealers, Inc. to Provide for a 10-Day Notice Requirement Before a Party Issues a Subpoena to a Non-Party for Pre-Hearing Discovery

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 17, 2005, the National Association of Securities Dealers, Inc. (“NASD”) 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 the NASD Code of Arbitration Procedure (“Code”) to provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery.

Below is the text of the proposed rule change.³ Proposed new language is

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The rules proposed in this filing will be renumbered as appropriate following Commission approval of the pending revisions to the NASD Code of Arbitration Procedure for Customer Disputes filed on October 15, 2003, and amended on January 3, 2005, January 19, 2005, April 8, 2005, and June 10, 2005 (SR-NASD-2003-158); and the NASD Code of Arbitration Procedure for Industry Disputes filed on January 16, 2004, and amended on February 26, 2004, January 3, 2005, April 8, 2005, and June 10, 2005 (SR-NASD-2004-011).

underlined; proposed deletions are in brackets.

* * * * *

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(b) No subpoenas seeking discovery shall be issued to or served upon non-parties to an arbitration unless, at least 10 days prior to the issuance or service of the subpoena, the party seeking to issue or serve the subpoena sends notice of intention to serve the subpoena, together with a copy of the subpoena, to all parties to the arbitration.

(c) If a subpoena is issued, the issuing party must cause a copy of the request or subpoena to be served on the same day to all parties and the entity receiving the subpoena.

(d) In the event a party receiving such a notice objects to the scope or propriety of the subpoena, that party shall, within 10 days of service of the notice, file with the Director, with copies to all other parties, written objections. The party seeking to issue or serve the subpoena may respond thereto. The arbitrator appointed pursuant to this Code shall rule promptly on the issuance and scope of the subpoena.

(e) In the event an objection to a subpoena is filed under paragraph (d), the subpoena may only be issued or served prior to the arbitrator's ruling if the party seeking to issue or

serve the subpoena advises the subpoenaed party of the existence of the objection at the time the subpoena is served, and instructs the subpoenaed party that it should preserve the subpoenaed documents, but not deliver them until a ruling is made by the arbitrator.

(f) Paragraphs (b) and (d) above do not apply to subpoenas addressed to parties or non-parties to appear at a hearing before the arbitrators.

(g) The arbitrator(s) shall have the power to quash or limit the scope of any subpoena.

[(b) Power to Direct Appearances and Production of Documents]

(h) The arbitrator(s) shall be empowered without resort to the subpoena process to direct the appearance of any person employed 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 the arbitrator(s) 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.

* * * * *

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**

1. Purpose

The purpose of the proposed rule change is to provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery.

Under Rule 10322(a) of the Code of Arbitration Procedure (“Code”), an arbitrator and any counsel of record to the arbitration has the power to issue a subpoena, as provided by law. In the course of preparing their cases, attorneys sometimes issue subpoenas to non-parties requesting the production of documents in advance of an arbitration hearing. For example, an investor’s attorney might subpoena account records for other investors at a broker’s firm, or a brokerage firm’s attorney might subpoena records from the investor’s cell phone company. Disputes regarding the propriety or scope of these subpoenas to non-parties occasionally arise, raising the issue of whether the subpoenaed materials should be produced. Currently, the Code does not contain any rules that specifically address the issuance of subpoenas to non-parties or the resolution of disputes involving such subpoenas.

In order to make the pre-hearing discovery process more orderly and efficient, NASD is proposing to revise the Code to provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery.⁴ Specifically, the rule will require parties seeking to subpoena discovery-related documents from a non-party to send, at least 10 days prior to the issuance or service of the subpoena, notice of their intention to serve the subpoena, along with a copy of the subpoena, to all parties to the arbitration. If any party receiving the notice objects to the scope or propriety of the subpoena, that party may,

⁴ The subpoena notice and objections provisions of the proposed rule will apply only to pre-hearing discovery and not to subpoenas pertaining to appearances before the panel.

within 10 days of service of the notice, file a written objection with the Director of Arbitration and provide copies of the written objection to all other parties at the same time. Thereafter, the arbitrator responsible for deciding discovery-related motions will rule promptly on the issuance and scope of the subpoena. The arbitrator will have the authority to approve the issuance of a subpoena as well as to quash or limit the scope of any subpoena. In those situations where a panel has not yet been appointed, the rule will allow parties to issue a subpoena only if they advise a subpoenaed party of the existence of the objection at the time the subpoena is served and instruct the subpoenaed party to preserve, but not deliver, the subpoenaed documents until directed to do so by an arbitrator.

Lastly, the proposed rule will clarify the requirements regarding the service of subpoenas. Currently, Rule 10322(a) provides only that all parties are to be given a copy of a subpoena upon its issuance. The proposed rule will require a party that issues a subpoena to serve a copy of the subpoena to all parties and the entity receiving the subpoena on the same day.⁵

2. 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 NASD'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 will make the arbitration pre-hearing discovery process more orderly and efficient, thereby improving the forum for all parties.

⁵ Rule 10314(c) describes how service may be effected.

(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 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-2005-079 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-2005-079. 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 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-2005-079 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁶

Margaret H. McFarland
Deputy Secretary

Action as set forth or recommended herein
APPROVED pursuant to authority delegated by
the Commission under Public Law 87-592.

For the Division of Market Regulation

by: _____

(DATE)

⁶ 17 CFR 200.30-3(a)(12).