

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

Initial <input type="checkbox"/>	Amendment <input checked="" 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"/>
Pilot <input type="checkbox"/>			Rule		
Extension of Time Period for Commission Action <input type="checkbox"/>		Date Expires <input type="text"/>	<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).

**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="Mignon"/>	Last Name	<input type="text" value="McLemore"/>
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**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="05/04/2006"/>
By	<input type="text" value="Jean I. Feeney"/>
	(Name)
	<input type="text" value="Vice President and Chief Counsel, 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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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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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.

May 4, 2006

Ms. Lourdes Gonzalez  
Assistant Chief Counsel  
Division of Market Regulation  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

**Re: File No. SR-NASD-2003-158 – Amendments to the NASD Code of Arbitration Procedure for Customer Disputes - Response to Comments and Amendment No. 5; and Notice of Filing and Order Granting Accelerated Approval**

Dear Ms. Gonzalez:

NASD hereby responds to the comment letters received by the Securities and Exchange Commission (SEC) with respect to the above rule filing. In this rule filing, NASD is proposing to amend the NASD Code of Arbitration Procedure (current Code) to reorganize the current rules, simplify the language, codify current practices, and implement several substantive changes. This proposal was part of a series of rule filings to reorganize the current dispute resolution rules into three separate procedural codes: the NASD Code of Arbitration Procedure for Customer Disputes (Customer Code); the NASD Code of Arbitration Procedure for Industry Disputes (Industry Code); and the NASD Code of Mediation Procedure (Mediation Code). The SEC approved the Mediation Code on October 31, 2005, and it became effective on January 30, 2006.<sup>1</sup>

The SEC received 51 comment letters addressing concerns with the Customer Code.<sup>2</sup> The response to the comment letters is organized in the order of the rules of the Customer Code. If a proposed rule is addressed in the comment letters, the response to comments provides a summary of the comments and NASD's response. In those instances in which NASD agrees with the issues raised by the commenters concerning a proposed rule, NASD provides its proposal to address the issues along with an explanation of any changes. If the proposal involves a change to rule language, proposed additions will be underlined and deletions will be bracketed. And where appropriate, NASD is proposing to amend the Customer Code to correct typographical, grammatical and other technical errors.<sup>3</sup>

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<sup>1</sup> Securities Exchange Act Rel. No. 34-52705 (Oct. 31, 2005); 70 FR 67525 (Nov. 7, 2005) (SR-NASD-2004-013).

<sup>2</sup> See List of Commenters Received In Connection With SR-NASD-2003-158.

<sup>3</sup> For example, Proposed Rules 12214 and 12601 have been amended to reflect language changes from a proposed rule change that the SEC approved, but was inadvertently omitted from the last amendment to this rule filing. See Securities Exchange Act Rel. No. 49716 (May 17, 2004), 69 FR 29342 (May 21, 2004) (File No. SR-NASD-2003-164).

While none of the commenters specifically address the Industry Code (File No. SR-NASD-2004-011), many of the issues raised apply to the Industry Code, because the two codes contain similar rules and procedures. Thus, NASD has considered the comments filed in connection with the Customer Code and has made similar changes to the Industry Code, where applicable. Therefore, this response to comments also will apply to the changes to the proposed rules of the Industry Code, where relevant.<sup>4</sup>

At the conclusion of the response to comments, NASD addresses any remaining issues raised by the SEC's Solicitation of Comments and provides a brief summary of other issues raised by the commenters that NASD believes are outside the scope of the rule filing, but could be addressed in a separate rule filing at a later time.

## I. Summary of Comments

### Definitions (Rule 12100)

Two commenters<sup>5</sup> suggest that the term "customer" be defined to help clarify jurisdictional and standing issues related to arbitration. One commenter<sup>6</sup> also suggests that the term "pleadings" be defined to assist *pro se* claimants understand which documents are required for their arbitration claims. Another commenter<sup>7</sup> suggests that the term "award" be defined to minimize the confusion concerning what type of ruling by the panel constitutes an award.

NASD agrees that these terms should be added to the Customer Code. The definition of "customer" is the same as that found in the general definitions for NASD rules, Rule 0129(g). The proposed rule change is amended as follows:

#### **12100. Definitions**

\* \* \*

#### **(b) Award**

An award is a document stating the disposition of a case.

\* \* \*

#### **(i) Customer**

A customer shall not include a broker or dealer.

\* \* \*

#### **(s) Pleadings**

A pleading is a statement describing a party's causes of action or defenses. Documents that are considered pleadings are: a statement of claim, an answer, a counterclaim, a cross claim, a third party claim, and any replies.

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<sup>4</sup> For example, the list selection rules will work differently in the Industry Code. Some industry cases have a majority public panel as in the Customer Code, but other cases have either an all-public panel (statutory employment discrimination claims) or an all-industry panel (employment claims relating exclusively to promissory notes, employment contracts, or receipt of commissions).

<sup>5</sup> PACE and Ryder.

<sup>6</sup> PACE.

<sup>7</sup> Ryder.

As a result of these additions, the remaining terms in the definition section have been re-lettered.

**Associated Person (Rule 12100(a))**  
**Person Associated with a Member (Rule 12100(p))**

One commenter<sup>8</sup> suggests that the definition of associated person or person associated with a member be amended to limit jurisdiction over a former associated person to two years, similar to provisions in NASD By-Laws.<sup>9</sup> The commenter asserts that these proposed rules, read in conjunction with Proposed Rule 12200, exercise jurisdiction over former associated persons in perpetuity. The commenter contends that there are no rules or by-laws for NASD Dispute Resolution that permit lifelong jurisdiction.

The two-year retention of jurisdiction in Article V, Section 4 of NASD By-Laws is for NASD regulatory purposes; it does not apply to arbitrations. In the arbitration context, NASD maintains jurisdiction over a former associated person for events that occurred while the person was associated with a member firm (or related to the person's termination of employment with a member firm). Such arbitrations are, of course, subject to any applicable Statute of Limitations and the six-year eligibility rule in Proposed Rule 12206. For these reasons, NASD is not proposing to amend Proposed Rules 12100(a) and 12100(p).

**Definition of Public Arbitrator (Rule 12100(n))**  
**Definition of Non-Public Arbitrator (Rule 12100(r))**

Twenty-three commenters<sup>10</sup> raise concerns with the definitions of public arbitrator and non-public arbitrator. First, these commenters argue that the term "non-public arbitrator" should be changed to "industry arbitrator." These commenters believe that the terminology is not in keeping with the goal of rewriting the Customer Code in plain English and suggest that this change would assist *pro se* parties or inexperienced attorneys with no background in arbitration. NASD notes that the term "non-public arbitrator" has existed since the SEC approved the Neutral List Selection System in 1998.<sup>11</sup> NASD believes users of the forum understand the term and does not agree that it should be changed.

In addition, these commenters suggest several changes to the definition of "public arbitrator" and objected to the inclusion of a non-public arbitrator on three-person panels. NASD has not made substantive amendments to these provisions in the Customer Code; therefore these suggestions are outside the scope of the rule filing.

**National Arbitration and Mediation Committee (Rule 12102)**

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<sup>8</sup> SIA.

<sup>9</sup> See NASD By-Laws, Art. V, Sec. 4.

<sup>10</sup> PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, Schultz, Estell, Miller, Caruso, and Sadler.

<sup>11</sup> See Securities Exchange Act Rel. No. 34-40555, 63 FR 56670 (Oct. 22, 1998) (approval order for File No. SR-NASD-1998-48).

Proposed Rule 12102 explains the composition and authority of the National Arbitration and Mediation Committee (NAMC).

One commenter<sup>12</sup> notes that the size and composition requirements of the NAMC are not included in the current Code.

NASD is codifying the size and composition requirements as set forth in the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries.<sup>13</sup>

### **Director of Dispute Resolution (Rule 12103)**

This proposed rule explains the duties and responsibilities of the Director of Dispute Resolution.

One commenter<sup>14</sup> notes the change in the Director's responsibilities concerning the NAMC. Specifically, under the current Code, the Director is directly responsible to the NAMC; under the Customer Code, the Director shall consult with the NAMC upon the NAMC's request.

NASD notes that the proposed rule has been changed to reflect current practice. The Director meets with the NAMC, usually every quarter, and updates the Committee on the state of the arbitration forum. At this time, the Director receives feedback and suggestions on arbitration rules and procedures. In terms of lines of authority, however, the Director reports to the President of NASD Dispute Resolution and ultimately, as an officer, to the NASD Dispute Resolution Board.<sup>15</sup>

Another commenter<sup>16</sup> expresses concern regarding the Director's authority to delegate certain functions as appropriate. According to the commenter, arbitrators represent that they will seek out the advice of NASD staff on certain issues, including who has the authority to issue subpoenas, discovery matters, and motions. The commenter contends that these are the types of issues that should be addressed to the panel and, if necessary, argued by the parties; NASD staff should not provide their opinions on such issues.

NASD's current policy is that staff advises arbitrators on procedural matters, but does not provide opinions on substantive issues. If the arbitrators ask staff about substantive matters, NASD staff suggests that the arbitrators have all the parties brief the issue, so that the arbitrators, not staff, can decide the issue. NASD will emphasize this policy in staff training on the Customer Code, upon approval of the rule filing.

### **Effect of Arbitration on NASD Regulatory Activities (Rule 12104)**

Proposed Rule 12104 provides that submitting a dispute to arbitration does not prevent NASD from taking additional regulatory action, if warranted. The rule also allows any arbitrator to make disciplinary referrals at the conclusion of an arbitration.

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<sup>12</sup> Ryder.

<sup>13</sup> See NASD Manual, Plan of Allocation and Delegation of Functions by NASD to Subsidiaries, Part V(C)(1)(b); Securities Exchange Act Rel. No. 34-37107 (April 11, 1996) (approval order for File No. SR-NASD-96-16).

<sup>14</sup> Ryder.

<sup>15</sup> See Article V, Section 5.1 of the NASD Dispute Resolution By-Laws.

<sup>16</sup> Magary.

One commenter<sup>17</sup> suggests that the proposed rule should have included language to authorize regulatory sanctions for breaches of the procedural requirements of the arbitration rules.

NASD notes that Proposed Rule 12104 is substantially the same as Rule 10105 of the current Code and gives arbitrators the authority to refer matters for disciplinary investigation at the conclusion of the case.

### **Agreement of the Parties (Rule 12105)**

Proposed Rule 12105(b) states that if the Director or the panel determines that a named party is inactive in the arbitration or has failed to respond after adequate notice has been given, the Director or the panel may determine that the written agreement of that party is not required while the party is inactive or not responsive. In its Solicitation of Comments, the SEC asks whether the term “inactive” party is defined sufficiently.

One commenter<sup>18</sup> notes that the current Code provisions that allow parties to modify rules have created problems in instances where there are “inactive” parties. This commenter believes the rule solves the problem by allowing active parties to dispense with approval from inactive parties if the Director or panel approves. This commenter supports the rule change and believes that it is sufficiently clear what an “inactive” party is.

Several commenters<sup>19</sup> suggest that “inactive” party be defined as a party in default for failure to file a response to a claim, counter-claim, or cross claim.

NASD believes that the rule language, as drafted, makes it is sufficiently clear what an “inactive” party is. In response to the comments and the SEC’s inquiry, however, NASD believes that providing examples of a party’s inactive status may help clarify further the term’s meaning. Based on current practices in the arbitration forum, the term “inactive” could apply to: (1) a party who answers and then fails to respond to administrative matters or correspondence; (2) a claimant who cannot be found, after the claimant’s attorney withdraws; or (3) a party who does not answer. (This list is meant to be illustrative, not exhaustive.) For the foregoing reasons, NASD is not proposing to amend Proposed Rule 12105.

### **Arbitration Under an Arbitration Agreement or the Rules of NASD (Rule 12200)**

Proposed Rule 12200 states that parties must arbitrate a dispute under the Customer Code if the dispute arises in connection with the business activities of the member or the associated person, except the insurance business activities of a member that is also an insurance company. Eighteen commenters<sup>20</sup> argue that variable annuities could (inadvertently) be excluded from arbitration under this rule, because some state statutes treat these products as insurance products, not securities. These commenters

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<sup>17</sup> Ryder.

<sup>18</sup> PACE.

<sup>19</sup> PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

<sup>20</sup> PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

also contend that the choice of whether to arbitrate variable annuity claims against NASD members should belong to the investor.

NASD notes that variable annuities are securities, and are not excluded from arbitration under the exception for disputes involving the insurance business of a member that is also an insurance company in Rule 10101 of the current Code. No substantive change is intended in Proposed Rule 12200.

One commenter<sup>21</sup> argues that the proposed rule should be amended to clarify that arbitration is permitted if “requested by the customer of the member.” The commenter asserts that this change will eliminate attempts by customers to demand arbitration of disputes against firms with which the customer does not have an account or other relationship. In response to this suggestion, a different commenter<sup>22</sup> opposes any such proposed amendment to the proposed rule, because it may jeopardize the legitimate claims of customers who have been victims of “selling away” claims (in which an associated person is alleged to have engaged in securities activities outside his or her firm). According to this commenter, there are numerous court decisions supporting the right of a customer to file a selling away claim against the brokerage firm that employed such an associated person, even if, technically, the customer has no account at that brokerage firm.

NASD agrees with the latter commenter that the suggested amendment would inappropriately narrow the scope of claims that are arbitrated under the Customer Code. Further, Proposed Rule 12200 is substantially the same as Rule 10301 of the current Code; hence, the comments made on the proposed rule seek changes to current policy and are outside the scope of the rule filing. For these reasons, NASD is not proposing to amend Proposed Rule 12200.

One commenter<sup>23</sup> suggests that the language of the proposed rule (*i.e.*, business activities of a member or the associated person) could alter the scope of arbitrable disputes that members must arbitrate with customers. The commenter also argues that a similar interpretation would apply where the Customer Code exempts from required arbitration disputes in connection with the “insurance business activities” of a member.

NASD notes that Proposed Rule 12200 is substantively the same as Rule 10301 of the current Code and is not intended to change the scope of arbitrable disputes. However, NASD agrees that the insurance company exception should be removed from Proposed Rule 12200, since it is already in Proposed Rule 12201. Hence, the proposed rule change is amended as follows:

**12200. Arbitration Under an Arbitration Agreement or the Rules of NASD**

Parties must arbitrate a dispute under the Code if:

- Arbitration under the Code is either:
  - (1) Required by a written agreement, or

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<sup>21</sup> SIA.

<sup>22</sup> Eccleston.

<sup>23</sup> Ryder.



(2) Requested by the customer;

- The dispute is between a customer and a member or associated person of a member; and
- The dispute arises in connection with the business activities of the member or the associated person[, except the insurance business activities of a member that is also an insurance company].

\* \* \*

### **Elective Arbitration (Rule 12201)**

One commenter<sup>24</sup> suggests that the language of the proposed rule (*i.e.*, business activities of a member or the associated person) could alter the scope of arbitrable disputes that members must arbitrate with customers. The commenter argues that the new phrase “business activities” of an associated person is a substantive change to types of cases that can be arbitrated because the phrase implies a “scope of employment” construction. This commenter also argues that including the “insurance company” exception in the elective arbitration rule implies that NASD cannot entertain the arbitration of such disputes, even if all the parties agree.

NASD disagrees with the commenter. Proposed Rule 12201 is not intended to alter the scope of claims that currently are eligible for arbitration under Rule 10101 of the current Code.

Finally, three commenters<sup>25</sup> argue that respondents should be required to disclose the presence and amount of insurance, so that small brokerage firms, who have insurance, cannot coerce a small settlement by falsely suggesting an inability to pay. These commenters suggest that this information would help claimants determine arbitrator conflicts and the affiliation of a respondent’s representative.

NASD notes that Proposed Rule 12201 is substantively the same as Rule 10101 of the current Code; hence, the comments made on this issue are outside the scope of the rule filing.

### **Denial of NASD Forum (Rule 12203)**

Proposed Rule 12203 explains when the Director or the President of Dispute Resolution may decline to permit use of the arbitration forum. One commenter<sup>26</sup> suggests that the proposed rule should clarify that if the Director or President denies the use of the forum, and if there is no alternate available forum specified in the arbitration agreement, a customer can pursue his remedies in court.

NASD does not believe it is appropriate to offer an opinion as to any other remedies that a party might be able to pursue. Accordingly, NASD proposes to amend the title of the proposed rule as follows:

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<sup>24</sup> *Id.*

<sup>25</sup> Lipner, Sutherland, and Canning.

<sup>26</sup> PACE.

### **12203. Denial of NASD Forum [and Referral to Other Forums]**

\* \* \*

One commenter<sup>27</sup> is concerned that, under the proposed rule, the Director no longer requires the approval of the NAMC or the Executive Committee for denial of access to the arbitration forum.

NASD notes that the proposed rule expands the grounds upon which the Director may deny access to the forum, to give the Director more flexibility in addressing security concerns and other unusual but serious situations that may require immediate resolution. The proposed rule also provides that the Director's authority under this rule may not be delegated or exercised by anyone other than the Director or the President of NASD Dispute Resolution.

### **Class Actions (Rule 12204)**

Eighteen commenters<sup>28</sup> raise two issues with how the current class action rule is interpreted by users of the forum. First, these commenters suggest that respondent member firms contend that any pending NASD arbitration involving a security that is also the subject of a pending class action lawsuit is ineligible for arbitration. These commenters argue that firms offer this argument even though claims made in the pending NASD arbitration are factually and legally distinguishable from those in the class action. Moreover, these commenters contend that the respondents move to dismiss even when the firms are not defendants in the class action.

Second, the commenters argue that, even though the current rule allows a party to opt out of the class action, it does not explain how a party could exercise the opt out provision. The commenters also question how a putative class member can demonstrate that he is not participating in the class action before a class has been certified.

Based on these comments, NASD agrees that Proposed Rule 12204(b) should be amended to clarify when a party may opt out of a class so an individual claim may be arbitrated, and the procedure a party would use to do so. The proposed rule change is amended as follows:

### **12204. Class Action Claims**

(a) No change.

(b) [No claim that is included] Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, [will] shall not be arbitrated under the Code, unless the party bringing the claim [shows] files with NASD one of the following:

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<sup>27</sup> Ryder.

<sup>28</sup> PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

(1) a copy of a notice filed with the court in which the class action is pending that [it is not participating] the party will not participate in the class action[,] or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court[,if any]; or

(2) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

(c) No change.

(d) No change.

\* \* \*

### **Time Limits (Rule 12206)**

One commenter<sup>29</sup> suggests that the current six-year eligibility rule should be eliminated, and instead the proposed rules should authorize the arbitration panel to apply, to the extent applicable, relevant statutes of limitations.

NASD notes that Proposed Rule 12206 is substantively the same as Rule 10304 of the current Code; hence, the comments made on this issue are outside the scope of the rule filing.

One commenter<sup>30</sup> suggests that NASD amend the proposed rule to clarify that this rule is not a statute of repose.

NASD believes that the suggestion could make Proposed Rule 12206 confusing; therefore, NASD is not proposing to amend the rule at this time.

### **Extension of Deadlines (Rule 12207)**

Two commenters<sup>31</sup> suggest that the standard for extending deadlines for answering the statement of claim should remain the same as in the current Code. The commenter contends that Proposed Rule 12207, when read together with Proposed Rule 12303, is less stringent than the current standard, which states that extensions of the time to answer are disfavored and will not be granted by the Director except in extraordinary circumstances.

NASD believes that having a single, uniform standard for extensions of deadlines by the Director simplifies the Customer Code and is in the public interest. Such extensions are not automatic upon request, but require the respondents to demonstrate that they have good cause for seeking an extension of time to answer the statement of claim. For these reasons, NASD is not proposing to amend Proposed Rule 12207 at this time.

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<sup>29</sup> PACE.

<sup>30</sup> Magary.

<sup>31</sup> Feinberg and Canning.

One commenter<sup>32</sup> notes that the proposed rule gives the Director the authority to override a panel deadline, even though this authority is limited to extraordinary circumstances. The commenter also questions the Director's need for this power and the necessity of overriding a case-specific ruling made by a panel.

The phrase "extraordinary circumstances" would encompass such unexpected and uncontrollable events as a weather-related or security emergency. There have been instances, such as hurricanes and terrorist attacks, when Dispute Resolution offices had to be evacuated, the offices of parties and counsel were damaged, and hearings could not be held safely. In such situations, the Director needs the authority to postpone deadlines until order is restored.

### **Sanctions (Rule 12212)**

One commenter<sup>33</sup> argues that Proposed Rule 12212 grants broad authority to the panel to impose sanctions without providing guidance on how and when the rule should be applied. This commenter contends that the proposed rule expands the scope of a panel's authority from current practice by permitting sanctions for violations of any provision of the Customer Code. Moreover, the commenter suggests that the lack of procedural and substantive standards creates the risk that sanctions will become a routine part of arbitration practice. The commenter suggests that the proposed rule be amended to, among other things, include a provision requiring notice and an opportunity to be heard, and remove language that grants a panel the authority to sanction for failing to comply with any provision of the Code.

NASD notes that Proposed Rule 12212 incorporates and codifies the sanctions provisions in the NASD Discovery Guide. The proposed rule is intended to provide more guidance to parties and arbitrators regarding the scope of arbitrator authority to address noncompliance with the Customer Code or orders of the panel. NASD has expanded the scope of a panel's authority to impose sanctions for violations of any provision of the Code to clarify that the panel has the authority to control all aspects of an arbitration, and, therefore, must have the ability to enforce the rules of the forum as well as its orders. NASD believes that this authority will deter parties from violations of the Customer Code, which require considerable time and effort to resolve. Further, NASD believes that this authority will expedite the pace of arbitrations, as parties face the possibility of sanctions for the use of abusive tactics. In the arbitrator training materials on the Customer Code, NASD will provide guidance on how and when this rule should be applied. For these reasons, NASD is not proposing to amend the proposed rule at this time.

One commenter<sup>34</sup> who supports Proposed Rule 12212 believes that, under the Customer Code, a gap exists in a panel's authority to sanction due to the delay in the selection of arbitrators and the resulting inability of parties to enforce compliance the provisions of the Customer Code. Thus, this commenter suggests that the proposed rule be amended further to provide explicit authority to a panel or other neutral to sanction parties for abusive or violative conduct that occurs before the appointment of a panel.

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<sup>32</sup> Ryder.

<sup>33</sup> SIA.

<sup>34</sup> PACE.

Under Proposed Rule 12212, the panel will have the discretion to impose sanctions for any violations of the Customer Code, regardless of when these violations occurred. For this reason, NASD is not proposing to amend the proposed rule at this time.

One commenter<sup>35</sup> contends that the proposed rule does not contain any standards for imposing sanctions, other than for failure to comply with any provision in the Customer Code. The commenter also argues that a party cannot appeal an abusive or excessive ruling, and arbitrators are not required to explain their decision to impose sanctions. This commenter also suggests that Proposed Rule 12212 be amended to require that forum fees be assessed against the industry, except in cases where a claim is brought in bad faith, and require the panel to explain its findings, if a panel assesses fees against an individual.

A panel's rulings are not appealable under the Customer Code, and NASD is not proposing to create an appellate process. Parties may ask the arbitrators to explain their imposition of sanctions in the award. Parties may, as at present, seek to vacate or modify an award on the grounds provided by applicable federal or state arbitration laws. Although sanctions are rarely imposed, NASD will recommend in its arbitrator training on this topic that arbitrators provide a written explanation for any sanctions in the award. For these reasons, NASD is not proposing to amend Proposed Rule 12212 at this time.

One commenter<sup>36</sup> suggests that the proposed rule should emphasize that a panel can order a disciplinary referral for a violation of NASD rules that has occurred either during an arbitration or as a result of conduct addressed as a claim in arbitration.

NASD is not proposing to amend Proposed Rule 12212 at this time, but will address the use of disciplinary referrals in NASD arbitrator training materials on the Customer Code.

### **Hearing Locations (Rule 12213)**

Proposed Rule 12213 provides that the Director generally will select the hearing location closest to the customer's residence at the time of the events giving rise to the dispute. One commenter<sup>37</sup> supports the proposed rule, but is concerned that a *pro se* customer might be discouraged from submitting an arbitration claim because the customer could not afford to travel to a distant hearing location. This commenter suggests that the NASD amend the proposed rule to clarify that a customer may request a more convenient hearing location upon filing a claim.

NASD notes that Proposed Rule 12213 is substantively the same as Rule 10315 of the current Code. NASD believes the commenter's suggested change may provide customers with the false impression that their request will be the only factor used to determine where the hearing is held. Currently, parties may request a hearing location and this request will be considered, along with other factors, in determining the hearing location for an arbitration. This practice will not change under the Customer Code.

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<sup>35</sup> Ragsdale.

<sup>36</sup> Magary.

<sup>37</sup> PACE.

As noted, Proposed Rule 12213 is substantively the same as Rule 10315 of the current Code. Therefore, the panel, once appointed, has the authority to change the hearing location. This authority is included in Proposed Rule 12503(c)(2), and NASD believes that it is logical to include this authority in Proposed Rule 12213. Thus, the proposed rule is amended as follows:

**12213. Hearing Locations**

**(a) U.S. Hearing Location**

(1) No change.

(2) No change.

(3) No change.

(4) After the panel is appointed, the panel may decide a motion relating to changing the hearing location.

**(b) Foreign Hearing Location**

No change.

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**Filing and Serving Documents (Rule 12300)**

Two commenters<sup>38</sup> suggest that Proposed Rule 12300 should allow the claimant to serve the respondents with the statement of claim and the Uniform Submission Agreement (USA) directly. The commenter argues that this change would be especially helpful to the claimant when time is of the essence.

Currently, NASD tries to serve claims as quickly as possible, and if staff is notified that a party is elderly or infirm, NASD will try to expedite the process even further. NASD notes that Proposed Rule 12300 does not change the current process for serving claims. The comments made on this issue are, therefore, outside the scope of the rule filing.

**Service on Persons Currently Associated with a Member (Rule 12301)**

One commenter<sup>39</sup> notes that the proposed rule language does not limit its use to the Director or to initial pleadings. The commenter suggests that, under Proposed Rule 12301, a claimant would be allowed to serve subsequent pleadings on the member only, which could delay service on the associated person. Thus, the commenter suggests amending the proposed rule so that it applies only to the service of initial pleadings, or is available only to the Director for service of statements of claim.

NASD did not intend to make any substantive changes to the current rule, which permits (but does not require) the Director to serve statements of claim on active associated persons through their firms when the associated person and the firm are respondents. In practice, however, NASD rarely uses this form of service. NASD has

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<sup>38</sup> Feinberg and Canning.

<sup>39</sup> SIA.

determined, therefore, that the proposed rule should be amended to reflect current procedure. These requirements will apply to initial statements of claim only. The proposed rule change is amended as follows:

**12301. Service on Associated Persons [Currently Associated with a Member]**

(a) [If a member and a person currently associated with the member are named as respondents to the same arbitration,] The Director will serve the initial statement of claim on [service on the person] an associated person [with the member] directly at the person's residential address or usual place of abode [may be made on the member or directly on the associated person]. If service cannot be completed at the person's residential address or usual place of abode, the Director will serve the initial statement of claim on the associated person at the person's business address.

(b) If a member and a person currently associated with the member are named as respondents to the same arbitration, and the Director cannot complete service as provided in paragraph (a), then the Director may serve the member with the initial statement of claim on behalf of the associated person. If service is made on the member, the member must serve the associated person, even if the member will not be representing the associated person in the arbitration. If the member is not representing the associated person in the arbitration, the member must notify, and provide the associated person's current address to, all parties and the Director.

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**Filing an Initial Statement of Claim (Rule 12302)**

One commenter<sup>40</sup> suggests that NASD amend Proposed Rule 12302 to state that there is no requirement that the statement of claim plead legal causes of action or legal theories.

NASD notes that Proposed Rule 12302 is substantially the same as Rules 10314(a)(1) and (2) of the current Code; hence, the comments made on this rule are outside the scope of the rule filing.

Two commenters<sup>41</sup> suggest that the proposed rule should allow the claimant to serve the respondents with the statement of claim and the USA directly.

NASD notes that Proposed Rule 12300 does not change the current process for serving claims. The comments made on this issue are, therefore, outside the scope of the rule filing.

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<sup>40</sup> PACE.

<sup>41</sup> Feinberg and Canning.

### **Deficient Claims (Rule 12307)**

Proposed Rule 12307 provides that the Director will not serve any claim that is deficient and lists the reasons that a claim may be deficient. Two commenters<sup>42</sup> contend that the proposed rule should also apply when an answer is deficient, such as when a respondent fails to submit a USA. The commenter contends that respondents attempt to circumvent the deadlines of certain current Code provisions by filing a one-page denial as an initial answer, so that they can submit an amended answer at their convenience. The commenter argues that there should be uniformity in application of the current rule.

NASD notes that the proposed rule codifies current deficiency practice. There is a fundamental difference between claims and answers: NASD serves the initial statement of claim once all deficiencies are cured, but respondents serve their answers directly. NASD does not have a mechanism to delay or prevent service of the answer. Arbitrators retain the authority, however, to sanction the respondent as provided in Proposed Rules 12308 and 12212.

### **Loss of Defenses Due to Untimely or Incomplete Answer (Rule 12308)**

One commenter<sup>43</sup> argues that Proposed Rule 12308(a) permits a panel to bar a respondent from presenting facts or defenses for failure to timely answer any claim. The commenter contends that, based on the definition of “claim,” the proposed rule could bar a respondent’s answer if the respondent fails to timely respond to an allegation. Based on this interpretation, the commenter argues that the proposed rule imposes a severe penalty for failure to answer an allegation regardless of materiality, a party’s ability to investigate by the time the answer is due, or the “boilerplate” nature of the allegation. The commenter suggests that NASD amend the proposed rule to address this concern.

NASD notes that Proposed Rule 12308 is substantially the same as Rule 10314(b)(2) of the current Code; hence, the comments made on Proposed Rule 12308 are outside the scope of the rule filing.

One commenter<sup>44</sup> notes that under Rule 10314(e) of the current Code, default proceedings apply to defunct firms only. This commenter argues that the reference to default proceedings under Proposed Rule 12801 can be read as expanding the default proceedings to include non-responsive respondents, whether active or defunct.

NASD disagrees with this commenter’s interpretation and addresses this issue under Proposed Rule 12801.

### **Amending Pleadings (Rule 12309)**

Two commenters<sup>45</sup> contend that respondents attempt to prevent claimants from submitting a response to amended pleadings by alleging that Rule 10314 of the current

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<sup>42</sup> Meissner and Canning.

<sup>43</sup> SIA.

<sup>44</sup> Ryder.

<sup>45</sup> Meissner and Canning.



Code only allows the claimant to reply to a counterclaim. The commenter suggests that NASD amend Proposed Rule 12310 to clarify that all parties have a right to file a response to any amended pleading, as permitted by Rule 10328 of the current Code.

NASD did not intend to change current practice in the Customer Code. The current rules governing answering counterclaims, cross claims, and amended claims do not prohibit a party from responding to any amended pleadings; however, they do not specifically permit the practice. Thus, NASD agrees that Proposed Rule 12309 should be amended to clarify that all parties have a right to file a response to any amended pleading. Also, NASD is proposing to amend Proposed Rule 12309(a)(1) to clarify that the service requirements of Proposed Rule 12300 also apply to Proposed Rule 12309. The proposed rule change is amended as follows:

### **12309. Amending Pleadings**

#### **(a) Before Panel Appointment**

Except as provided in paragraph (c), a party may amend a pleading at any time before the panel has been appointed.

(1) To amend a statement of claim that has been filed but not yet served by the Director, the claimant must file the amended claim with the Director, with additional copies for each arbitrator and each other party. The Director will then serve the amended claim in accordance with Rules 12300 and 12301.

(2) No change.

(b) No change.

(c) No change.

#### **(d) Responding to an Amended Pleading**

Any party may file a response to an amended pleading, provided the response is filed and served within 20 days of receipt of the amended pleading, unless the panel determines otherwise.

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### **Answering Amended Claims (Rule 12310)**

One commenter<sup>46</sup> notes that under paragraphs a, b, and c of Proposed Rule 12310, a respondent is given 20 days to answer an amended statement of claim. The commenter suggests that NASD amend the proposed rule so that each 20-day period is calculated from the respondent's receipt of the amended statement of claim.

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<sup>46</sup> SIA.

As part of the initiative to standardize time limits in the Customer Code, the time to answer an amended claim has been extended from 10 business days to 20 calendar days. Thus, a respondent will have more time to respond to an amended claim under the Customer Code. For this reason, NASD is not proposing to amend the proposed rule at this time.

**Multiple Claimants (Rule 12312)**  
**Multiple Respondents (Rule 12313)**

Two commenters<sup>47</sup> argue that Proposed Rules 12312 and 12313 substantively change the joinder requirements for multiple parties. The commenters contend that the proposed rules make substantive changes to Rule 10314(d) of the current Code, which tracks Rule 20 of the Federal Rules of Civil Procedure (FRCP), “Permissive Joinder of Parties.” The commenters contend that the phrase concerning joint and several relief is misplaced and changes the application of Rule 10314(d) of the current Code.

NASD notes that Proposed Rules 12312 and 12313 have not changed the joinder requirements that exist in Rule 10314(d) of the current Code, but merely reformatted them. Under FRCP Rule 20 and in Rule 10314(d) of the current Code, the phrase concerning joint and several relief is an alternative requirement to the “same transactions or occurrences” requirement, and is appropriately placed in the proposed rule.

One commenter<sup>48</sup> suggests that the changes to Proposed Rule 12312 would prevent the joinder of claimants in certain situations, which would result in added expense and repetitious hearings for the parties. The commenter believes the proposed rule language should be broader to give a panel more discretion to join claims if it would save time and money and not be unreasonably prejudicial to the parties.

As noted above, NASD has not changed the joinder requirements that exist in Rule 10314(d) of the current Code. Hence, these comments are outside the scope of the rule filing.

One commenter<sup>49</sup> argues that Proposed Rule 12312(b) gives the Director unfettered discretion to sever claims, without providing any standards for doing so. The commenter also contends that severing claims could impose a financial hardship on some parties. Thus, the commenter suggests that NASD amend the proposed rule to incorporate the standards used to determine when to sever a claim.

NASD notes that Proposed Rules 12312 and 12313 list the criteria for determining when cases may be joined. Conversely, cases involving multiple claimants or multiple respondents that do not meet these criteria may be severed. NASD did not intend to change the current policy that the Director’s decision to consolidate or sever claims is preliminary and may be reconsidered by the surviving panel, in the case of joining parties.

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<sup>47</sup> SIA and Krosschell.

<sup>48</sup> Greco.

<sup>49</sup> Magary.

In the rare instance in which the Director severs claims, however, NASD believes the proposed rules should be amended to codify current practice. Because there are multiple surviving panels when the Director severs claims, there would be two or more panels reviewing the Director's decision, with potentially conflicting results. To avoid inconsistent results and to expedite the arbitration process, NASD currently forwards any motion to rejoin severed claims to the panel on the lowest numbered case (i.e., the panel from the first-filed claim in the matter that was severed) to decide a motion to re-join the claims. In light of the comments and current practice in the forum, NASD is amending Proposed Rules 12312(b) and 12313(b) as follows:

**12312. Multiple Claimants**

(a) No change.

(b) After all responsive pleadings have been served, claims joined together under paragraph (a) of this rule may be separated into two or more arbitrations by the Director before a panel is appointed, or by the panel after the panel is appointed. A party whose claims were separated by the Director may make a motion to the panel in the lowest numbered case to reconsider the Director's decision.

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**12313. Multiple Respondents**

(a) No change.

(b) After all responsive pleadings have been served, claims joined together under paragraph (a) of this rule may be separated into two or more arbitrations by the Director before a panel is appointed, or by the panel after the panel is appointed. A party whose claims were separated by the Director may make a motion to the panel in the lowest numbered case to reconsider the Director's decision.

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**Combining Claims (Rule 12314)**

Proposed Rule 12314 allows the Director to make decisions concerning whether to consolidate separate but related claims, and, once a panel is appointed, allows the panel to reconsider the Director's decision upon motion of a party. One commenter<sup>50</sup> contends that, under the proposed rule, the panel no longer has the authority to review *sua sponte* an order to sever or consolidate claims by the Director. The commenter contends that, under the current Code, the Director has the authority to make preliminary rulings on these issues and the panel has the plenary authority, once appointed, to review any such rulings involving multiple parties. The commenter believes the proposed rule eliminates this authority of the panel.

NASD disagrees with the commenter. In the current Code, following provisions that allow the Director to make preliminary determinations on consolidation and

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<sup>50</sup> Ryder.

severance, Rule 10314(d) states: “Further determinations with respect to joinder, consolidation, and multiple parties under this paragraph (d) shall be made by the arbitration panel and shall be deemed final.” NASD did not intend to change the current practice, in which the panel makes such determinations upon a motion of a party.

### **Neutral List Selection System and Arbitrator Rosters (Rule 12400(a))**

Nineteen commenters<sup>51</sup> suggest that NASD hire a neutral third party, not connected to NASD or the securities industry, to conduct an annual audit of the Neutral List Selection System (NLSS), and make the results of the audit publicly available on NASD’s Web site.

NASD is committed to ensuring that the NLSS operates as described in the Customer Code. Thus, NASD plans to hire an independent auditor to conduct an initial audit of the system and will make public the results of the audit. Thereafter, NASD will conduct an audit on an as needed basis.

### **Arbitrator Rosters (Rule 12400(b))**

Proposed Rule 12400 does not specify whether chair-qualified public arbitrators will also be included in the public non-chair list. Eighteen commenters<sup>52</sup> oppose including arbitrators eligible for the chairperson pool in the general public arbitrator pool, because they believe it will allow arbitrators on the chair lists to appear on panels more frequently than public arbitrators.

Three commenters<sup>53</sup> state that they would oppose the proposed rule if arbitrators who are eligible to be listed on the chairperson roster were not also eligible to be listed on the general public arbitrator roster. These commenters and others<sup>54</sup> contend that this interpretation would decrease the pool of experienced, knowledgeable public arbitrators, particularly in regions of the country where the size of the arbitrator pool is already limited. Further, many of these commenters argue that arbitration panels selected under this interpretation would have less overall experience and expertise than they currently have, which would be detrimental to all parties.

NASD agrees that chair-qualified arbitrators should be included in the public arbitrator pool as well as in the public chair pool. As a result, NASD is proposing to amend the proposed rule language to make this clear. NASD notes that this proposed change will not result in duplication of names on the chair and public lists for the same case as the rule filing suggests.<sup>55</sup> NLSS will be programmed to select arbitrators such that a specific arbitrator’s name will not appear on both lists in the same case. NASD believes the proposed change will provide users of the forum with access to an

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<sup>51</sup> PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, and Estell.

<sup>52</sup> PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

<sup>53</sup> Schwab, Stolle, and PACE.

<sup>54</sup> PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, Miller, and Feldman.

<sup>55</sup> See Securities Exchange Act Rel. No. 34-51856, 70 FR 36442, 36446 (June 23, 2005) (Customer Code).

expanded pool of the most experienced public arbitrators. Also, NASD is proposing to amend the title of Proposed Rule 12400(b) to correct a typographical error.

The proposed rule change is amended as follows:

**12400. Neutral List Selection System and Arbitrator Rosters**

**(a) Neutral List Selection System**

No change.

**(b) Arbitrator[s] Rosters**

NASD maintains the following roster of arbitrators:

- A roster of non-public arbitrators as defined in Rule 12100(n);
- A roster of public arbitrators as defined in Rule 12100(r); and
- A roster of arbitrators who are eligible to serve as chairperson of a panel as described in paragraph (c). Arbitrators who are eligible to serve as chairperson will also be included in the roster of public arbitrators, but will only appear on one list in a case.

**(c) Eligibility for Chairperson Roster**

No change.

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**Eligibility for Chairperson Roster (Rule 12400(c))**

The proposed rules governing NLSS and arbitrator appointment establish a new chair list. Twenty-five commenters<sup>56</sup> oppose the creation of the chair list and question the chair eligibility requirements of Proposed Rule 12400(c). One commenter<sup>57</sup> supports the concept of the chair list, but disagrees with the criteria used to select the arbitrators for the list. The primary objections raised by the commenters are (1) that the term “substantially equivalent training” is not defined and allows for subjective interpretation, which could lead to inexperienced persons serving as chairs; (2) that the chair list would create a class of “professional arbitrators” who would strive for the appearance of fairness to both sides by issuing more compromise awards; and (3) that a law degree and litigation experience are better predictors of chair qualification than serving as an arbitrator on two or three cases.

First, NASD believes that the term “substantially equivalent training” is defined sufficiently in the narrative portion of the rule filing. The rule filing states that “substantially equivalent training or experience would include service as a judge or administrative hearing officer, chairperson training offered by another recognized dispute resolution forum, or the like.” Other factors, such as peer, party, and staff evaluations and a willingness to serve as chair, will be used in determining whether an arbitrator

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<sup>56</sup> PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, Estell, Caruso, Miller, Layne, Meissner, Greco, and Sadler.

<sup>57</sup> PACE.

should be added to the chair list. These standards require the use of judgment, and the SEC retains oversight authority to review the staff's decisions. NASD does not plan to grandfather any current arbitrators solely because they may have served as chairs on previous panels.

Second, NASD disagrees with the comments that the chair list will create a group of professional arbitrators. NASD believes that eliminating the ability to select an arbitrator based on expertise and implementing the random selection function of NLSS will expand use of the full arbitrator pool, so that all arbitrators on the lists will have the same chance of being selected for any case. Moreover, all arbitrators take an oath in which they affirm their neutrality and ability to decide a matter fairly. NASD expects all arbitrators to adhere to these basic principles, regardless of the arbitrators' classification.

Last, NASD believes that the requirement that an arbitrator serve on at least three arbitrations through award to be eligible for the chair roster is an objective standard that is easily measured.<sup>58</sup> While this standard is easy to measure, it is not easy to meet. Of the arbitration cases filed in the past four years, approximately 22% went to hearing.<sup>59</sup> NASD believes that the experience and training gained by arbitrators in the time it takes to serve on three hearings through award should qualify an arbitrator to serve as a chair even without legal training or experience.

For these reasons, NASD is not proposing to modify the rule filing or Proposed Rule 12400(c) concerning these issues.

### **Generating and Sending Lists to Parties (Rule 12403)**

Currently, NLSS generates a list of five names for a single arbitrator customer case; for a three-arbitrator case, NLSS generates a list of ten public arbitrators and five non-public arbitrators.<sup>60</sup> Once the parties receive the lists, they begin the process of selecting the members of the panel by striking arbitrators from each list, and ranking the others. Currently, the parties have an unlimited number of strikes, which they may exercise for any reason. This often results in so many strikes by both sides that an insufficient number of names remain on the list to fill a panel. When this happens, the computer must generate additional names in the appropriate public/non-public categories and "extend" the list to fill the panel. When the list is extended, parties often are unhappy because they have no additional strikes to use, and can make only challenges for cause.

In the Customer Code, therefore, NASD devised a system of limited strikes to ensure that more names from the original list would remain. NASD proposed that NLSS select seven arbitrators from a particular arbitrator roster (public chair, public, and non-public) to generate the lists to be sent to the parties. Each separately represented party could strike up to five of the seven arbitrators on each list for any reason, but two names

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<sup>58</sup> Similarly, the requirements that the chair have a law degree and be a member of the Bar are also objective standards, subject only to verification.

<sup>59</sup> This average is based on data listed on NASD's Web site under Dispute Resolution Statistics, How Arbitration Cases Close (visited April 13, 2006) <[http://www.nasd.com/web/idcplg?IdcService=SS\\_GET\\_PAGE&nodeId=516&ssSourceNodeId=12](http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&nodeId=516&ssSourceNodeId=12)>.

<sup>60</sup> The SEC has given NASD permission to generate lists of only three names per arbitrator slot in the smaller hearing locations.

would remain on each list. NASD's objective was to increase the likelihood that some of the original names from the first list would remain after the striking and ranking process.

Some commenters noted that the procedure for striking arbitrators under the Customer Code is an improvement over the current system, but still could result in entire lists being stricken.<sup>61</sup> For example, if a claimant strikes the first five arbitrators from a seven-name list and a respondent strikes arbitrators three through seven, then the parties will have stricken the entire list. Thus, the commenters argue that NASD will appoint arbitrators more often than the parties select them. To avoid having NASD appoint arbitrators, these commenters suggest that NLSS generate a second list with limited strikes in the event that all candidates are stricken from a list. Also, some commenters<sup>62</sup> suggest that, if each party only ranks two arbitrators from the list, there is a likelihood for ties in the rankings of arbitrators by claimants and respondents.

In light of the comments, NASD proposes to increase the number of arbitrators on each list to eight, and to reduce the number of strikes per each separately represented party to four. By increasing the panel size and reducing the number of strikes, there is a greater likelihood that arbitrators from the original list will remain on the list after the parties exercise their strikes and all lists are consolidated.<sup>63</sup> This change will not eliminate the possibility of computer-generated extended lists, but should reduce the instances of extended lists, thus providing parties with more control in the arbitrator selection process.

NASD is proposing to amend Proposed Rule 12403 to increase the number of arbitrators on each list to eight and to amend Proposed Rule 12404 to reduce the number of strikes per each separately represented party to four. Also, NASD is proposing to amend Proposed Rule 12403 to clarify that those arbitrators who are eligible to serve as chairperson will be included in the roster of public arbitrators, but will only appear on one list in a case. The proposed rule change is amended as follows:

### **12403. Generating and Sending Lists to the Parties**

#### **(a) Generating Lists**

(1) If the panel consists of one arbitrator, the Neutral List Selection System will generate a list of [seven] eight public arbitrators from the NASD's chairperson roster.

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<sup>61</sup> PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, Estell, Caruso, Miller, Layne, Meissner, Greco, and Sadler.

<sup>62</sup> Id.

<sup>63</sup> The system will select randomly one name at a time for each list (i.e., chair, public, non-public), and list the names in the order in which they were selected. The first arbitrator selected would be Arbitrator #1; the second would be Arbitrator #2, etc. After the parties have made their selections and the lists have been consolidated, in the unlikely event of a tie among arbitrators, the system will break the tie based on the order in which the arbitrators were placed on the list. So, for example, if Arbitrators 3 and 5 are "tied" after the public lists are consolidated, the system will select Arbitrator 3 for the public non-chair position, because the system selected him or her before Arbitrator 5.

(2) If the panel consists of three arbitrators, the Neutral List Selection System will generate:

- A list of [seven] eight arbitrators from the NASD's non-public arbitrator roster;
- A list of [seven] eight arbitrators from the NASD's public arbitrator roster; and
- A list of [seven] eight public arbitrators from the NASD's chairperson roster.

(3) If the panel consists of three arbitrators, the Neutral List Selection System will generate the chairperson list first. Chair-qualified arbitrators who were not selected for the chairperson list will be eligible for selection on the public list. An individual arbitrator cannot appear on both the chairperson list and the public list for the same case.

(4) No change.

**(b) Sending Lists to Parties**

No change.

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**Striking and Ranking Arbitrators (Rule 12404)**

As discussed under Proposed Rule 12403, NASD is proposing to amend this rule to reduce the number of strikes per each separately represented party to four. The proposed rule change is amended as follows:

**12404. Striking and Ranking Arbitrators**

(a) Each separately represented party may strike up to [five] four of the arbitrators from each list for any reason by crossing through the names of the arbitrators. [Two] At least four names must remain on each list.

(b) No change.

(c) No change.

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One commenter<sup>64</sup> suggests that Proposed Rule 12404 should include a procedure for replacing arbitrators who have disqualifying conflicts before the parties are required to submit their rankings.

NASD Dispute Resolution's new computer platform, MATRICS,<sup>65</sup> will be programmed to check for certain conflicts before the lists are sent to parties. For

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<sup>64</sup> SIA.



example, MATRICS will eliminate from a list any arbitrator who is currently employed by a firm that is a party to the case. MATRICS will also eliminate any arbitrator with a securities account at a firm that is a party to the case. In these instances, parties will not have to use a strike to eliminate an arbitrator with such conflicts.

**Appointment of Arbitrators; Discretion to Appoint Arbitrators Not on List (Rule 12406)**

Many non-industry commenters<sup>66</sup> oppose the inclusion of a non-public arbitrator on three-person panels under Proposed Rule 12406(c). In response to these comments, NASD notes first that Proposed Rule 12406(c) has not changed the substantive requirements that exist concerning arbitrator appointments in Rule 10308(c)(4) of the current Code. Hence, the comments made on this rule are outside the scope of the rule filing. Second, NASD has made significant changes to the definition of “public arbitrator” to ensure that the public arbitrators are truly public and is considering further changes. Third, in originally approving NLSS, the SEC found that the NASD had created reasonable procedures for implementing the list selection process, which it determined should give investors and other parties more input into the selection of the arbitration panel, and were consistent with the Exchange Act.<sup>67</sup> Finally, the analyses NASD has performed do not show any bias on the part of industry arbitrators. For these reasons, NASD is not proposing to amend the proposed rule at this time.

In its Solicitation of Comments, the SEC notes that under Proposed NASD Rules 12406, 12410, and 12411, each side in the arbitration would not be given a peremptory strike in the event it becomes necessary for the Director to appoint an arbitrator. The SEC asks: where the Uniform Code differs from the proposed NASD Rules with respect to appointment of arbitrators by the Director, which alternative is preferable?

Many commenters<sup>68</sup> oppose Proposed Rule 12410 to the extent that it varies from the Uniform Code by not providing the parties with a peremptory strike when it is necessary for the Director to appoint an arbitrator. These commenters contend that the proposed standard for removal is overly restrictive and unlikely to provide assurances of impartiality to an investor who objects to the appointment of an arbitrator whom he or she had no voice in selecting. One commenter<sup>69</sup> believes that Proposed Rule 12410 is an improvement over current practice, but that one peremptory strike per side would be appropriate where it is necessary for the Director to appoint an arbitrator.

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<sup>65</sup> NASD Dispute Resolution is upgrading its computer technology platform, in what is known as the MATRICS Computer Project. MATRICS stands for Mediation and Arbitration Tracking and Retrieval Interactive Case System. MATRICS will replace two legacy case management systems: CRAFTIS and NLSS. CRAFTIS is the legacy software application that NASD Dispute Resolution uses to support its case administration functions. It uses an old technology platform and is not Web-based. NLSS is the computer program NASD Dispute Resolution uses to appoint arbitrators.

<sup>66</sup> PIABA, PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, Estell, Caruso, Miller, Layne, Meissner, Greco, Sadler, Fynes, and Jones.

<sup>67</sup> See *supra* note 11.

<sup>68</sup> PACE, PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, Greco, Layne, Caruso, Miller, and Meissner.

<sup>69</sup> Greco.

In response to these comments and the SEC's inquiry, NASD notes that Proposed Rule 12410 has not changed the substantive requirements that exist concerning arbitrator removal in Rules 10308(d)(1) – (3) and (f), and Rule 10312(d) of the current Code. NASD also believes that the proposed changes to Proposed Rules 12403 and 12404 will minimize the need for preemptory strikes by reducing the instances of extended lists, thus providing parties with more control in the arbitrator selection process. Therefore, NASD is not proposing to allow preemptory strikes when the list is extended.

### **Disclosures Required of Arbitrators (Rule 12408)**

One commenter<sup>70</sup> suggests that arbitrator disclosure obligations should parallel those set forth by the California Judicial Council, in which prospective arbitrators must disclose, among other things, all arbitrations in which the arbitrator was a panelist, which forums conducted the arbitrations, and whether any of the parties or their counsel in the current proceeding were involved in any proceeding in which the arbitrator was a panelist.

In response to these comments, NASD notes that subparagraph (a)(4) was added to Proposed Rule 12408 to reflect approval of a proposed rule change by the SEC on March 7, 2005. Otherwise, there are no substantive changes from Rules 10312(a), (b), (c), and (e) of the current Code. Hence, the comments made on Proposed Rule 12408(a)(4) are outside the scope of the rule filing.

In its Solicitation of Comments, the SEC suggests that Proposed Rule 12408(a)(4) may have two interpretations. The SEC suggests that the proposed rule could mean that arbitrators must disclose only any service as a mediator that might preclude the arbitrator from rendering an objective and impartial determination in the proceeding. Alternatively, the SEC suggests that the proposed rule could mean that arbitrators must disclose any existing or past service as a mediator, even if it has no connection with the proceeding. Based on these interpretations, the SEC asks whether the proposed rule should be amended to reflect precisely one or the other interpretation.

One commenter<sup>71</sup> believes that it is clear that the proposed rule calls for arbitrators to disclose "existing or past service as mediator" on any case, not just service that the arbitrator thinks would affect impartiality in the instant proceeding. According to the commenter, an arbitrator's ethical obligations would preclude a more constrained reading of the rule. Many commenters<sup>72</sup> also support the interpretation that results in full disclosure.

NASD believes that the interpretation of Proposed Rule 12408(a)(4) that requires an arbitrator to disclose all existing or past service as a mediator on any case is too broad. Some of the arbitrators in NASD's forum have served as a mediator for a significant number of cases, and the list of cases could change frequently. NASD

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<sup>70</sup> Canning.

<sup>71</sup> PACE.

<sup>72</sup> PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, Estell, Layne, Greco, Sadler, Caruso, Miller, and Meissner.

believes that it would be unduly burdensome, and of little value to parties, to require these arbitrators to disclose all their existing or past service as a mediator on any case. Moreover, NASD believes this requirement would result in a significant reduction in the arbitrator roster. NASD believes, however, that arbitrators who serve as mediators should disclose whether they have served as a mediator for any of the parties in the case for which they have been selected. Thus, NASD plans to update the arbitrator disclosure forms to include a question that will require the arbitrator to provide this information. For these reasons, NASD does not believe the proposed rule should be amended at this time.

### **Arbitrator Recusal (Rule 12409)**

One commenter<sup>73</sup> suggests that Proposed Rule 12409 be amended to prevent “panel shopping.” The commenter contends that parties will request the recusal of an arbitrator based on an adverse ruling prior to the hearing on the merits. The commenter suggests that a provision be added to the proposed rule that states that a ruling adverse to the party requesting recusal does not constitute good cause.

Arbitrators are aware that some parties may use recusal requests as a way to obtain a more favorable panel. The proposed rule provides an arbitrator with the discretion, in deciding whether to grant a recusal request, to determine whether the party making the request has demonstrated good cause for its request. NASD does not believe it is appropriate to limit this discretion, and is not proposing to amend the rule at this time.

### **Removal of Arbitrator by Director (Rule 12410)**

One commenter<sup>74</sup> notes that Proposed Rule 12410(a)(1) states that close questions regarding challenges to an arbitrator by a customer will be resolved in favor of the customer. The commenter argues that there is no justification for continuing this “double standard.” Thus, the commenter provides suggested language to change the standard and suggests that the term “indirect” be removed in the phrase, “direct or indirect interest in the outcome of the arbitration.”

In response to these comments, NASD notes that Proposed Rule 12410 has not changed the substantive requirements that exist concerning arbitrator removal in Rules 10308(d)(1) – (3) and (f), and Rule 10312(d) of the current Code. The comments made on this rule, therefore, are outside the scope of the rule filing.

### **Replacement of Arbitrators (Rule 12411)**

One commenter<sup>75</sup> contends that under the current Code, before the Director replaces an arbitrator, he must give notice to the parties of the vacancy, so that the parties can decide whether to proceed with only the remaining panel members. By comparison, the commenter notes that there is no such notice requirement under Proposed Rule 12411. The commenter contends that, under the proposed rule, it is

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<sup>73</sup> SIA.

<sup>74</sup> *Id.*

<sup>75</sup> Ryder.

possible that the Director can replace an arbitrator before parties become aware of the vacancy.

NASD notes that Proposed Rule 12411 is substantially the same as the provisions of the current Code that address the replacement of arbitrators. Currently, if an arbitrator becomes unavailable and must be replaced, the parties rarely agree to proceed with only the two remaining arbitrators. Thus, to expedite the replacement process, NASD selects the replacement arbitrator and notifies the parties of the replacement simultaneously. NASD gives the parties 5 business days from the date of the notice to accept the replacement or agree to proceed with the two remaining arbitrators. Proposed Rule 12411 is, therefore, codifying current practice in the forum, which NASD has determined is the most efficient method for addressing arbitrator replacements.

### **Other Prehearing Conferences (Rule 12501)**

Two commenters<sup>76</sup> are concerned that the language of Proposed Rule 12501 removes the authority of the Director to hold an initial prehearing conference (IPHC) with the parties before the panel is selected.

NASD agrees that Proposed Rule 12501 does not grant the Director the explicit authority to hold an IPHC before the panel is selected. On rare occasions, parties may need to request a prehearing conference before the panel is appointed to resolve discovery disputes at an earlier stage in the arbitration process or to discuss jurisdictional issues. Thus, NASD is proposing to amend Proposed Rule 12501 to reinstate similar language from the current Code. The proposed rule change is amended as follows:

#### **12501. Other Prehearing Conferences**

(a) A prehearing conference may be scheduled upon the joint request of the parties or at the discretion of the Director. The Director will set the time and place of the prehearing conference and appoint a person to preside.

(b) No change.

(c) No change.

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### **Motions (Rule 12503)**

One commenter<sup>77</sup> contends that the provision for oral motions, under Proposed Rule 12503(a)(1), allows a party to make an oral motion on short notice, and allows the panel to grant relief without giving the opposing party adequate opportunity to respond to the motion. The commenter suggests that oral motions should be limited to matters that could not have been anticipated and require immediate consideration. The commenter

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<sup>76</sup> Feinberg and Canning.

<sup>77</sup> SIA.

also suggests that the party opposing the oral motion should be given 10 days to respond, unless there is good cause for deciding the motion on a shorter timeframe.

Proposed Rule 12503(a)(1) provides that a party must make an effort to resolve a matter with the other parties before making a motion, and that both oral and written motions must describe such efforts. Therefore, the panel will be able to consider these factors, and any objections, in ruling on the motion or in deferring a decision to allow more time to respond. For these reasons, NASD is not proposing to amend the proposed rule at this time.

One commenter<sup>78</sup> suggests that Proposed Rule 12503(a)(2) should allow for some variation in service methods, rather than requiring that all parties be served at the same time and in the same manner.

Based on current practice in the forum, NASD believes the service requirements in Proposed Rule 12503(a)(2) are reasonable, because they will prevent a party from attempting to gain an advantage in the proceeding by delaying service of a motion on some parties. Thus, NASD is not proposing to amend the proposed rule at this time.

Two commenters<sup>79</sup> oppose the requirement in Proposed Rule 12503(a)(3) that motions filed within 20 days before the hearing require panel approval. These commenters argue that motions are usually filed because of an emergency and the requirement that a panel grant advance permission reduces the time for the panel to decide the motion. The commenters assert that parties should not have to get permission to file a motion in arbitration. These commenters also suggest that Proposed Rule 12503(a)(4) be amended to allow a party to submit additional documents with a motion to amend a pleading to add a party.

NASD believes that the panel should control events and procedures that occur close to the start of a hearing. NASD believes that Proposed Rule 12503(a)(3) allows the panel to prevent any unnecessary delays to the start of a hearing. NASD notes that the proposed service rules and proposed amended pleadings rules state that additional information may be submitted in connection with the filing. For these reasons, NASD is not proposing to amend these proposed rules at this time.

One commenter<sup>80</sup> contends that the provision in Proposed Rule 12503(b) requiring responses to written motions within 10 calendar days of receipt should be deleted. Instead, the commenter suggests that NASD should continue with the procedure, in which responses to motions are due after the first IPHC. Thereafter, the commenter suggests that deadlines to respond to motions should be set by the panel at the prehearing conference or otherwise.

NASD notes that if a party submits a motion before the IPHC, staff forwards it to the panel, along with any responses that were voluntarily submitted by other parties. Based on current practice in the forum, NASD believes Proposed Rule 12503(b) provides parties with adequate time to respond to written motions. In addition, the parties and the panel have the ability to extend the 10-day timeframe under Proposed

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<sup>78</sup> Krosschell.

<sup>79</sup> Feinberg and Canning.

<sup>80</sup> Krosschell.

Rule 12207. For these reasons, NASD is not proposing to amend Proposed Rule 12503(b) at this time.

Two commenters<sup>81</sup> contend that, under Proposed Rule 12503(c)(2), the hearing location should always be set where it would be most convenient for the customer, as indicated on the customer's statement of claim. The commenters also argue that there is no reason to allow the Director to decide a motion to change the hearing location before a panel is appointed.

Under the Customer Code, a party may request a convenient hearing location, but there may be reasons that a party's request is not always granted. NASD believes the Director should have the authority to change the hearing location before a panel is appointed. For these reasons, NASD is not proposing to amend Proposed Rule 12503(c)(2) at this time.

One commenter<sup>82</sup> notes that Proposed Rule 12503(c)(3) allows the full panel to hear discovery motions under certain circumstances (e.g., at the request of a party or on the arbitrator's initiative). The commenter contends that the proposed rule should be amended to require the full panel to hear and decide any discovery-related motion.

Proposed Rule 12503(c)(3) is based on current practice in the forum, and allows the parties or designated arbitrator to determine which motions require consideration by the full panel. Further, NASD believes the commenter's suggestion would increase the costs of arbitration, since the parties would have to pay the honorarium for two additional arbitrators. For these reasons, NASD is not proposing to amend the proposed rule at this time.

#### **Motions to Decide Claims Before a Hearing on the Merits (Rule 12504)**

Most commenters oppose Proposed Rule 12504, which would permit a motion to dismiss to be granted by a panel prior to an evidentiary hearing but only under extraordinary circumstances ("dispositive motion"). Some industry commenters argue that the proposed rule improperly discourages dispositive motions and improperly imposes an "extraordinary circumstances" requirement.<sup>83</sup> According to these commenters, there may be situations in which dispositive motions are appropriate but circumstances are not extraordinary. One industry commenter<sup>84</sup> also contends that NASD should continue to allow arbitrators to decide on a case-by-case basis whether to grant the motion, instead of codifying a bar on dispositive motions. Moreover, these commenters believe that the lack of guidance on the meaning of "extraordinary circumstances" will have a chilling effect on the filing of dispositive motions and may expose respondent's counsel to sanctions.

Investor representatives<sup>85</sup> also oppose the proposed rule, but for different reasons. Most of these commenters believe that the proposed rule removes a

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<sup>81</sup> Stolle and Canning.

<sup>82</sup> SIA.

<sup>83</sup> SIA, Schwab, and Davis.

<sup>84</sup> Schwab.

<sup>85</sup> Miller, Speyer, Lopez, Ledbetter, Steinberg, Krosschell, Estell, Page, Brannan, Sutherland, Layne, Ilgenfritz, Shewan, Canning, Finer, Boliver, Stolle, Pounds, Tepper, Sonn, Ball, Schultz #2, Williams, and Woska.

fundamental element of arbitration, which is a party's right to have a hearing. These commenters contend that the proposed rule would be a tool for abuse by defense counsel to delay the arbitration process and would hinder claimants' attempts to have their claims adjudicated by an arbitration panel. Further, these commenters argue that the proposed rule will cause claimants, who have already suffered losses, to incur additional expense and delay in responding to these motions. Moreover, these commenters believe that the use of these motions will become more prevalent with the adoption of Proposed Rule 12504.

Some commenters<sup>86</sup> support the proposed rule, provided it is amended to expressly safeguard the rights of the non-moving party, particularly an investor who has suffered harm or loss. One commenter, who opposes the proposed rule, agrees that these safeguards should be added, if the proposed rule remains in the Customer Code.<sup>87</sup> Some safeguards suggested by these commenters include the following:

- All factual allegations made by the non-moving party are to be taken as true for the purposes of the motion.
- The motion must be denied whenever credibility is at issue, there are any facts in dispute, or the panel must make factual findings against the non-moving party.
- If the non-moving party asserts that it can cure any defect by filing an amended statement of claim, that party should be given an opportunity to do so.
- The rule should clarify that arbitrators should not apply a "failure to state a claim" standard, since claimants are not required to plead legally cognizable claims.

NASD understands the commenters' concerns, and has considered the effects this proposed rule will have on public and industry users of the forum. Currently, the current Code does not provide any guidance with respect to motions to dismiss; thus, arbitrator decisions in this area may lack uniformity. As motions to dismiss are being filed more frequently, NASD believes the proposed rule is necessary to provide some uniform guidelines to arbitrators and users of the forum concerning this practice. NASD believes that the proposed rule will provide valuable guidance to parties and arbitrators, and make the administration of arbitrations more uniform and transparent.

Based on these comments and meetings with SEC staff, NASD agreed that the term "extraordinary circumstances" should be explained to clarify when Proposed Rule 12504 would apply and that more guidance should be provided on the standards to use when deciding a motion to dismiss. In a policy meeting with various constituent groups of the arbitration forum, including investor and industry representatives, NASD suggested amending the proposed rule to provide that a panel may grant a motion to dismiss before a hearing only if it determines that there are no material facts in dispute or that there are no credibility determinations to be made. None of the constituencies approved the suggested amendments, nor were they able to reach a consensus on any amendments to the proposed rule. As a compromise, NASD suggested that the narrative portion of the rule filing be amended to explain under what circumstances a motion to dismiss might be granted. The various constituencies agreed to this compromise.

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<sup>86</sup> PACE, PIABA, Lea, Josel, Evans, Komninos, Stoltmann, Willner, Rosenfield, Lapidus, Lipner, Magary, and Eccleston.

<sup>87</sup> Schultz.

NASD proposes to insert the following language in the Dispositive Motions section of the rule filing, following the general description of the proposed rule:

For purposes of this rule, if a party demonstrates affirmatively the legal defenses of, for example, accord and satisfaction, arbitration and award, settlement and release, or the running of an applicable statute of repose, the panel may consider these defenses to be extraordinary circumstances. In such cases, the panel may dismiss the arbitration claim before a hearing on the merits if the panel finds that there are no material facts in dispute concerning the defense raised, and there are no determinations of credibility to be made concerning the evidence presented.

Two commenters<sup>88</sup> suggest that Proposed Rule 12504 be amended to require that the costs of losing a motion to dismiss before a hearing, including a denial of such motion by the panel, be awarded against the firm immediately. These commenters believe that the panel should not wait to include costs in the final award, as the deterrent effect will be lost with a delay in assessing penalties.

NASD notes that Proposed Rule 12504 is not intended to change the current practice of assessing costs and expenses of a hearing in the award. The comments made on this issue are, therefore, outside the scope of the rule filing.

Finally, another commenter<sup>89</sup> suggests that a claimant should not have to respond to a motion to dismiss if the motion is frivolous or without merit. The commenter notes that the proposed rule does not expressly state that the panel can deny leave to make such a motion. Moreover, the commenter contends that by setting forth timeframes for briefing and consideration, the proposed rule implies that all motions will be considered.

NASD will revisit this issue when the forum has some experience with the new motions practice rules.

### **Cooperation of Parties in Discovery (Rule 12505)**

One commenter<sup>90</sup> contends that the proposed rules should state explicitly that the discovery procedures are mandatory. This commenter suggests removing the word “voluntary” from Proposed Rule 12505.

NASD agrees that the word “voluntary” should be removed from Proposed Rule 12505. NASD believes this change will ensure that the parties understand the importance of complying with the discovery process. The proposed rule change is amended as follows:

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<sup>88</sup> Lipner and Canning.

<sup>89</sup> Ryder.

<sup>90</sup> PACE.



### **12505. Cooperation of Parties in Discovery**

The parties must cooperate to the fullest extent practicable in the [voluntary] exchange of documents and information to expedite the arbitration.

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### **Document Production Lists (Rule 12506)**

Several commenters<sup>91</sup> note that Proposed Rule 12506 requires parties to produce documents from the Document Production Lists within 60 days of the date the answer to the statement of claim is due. Under Proposed Rule 12303, an answer is due 45 days from the receipt of the statement of claim. Based on these timeframes, the commenters suggest that respondents will have 105 days to produce documents from the Document Production Lists. Thus, these commenters argue that Proposed Rule 12506 should be amended to require a party to provide substantial justification for the failure to produce documents within 105 days, or face sanctions.

Under Proposed Rule 12511, a party faces sanctions for failing to comply with the discovery provisions of the Customer Code. Specifically, the panel may issue sanctions against any party for failing to comply with the discovery provisions, unless the panel determines that there is substantial justification for the failure to comply. Clearly, a party would have to provide evidence of substantial justification for the panel to make this determination. For these reasons, NASD is not proposing to amend Proposed Rule 12506 at this time.

Several commenters<sup>92</sup> contend that the Document Production Lists, under Proposed Rule 12506(a), should be revised to require production of information and documents regarding insurance policies that might provide coverage on the dispute. These commenters argue that courts uniformly require production of this information, because it assists the parties in evaluating settlement possibilities and aids in screening for conflicts.

NASD notes that Proposed Rule 12506(a) has not changed the substantive requirements that exist concerning the Production Lists of the Discovery Guide. Hence, the comments made on this proposed rule are outside the scope of the rule filing.

Some commenters<sup>93</sup> oppose extending the time to produce documents from 30 to 60 days, under Proposed Rules 12506(b) and 12507(b), because they believe the extension of time authorizes a delay of discovery for another month before parties may initiate the process to compel discovery. These commenters suggest that the standard timeframe for document exchange should remain 30 days, as it is under the current Code.

Proposed Rules 12506(b) and 12507(b) extend the initial time to respond to discovery lists from 30 to 60 days to address concerns of many frequent users of the forum that the current time frame is unrealistic, and sometimes leads to unnecessary

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<sup>91</sup> PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

<sup>92</sup> Id.

<sup>93</sup> Komninos, Stolle, Estell, Feldman, Feinberg, and Canning.

disputes. For these reasons, NASD is not proposing to amend these proposed rules at this time.

Several commenters<sup>94</sup> argue that the term “control” should be removed from Proposed Rules 12506(b) and 12514(a). These commenters note that the concept of “control” in the discovery context has been defined, through case law, to include not only possession of the requested documents, but also the legal right to obtain those documents. As a result, these commenters contend that, based on this definition, customers could incur increased costs to comply with these proposed rules, which could prevent customers from gaining access to documents from third parties.

The addition of the term “control” to Proposed Rules 12506(b) and 12514(a) is intended to expand, not narrow, the range of documents that are to be produced in discovery. Under these proposed rules, it should be easier for customers to gain access to documents held by third parties on behalf of respondents, because respondents would be required to produce documents, regardless of where the documents are stored or maintained. NASD believes that, under these proposed rules, the customer will have more control in the discovery process. For these reasons, NASD is not proposing to amend Proposed Rules 12506(b) and 12514(a) concerning this issue at this time.

Several commenters<sup>95</sup> believe that parties will abuse the discovery process, under Proposed Rules 12506(b) and 12507(b), by exercising the option to identify a document that cannot be produced and then setting an artificial deadline for compliance that will further impede and delay discovery. These commenters contend that these proposed rules do not provide for any sanctions for bad faith use of the delay provisions in these rules. Moreover, they suggest that a bad faith use of Proposed Rules 12506(b) and 12507(b) is not subject to sanctions under Proposed Rule 12511.

NASD believes that the expectation for parties to act in good faith is implied in the discovery provisions of the current Code and Customer Code. NASD agrees, however, that Proposed Rules 12506(a) and 12507(b) of the Customer Code should be amended to avoid any ambiguity concerning the applicability of a “good faith” standard. Therefore, NASD is proposing to amend these rules to expressly provide a “good faith” standard for compliance, so that frivolous delays, unreasonable timeframes, or bad-faith objections would be subject to sanctions under the Customer Code. The proposed rule change is amended as follows:

**12506. Document Production Lists**

(a) No change.

(b) Time for Responding to Document Production Lists

(1) Unless the parties agree otherwise, within 60 days of the date that the answer to the statement of claim is due, or, for parties added by amendment or

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<sup>94</sup> PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, Stolle, Estell, and Feinberg.

<sup>95</sup> PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, Stolle, and Feinberg.

third party claim, within 60 days of the date that their answer is due, parties must either:

Remainder of the rule – No change.

(2) A party must act in good faith when complying with subparagraph (1) of this rule. “Good faith” means that a party must use its best efforts to produce all documents required or agreed to be produced. If a document cannot be produced in the required time, a party must establish a reasonable timeframe to produce the document.

(c) No change.

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### **Other Discovery Requests (Rule 12507)**

In drafting the discovery portion of the Customer Code, NASD codified several provisions of the Discovery Guide and thus proposed to remove them from the Discovery Guide. One commenter<sup>96</sup> noted that Section V (Information Requests) of the Discovery Guide, which defines and limits information requests, was deleted from the Discovery Guide, but not included in the Customer Code. This commenter supports the policy established by this section, which suggests that these requests should be for targeted information, reasonable in number and not used for the purpose of fact-finding. Several commenters<sup>97</sup> support this commenter’s position and agree that the use of extensive sets of “interrogatories” is inappropriate in alternative dispute resolution. Moreover, these commenters agree that this section of the Discovery Guide should be incorporated into the Customer Code.

In light of these comments, NASD is proposing to incorporate Section V of the Discovery Guide into Proposed Rule 12507(a). In addition, as discussed under Proposed Rule 12506, NASD is proposing to amend Proposed Rule 12507(b) to make express a “good faith” standard for compliance. The proposed rule change is amended as follows:

#### **12507. Other Discovery Requests**

##### **(a) Making Other Discovery Requests**

(1) Parties may also request additional documents or information from any party by serving a written request directly on the party. Requests for information are generally limited to identification of individuals, entities, and time periods related to the dispute; such requests should be reasonable in number and not require narrative answers or fact finding. Standard interrogatories are generally not permitted in arbitration.

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<sup>96</sup> SIA.

<sup>97</sup> PACE, PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

(2) [Such] Other discovery requests may be served:

Remainder of subparagraph (2) – No change.

(b) Responding to Other Discovery Requests

(1) Unless the parties agree otherwise, within 60 days from the date a discovery request other than the Document Production Lists is received, the party receiving the request must either:

Remainder of subparagraph (1) – No change.

(2) A party must act in good faith when complying with subparagraph (1) of this rule. “Good faith” means that a party must use its best efforts to produce all documents or information required or agreed to be produced. If a document or information cannot be produced in the required time, a party must establish a reasonable timeframe to produce the document or information.

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### **Objecting to Discovery; Waiver of Objection (Rule 12508)**

Proposed Rule 12508(a) requires a party who is objecting to a discovery request to specifically identify which documents and requested information it is objecting to and why. One commenter<sup>98</sup> contends that the proposed rule imposes a burden on the parties to locate and identify the documents and information to which they are objecting. The commenter suggests that the proposed rule be amended to require an objecting party to specify only the request for documents or information that it is objecting to and why.

NASD believes the language of Proposed Rule 12508(a) is appropriate. Allowing parties to object to an entire document or information request would undermine the purpose of the proposed rule, which is to require more specificity in objections. Thus, NASD is not proposing to amend the proposed rule at this time.

The commenter<sup>99</sup> also contends that Proposed Rule 12508(b) unnecessarily requires the parties to anticipate every possible objection or face the penalty of waiver. The commenter states that the proposed rule encourages objections as a protective measure, even though a party may be sanctioned under Proposed Rule 12511 for frivolous objections. As a result, the commenter contends that parties must balance the risk of waiver against the risk of sanctions. Thus, the commenter suggests that Proposed Rule 12508(b) be eliminated.

Based on current practice in the forum, NASD believes the language and intent of Proposed Rule 12508(b) are clear. NASD is, therefore, not proposing to amend the proposed rule at this time.

### **Motions to Compel Discovery (Rule 12509)**

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<sup>98</sup> SIA.

<sup>99</sup> Id.

Two commenters<sup>100</sup> contend that the proposed rule should list all the reasons that a motion to compel might be filed, such as bad-faith assertion of the delay provisions of Proposed Rules 12506 and 12507. These commenters argue that parties may comply with Proposed Rules 12506 or 12507, but a motion to compel still may be warranted because, for example, the parties' reason for delay is disingenuous, or the new deadline is unreasonably long. These commenters reiterate concern that a bad-faith use of the delay provisions in Proposed Rules 12506 and 12507 is not subject to sanctions under Proposed Rule 12511.

As noted above, NASD believes that the concept of "good faith" is implied in the discovery provisions of the current Code and the Customer Code. To avoid any ambiguity concerning the applicability of a "good faith" standard under the Customer Code, however, NASD is proposing to amend Proposed Rules 12506 and 12507 to expressly provide a "good faith" standard for compliance. NASD believes the issues raised concerning Proposed Rule 12509 will be addressed with these proposed changes. For these reasons, NASD is not proposing to amend Proposed Rule 12509 at this time.

Several commenters<sup>101</sup> suggest that costs and attorneys fees be assessed immediately to the losing party in a discovery motion seeking the production of Document Production Lists 1 and 2, absent a finding by the panel of substantial justification.

Motions to compel are issued to enforce compliance with the discovery rules, and are not meant to be punitive. Arbitrators may, in appropriate situations, impose a range of sanctions as provided in Proposed Rules 12212 and 12511. For these reasons, NASD is not proposing to amend Proposed Rule 12509 at this time.

### **Depositions (Rule 12510)**

Proposed Rule 12510 provides that depositions are discouraged, but may be approved by the panel in very limited circumstances. Other commenters<sup>102</sup> contend that, when time is of the essence, the requirement to receive arbitrator approval in advance could result in the loss of testimony or evidence. Thus, these commenters suggest that the proposed rule include a procedure that permits a deposition to be taken before a panel is selected.

NASD is sensitive to the commenters' concerns. If parties mutually agree to take the testimony of an ill or dying witness before a panel has been selected, the proposed rules do not prevent them from doing so. For this reason, NASD is not proposing to amend Proposed Rule 12510 at this time.

### **Discovery Sanctions (Rule 12511)**

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<sup>100</sup> Feinberg and Canning.

<sup>101</sup> PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

<sup>102</sup> Feinberg and Canning.

Under Proposed Rule 12511, a party faces sanctions for failing to cooperate in the exchange of documents and information as required under the Customer Code. Several commenters<sup>103</sup> suggest that the proposed rule be amended to impose sanctions if parties do not timely produce the requisite documents from Document Production Lists 1 and 2 without good cause.

NASD believes the commenters' concern is sufficiently addressed under Proposed Rule 12511. For this reason, NASD is not proposing to amend the rule at this time.

One commenter<sup>104</sup> argues that Proposed Rule 12511 broadens the type of conduct that arbitrators can sanction by permitting sanctions for violations of the Customer Code, as opposed to violations of orders only. This commenter contends that the proposed rule expands the scope of a panel's authority from current practice. The commenter notes that, under the Discovery Guide, sanctions are permitted if a party fails to produce documents or information required by written order.

NASD notes that Proposed Rule 12511 incorporates and codifies the sanctions provisions in the NASD Discovery Guide. The proposed rule is intended to provide more guidance to parties and arbitrators regarding the scope of arbitrator authority to address party noncompliance. NASD has expanded the Discovery Guide's sanction provisions to clarify that the panel has the authority to control all aspects of an arbitration, and, therefore, must have the ability to enforce the rules of the forum as well as its orders.

Two commenters<sup>105</sup> contend that a bad-faith use of the delay provisions in Proposed Rules 12506 and 12507 is not subject to sanctions under Proposed Rule 12511. These commenters suggest amending Proposed Rule 12511 to address this issue.

As previously discussed, NASD is proposing to amend Proposed Rules 12506 and 12507 to expressly provide a "good faith" standard for compliance. NASD believes the issues raised concerning Proposed Rule 12511 will be addressed with these proposed changes. For these reasons, NASD is not proposing to amend Proposed Rule 12511 at this time.

### **Subpoenas (Rule 12512)**

See Section III (Issues to be Addressed Separately) for a discussion of the comments on this proposed rule and NASD's response to the comments.

### **Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas (Rule 12513)**

One commenter<sup>106</sup> contends that under Proposed Rules 12100(a) and (p), the definition of associated person has been expanded to include *former* associated

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<sup>103</sup> PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

<sup>104</sup> SIA.

<sup>105</sup> Feinberg and Canning.

<sup>106</sup> SIA.

persons. Thus, according to the commenter, under Proposed Rule 12513, a panel could order a former associated person to attend an arbitration hearing. The commenter argues that Proposed Rule 12513 is impractical, because a panel has no means to enforce an order compelling the attendance of a former associated person. Therefore, the commenter suggests that the proposed rule should be limited to current associated persons and that attendance of former associated persons should be compelled by subpoena only.

Proposed Rule 12100(p) codifies current policy, under which, in the arbitration context, NASD maintains jurisdiction over a former associated person for events that occurred while the person was associated with a member firm (or related to the person's termination of employment with a member firm). Such arbitrations are, of course, subject to any applicable Statute of Limitations and the six-year eligibility rule in Proposed Rule 12206. With regard to Proposed Rule 12513, NASD acknowledges that this proposed rule is geared toward current associated persons, and arbitrators have limited means of requiring former associated persons to appear or produce documents. Nevertheless, some former associated persons may cooperate with such orders to facilitate the resolution of the matter. If they do not, they may be subject to a subpoena.

In light of the fact that Proposed Rule 12513 is substantively the same as in the current Code, NASD is not proposing to amend this proposed rule at this time. Exchange of Documents and Witness Lists Before Hearing (Rule 12514)

Two commenters<sup>107</sup> contend that Proposed Rule 12514 will cause parties to provide more documents than they intend to use at the hearing, which will limit any meaningful analysis of the evidence that the opposing parties actually intend to offer at the hearing. Thus, these commenters suggest that Proposed Rule 12514 should be amended to require parties to provide notebooks of numbered exhibits with an index to opposing parties 20 days before hearing and to panel at the hearing.

Proposed Rule 12514 is meant to provide general guidance on the exchange or documents and witness lists before a hearing, and is substantively the same as Rule 10321(a) of the current Code. The comments made on this issue are, therefore, outside the scope of the rule filing.

Several commenters<sup>108</sup> argue that the term "control" should be removed from Proposed Rules 12506(b) and 12514(a).

See Proposed Rule 12506 for a discussion of the comments on this proposed rule and NASD's response to those comments.

One commenter<sup>109</sup> expresses concern that the "good cause" exception in Proposed Rule 12514(c) creates uncertainty that a panel will accept documents or witnesses not produced or identified during the 20-day exchange. The commenter argues that the good-cause exception may lead to too much discretion on the part of the panel.

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<sup>107</sup> Layne and Canning.

<sup>108</sup> PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, Stolle, Estell, and Feinberg.

<sup>109</sup> Ryder.

Proposed Rule 12514(c) creates a presumption that parties may not use any documents at the hearing that were not exchanged, or call any witnesses at the hearing who were not identified, within the time provided by the proposed rule, unless the panel determines that good cause exists. Moreover, the proposed rule specifically provides that good cause includes the need to use documents or call witnesses for rebuttal or impeachment purposes based on developments at the hearing. NASD believes the language and intent of Proposed Rule 12514(c) are clear on this issue.

Two commenters<sup>110</sup> contend that the affirmation in the Discovery Guide that a person must make if no documents are found that respond to a document request is inadequate, and suggest that it be amended.

In response to these comments, NASD notes that the Customer Code is not changing the affirmation provision in the Discovery Guide. The comments made on this issue, therefore, are outside the scope of the rule filing.

One commenter<sup>111</sup> opposes Proposed Rule 12514(c) because it requires parties to turn over, at the 20-day exchange, documents that are contemplated for use on cross-examination. The commenter believes this disclosure is antithetical to concept of cross-examination, as it would give each party time to formulate responses to cross-examination questions. Thus, the commenter suggests amending the proposed rule to specifically identify cross-examination documents as an exception to the 20-day exchange, as is in effect under the current Code.

In developing Proposed Rule 12514(c), NASD heard from some constituents that parties have been abusing the “cross examination” exception by designating documents as those to be used for cross-examination, so that these documents will not have to be exchanged under Rule 10321 of the current Code. Subsequently, at the hearing, parties surprise their opponents with these documents, limiting their opponent’s ability to effectively rebut their significance. Thus, NASD amended the current rule in an effort to prevent this gamesmanship, and declines to amend the proposed rule as suggested.

Two commenters<sup>112</sup> express concern that the new provision in Proposed Rule 12514(c), “impeachment purposes based on developments during the hearing,” is ambiguous, creates more uncertainty in the hearing preparation process, and makes its application by the arbitrators more difficult. Thus, these commenters recommend retaining the “good cause” requirement, but replacing the provision with language implementing a cross-examination standard.

NASD believes the language and intent of Proposed Rule 12514(c) are clear. Moreover, NASD does not plan to replace the cross-examination exception, for the reasons stated above.

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<sup>110</sup> Feinberg and Canning.

<sup>111</sup> Schwab.

<sup>112</sup> Feinberg and Canning.



Several commenters<sup>113</sup> suggest that to avoid any misunderstanding of what constitutes rebuttal, Proposed Rule 12514(c) should be amended to state that documents and lists of witnesses in defense of a claim are not considered rebuttal and, therefore, must be exchanged by the parties.

NASD agrees that Proposed Rule 12514(c) should be amended to clarify the types of documents that would not be considered rebuttal information, and, therefore, should be exchanged. In amending the proposed rule, NASD would be codifying current practice as the proposed language is currently contained in a form letter that is sent to parties advising them of the hearing date and location. NASD is also proposing to amend Proposed Rule 12514(b) to correct a grammatical error. The proposed rule change is amended as follows:

**12514. Exchange of Documents and Witness Lists Before Hearing**

**(a) Documents and Other Materials**

No change.

**(b) Witness Lists**

At least 20 days before the first scheduled hearing date, all parties must provide each other party with the names and business affiliations of all witnesses they intend to present at the hearing. At the same time, [each party] all parties must file their witness lists with the Director, with enough copies for each arbitrator.

**(c) Exclusion of Documents or Witnesses**

Parties may not present any documents or other materials not produced and or any witnesses not identified in accordance with this rule at the hearing, unless the panel determines that good cause exists for the failure to produce the document or identify the witness. Good cause includes the need to use documents or call witnesses for rebuttal or impeachment purposes based on developments during the hearing. Documents and lists of witnesses in defense of a claim are not considered rebuttal or impeachment information and, therefore, must be exchanged by the parties.

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**Required Hearings (Rule 12600)**

One commenter<sup>114</sup> notes that Proposed Rule 12600(a) lists circumstances in which hearings will not be held, but does not mention that cases may be dismissed without a hearing under Proposed Rule 12504. The commenter suggests that Proposed Rule 12600(a) should be amended to include dismissal pursuant to Proposed Rule 12504 as an additional exception to the requirement that a hearing will be held.

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<sup>113</sup> PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, and Feinberg.

<sup>114</sup> SIA.

NASD believes the language and intent of Proposed Rule 12600(a) are clear. NASD is, therefore, not proposing to amend this rule at this time.

Proposed Rule 12600(c) provides that if a hearing will be held, the Director will notify the parties of the time and place of the hearing at least 10 days before the hearing begins, unless the parties agree to a shorter time. In its Solicitation of Comments, the SEC asks whether parties need notice of the hearing earlier than 10 days before the hearing.

Several commenters<sup>115</sup> oppose the proposed 10-day notice requirement of Proposed Rule 12600(c). One commenter<sup>116</sup> argues that short notice might cause a small investor to lose his or her counsel, as that counsel's schedule might not allow an appearance for a hearing on 10 days' notice. In this situation, according to the commenter, the investor may be forced to proceed at the hearing without counsel. Other commenters<sup>117</sup> suggest that it is difficult for parties and witnesses, who are traveling from out of town, to make travel arrangements on 10 days' notice.

NASD notes that parties normally are notified prior to the initial prehearing conference (IPHC) of the city in which the hearing will take place. The parties generally agree to hearing dates at the IPHC. This practice will not change under the Customer Code. The notice period in Proposed Rule 12600(c) refers to the date on which NASD notifies parties of the specific facility in which the hearings will be held. In response to the comments and to ensure consistent timeframes under the Customer Code, however, NASD is proposing to amend Proposed Rule 12600(c) to increase the notice period from 10 to 20 days. The proposed rule change is amended as follows:

**12600. Required Hearings**

- (a) No change.
- (b) No change.
- (c) The Director will notify the parties of the time and place at least [10] 20 days before the hearing begins, unless the parties agree to a shorter time.

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**Postponement of Hearings (Rule 12601)**

Proposed Rule 12601 governs the postponement of hearings. One commenter<sup>118</sup> asks whether a motion for postponement outside of the 10-day window, under Proposed Rule 12601(a), requires a "good cause" explanation.

If a party requests to postpone a hearing more than 10 days from the date the hearing is scheduled to begin, the "good cause" exception would not apply under Proposed Rule 12601(a). Thus, the panel may grant the party's request, based solely on the request. And the party would be required to pay any applicable fees.

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<sup>115</sup> PACE, PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

<sup>116</sup> PACE.

<sup>117</sup> PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

<sup>118</sup> Ryder.

One commenter<sup>119</sup> contends that, sometimes, arbitrators have attempted to ignore the agreement of the parties to postpone an arbitration and compel parties to proceed. To eliminate this possibility, the commenter suggests that the proposed rule should state that a hearing must be postponed by agreement of the parties and may be postponed under the other listed circumstances.

Another commenter<sup>120</sup> notes that Proposed Rule 12601(a)<sup>121</sup> appears to give the parties the unfettered right to postpone the hearing whenever they agree to do so, which contradicts an arbitrator's duty to keep the cases moving toward resolution. The commenter suggests incorporating some provisions from Rule 10319(c) of the current Code to give the panel some express control over the number of times a case may be postponed and to eliminate repeat postponements.

To facilitate settlement negotiations among the parties, NASD believes that the parties should have the discretion to postpone a hearing if they mutually agree. NASD believes, however, that the postponement fees in the rule, which are non-refundable, should serve as a deterrent to multiple postponements. Moreover, the panel has the right to dismiss the arbitration without prejudice if the parties request or agree to more than two postponements. In this case, a party may re-file the claim, but would be subject to all applicable fees and costs under the Customer Code.

Based on these comments, NASD believes that Proposed Rule 12601 should expressly distinguish between when a hearing may be postponed and when a hearing must be postponed. Thus, NASD is proposing to amend this rule to make these changes. Also, NASD is adding language from a proposed rule change that was approved by the SEC, but inadvertently omitted from the last amendment to the Customer Code. The proposed rule change is amended as follows:

#### **12601. Postponement of Hearings**

##### **(a) [When a Hearing May Be Postponed] Postponement of Hearings**

###### **(1) When a Hearing Shall Be Postponed**

A hearing shall be postponed by agreement of the parties.

###### **(2) When a Hearing May Be Postponed**

A hearing may be postponed [only]:

- [By agreement of the parties;]
- By the Director, in extraordinary circumstances;
- By the panel, in its own discretion; or

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<sup>119</sup> SIA.

<sup>120</sup> Elster. See List of Commenters Received In Connection With SR-2004-011.

<sup>121</sup> The commenter submitted his comments on Rule 13601(a) of the Industry Code, but the comments are relevant to the Customer Code as well.

- By the panel, upon motion of a party. The panel may not grant a motion to postpone a hearing made within 10 days of the date that the hearing is scheduled to begin, unless the panel determines that good cause exists.

**(b) Postponement Fees**

(1) No change.

(2) If a postponement request is made by one or more parties and granted within three business days before a scheduled hearing session, the party or parties making the request shall pay an additional fee of \$100 per arbitrator. If more than one party requests the postponement, the arbitrators shall allocate the \$100 per arbitrator fee among the requesting parties. The arbitrators may allocate all or a portion of the \$100 per arbitrator fee to the non-requesting party or parties, if the arbitrators determine that the non-requesting party or parties caused or contributed to the need for the postponement. In the event that a request results in the postponement of consecutively scheduled hearing sessions, the additional fee will be assessed only for the first of the consecutively scheduled hearing sessions. In the event that an extraordinary circumstance prevents a party or parties from making a timely postponement request, the arbitrators may use their discretion to waive the fee, provided verification of such circumstance is received.

(3) No change.

(c) No change.

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**Attendance at Hearings (Rule 12602)**

Several commenters<sup>122</sup> argue that Proposed Rule 12602 is inconsistent with directions given in the Securities Industry Conference on Arbitration Manual (SICA), which creates a presumption for the attendance of expert witnesses and an investor's representative. These commenters suggest that NASD amend the proposed rule to expressly allow expert witnesses and other fact witnesses to attend hearings.

NASD agrees that expert witnesses should be allowed to attend all hearings. However, the panel has the discretion to allow other persons to attend hearings (e.g., an individual assisting an elderly or disabled party) or to bar someone who may be disruptive to the proceeding.

In response to these comments, NASD proposes to amend Proposed Rule 12602 to allow expert witnesses to attend all hearings. The proposed rule change is amended as follows:

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<sup>122</sup> PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, and Page.

## **12602. Attendance at Hearings**

The parties and their representatives are entitled to attend all hearings. Absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings. The panel will decide who else may attend any or all of the hearings.

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## **Order of Presentation of Evidence and Arguments (Rule 12607)**

Several commenters<sup>123</sup> suggest Proposed Rule 12607 be amended to incorporate IM-10317 of the Code, which addresses the order of closing arguments at a hearing. Specifically, the commenters recommend that the proposed rule allow claimants to reserve all of their closing argument for rebuttal.

Three commenters<sup>124</sup> suggest that Proposed Rule 12607 should address rebuttal testimony, because no other proposed rule addresses the order of the presentation of evidence. These commenters recommend that Proposed Rule 12607 provide the entire order of presentation of evidence, to eliminate any debate on whether or when rebuttal testimony is allowed.

Proposed Rule 12607 states that the panel has the discretion to vary the order in which the hearing is conducted, provided each party is given a fair opportunity to present its case. NASD believes that the panel has the authority to control a hearing, which includes determining the order in which the hearing is conducted. For these reasons, NASD is not proposing to amend this rule at this time.

## **Dismissal of Proceedings Prior to Award (Rule 12700)**

One commenter<sup>125</sup> believes that dismissals of an arbitration under Proposed Rule 12700(b) should be classified as an award for purposes of Proposed Rule 12904. The commenter suggests that these orders require a dispositive determination of the arbitrators, meaning an award. The commenter also argues that since these final decisions of the panel will be subject to vacatur challenges in the courts, they are legally “awards.”

NASD is proposing to add the definition of “award” to the Customer Code as discussed under Proposed Rule 12100. Also, currently, if a panel determines that an entire case should be dismissed with or without prejudice, the panel will issue an award. For these reasons, NASD is not proposing to amend Proposed Rule 12700(b) at this time.

## **Withdrawal of Claims (Rule 12702)**

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<sup>123</sup> PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, Feinberg, and Page.

<sup>124</sup> Stoltmann, Feinberg, and Canning.

<sup>125</sup> Ryder.

Proposed Rule 12702(a) provides that before a claim has been answered by a party, the claimant may withdraw the claim against the party with or without prejudice. Proposed Rule 12702(b) provides that after a claim has been answered by a party, the claimant may only withdraw it against that party with prejudice unless the panel decides, or the claimant and that party agree, otherwise.

In its Solicitation of Comments, the SEC asks whether Proposed Rule 12702(b) appropriately addresses the concern of allowing claimants to withdraw claims without prejudice, while protecting respondents from expending significant resources to respond to a claim that is later withdrawn or having to respond to the same claim multiple times.

Several commenters<sup>126</sup> oppose Proposed Rule 12702(b). These commenters contend that, in their collective experiences, there are few instances in which a claim had to be withdrawn after an answer was filed. Further, these commenters argue that, at the very least, the proposed rule should provide arbitrators with the authority to decide whether a claim, if withdrawn after an answer is filed, should be withdrawn with or without prejudice.

NASD believes that Proposed Rule 12702(b) will serve to deter gamesmanship in which claimants withdraw claims and refile them in order to receive a new panel. If claimants have legitimate reasons to withdraw claims without prejudice after the answer is filed, they may ask the arbitrators to allow them to do so. NASD believes that this provision is a reasonable accommodation of the competing interests in the forum, and should be approved.

### **Simplified Arbitration (Rule 12800)**

In its Solicitation of Comments, the SEC asks whether the 45-day timeframe within which parties must answer a statement of claim in simplified arbitrations should be shortened to reflect the fact that simplified arbitrations are meant to take place more expeditiously than regular arbitrations.

Several commenters<sup>127</sup> oppose extending the deadline for responding to pleadings from 20 days to 45 days. These commenters contend that firms should be able to respond more quickly to small, uncomplicated claims. Moreover, these commenters believe that extending the deadline will diminish the benefits of these types of arbitrations as a quick, inexpensive option for small investors. As an alternative, several commenters<sup>128</sup> suggest that answers should be filed within 30 days of service of a claim, similar to the requirements in most state courts for the filing of an answer.

NASD is sensitive to the commenters' concerns. NASD notes, however, that the 45-day timeframe reflects current practice in the forum. Frequent users of the forum, as well as NASD staff, report that the time limits in simplified cases are routinely extended

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<sup>126</sup> PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

<sup>127</sup> PACE, PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

<sup>128</sup> PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

under Rule 10302 of the current Code. NASD believes that Proposed Rule 12800 will simplify and streamline the administration of simplified cases, and, because extensions are routine in simplified cases under the current Code, will not result in significant delay in their administration.

One commenter<sup>129</sup> contends that, under the current Code, a claimant may file a reply to respondent's answer; however, the Customer Code does not explicitly authorize this practice. The commenter notes that since many claimants filing simplified arbitration claims are *pro se*, the procedures controlling these arbitrations should be expressly stated. Thus, the commenter suggests adding a definition of "pleadings" to clarify that replies can be filed in simplified arbitration. The commenter also suggests that claimants should be given 10 days to file a reply following the close of the discovery period.

NASD agrees that a definition of "pleadings" should be added to the Customer Code. (See 12100 – Definitions above, for the proposed rule language and explanation.) NASD does not agree with the suggestion that claimants be given 10 days to file a reply following the close of the discovery period. The proposed rule does not include special time limits or deadlines for pleadings in simplified cases as does the current rule, because the time limits, under the Customer Code, would now be the same as those in regular cases. For this reason, NASD is not proposing to amend Proposed Rule 12800 at this time.

One commenter<sup>130</sup> opposes the requirement that, in simplified arbitration, the only arbitrators eligible to hear these types of cases are those arbitrators included on the chairperson eligible arbitrator roster.

Simplified arbitration is used for cases involving claims of \$25,000 or less, and these claims normally are decided without a hearing. Claimants who use the simplified arbitration procedures tend to be small investors, and, because there is only one arbitrator deciding this type of claim, NASD believes that the arbitrator should have had the experience of sitting on prior cases. Under the Customer Code, the most experienced arbitrators will be those on the chairperson roster. Therefore, NASD believes that chair-qualified arbitrators should decide simplified claims. Under Proposed Rule 12800, the parties have the option, however, to select an arbitrator from a different roster, if they mutually agree.

### **Default Proceedings (Rule 12801)**

One commenter<sup>131</sup> notes that under Rule 10314(e) of the current Code, default proceedings apply to defunct firms only. This commenter argues that the reference to default proceedings in Proposed Rule 12308 expands the default proceedings, under the Customer Code, to include all respondents who fail to answer, whether active or defunct.

Proposed Rule 12308 provides that a party that fails to answer any claim within the time period may also be subject to default proceedings. The proposed default rule provides that a claimant may request default proceedings against any respondent that

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<sup>129</sup> PACE.

<sup>130</sup> Caruso.

<sup>131</sup> Ryder.

falls within specific categories and fails to file an answer within the time provided by the Customer Code. Therefore, a party that fails to answer a claim within the relevant time period must also fall within one of the categories of the default rule to be subject to default proceedings under the Customer Code. The Customer Code has not changed the substantive requirements of the default procedures under the current Code. Like Rule 10314(e) of the current Code, Proposed Rule 12801 applies to a respondent that falls within one of the following categories: a member whose membership has been terminated, suspended, canceled, or revoked; a member that has been expelled from the NASD; a member that is otherwise defunct; or an associated person whose registration is terminated, revoked, or suspended.

Two commenters<sup>132</sup> suggest amending Proposed Rule 12801 to permit default proceedings where a respondent has failed to file both an answer and a USA. These commenters also recommend expanding the proposed rule to include current members and associated persons with active registrations. Finally, these commenters suggest limiting the time a party has to file the answer and USA.

These commenters also suggest that under the proposed default process, determinations should be dispositive only in favor of the claimant. In addition, these commenters recommend that if movants lose any part of case, then they should be given the opportunity to present the case in evidentiary hearing on those issues not favorably ruled on.

NASD notes that Proposed Rule 12801 has not changed the substantive requirements that exist concerning default procedures in Rule 10314(e) of the current Code, which requires claimants to present a sufficient basis to support the granting of an award. The comments made on this issue, therefore, are outside the scope of the rule filing.

### **Fees Due When a Claim Is Filed (Rule 12900)**

Several commenters<sup>133</sup> contend that industry members should pay the majority of the customer filing fee. These commenters suggest that public customers should pay \$200 and the industry respondents should deposit the balance of the fees owing. According to these commenters, public customers should be subject to the panel's allocation of fees in the award, but should not have to incur undue expense at the outset to file a claim.

Another commenter<sup>134</sup> suggests that the lack of an increase in fees for claims above one million dollars seems to favor the wealthier claimants. The commenter asserts that as the mid-level claimant appears to be shouldering a disproportionate

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<sup>132</sup> Feinberg and Canning.

<sup>133</sup> PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, Magary, and Page.

<sup>134</sup> Ryder.



percentage of the forum fees, the fee schedules could be perceived as unfair. The commenter suggests amending the proposed rule to charge a fixed percentage as an additional fee for any amounts claimed over one million dollars. The commenter believes that this change would shift the cost burden to those who stand to benefit the most, while eliminating the perception that the fee changes impact the middle-class investor the most.

NASD notes that Proposed Rule 12900 made very minimal changes to the schedule of fees in Rule 10332 of the current Code. The proposed changes will not result in an increase in the total amount of fees paid by customers or associated persons when filing a claim. In fact, for claims of \$30,000 to \$50,000, the customer's overall filing fees would decrease by \$50, and for claims of \$1 million to \$3 million, the customer's overall filing fees would decrease by \$100. Also, NASD believes that its fee schedules are commensurate with the dollar amount of the claims filed and damages requested. NASD believes that the proposed changes will greatly simplify the fee schedules and make it easier for parties to understand the total amount due upon filing.

### **Hearing Session Fees, and Other Costs and Expenses (Rule 12902)**

Several commenters<sup>135</sup> suggest that, although Proposed Rule 12902 provides that a party must pay one fee which includes the filing fee and the hearing session deposit fee, the proposed rule does not provide that any of the fee will be applied to any hearing fees incurred. The commenters contend that a claimant would pay for the first hearing session twice – once through the filing fee and then again when the hearing session fees are assessed.

NASD agrees that clarification is needed, as NASD did not intend to increase the charge for submitting a claim to arbitration under the Customer Code. Thus, NASD proposes to amend Proposed Rule 12902(b) to provide for an amount equal to a hearing session fee be deducted from the total amount of the hearing session fees assessed against the party who paid the filing fee. The proposed rule change is amended as follows:

#### **12902. Hearing Session Fees, and Other Costs and Expenses**

(a) No change.

##### **(b) Payment of Hearing Session Fees**

(1) No change.

(2) No change.

(3) In the award, the amount of one hearing session fee will be deducted from the total amount of hearing session fees assessed against the party who paid the filing fee. If this amount is more than any fees, costs, and expenses assessed against this party under the Code, the balance will be refunded to the party.

(c) No change.

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<sup>135</sup> PIABA, Lea, Josel, Evans, Komminos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

(d) No change.

NASD is also proposing to amend Proposed Rule 12902 to address the issue of refund payments. NASD receives numerous requests from non-parties to make refunds payable to the attorneys or other non-parties that may have made payment on behalf of named parties. Currently, when there is any money remaining in a party's account after all fees and charges are assessed, NASD's practice is to refund the money directly to the party. Parties sign the uniform submission agreement and are liable for any fees or costs incurred under the Code. As a result, NASD believes it is inappropriate to issue money to anyone else other than a party. Therefore, NASD is proposing to codify its practice by adding a new provision to Proposed Rule 12902. The proposed rule change is amended as follows:

**12902. Hearing Session Fees, and Other Costs and Expenses**

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**(e) Refund Payments**

Any refunds of fees or costs incurred under the Code will be paid directly to the named parties, even if a non-party made a payment on behalf of the named parties.

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**Awards (Rule 12904)**

One commenter<sup>136</sup> suggests that the term "award" be defined under the Customer Code.

NASD agrees that a definition of "award" should be added to the Customer Code. (See 12100 – Definitions above for the proposed rule language and explanation.)

The same commenter contends that parties should not be allowed to waive the requirement that one arbitrator may sign a stipulated award on behalf of the entire panel. The commenter believes that the provisions of the award rule, both current and proposed, cannot be waived.

NASD believes that, if the parties mutually agree that one arbitrator may sign a stipulated award on behalf of the panel, the request should be honored, under the current Code and Customer Code.

Finally, the commenter argues that, if an entire claim is dismissed, under Proposed Rule 12700(b), it should be considered an award.

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<sup>136</sup> Ryder.

NASD agrees that, if an entire claim is dismissed, it should be considered an award. NASD believes that the proposed definition of “award,” under Proposed Rule 12100, addresses this issue.

## II. Solicitation of Comments by the SEC

In the rule filing, the SEC solicits comment on whether the proposed rule change, as amended, provides for arbitration procedures that are fair to and consistent with the protection of investors for the resolution of their disputes. NASD has responded to these inquiries in Section I under the appropriate proposed rule with the exception of the following issues:

### A. Differences Between the Proposal and Uniform Code of Arbitration Procedure

Where provisions differ between the Customer Code and the Uniform Code of Arbitration (“Uniform Code”) developed by SICA, the SEC asks which alternative is preferable.

One commenter<sup>137</sup> prefers the Uniform Code to the Customer Code. The commenter contends that NASD operates from a position of dominance, and therefore, has abandoned the uniformity premise under which SICA operates.

NASD participates actively in SICA meetings and values the input of SICA participants. In some instances, however, the nature and volume of NASD’s caseload require NASD to adopt rules in advance of or different from the other self-regulatory organizations. In order to gather a wide range of ideas and information, NASD discusses rule proposals with the same constituencies represented at SICA: representatives of the investor and industry communities, arbitrators, and mediators.

### B. Nonsubstantive Changes

#### 1. Deficient Claims (Proposed Rule 12307).

Several commenters<sup>138</sup> argue that Proposed Rule 12307 is biased in favor of respondents. These commenters contend that if claimants file a deficient claim, then the arbitration is delayed until all deficiencies are corrected. The commenters argue, however, that claims also are not processed if the respondent files a deficient answer. The commenters suggest that the proposed rule should be amended to provide that deficient filings by respondents shall not delay the service of the arbitrator list selection materials, so as not to delay the case.

The commenters are correct that if a claim is deficient, it will not be processed until the deficiencies are corrected. However, NASD does not delay the processing of a claim if a respondent’s answer is deficient. In this case, the claim proceeds and the respondent may lose the ability to assert any claims or defenses at the hearing. For these reasons, NASD is not proposing to amend this rule at this time.

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<sup>137</sup> *Id.*

<sup>138</sup> PIABA, Lea, Josel, Evans, Komninos, Lopez, Pounds, Stoltmann, Willner, Rosenfield, Lapidus, Ilgenfritz, Shewan, Boliver, Sutherland, Canning, Lipner, and Magary.

### **III. Issues To Be Addressed Separately**

With the exception of the subpoena rule, these comments are outside the scope of the rule filing. NASD will consider them, however, when determining whether future amendments are warranted.

#### **A. Failure to Submit a USA by the Respondent (12308)**

Two commenters<sup>139</sup> express concern that the sanctions imposed on respondents under Proposed Rule 12308 (Loss of Defenses Due to Untimely or Incomplete Answer) are not the same as those imposed on claimants for similar conduct. These commenters note that if a claimant fails to file a USA, then NASD considers the claim to be deficient under Proposed Rule 12307. Yet, these commenters note, if the respondent fails to file a USA, the arbitration will proceed as though the respondent has fulfilled its obligations.

These commenters suggest that NASD amend Proposed Rule 12308 to require the respondents to submit a USA in a timely manner. They suggest that NASD should refuse to transmit the answer to arbitrators unless respondent files a USA, and that respondents should be barred from engaging in any arbitration-related activity until they file the USA.

#### **B. Other Discovery Issues**

One commenter<sup>140</sup> believes that the documents on the Document Production Lists should be automatically, not presumptively, discoverable. This commenter also argues that brokerage firms do not have grounds to assert confidentiality of compliance manuals. The commenter recommends amending the Customer Code to state that the party asserting confidentiality has the burden of establishing that the documents in question legitimately require confidential treatment.

#### **C. Subpoena Rule (12512)**

Proposed Rule 12512, as initially filed, retained the current rule that allows attorneys to issue subpoenas “as provided by law,” under which some parties have issued subpoenas to non-parties to an arbitration. Seven commenters<sup>141</sup> contend that brokerage firms abuse this subpoena practice by issuing overly broad subpoenas to non-parties, while failing to provide notice of the subpoena to claimants in a timely manner. These commenters state that claimants usually receive a copy of the subpoena after the subpoenaed party has produced the requested documents, thereby making objection by claimants moot. The commenters argue that parties should be allowed to object to the subpoena before it is issued. Further, several commenters also suggest that the proposed rule should state clearly that only arbitrators may issue subpoenas.

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<sup>139</sup> Feinberg and Canning.

<sup>140</sup> PACE.

<sup>141</sup> Miller, Stolle, Stoltmann, Feinberg, Greco, Layne, and Canning.

NASD agrees that changes to the subpoena process are needed. On June 17, 2005, NASD filed with the SEC a proposed rule change, SR-NASD-2005-079, to provide that only arbitrators will be able to issue subpoenas. And on March 29, 2006, NASD filed Amendment No. 1 to address letters received by the Commission in response to the publication of the proposed rule change in the Federal Register and to propose amendments responsive to the comments where appropriate. As the SEC is currently considering a proposed rule change that would make significant changes to the subpoena process, NASD is not proposing to amend Proposed Rule 12512 at this time. Instead, once the proposed rule change is approved, NASD will incorporate the changes into the Customer Code.

#### **D. Number of Arbitrators (12401)**

One commenter<sup>142</sup> suggested that NASD amend Proposed Rule 12401 to increase the limit for a single arbitrator case to \$150,000 or more. According to the commenter, the current limitation of \$25,000 is antiquated, and there is no empirical evidence to suggest that a single arbitrator cannot decide a claim involving a larger amount in dispute.

#### **E. Reimbursement of Filing Fees (12900(d))**

One commenter<sup>143</sup> is concerned that the expense of arbitration (i.e., filing fees) may prevent access to the forum. The commenter suggests that NASD amend Proposed Rule 12900(d) to expressly disclose that fee waivers might be granted to parties who can demonstrate financial hardship. Moreover, the commenter believes that the proposed rule should explain the practice and procedure for applying for such fee waivers as well as the criteria for granting them.

\* \* \*

If you have any questions, please contact me on (202) 728.8151 or at [mignon.mclmore@nasd.com](mailto:mignon.mclmore@nasd.com).

Very truly yours,

Mignon McLemore  
Assistant Chief Counsel  
NASD Dispute Resolution, Inc.

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<sup>142</sup> Caruso.

<sup>143</sup> PACE.

**COMMENT LETTERS RECEIVED IN CONNECTION WITH SR-NASD-2003-158**

1. Public Investors Arbitration Bar Association (by Rosemary Shockman, President); August 2, 2005 (PIABA #2)
2. Securities Arbitration Commentator, Inc. (by Richard P. Ryder, President); July 21, 2005 (Ryder)
3. Jorge A. Lopez, Esq.; July 21, 2005 (Lopez)
4. Miller Faucher and Cafferty LLP (by Michael J. Willner, Esq.); July 16, 2005 (Willner)
5. Stuart Finer, Esq.; July 15, 2005 (Finer)
6. Steele T. Williams, P.A., Attorney at Law (Steele T. Williams); July 15, 2005 (Williams)
7. Selzer Gurvitch Rabin & Obecny, Chtd. (by Daniel A. Ball, Esq.); July 14, 2005 (Ball)
8. Charles Schwab & Co., Inc. (by Richard A. Karoly, Vice President and Senior Corporate Counsel); July 14, 2005 (Schwab)
9. Shaheen, Novoselsky, Staat, Filipowski & Eccleston, P.C. (James J. Eccleston, Esq.); July 14, 2005 (Eccleston)
10. Stoltmann Law Offices, P.C. (Andrew Stoltmann, Esq.); July 14, 2005 (Stoltmann)
11. Driggers, Schultz & Herbst (Laurence S. Schultz, Esq.); July 14, 2005 (Schultz)
12. Law Offices of Debra G. Speyer (Debra G. Speyer, Esq.); July 14, 2005 (Speyer)
13. Born, Pape & Shewan LLP (Scott R. Shewan, Esq.); July 14, 2005 (Shewan)
14. Jonathan W. Evans & Associates (Jonathan W. Evans, Esq.); July 14, 2005 (Evans)
15. Law Offices of Cary S. Lapidus (Cary S. Lapidus, Esq.); July 14, 2005 (Lapidus)
16. Sonn & Erez (Jeff Sonn, Esq.); July 14, 2005 (Sonn)
17. Johnson, Pope, Bokor, Ruppel, and Burns, LLP (by Scott C. Ilgenfritz, Esq.); July 14, 2005 (Ilgenfritz)
18. Page Perry, LLC (J. Boyd Page, Esq. and Samuel T. Brannan, Esq.); July 14, 2005 (Page)
19. Goodman & Nekvasil (by Stephen Krosschell); July 14, 2005 (Krosschell)
20. Investors' Rights, Inc. (by Arnold Y. Steinberg, P.C.); July 14, 2005 (Steinberg)

21. Adorno & Yoss (by Dale Ledbetter); July 14, 2005 (Ledbetter)
22. Komninos, Fowkes & Farrugia Law Group, LLC (Spiro T. Komninos, Esq.); July 14, 2005 (Komninos)
23. Law Offices of Timothy A. Canning (Tim Canning, Esq.); July 14, 2005 (Canning)
24. Barry D. Estell, Attorney at Law (Barry D. Estell, Esq.); July 14, 2005 (Estell)
25. Howard M. Rosenfield, Esq.; July 14, 2005 (Rosenfield)
26. Tate, Lazarini & Beall, PLC (by Rebecca C. Davis, Esq.); July 14, 2005 (Davis)
27. Ragsdale LLC (M. Clay Ragsdale, Esq.); July 14, 2005 (Ragsdale)
28. Brickley, Sears & Sorett (by Angela H. Magary); July 14, 2005 (Magary)
29. Brickley, Sears & Sorett (by John E. Sutherland, Esq.); July 14, 2005 (Sutherland)
30. Pace Investor Rights Project (by Jill I. Gross and Barbara Black, Directors); July 14, 2005 (PACE)
31. Bingham & Lea, P.C (Royal Lea, Esq.); July 14, 2005 (Lea)
32. Mark A. Tepper, P.A. (Mark A. Tepper, Esq.); July 14, 2005 (Tepper)
33. J. Pat Sadler; July 13, 2005 (Sadler)
34. Martin L. Feinberg, Attorney at Law (Martin L. Feinberg, Esq.); July 13, 2005 (Feinberg)
35. Kaufmann, Feiner, Yamin, Gilden, & Robbins LLP (by Wayne M. Josel, Esq.); July 13, 2005 (Josel)
36. Boliver Law Firm (Gail E. Boliver, Esq.); July 13, 2005 (Boliver)
37. Deutsch & Lipner (Seth E. Lipner, Esq.); July 13, 2005 (Lipner)
38. William A. Fynes; July 13, 2005 (Fynes)
39. Securities Industry Association (by Edward G. Turan, Esq., Chair, Arbitration and Litigation Committee); July 13, 2005 (SIA)
40. Maddox Hargett & Caruso, P.C. (Steven B. Caruso, Esq.); July 13, 2005 (Caruso)
41. Public Investors Arbitration Bar Association (by Rosemary J. Shockman, President, and Robert S. Banks, Jr., Executive Vice President, President Elect); July 13, 2005 (PIABA)
42. Stuart D. Meissner, Esq.; July 12, 2005 (Meissner)

43. Law Office of John J. Miller, P.C. (John J. Miller, Esq.); July 12, 2005 (Miller)
44. Layne & Lewis LLP (Richard M. Layne, Esq.); July 12, 2005 (Layne)
45. Jeffrey A. Feldman, Esq.; July 11, 2005 (Feldman)
46. Rohde & Van Kampen PLLC (by Steven A. Stolle, Esq.); July 8, 2005 (Stolle)
47. Greco and Greco, P.C. (W. Scott Greco, Esq.); June 24, 2005 (Greco)
48. Norman B. Arnoff, Esq.; August 12, 2004 (Arnoff)
49. Woska & Hayes, LLP (A. Daniel Woska, Esq.); June 15, 2005 (Woska)
50. Driggers, Schultz & Herbst PC (Laurence S. Schultz, Esq.); June 8, 2005 (Schultz #2)
51. James S. Jones, Esq; March 30, 2006 (Jones)



**NASD**  
**CODE OF ARBITRATION PROCEDURE**  
**FOR**  
**CUSTOMER DISPUTES**

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**PART I INTERPRETIVE MATERIAL, DEFINITIONS, ORGANIZATION AND AUTHORITY**

**IM-12000. Failure to Act Under Provisions of Code of Arbitration Procedure for Customer Disputes**

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110 for a member or a person associated with a member to:

(a) fail to submit a dispute for arbitration under the NASD Code of Arbitration Procedure ("Code") as required by the Code;

(b) fail to comply with any injunctive order issued pursuant to the Code;

(c) fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the Code;

(d) fail to honor an award, or comply with a written and executed settlement agreement, obtained in connection with an arbitration submitted for disposition pursuant to the procedures specified by NASD, the New York, American, Boston, Cincinnati, Chicago, or Philadelphia Stock Exchanges, the Pacific Exchange, Inc., the Chicago Board Options Exchange, the Municipal Securities Rulemaking Board, or pursuant to the rules applicable to the arbitration of disputes before the American Arbitration Association or other dispute resolution forum selected by the parties where timely motion has not been made to vacate or modify such award pursuant to applicable law;

(e) fail to comply with a written and executed settlement agreement, obtained in connection with a mediation submitted for disposition pursuant to the procedures specified by NASD;

(f) fail to waive the California Rules of Court, Division VI of the Appendix, entitled, "Ethics Standards for Neutral Arbitrators in Contractual Arbitration" (the "California Standards"), if application of the California Standards has been waived by all parties to the dispute who are:

(1) customers with a claim against a member or an associated person;

(2) associated persons with a claim against a member or an associated person;

(3) members with a claim against another member; or

(4) members with a claim against an associated person that relates exclusively to a promissory note.

Written waiver by such parties shall constitute and operate as a waiver for all member firms or associated persons against whom the claim has been filed. This paragraph applies to claims brought in California against all member firms and associated persons, including terminated or otherwise inactive member firms or associated persons.

All awards shall be honored by a cash payment to the prevailing party of the exact dollar amount stated in the award. Awards may not be honored by crediting the prevailing party's account with the dollar amount of the award, unless authorized by the express terms of the award or consented to in writing by the parties. Awards shall be honored upon receipt thereof, or within such other time period as may be prescribed by the award.

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110 for a member to require associated persons to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure.

#### **12100. Definitions**

Unless otherwise defined in the Code, terms used in the Rules and interpretive material, if defined in the NASD By-Laws, shall have the meaning as defined in the NASD By-Laws.

##### **(a) Associated Person**

The term "associated person" or "associated person of a member" means a person associated with a member, as that term is defined in paragraph [(p)] (r).

##### **(b) Award**

An award is a document stating the disposition of a case.

##### **[(b)] (c) Board**

The term "Board" means the Board of Directors of NASD Dispute Resolution, Inc.

##### **[(c)] (d) Claim**

The term "claim" means an allegation or request for relief.

##### **[(d)] (e) Claimant**

The term "claimant" means a party that files the statement of claim that initiates an arbitration under Rule 12302.

##### **[(e)] (f) Code**

The term "Code" means the Code of Arbitration Procedure for Customer Disputes. For disputes involving only industry parties, see the NASD Code of Arbitration Procedure for Industry Disputes.

##### **[(f)] (g) Counterclaim**

The term "counterclaim" means a claim asserted against a claimant by a respondent.

**[(g)] (h) Cross Claim**

The term “cross claim” means a claim asserted by a respondent against another already-named respondent.

**[(i)] (i) Customer**

A customer shall not include a broker or dealer.

**[(h)] (i) Day**

Except as otherwise provided, the term “day” means calendar day. If a deadline specified in the Code falls on a Saturday, Sunday or any NASD holiday, the deadline is extended until the next business day.

**[(i)] (k) Director**

The term “Director” means the Director of NASD Dispute Resolution. Unless the Code provides that the Director may not delegate a specific function, the term includes NASD staff to whom the Director has delegated authority.

**[(j)] (l) Dispute**

The term “dispute” means a dispute, claim or controversy. A dispute may consist of one or more claims.

**[(k)] (m) Hearing**

The term “hearing” means the hearing on the merits of an arbitration under Rule 12600.

**[(l)] (n) Hearing Session**

The term “hearing session” means any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing conference.

**[(m)] (o) Member**

For purposes of the Code, the term “member” means any broker or dealer admitted to membership in NASD, whether or not the membership has been terminated or cancelled.

**[(n)] (p) Non-Public Arbitrator**

The term “non-public arbitrator” means a person who is otherwise qualified to serve as an arbitrator and:

- (1) Is or, within the past five years, was:



- (A) Associated with a broker or a dealer (including a government securities broker or dealer or a municipal securities dealer);
- (B) Registered under the Commodity Exchange Act;
- (C) A member of a commodities exchange or a registered futures association; or
- (D) Associated with a person or firm registered under the Commodity Exchange Act;

(2) Is retired from, or spent a substantial part of a career engaging in, any of the business activities listed in paragraph [(n)] (p)(1);

(3) Is an attorney, accountant, or other professional who has devoted 20 percent or more of his or her professional work, in the last two years, to clients who are engaged in any of the business activities listed in paragraph [(n)] (p)(1); or

(4) Is an employee of a bank or other financial institution and effects transactions in securities, including government or municipal securities, and commodities futures or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.

For purposes of this rule, the term “professional work” shall not include mediation services performed by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.

**[(o)] (q) Panel**

The term “panel” means the arbitration panel, whether it consists of one or more arbitrators.

**[(p)] (r) Person Associated with a Member**

The term “person associated with a member” means:

(1) A natural person registered under the Rules of NASD; or

(2) A sole proprietor, partner, officer, director, or branch manager of a member, or a natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with NASD under the By-Laws or the Rules of NASD.

For purposes of the Code, a person formerly associated with a member is a person associated with a member.

**(s) Pleadings**

A pleading is a statement describing a party’s causes of action or defenses. Documents that are considered pleadings are: a statement of claim, an answer, a

counterclaim, a cross claim, a third party claim, and any replies.

[(q)] (t) Prehearing Conference

The term "prehearing conference" means any hearing session, including an Initial Prehearing Conference, that takes place before the hearing on the merits begins.

[(r)] (u) **Public Arbitrator**

The term "public arbitrator" means a person who is otherwise qualified to serve as an arbitrator and:

(1) Is not engaged in the conduct or activities described in paragraphs [(n)] (p)(1)-(4);

(2) Was not engaged in the conduct or activities described in paragraphs [(n)] (p)(1)-(4) for a total of 20 years or more;

(3) Is not an investment adviser;

(4) Is not an attorney, accountant, or other professional whose firm derived 10 percent or more of its annual revenue in the past two years from any persons or entities listed in paragraphs [(n)] (p)(1)-(4); and

(5) Is not the spouse or a family member of a person who is engaged in the conduct or activities described in paragraphs [(n)] (p)(1)-(4). For the purposes of this rule, the term "family member" means:

(A) The parent, stepparent, child, or stepchild of any person engaged in the conduct or activities described in paragraphs [(n)] (p)(1)-(4);

(B) A member of the household of a person engaged in the conduct or activities described in paragraphs [(n)] (p)(1)-(4);

(C) A person who receives financial support of more than 50 percent of his or her annual income from a person engaged in the conduct or activities described in paragraphs [(n)] (p)(1)-(4); or

(D) A person who is claimed as a dependent for federal income tax purposes by a person engaged in the conduct or activities described in paragraphs [(n)] (p)(1)-(4).

For purposes of this rule, the term “revenue” shall not include mediation fees received by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.

**[(s)] (v) Respondent**

The term “respondent” means a party against whom a statement of claim or third party claim has been filed. A claimant against whom a counterclaim has been filed is not a respondent for purposes of the Code.

**[(t)] (w) Statement of Claim**

The term “statement of claim” means the initial or amended claim filed by the party or parties initiating the arbitration.

**[(u)] (x) Third Party Claim**

The term “third party claim” means a claim asserted against a party not already named in the statement of claim or any other previous pleading.

**[(v)] (y) Uniform Submission Agreement**

The term “Uniform Submission Agreement” means the NASD Uniform Submission Agreement. The NASD Uniform Submission Agreement is a document that parties must sign at the outset of an arbitration in which they agree to submit to arbitration under the Code.

**12101. Applicability of Code and Incorporation by Reference**

**(a) Applicability of Code**

The Code applies to any dispute between a customer and a member or associated person of a member that is submitted to arbitration under Rule 12200 or 12201.

**(b) Incorporation by Reference**

When a dispute is submitted to arbitration under the Code pursuant to an arbitration agreement, the Code is incorporated by reference into the agreement.

**12102. National Arbitration and Mediation Committee**

(a) Pursuant to Part V(C)(1)(b) of the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries (“Delegation Plan”), the Board shall appoint a National Arbitration and Mediation Committee (“NAMC”).

(1) The NAMC shall consist of no fewer than 10 and no more than 25 members. At least 50 percent of the NAMC shall be Non-Industry members.

(2) The Chairperson of the Board shall name the chairperson of the NAMC.

(b) Pursuant to the Delegation Plan, the NAMC shall have the authority to recommend rules, regulations, procedures and amendments relating to arbitration, mediation, and other dispute resolution matters to the Board. All matters recommended by the NAMC to the Board must have been approved by a quorum, which shall consist of a majority of the NAMC, including at least 50 percent of the Non-Industry committee members. If at least 50 percent of the Non-Industry committee members are either (i) present at or (ii) have filed a waiver of attendance for a meeting after receiving an agenda prior to such meeting, the requirement that at least 50 percent of the Non-Industry committee members be present to constitute the quorum shall be waived. The NAMC has such other power and authority as is necessary to carry out the purposes of the Code.

(c) The NAMC may meet as frequently as necessary, but must meet at least once a year.

#### **12103. Director of Dispute Resolution**

(a) The Board shall appoint a Director of Dispute Resolution. The Director shall perform all the administrative duties relating to arbitrations submitted under the Code. The Director may delegate his or her duties when it is appropriate, unless the Code provides otherwise.

(b) The Director shall consult with the NAMC at the NAMC's request.

(c) The President of NASD Dispute Resolution may perform the Director's duties. If the Director is unable to perform his or her duties, the President of NASD Dispute Resolution may appoint an interim Director.

#### **12104. Effect of Arbitration on NASD Regulatory Activities**

(a) Submitting a dispute to arbitration under the Code does not limit or preclude any right, action or determination by NASD that it would otherwise be authorized to adopt, administer or enforce.

(b) Only at the conclusion of an arbitration, any arbitrator may refer to NASD for disciplinary investigation any matter that has come to the arbitrator's attention during and in connection with the arbitration, either from the record of the proceeding or from material or communications related to the arbitration, which the arbitrator has reason to believe may constitute a violation of NASD's rules, the federal securities laws, or other applicable rules or laws.

**12105. Agreement of the Parties**

(a) Except as provided in paragraph (b), if the Code provides that the parties may agree to modify a provision of the Code, or a decision of the Director or the panel, the written agreement of all named parties is required.

(b) If the Director or the panel determines that a named party is inactive in the arbitration, or has failed to respond after adequate notice has been given, the Director or the panel may determine that the written agreement of that party is not required while the party is inactive or not responsive.

## **PART II GENERAL ARBITRATION RULES**

### **12200. Arbitration Under an Arbitration Agreement or the Rules of NASD**

Parties must arbitrate a dispute under the Code if:

- Arbitration under the Code is either:
  - (1) Required by a written agreement, or
  - (2) Requested by the customer;
- The dispute is between a customer and a member or associated person of a member; and
- The dispute arises in connection with the business activities of the member or the associated person[, except the insurance business activities of a member that is also an insurance company].

### **12201. Elective Arbitration**

Parties may arbitrate a dispute under the Code if:

- The parties agree in writing to submit the dispute to arbitration under the Code after the dispute arises; and
- The dispute is between a customer and a member, associated person of a member, or other related party; and
- The dispute arises in connection with the business activities of a member or an associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

### **12202. Claims Against Inactive Members**

A claim by or against a member in one of the following categories is ineligible for arbitration under the Code unless the customer agrees in writing to arbitrate after the claim arises:

- A member whose membership is terminated, suspended, cancelled or revoked;
- A member that has been expelled from NASD; or
- A member that is otherwise defunct.

**12203. Denial of NASD Forum [and Referral to Other Forums]**

(a) The Director may decline to permit the use of the NASD arbitration forum if the Director determines that, given the purposes of NASD and the intent of the Code, the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives. Only the Director or the President of NASD Dispute Resolution may exercise the Director's authority under this rule.

(b) Disputes that arise out of transactions in a readily identifiable market may be referred to the arbitration forum for that market, if the claimant agrees.

**12204. Class Action Claims**

(a) Class action claims may not be arbitrated under the Code.

(b) [No claim that is included] Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, [will] shall not be arbitrated under the Code, unless the party bringing the claim [shows] files with NASD one of the following:

(1) a copy of a notice filed with the court in which the class action is pending that [it is not participating] the party will not participate in the class action[,] or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court[,if any]; or

(2) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

(c) The Director will refer to a panel any dispute as to whether a claim is part of a class action, unless a party asks the court hearing the class action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(d) A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

- The class certification is denied;
- The class is decertified;
- The member of the certified or putative class is excluded from the class by the court; or
- The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.

This paragraph does not otherwise affect the enforceability of any rights under the Code or any other agreement.

#### **12205. Shareholder Derivative Actions**

Shareholder derivative actions may not be arbitrated under the Code.

#### **12206. Time Limits**

##### **(a) Time Limitation on Submission of Claims**

No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.

##### **(b) Dismissal under Rule**

Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court. By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

##### **(c) Effect of Rule on Time Limits for Filing Claim in Court**

The rule does not extend applicable statutes of limitations. However, where permitted by applicable law, when a claimant files a statement of claim in arbitration, any time limits for the filing of the claim in court will be tolled while NASD retains jurisdiction of the claim.

##### **(d) Effect of Filing a Claim in Court on Time Limits for Filing in Arbitration**

If a party submits a claim to a court of competent jurisdiction, the six-year time limitation will not run while the court retains jurisdiction of the claim matter.

#### **12207. Extension of Deadlines**

(a) The parties may agree in writing to extend or modify any deadline for:

- Serving an answer;
- Returning arbitrator or chairperson lists;
- Responding to motions; or
- Exchanging documents or witness lists.



If the parties agree to extend or modify a deadline under this rule, they must notify the Director of the new deadline in writing.

(b) The panel may extend or modify any deadline listed in paragraph (a), or any other deadline set by the panel, either on its own initiative or upon motion of a party.

(c) The Director may extend or modify any deadline or time period set by the Code for good cause. The Director may also extend or modify any deadline or time period set by the panel in extraordinary circumstances.

#### **12208. Representation of Parties**

All parties have the right to be represented by counsel during any stage of an arbitration.

#### **12209. Legal Proceedings**

During an arbitration, no party may bring any suit, legal action, or proceeding against any other party that concerns or that would resolve any of the matters raised in the arbitration.

#### **12210. Ex Parte Communications**

(a) Except as provided in Rule 12211, no party, or anyone acting on behalf of a party, may communicate with any arbitrator outside of a scheduled hearing or conference regarding an arbitration unless all parties or their representatives are present.

(b) No party, or anyone acting on behalf of a party, may send or give any written motion, request, submission or other materials directly to any arbitrator, unless the arbitrators and the parties agree, or the Code provides otherwise.

#### **12211. Direct Communication Between Parties and Arbitrators**

(a) This rule provides procedures under which parties and arbitrators may communicate directly.

(b) Only parties that are represented by counsel may use direct communication under this rule. If, during the proceeding, a party chooses to appear *pro se* (without counsel), this rule shall no longer apply.

(c) All arbitrators and all parties must agree to the use of direct communication during the Initial Prehearing Conference or a later conference or hearing before it can be used.

(d) Parties may send the arbitrators only items that are listed in an order.

(e) Parties may send items by regular mail, overnight courier, facsimile, or email. All the arbitrators and parties must have facsimile or email capability before such a delivery method may be used.

(f) Copies of all materials sent to arbitrators must also be sent at the same time and in the same manner to all parties and the Director. Materials that exceed 15 pages, however, shall be sent to the Director only by regular mail or overnight courier.

(g) The Director must receive copies of any orders and decisions made as a result of direct communications among the parties and the arbitrators.

(h) Parties may not communicate orally with any of the arbitrators outside the presence of all parties.

(i) Any party or arbitrator may terminate the direct communication order at any time, after giving written notice to the other arbitrators and the parties.

### **12212. Sanctions**

(a) The panel may sanction a party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel.

Unless prohibited by applicable law, sanctions may include, but are not limited to:

- Assessing monetary penalties payable to one or more parties;
- Precluding a party from presenting evidence;
- Making an adverse inference against a party;
- Assessing postponement and/or forum fees; and
- Assessing attorneys' fees, costs and expenses.

(b) The panel may initiate a disciplinary referral at the conclusion of an arbitration.

(c) The panel may dismiss a claim, defense or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.

### **12213. Hearing Locations**

#### **(a) U.S. Hearing Location**

(1) The Director will decide which of NASD's hearing locations will be the hearing location for the arbitration. Generally, the Director will select the hearing

location closest to the customer's residence at the time of the events giving rise to the dispute.

(2) Before arbitrator lists are sent to the parties under Rule 12403, the parties may agree in writing to a hearing location other than the one selected by the Director.

(3) The Director may change the hearing location upon motion of a party, as set forth in Rule 12503.

(4) After the panel is appointed, the panel may decide a motion relating to changing the hearing location.

**(b) Foreign Hearing Location**

(1) If the Director and all parties agree, parties may have their hearing in a foreign hearing location and conducted by foreign arbitrators, provided that the foreign arbitrators have:

(A) met NASD background qualifications for arbitrators;

(B) received training on NASD arbitration rules and procedures; and

(C) satisfied at least the same training and testing requirements as those arbitrators who serve in U. S. locations of NASD.

(2) The parties shall pay an additional surcharge for each day of hearings held in a foreign hearing location. The amount of the surcharge will be determined by the Director and must be agreed to by the parties before the foreign hearing location may be used. This surcharge shall be specified in the agreement to use a foreign hearing location and shall be apportioned equally among the parties, unless they agree otherwise. The foreign arbitrators shall have the authority to apportion this surcharge as provided in Rule 12902(c).

**12214. Payment of Arbitrators**

(a) Except as provided in paragraph (b) and in Rule 12800, NASD will pay the panel an honorarium, as follows:

- \$200 to each arbitrator for each hearing session in which he or she participates; [and]
- [An] an additional \$75 per day to the chairperson for each hearing on the merits;
- \$50 for travel to a hearing session that is postponed pursuant to Rule 12601; and
- \$100 for each arbitrator if a hearing session other than a prehearing conference is postponed within three business days before a scheduled hearing session pursuant to Rules 12601(a)(2) and (b)(2).

(b) The Director may authorize a higher or additional honorarium for the use of a foreign hearing location.

(c) Payment for Deciding Discovery-Related Motions Without a Hearing Session

(1) NASD will pay each arbitrator an honorarium of \$200 to decide a discovery-related motion without a hearing session. This paragraph does not apply to cases administered under Rule 12800.

(2) For purposes of paragraph (c)(1), a discovery-related motion and any replies or other correspondence relating to the motion shall be considered to be a single motion.

(3) The panel will allocate the cost of the honoraria under paragraph (c)(1) to the parties pursuant to Rules 12902(c).

### **PART III INITIATING AND RESPONDING TO CLAIMS**

#### **12300. Filing and Serving Documents**

(a) Initial statements of claim must be filed with the Director, with enough copies for each other party and each arbitrator. The number of arbitrators is determined in accordance with Rule 12401. The Director will serve the statement of claim on the other parties, and send copies of the statement of claim to each arbitrator.

(b) The parties must serve all other pleadings and other documents directly on each other party. Parties must serve all pleadings on all parties at the same time and in the same manner, unless the parties agree otherwise.

(c) Unless the Code provides otherwise, parties must also file all pleadings and other documents with the Director, with additional copies for each arbitrator. Pleadings and other documents must be filed with the Director at the same time and in the same manner in which they are served on the other parties. Parties filing pleadings and other documents with the Director must include a certificate of service stating the names of the parties served, the date and method of service, and the address(es) to which service was made.

(d) Pleadings and other documents may be filed and served by: first class mail; overnight mail or delivery service; hand delivery; facsimile; or any other method, including electronic mail, that is approved or required by the panel.

(e) Filing and service are accomplished on the date of mailing either by first-class postage prepaid mail or overnight mail service, or, in the case of other means of service, on the date of delivery. Whenever pleadings and other documents must be filed with the Director and served on the other parties, filing and service must occur on the same day and in the same manner, unless the parties agree or the panel directs otherwise.

(f) A party must inform the Director and all other parties in writing of any change of address during an arbitration.

#### **12301. Service on Associated Persons [Currently Associated with a Member]**

(a) [If a member and a person currently associated with the member are named as respondents to the same arbitration,] The Director will serve the initial statement of claim on [service on the person] an associated person [with the member] directly at the person's residential address or usual place of abode [may be made on the member or directly on the associated person]. If service cannot be completed at the person's residential address or usual place of abode, the Director will serve the initial statement of claim on the associated person at the person's business address.

(b) If a member and a person currently associated with the member are named as respondents to the same arbitration, and the Director cannot complete service as provided in paragraph (a), then the Director may serve the member with the initial statement of claim on behalf of the associated person. If service is made on the member, the member must serve the associated person, even if the member will not be representing the associated person in the arbitration. If the member is not representing

the associated person in the arbitration, the member must notify, and provide the associated person's current address to, all parties and the Director.

## **12302. Filing an Initial Statement of Claim**

### **(a) Filing Claim with the Director**

(1) To initiate an arbitration, a claimant must file the following with the Director:

- Signed and dated Uniform Submission Agreement; and
- A statement of claim specifying the relevant facts and remedies requested.

The claimant may include any additional documents supporting the statement of claim.

(2) A claimant may use the online claim notification and filing procedure to complete part of the arbitration claim filing process through the Internet. To commence this process, a claimant may complete a Claim Information Form that can be accessed through [www.nasd.com](http://www.nasd.com). In completing the Claim Information Form, the claimant may attach an electronic version of the statement of claim to the form, provided it does not exceed 50 pages. Once this online form has been completed, an NASD Dispute Resolution Tracking Form will be generated and displayed for the claimant to reproduce as necessary. The claimant shall then file with the Director the rest of the materials required in subparagraph (1) of the rule, along with a hard copy of the NASD Dispute Resolution Tracking Form.

### **(b) Number of Copies**

The claimant must file enough copies of the statement of claim, if it has not been submitted electronically, and the signed Uniform Submission Agreement, and any additional materials, for the Director, each arbitrator and each other party.

### **(c) Fees**

At the time the statement of claim is filed, the claimant must pay all required filing fees.

### **(d) Service by Director**

Unless the statement of claim is deficient under Rule 12307, the Director will send a copy of the Uniform Submission Agreement, the statement of claim, and any additional materials filed by the claimant, to each other party, and to each arbitrator once the panel has been appointed.

**12303. Answering the Statement of Claim**

(a) Respondent(s) must directly serve each other party with the following documents within 45 days of receipt of the statement of claim:

- Signed and dated Uniform Submission Agreement; and
- An answer specifying the relevant facts and available defenses to the statement of claim.

The respondent may include any additional documents supporting the answer to the statement of claim. Parties that fail to answer in the time provided may be subject to default proceedings under Rule 12801.

(b) The answer to the statement of claim may include any counterclaims against the claimant, cross claims against other respondents, or third party claims, specifying all relevant facts and remedies requested, as well as any additional documents supporting such claim. When serving a third party claim, the respondent must provide each new respondent with copies of all documents previously served by any party, or sent to the parties by the Director.

(c) At the same time that the answer to the statement of claim is served on the other parties, the respondent must file copies of the Uniform Submission Agreement, the answer to the statement of claim, and any additional documents, with the Director, with enough copies for the Director and each arbitrator.

(d) If the answer to the statement of claim contains any counterclaims, cross claims or third party claims, the respondent must pay all required filing fees.

**12304. Answering Counterclaims**

(a) A claimant must directly serve any answer to a counterclaim on each other party within 20 days of receipt of the counterclaim. At the same time, the claimant must file the answer to the counterclaim with the Director with additional copies for each arbitrator.

(b) The answer must include the relevant facts and available defenses to the counterclaim. The claimant may include any additional documents supporting the answer to the counterclaim.

**12305. Answering Cross Claims**

(a) A respondent must directly serve an answer to a cross claim on each other party within 20 days from the date that the respondent's answer to the statement of claim is due, or from the receipt of the cross claim, whichever is later. At the same time, the respondent must file the answer to the cross claim with the Director with additional copies for each arbitrator.

(b) The answer must include the relevant facts and available defenses to the cross claim. The respondent may include any additional documents supporting the answer to the cross claim.

### **12306. Answering Third Party Claims**

(a) A party responding to a third party claim must directly serve all other parties with the following documents within 45 days of receipt of the third party claim:

- Signed and dated Uniform Submission Agreement; and
- An answer specifying the relevant facts and available defenses to the third party claim.

The respondent may include any additional documents supporting the answer to the third party claim.

(b) The answer to the third party claim may also include any counterclaims, cross claims, or third party claims, specifying all relevant facts and remedies requested. The answer may also include any additional documents supporting such claim. When serving a third party claim, the respondent must provide each new respondent with copies of all documents previously served by any party, or sent to the parties by the Director.

(c) At the same time that the answer to the third party claim is served on the other parties, the third party respondent must also file copies of the Uniform Submission Agreement, the answer to the third party claim, and any additional documents, with the Director, with additional copies for each arbitrator.

(d) If the answer to the third party claim contains any counterclaim, cross claim or third party claim, the party must also pay all required filing fees.

### **12307. Deficient Claims**

(a) The Director will not serve any claim that is deficient. The reasons a claim may be deficient include the following:

- A Uniform Submission Agreement was not filed by each claimant;
- The Uniform Submission Agreement was not properly signed and dated;
- The Uniform Submission Agreement does not name all parties named in the claim;
- The claimant did not file the correct number of copies of the Uniform Submission Agreement, statement of claim or supporting documents for service on respondents and for the arbitrators;



- The claim does not specify the customer's home address at the time of the events giving rise to the dispute;
- The claim does not specify the claimant's or the claimant's representative's current address; or
- The claimant did not pay all required filing fees, unless the Director deferred the fees.

(b) The Director will notify the claimant in writing if the claim is deficient. If all deficiencies are not corrected within 30 days from the time the claimant receives notice, the Director will close the case without serving the claim, and will not refund any filing fees paid by the claimant.

(c) The panel will not consider any counterclaim, cross claim or third party claim that is deficient. The reasons a counterclaim, cross claim or third party claim may be deficient include the reasons listed in paragraph (a). The Director will notify the party making the counterclaim, cross claim or third party claim of the any deficiencies in writing. If all deficiencies are not corrected within 30 days from the time the party making the counterclaim, cross claim or third party claim receives notice of the deficiency, the panel will proceed with the arbitration as though the deficient counterclaim, cross claim or third party claim had not been made.

#### **12308. Loss of Defenses Due to Untimely or Incomplete Answer**

(a) If a party fails to answer any claim within the time period specified in the Code, the panel may, upon motion, bar that party from presenting any defenses or facts at the hearing, unless the time to answer was extended in accordance with the Code. The party may also be subject to default proceedings under Rule 12801.

(b) If a party answers a claim that alleges specific facts and contentions with a general denial, or fails to include defenses or relevant facts in its answer that were known to it at the time the answer was filed, the panel may bar that party from presenting the omitted defenses or facts at the hearing.

#### **12309. Amending Pleadings**

##### **(a) Before Panel Appointment**

Except as provided in paragraph (c), a party may amend a pleading at any time before the panel has been appointed.

(1) To amend a statement of claim that has been filed but not yet served by the Director, the claimant must file the amended claim with the Director, with additional copies for each arbitrator and each other party. The Director will then serve the amended claim in accordance with Rules 12300 and 12301.

(2) To amend any other pleading, a party must serve the amended pleading on each party. At the same time, the party must file the amended

pleading with the Director, with additional copies for each arbitrator. If a pleading is amended to add a party to the arbitration, the party amending the pleading must provide each new party with copies of all documents previously served by any party, or sent to the parties by the Director.

**(b) After Panel Appointment**

Once a panel has been appointed, a party may only amend a pleading if the panel grants a motion to amend in accordance with Rule 12503. Motions to amend a pleading must include a copy of the proposed amended pleading. If the panel grants the motion to amend, the amended pleading does not need to be re-served on the other parties, the Director, or the panel, unless the panel determines otherwise.

**(c) Amendments to Add Parties**

Once the ranked arbitrator lists are due to the Director under Rule 12404(c), no party may amend a pleading to add a new party to the arbitration until a panel has been appointed and the panel grants a motion to add the party. Motions to add a party after panel appointment must be served on all parties, including the party to be added, and the party to be added may respond to the motion in accordance with Rule 12503 without waiving any rights or objections under the Code.

(d) Responding to an Amended Pleading

Any party may file a response to an amended pleading, provided the response is filed and served within 20 days of receipt of the amended pleading, unless the panel determines otherwise.

12310. Answering Amended Claims

(a) If a claim is amended before it has been answered, the respondent's original time to answer is extended by 20 days.

(b) If a claim is amended after it has been answered, but before a panel has been appointed, the respondent has 20 days from the time the amended claim is served to serve an amended answer.

(c) If a claim is amended after a panel has been appointed, the respondent has 20 days from the time the respondent receives notice that the panel has granted the motion to amend the claim to serve an amended answer.

(d) The amended answer must be directly served on each other party. At the same time, the amended answer must also be filed with the Director, with additional copies for each arbitrator.

(e) If the amended claim adds a new party to the arbitration, the new party's answer is governed by Rule 12306.

### **12311. Amendments to Amount in Dispute**

If an amended pleading increases the amount in dispute, all filing fees, surcharges and process fees required by the Code will be recalculated based on the new amount in dispute.

### **12312. Multiple Claimants**

(a) One or more parties may join multiple claims together in the same arbitration if the claims contain common questions of law or fact and:

- The claims assert any right to relief jointly and severally; or
- The claims arise out of the same transaction or occurrence, or series of transactions or occurrences.

(b) After all responsive pleadings have been served, claims joined together under paragraph (a) of this rule may be separated into two or more arbitrations by the Director before a panel is appointed, or by the panel after the panel is appointed. A party whose claims were separated by the Director may make a motion to the panel in the lowest numbered case to reconsider the Director's decision.

### **12313. Multiple Respondents**

(a) One or more parties may name one or more respondents in the same arbitration if the claims contain any questions of law or fact common to all respondents and:

- The claims are asserted against the respondents jointly and severally; or
- The claims arise out of the same transaction or occurrence, or series of transactions or occurrences.

(b) After all responsive pleadings have been served, claims joined together under paragraph (a) of this rule may be separated into two or more arbitrations by the Director before a panel is appointed, or by the panel after the panel is appointed. A party whose claims were separated by the Director may make a motion to the panel in the lowest numbered case to reconsider the Director's decision.

### **12314. Combining Claims**

Before ranked arbitrator lists are due to the Director under Rule 12404(c), the Director may combine separate but related claims into one arbitration. Once a panel has been appointed, the panel may reconsider the Director's decision upon motion of a party.

## **Part IV Appointment, Disqualification, And Authority of Arbitrators**

### **12400. Neutral List Selection System and Arbitrator Rosters**

#### **(d) Neutral List Selection System**

The Neutral List Selection System is a computer system that generates, on a random basis, lists of arbitrators from NASD's rosters of arbitrators for the selected hearing location for each proceeding. The parties will select their panel through a process of striking and ranking the arbitrators on lists generated by the Neutral List Selection System.

#### **(b) Arbitrator[s] Rosters**

NASD maintains the following roster of arbitrators:

- A roster of non-public arbitrators as defined in Rule 12100[(n)] (p);
- A roster of public arbitrators as defined in Rule 12100[(r)] (u); and
- A roster of arbitrators who are eligible to serve as chairperson of a panel as described in paragraph (c). Arbitrators who are eligible to serve as chairperson will also be included in the roster of public arbitrators, but will only appear on one list in a case.

#### **(c) Eligibility for Chairperson Roster**

In customer disputes, chairpersons must be public arbitrators. Arbitrators are eligible for the chairperson roster if they have completed chairperson training provided by NASD or have substantially equivalent training or experience and:

- Have a law degree and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least two arbitrations administered by a self-regulatory organization in which hearings were held; or
- Have served as an arbitrator through award on at least three arbitrations administered by a self-regulatory organization in which hearings were held.

### **12401. Number of Arbitrators**

#### **(a) Claims of \$25,000 or Less**

If the amount of a claim is \$25,000 or less, exclusive of interest and expenses, the panel will consist of one arbitrator and the claim is subject to the simplified arbitration procedures under Rule 12800.

#### **(b) Claims of More Than \$25,000 Up To \$50,000**

If the amount of a claim is more than \$25,000 but not more than \$50,000, exclusive of interest and expenses, the panel will consist of one arbitrator unless any party requests a panel of three arbitrators.

**(c) Claims of More Than \$50,000; Unspecified or Non-Monetary Claims**

If the amount of a claim is more than \$50,000, exclusive of interest and expenses, or is unspecified, or if the claim does not request money damages, the panel will consist of three arbitrators, unless the parties agree in writing to one arbitrator.

**12402. Composition of Arbitration Panels**

(a) If the panel consists of one arbitrator, the arbitrator will be a public arbitrator selected from the public chairperson roster, unless the parties agree in writing otherwise.

(b) If the panel consists of three arbitrators, one will be a non-public arbitrator and two will be public arbitrators, one of whom will be selected from the public chairperson roster, unless the parties agree in writing otherwise.

**12403. Generating and Sending Lists to the Parties**

**(a) Generating Lists**

(1) If the panel consists of one arbitrator, the Neutral List Selection System will generate a list of [seven] eight public arbitrators from the NASD's chairperson roster.

(2) If the panel consists of three arbitrators, the Neutral List Selection System will generate:

- A list of [seven] eight arbitrators from the NASD's non-public arbitrator roster;
- A list of [seven] eight arbitrators from the NASD's public arbitrator roster; and
- A list of [seven] eight public arbitrators from the NASD's chairperson roster.

(3) If the panel consists of three arbitrators, the Neutral List Selection System will generate the chairperson list first. Chair-qualified arbitrators who were not selected for the chairperson list will be eligible for selection on the public list. An individual arbitrator cannot appear on both the chairperson list and the public list for the same case.

(4) The Neutral List Selection System will exclude arbitrators from the lists based upon current conflicts of interest identified within the Neutral List Selection System.

**(b) Sending Lists to Parties**

(1) The Director will send the lists generated by the Neutral List Selection System to all parties at the same time, within approximately 30 days after the last answer is due. The parties will also receive employment history for the past 10 years and other background information for each arbitrator listed.

(2) If a party requests additional information about an arbitrator, the Director will request the additional information from the arbitrator, and will send any response to all of the parties at the same time. When a party requests additional information, the Director may, but is not required to, toll the time for parties to return the ranked lists under Rule 12404(c).

**12404. Striking and Ranking Arbitrators**

(a) Each separately represented party may strike up to [five] four of the arbitrators from each list for any reason by crossing through the names of the arbitrators. [Two] At least four names must remain on each list.

(b) Each separately represented party shall rank all remaining arbitrators on the lists in order of preference, with a “1” indicating the party’s first choice, a “2” indicating the party’s second choice, and so on. Each list of arbitrators must be ranked separately.

(c) The ranked lists must be returned to the Director no more than 20 days after the date upon which the Director sent the lists to the parties. If the Director does not receive a party’s ranked lists within that time, the Director will proceed as though the party did not want to strike any arbitrator or have any preferences among the listed arbitrators.

**12405. Combining Lists**

For each arbitrator classification (public, non-public, and chairperson), the Director will prepare combined ranked lists of arbitrators based on the parties’ numerical rankings, as follows:

- The Director will add the rankings of all claimants together, and the rankings of all respondents together, to produce separate combined ranked lists for the claimants and the respondents.
- The Director will then add the combined rankings of claimants and the respondents together, to produce a single combined ranking number for each arbitrator, excluding all arbitrators stricken by a party.
- The Director will create separate combined ranked lists for each arbitrator classification in cases with both public and non-public arbitrators.

**12406. Appointment of Arbitrators; Discretion to Appoint Arbitrators Not on List**

(a) If the panel consists of one arbitrator, the Director will appoint the highest-ranked available arbitrator from the combined chairperson list.

(b) If the panel consists of three arbitrators, the Director will appoint:

- The highest-ranked available non-public arbitrator from the combined non-public arbitrator list;
- The highest-ranked available public arbitrator from the combined public arbitrator list, and
- The highest-ranked available public arbitrator from the combined chairperson list, who will serve as chairperson of the panel.

(c) If the number of arbitrators available to serve from the combined list(s) is not sufficient to fill an initial panel, the Director will appoint one or more arbitrators of the required classification to complete the panel from names generated randomly by the Neutral List Selection System. If the Director must appoint a non-public arbitrator, the Director may not appoint a non-public arbitrator as defined in Rule 12100[(n)] (p)(2) or (3), unless the parties agree otherwise. The Director will provide the parties information about the arbitrators as provided in Rule 12403 and the parties will have the right to challenge the arbitrators as provided in Rule 12410.

(d) Appointment of arbitrators occurs when the Director sends notice to the parties of the names of the arbitrators on the panel. Before making any decision as an arbitrator or attending a hearing session, the arbitrators must execute NASD's arbitrator oath or affirmation.

**12407. Additional Parties**

(a) If a party is added to an arbitration after the Director sends the lists generated by the Neutral List Selection System to the parties, but before parties must return the ranked lists to the Director, the Director will send the lists to the newly added party, with employment history for the past 10 years and other background information for each arbitrator listed. The newly added party may rank and strike the arbitrators in accordance with Rule 12404. If the newly added party returns the lists within 20 days after the date upon which the Director sent the lists to the party, the Director will include the new party's lists when combining rankings under Rule 12405. If the Director does not receive the list within that time, the Director will proceed as though the party did not want to strike any arbitrator or have any preference among the listed arbitrators.

(b) Once the ranked lists are due to the Director under Rule 12404, no party may amend a pleading to add a new party to the arbitration until a panel is appointed and grants a motion to add the party. Motions to add a party must be served on all parties, including the party to be added, and the party to be added may respond to the motion in accordance with Rule 12503 without waiving any rights or objections under the Code. If the panel grants the motion to add the party, the newly added party may not strike and

rank the arbitrators, but may challenge an arbitrator for cause in accordance with Rule 12410.

**12408. Disclosures Required of Arbitrators**

(a) Before appointing arbitrators to a panel, the Director will notify the arbitrators of the nature of the dispute and the identity of the parties. Each potential arbitrator must make a reasonable effort to learn of, and must disclose to the Director, any circumstances which might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, including:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances with any party, any party's representative, or anyone who the arbitrator is told may be a witness in the proceeding, that are likely to affect impartiality or might reasonably create an appearance of partiality or bias;

(3) Any such relationship or circumstances involving members of the arbitrator's family or the arbitrator's current employers, partners, or business associates; and

(4) Any existing or past service as a mediator.

(b) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in paragraph (a) is a continuing duty that requires an arbitrator who accepts appointment to an arbitration proceeding to disclose, at any stage of the proceeding, any such interests, relationships, or circumstances that arise, or are recalled or discovered.

(c) The Director will inform the parties to the arbitration of any information disclosed to the Director under this rule unless the arbitrator who disclosed the information declines appointment or voluntarily withdraws from the panel as soon as the arbitrator learns of any interest, relationship or circumstance that might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, or the Director removes the arbitrator.

**12409. Arbitrator Recusal**

Any party may ask an arbitrator to recuse himself or herself from the panel for good cause. Requests for arbitrator recusal are decided by the arbitrator who is the subject of the request.



## **12410. Removal of Arbitrator by Director**

### **(a) Before First Hearing Session Begins**

Before the first hearing session begins, the Director may remove an arbitrator for conflict of interest or bias, either upon request of a party or on the Director's own initiative.

(1) The Director will grant a party's request to remove an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration. The interest or bias must be direct, definite, and capable of reasonable demonstration, rather than remote or speculative. Close questions regarding challenges to an arbitrator by a customer under this [R]rule will be resolved in favor of the customer.

(2) The Director must first notify the parties before removing an arbitrator on the Director's own initiative. The Director may not remove the arbitrator if the parties agree in writing to retain the arbitrator within five days of receiving notice of the Director's intent to remove the arbitrator.

### **(b) After First Hearing Session Begins**

After the first hearing session begins, the Director may remove an arbitrator based only on information required to be disclosed under Rule 12408 that was not previously known by the parties. The Director may exercise this authority upon request of a party or on the Director's own initiative. Only the Director or the President of NASD Dispute Resolution may exercise the Director's authority under this paragraph (b).

## **12411. Replacement of Arbitrators**

(a) If an arbitrator is removed, or becomes otherwise unable or unwilling to serve, the Director will appoint a replacement arbitrator in accordance with this rule, unless the parties agree in writing to proceed with only the remaining arbitrators.

(b) The Director will appoint as a replacement arbitrator the arbitrator who is the most highly ranked available arbitrator of the required classification remaining on the combined list.

(c) If there are no available arbitrators of the required classification on the consolidated list, the Director will appoint an arbitrator of the required classification to complete the panel from names generated by the Neutral List Selection System. The Director will provide the parties information about the arbitrator as provided in Rule 12403, and the parties shall have the right to object to the arbitrator as provided in Rule 12410.

(d) If the Director must appoint a non-public arbitrator under paragraph (c), the Director may not appoint a non-public arbitrator as defined in Rule 12100[(n)] (p)(2) or (3), unless the parties agree otherwise.

**12412. Director's Discretionary Authority**

The Director may exercise discretionary authority and make any decision that is consistent with the purposes of the Code to facilitate the appointment of arbitrators and the resolution of arbitrations.

**12413. Jurisdiction of Panel and Authority to Interpret the Code**

The panel has the authority to interpret and determine the applicability of all provisions under the Code. Such interpretations are final and binding upon the parties.

**12414. Determinations of Arbitration Panel**

All rulings and determinations of the panel must be made by a majority of the arbitrators, unless the parties agree, or the Code or applicable law provides, otherwise.

## **PART V      PREHEARING PROCEDURES AND DISCOVERY**

### **12500. Initial Prehearing Conference**

(a) After the panel is appointed, the Director will schedule an Initial Prehearing Conference before the panel, except as provided in paragraph (c) of this rule.

(b) The Initial Prehearing Conference will generally be held by telephone. Unless the parties agree otherwise, the Director must notify each party of the time and place of the Initial Prehearing Conference at least 20 days before it takes place.

(c) At the Initial Prehearing Conference, the panel will set discovery, briefing, and motions deadlines, schedule subsequent hearing sessions, and address other preliminary matters. The parties may agree to forgo the Initial Prehearing Conference only if they jointly provide the Director with the following information, in writing, with additional copies for each arbitrator, before the Initial Prehearing Conference is scheduled to be held:

- A statement that the parties accept the panel;
- Whether any other prehearing conferences will be held, and if so, for each prehearing conference, a minimum of four mutually agreeable dates and times, and whether the chairperson or the full panel will preside;
- A minimum of four sets of mutually agreeable hearing dates;
- A discovery schedule;
- A list of all anticipated motions, with filing and response due dates; and
- A determination regarding whether briefs will be submitted, and, if so, the due date for the briefs and any reply briefs.

### **12501. Other Prehearing Conferences**

(a) A prehearing conference may be scheduled upon the joint request of the parties or at the discretion of the Director. The Director will set the time and place of the prehearing conference and appoint a person to preside.

(b) At a party's request, or at the discretion of the panel, the panel may schedule one or more additional prehearing conferences regarding any outstanding preliminary matters, including:

- Discovery disputes;
- Motions;
- Witness lists and subpoenas;
- Stipulations of fact;

- Unresolved scheduling issues;
- Contested issues on which the parties will submit briefs; and
- Any other matter that will simplify or expedite the arbitration.

(c) The panel will determine the time and place of any additional prehearing conferences. Prehearing conferences will generally be held by telephone. Unless the full panel is required under Rule 12503, prehearing conferences may be held before a single arbitrator, generally the chairperson.

## **12502. Recording Prehearing Conferences**

(a) Except as provided in Rule 12504, prehearing conferences will not be tape-recorded unless the panel determines otherwise, either on its own initiative or upon motion of a party.

(b) If a prehearing conference is tape-recorded, the Director will provide a copy of the tape to any party upon request for a nominal fee.

## **12503. Motions**

### **(a) Motions**

(1) A party may make motions in writing, or orally during any hearing session. Before making a motion, a party must make an effort to resolve the matter that is the subject of the motion with the other parties. Every motion, whether written or oral, must include a description of the efforts made by the moving party to resolve the matter before making the motion.

(2) Written motions are not required to be in any particular form, and may take the form of a letter, legal motion, or any other form that the panel decides is acceptable. Written motions must be served directly on each other party, at the same time and in the same manner. Written motions must also be filed with the Director, with additional copies for each arbitrator, at the same time and in the same manner in which they are served on the parties.

(3) Except as provided by Rule 12504, written motions must be served at least 20 days before a scheduled hearing, unless the panel decides otherwise.

(4) Motions to amend a pleading after panel appointment pursuant to Rule 12309(b) must be accompanied by copies of the proposed amended pleading when the motion is served on the other parties and filed with the Director. If the panel grants the motion, the amended pleading does not have to be served again, unless the panel determines otherwise. If a party moves to amend a pleading to add a party, the motion must be served on all parties, including the party to be added, and the party to be added may respond to the

motion in accordance with paragraph Rule 12309(c) without waiving any rights or objections under the Code.

**(b) Responding to Motions**

Except as provided by Rule 12504, parties have 10 days from the receipt of a written motion to respond to the motion, unless the moving party agrees to an extension of time, or the Director or the panel decides otherwise. Responses to written motions must be served directly on each other party, at the same time and in the same manner. Responses to written motions must also be filed with the Director, with additional copies for each arbitrator, at the same time and in the same manner in which they are served on the parties.

**(c) Authority to Decide Motions**

(1) The Director decides motions relating to use of the forum under Rule 12203 and removal of an arbitrator under Rule 12410.

(2) Motions relating to combining or separating claims or arbitrations, or changing the hearing location, are decided by the Director before a panel is appointed, and by the panel after the panel is appointed.

(3) Discovery-related motions are decided by one arbitrator, generally the chairperson. The arbitrator may refer such motions to the full panel either at his or her own initiative, or at the request of a party. The arbitrator must refer motions relating to privilege to the full panel at the request of a party.

(4) Motions for arbitrator recusal under Rule 12409 are decided by the arbitrator who is the subject of the request.

(5) The full panel decides all other motions, including motions relating to the eligibility of a claim under Rule 12206, or to decide a claim or arbitration before a hearing under Rule 12504, unless the Code provides or the parties agree otherwise.

**12504. Motions to Decide Claims Before a Hearing on the Merits**

(a) Except as provided in Rule 12206, motions to decide a claim before a hearing are discouraged and may only be granted in extraordinary circumstances.

(b) Motions under this rule must be made in writing. Unless the parties agree or the panel determines otherwise, motions under this rule must be served at least 60 days before a scheduled hearing, and parties have 45 days to respond to the motion.

(c) Motions under this rule will be decided by the full panel. The panel may not grant a motion under this rule unless a prehearing conference on the motion is held, or waived by the parties. Prehearing conferences to consider motions under this rule will be tape-recorded.

(d) The panel may issue sanctions under Rule 12212 if it determines that a party filed a motion under this rule in bad faith.

### **12505. Cooperation of Parties in Discovery**

The parties must cooperate to the fullest extent practicable in the [voluntary] exchange of documents and information to expedite the arbitration.

### **12506. Document Production Lists**

#### (a) Applicability of Document Production Lists

When the Director serves the statement of claim, the Director will provide the NASD Discovery Guide and Document Production Lists to the parties. Document Production Lists 1 and 2 describe the documents that are presumed to be discoverable in all arbitrations between a customer and a member or associated person. Other Document Production Lists may also apply, depending on the specific cause(s) of action alleged.

#### (b) Time for Responding to Document Production Lists

(1) Unless the parties agree otherwise, within 60 days of the date that the answer to the statement of claim is due, or, for parties added by amendment or third party claim, within 60 days of the date that their answer is due, parties must either:

- Produce to all other parties all documents in their possession or control that are described in the Document Production Lists 1 and 2, and any other Document Production List that is applicable based on the cause(s) of action alleged;
- Identify and explain the reason that specific documents described in Document Production Lists 1 and 2, and any other Document Production List that is applicable based on the cause(s) of action alleged, cannot be produced within the required time, and state when the documents will be produced; or
- Object as provided in Rule 12508.

(2) A party must act in good faith when complying with subparagraph (1) of this rule. "Good faith" means that a party must use its best efforts to produce all documents required or agreed to be produced. If a document cannot be produced in the required time, a party must establish a reasonable timeframe to produce the document.

**(c) Redacted Information**

For purposes of this rule and Rule 12507, if a party redacts any portion of a document prior to production, the redacted pages (or range of pages) shall be labeled “redacted.”

**12507. Other Discovery Requests**

**(a) Making Other Discovery Requests**

(1) Parties may also request additional documents or information from any party by serving a written request directly on the party. Requests for information are generally limited to identification of individuals, entities, and time periods related to the dispute; such requests should be reasonable in number and not require narrative answers or fact finding. Standard interrogatories are generally not permitted in arbitration.

(2) [Such] Other discovery requests may be served:

- On the claimant, or any respondent named in the initial statement of claim, 45 days or more after the Director serves the statement of claim; and
- On any party subsequently added to the arbitration, 45 days or more after the statement of claim is served on that party.

At the same time, the party must serve copies of the request on all other parties. Any request for documents or information not described in applicable Document Production Lists should be specific and relate to the matter in controversy.

**(b) Responding to Other Discovery Requests**

(1) Unless the parties agree otherwise, within 60 days from the date a discovery request other than the Document Production Lists is received, the party receiving the request must either:

- Produce the requested documents or information to all other parties;
- Identify and explain the reason that specific requested documents or information cannot be produced within the required time, and state when the documents will be produced; or
- Object as provided in Rule 12508.

(2) A party must act in good faith when complying with subparagraph (1) of this rule. “Good faith” means that a party must use its best efforts to produce all documents or information required or agreed to be produced. If a document

or information cannot be produced in the required time, a party must establish a reasonable timeframe to produce the document or information.

### **12508. Objecting to Discovery; Waiver of Objection**

(a) If a party objects to producing any document described in Document Production Lists 1 or 2, any other applicable Document Production List, or any document or information requested under Rule 12507, it must specifically identify which document or requested information it is objecting to and why. Objections must be in writing, and must be served on all other parties at the same time and in the same manner. Objections should not be filed with the Director. Parties must produce all applicable listed documents, or other requested documents or information not specified in the objection.

(b) Any objection not made within the required time is waived unless the panel determines that the party had substantial justification for failing to make the objection within the required time.

### **12509. Motions to Compel Discovery**

(a) A party may make a motion asking the panel to order another party to produce documents or information if the other party has:

- Failed to comply with Rule 12506 or 12507; or
- Objected to the production of documents or information under Rule 12508.

(b) Motions to compel discovery must be made, and will be decided, in accordance with Rule 12503. Such motions must include the disputed document request or list, a copy of any objection thereto, and a description of the efforts of the moving party to resolve the issue before making the motion.

### **12510. Depositions**

Depositions are strongly discouraged in arbitration. Upon motion of a party, the panel may permit depositions, but only under very limited circumstances, including:

- To preserve the testimony of ill or dying witnesses;
- To accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing;
- To expedite large or complex cases; and
- If the panel determines that extraordinary circumstances exist.



### **12511. Discovery Sanctions**

(a) Failure to cooperate in the exchange of documents and information as required under the Code may result in sanctions. The panel may issue sanctions against any party in accordance with Rule 12212(a) for:

- Failing to comply with the discovery provisions of the Code, unless the panel determines that there is substantial justification for the failure to comply; or
- Frivolously objecting to the production of requested documents or information.

(b) The panel may dismiss a claim, defense or proceeding with prejudice in accordance with Rule 12212(c) for intentional and material failure to comply with a discovery order of the panel if prior warnings or sanctions have proven ineffective.

### **12512. Subpoenas**

(a) To the extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas. Subpoenas for documents or the appearance of witnesses may be issued as provided by law.

(b) If a subpoena is issued, the issuing party must send copies of the subpoena to all other parties at the same time and in the same manner in which the subpoena was issued.

### **12513. Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas**

(a) Upon motion of a party, the panel may order the following without the use of subpoenas:

- The appearance of any employee or associated person of a member of NASD; or
- The production of any documents in the possession or control of such persons or members.

(b) Unless the panel directs otherwise, the party requesting the appearance of witnesses by, or the production of documents from, non-parties under this rule shall pay the reasonable costs of the appearance and/or production.

### **12514. Exchange of Documents and Witness Lists Before Hearing**

#### **(a) Documents and Other Materials**

At least 20 days before the first scheduled hearing date, all parties must provide all other parties with copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced. The parties should not file the documents with the Director or the arbitrators before the hearing.

**(b) Witness Lists**

At least 20 days before the first scheduled hearing date, all parties must provide each other party with the names and business affiliations of all witnesses they intend to present at the hearing. At the same time, [each party] all parties must file their witness lists with the Director, with enough copies for each arbitrator.

**(c) Exclusion of Documents or Witnesses**

Parties may not present any documents or other materials not produced and or any witnesses not identified in accordance with this rule at the hearing, unless the panel determines that good cause exists for the failure to produce the document or identify the witness. Good cause includes the need to use documents or call witnesses for rebuttal or impeachment purposes based on developments during the hearing. Documents and lists of witnesses in defense of a claim are not considered rebuttal or impeachment information and, therefore, must be exchanged by the parties.

**PART VI HEARINGS; EVIDENCE; CLOSING THE RECORD**

**12600. Required Hearings**

(a) Hearings will be held, unless:

- The arbitration is administered under Rule 12800 or Rule 12801;
- The parties agree otherwise in writing; or
- The arbitration has been settled, withdrawn or dismissed.

(e) The panel will decide the time and date of the hearing at the initial prehearing conference or otherwise in another manner.

(c) The Director will notify the parties of the time and place at least [10] 20 days before the hearing begins, unless the parties agree to a shorter time.

**12601. Postponement of Hearings**

**(b) [When a Hearing May Be Postponed] Postponement of Hearings**

**(1) When a Hearing Shall Be Postponed**

A hearing shall be postponed by agreement of the parties.

**(2) When a Hearing May Be Postponed**

A hearing may be postponed [only]:

- [By agreement of the parties;]
- By the Director, in extraordinary circumstances;
- By the panel, in its own discretion; or
- By the panel, upon motion of a party. The panel may not grant a motion to postpone a hearing made within 10 days of the date that the hearing is scheduled to begin, unless the panel determines that good cause exists.

**(b) Postponement Fees**

(1) Except as otherwise provided, a postponement fee will be charged for each postponement agreed to by the parties, or granted upon request of one or more parties. The fee will equal the applicable hearing session fee under Rule 12902. The panel may allocate the fee among the party or parties that agreed to or requested the postponement. The panel may also assess part or all of any postponement fees against a party that did not request the postponement, if the

panel determines that the non-requesting party caused or contributed to the need for the postponement. The panel may waive the fees.

(2) If a postponement request is made by one or more parties and granted within three business days before a scheduled hearing session, the party or parties making the request shall pay an additional fee of \$100 per arbitrator. If more than one party requests the postponement, the arbitrators shall allocate the \$100 per arbitrator fee among the requesting parties. The arbitrators may allocate all or portion of the \$100 per arbitrator fee to the non-requesting party or parties, if the arbitrators determine that the non-requesting party or parties caused or contributed to the need for the postponement. In the event that a request results in the postponement of consecutively scheduled hearing sessions, the additional fee will be assessed only for the first of the consecutively scheduled hearing sessions. In the event that an extraordinary circumstance prevents a party or parties from making a timely postponement request, arbitrators may use their discretion to waive the fee, provided verification of such circumstance is received.

(3) No postponement fee will be charged if a hearing is postponed:

- Because the parties agree to submit the matter to mediation at NASD;
- By the panel in its own discretion; or
- By the Director in extraordinary circumstances.

### **(c) Dismissal of Arbitration Due to Multiple Postponements**

If all parties jointly request, or agree to, more than two postponements, the panel may dismiss the arbitration without prejudice.

### **12602. Attendance at Hearings**

The parties and their representatives are entitled to attend all hearings. Absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings. The panel will decide who else may attend any or all of the hearings.

### **12603. Failure to Appear**

If a party fails to appear at a hearing after having been notified of the time, date and place of the hearing, the panel may determine that the hearing may go forward, and may render an award as though all parties had been present.

### **12604. Evidence**

(a) The panel will decide what evidence to admit. The panel is not required to follow state or federal rules of evidence.

(b) Production of documents in discovery does not create a presumption that the documents are admissible at the hearing. A party may state objections to the introduction of any document as evidence at the hearing to the same extent that any other objection may be raised in arbitration.

#### **12605. Witness Oath**

All witnesses must testify under oath or affirmation.

#### **12606. Record of Proceedings**

##### **(a) Tape Recording**

(1) Except as provided in paragraph (b), the Director will make a tape recording of every hearing. The Director will provide a copy of the tape to any party upon request for a nominal fee.

(2) The panel may order the parties to provide a transcription of the tape recording. If the panel orders a transcription, copies of the transcription must be provided to each arbitrator and each party. The panel will determine which party or parties must pay the cost of making the transcription and copies.

(3) The tape recording is the official record of the proceeding, even if it is transcribed.

##### **(b) Stenographic Record**

(1) Any party may make a stenographic record of the hearing. Even if a stenographic record is made, the tape recording will be the official record of the proceeding, unless the panel determines otherwise. If the panel determines in advance that the stenographic record will be the official record, the Director will not make a tape recording.

(2) If the stenographic record is the official record of the proceeding, a copy must be provided to the Director, each arbitrator, and each other party. The cost of making and copying the stenographic record will be borne by the party electing to make the stenographic record, unless the panel decides that one or more other parties should bear all or part of the costs.

#### **12607. Order of Presentation of Evidence and Arguments**

Generally, the claimant shall present its case, followed by the respondent's defense. The panel has the discretion to vary the order in which the hearing is conducted, provided that each party is given a fair opportunity to present its case.

**12608. Closing the Record**

(a) The panel will decide when the record is closed. Once the record is closed, no further submissions will be accepted from any party.

(b) In cases in which no hearing is held, the record is presumed to be closed when the Director sends the pleadings to the panel, unless the panel requests, or agrees to accept, additional submissions from any party. If so, the record is presumed to be closed when the last such submission is due.

(c) In cases in which a hearing is held, the panel will generally close the record at the end of the last hearing session, unless the panel requests, or agrees to accept, additional submissions from any party. If so, the panel will inform the parties when the submissions are due and when the record will close.

**12609. Reopening The Record**

The panel may reopen the record on its own initiative or upon motion of any party at any time before the award is rendered, unless prohibited by applicable law.

## **PART VII      TERMINATION OF AN ARBITRATION BEFORE AWARD**

### **12700. Dismissal of Proceedings Prior to Award**

(a) The panel must dismiss an arbitration or a claim at the joint request of the parties to that arbitration or claim. The dismissal will be with or without prejudice, depending on the request of the parties.

(b) The panel may dismiss a claim or an arbitration:

- Upon motion of a party under Rule 12206 or Rule 12504; or
- On its own initiative under Rule 12212(c) or Rule 12601(c).

### **12701. Settlement**

(a) Parties to an arbitration may agree to settle their dispute at any time. Parties who settle must notify the Director. The Director will continue to administer the arbitration, and fees may continue to accrue, until the Director receives written notice of the settlement. The parties do not need to disclose the terms of the settlement agreement to the Director or to NASD Dispute Resolution, but members and associated persons may have reporting obligations under the rules of NASD.

(b) Settling parties will remain responsible for fees incurred under the Code. If parties to a settlement fail to agree on the allocation of any outstanding fees, those fees will be divided equally among the settling parties, except member surcharges and prehearing and hearing process fees required by the Code, which will remain the responsibility of the member party or parties.

### **12702. Withdrawal of Claims**

(a) Before a claim has been answered by a party, the claimant may withdraw the claim against that party with or without prejudice.

(b) After a claim has been answered by a party, the claimant may only withdraw it against that party with prejudice unless the panel decides, or the claimant and that party agree, otherwise.

## **PART VIII SIMPLIFIED ARBITRATION AND DEFAULT PROCEEDINGS**

### **12800. Simplified Arbitration**

#### **(a) Applicability of Rule**

This rule applies to arbitrations involving \$25,000 or less, exclusive of interest and expenses. Except as otherwise provided in this rule, all provisions of the Code apply to such arbitrations.

#### **(b) Single Arbitrator**

All arbitrations administered under this rule will be decided by a single public arbitrator appointed from the NASD's chairperson roster in accordance with the Neutral List Selection System, unless the parties agree in writing otherwise.

#### **(c) Hearings**

(1) No hearing will be held in arbitrations administered under this rule unless the customer requests a hearing.

(2) If no hearing is held, no initial prehearing conference or other prehearing conference will be held, and the arbitrator will render an award based on the pleadings and other materials submitted by the parties. If a hearing is held, the regular provisions of the Code relating to prehearings and hearings, including fee provisions, will apply.

#### **(d) Discovery and Additional Evidence**

(1) Document Production Lists, described in Rule 12506, do not apply to arbitrations subject to this rule. However, the arbitrator may, in his or her discretion, choose to use relevant portions of the Document Production Lists in a manner consistent with the expedited nature of simplified proceedings.

(2) The parties may request documents and other information from each other. All requests for the production of documents and other information must be served on all other parties, and filed with the Director, within 30 days from the date that the last answer is due. Any response or objection to a discovery request must be served on all other parties and filed with the Director within 10 days of the receipt of the requests. The arbitrator will resolve any discovery disputes.

#### **(e) Increases in Amount in Dispute**

If any pleading increases the amount in dispute to more than \$25,000, the arbitration will no longer be administered under this rule, and the regular provisions of the Code will apply. If an arbitrator has been appointed, that arbitrator will remain on the panel. If a three-arbitrator panel is required or requested under Rule 12401, the remaining arbitrators will be appointed by the Director in accordance with Rule 12406(b). If no arbitrator has been appointed, the entire panel will be appointed in accordance with the Neutral List Selection System.



**(f) Arbitrator Honoraria**

NASD will pay the arbitrator an honorarium of \$125 for each arbitration administered under this rule.

**12801. Default Proceedings**

**(a) Applicability of Rule**

A claimant may request default proceedings against any respondent that falls within one of the following categories and fails to file an answer within the time provided by the Code.

- A member whose membership has been terminated, suspended, canceled, or revoked;
- A member that has been expelled from the NASD;
- A member that is otherwise defunct; or
- An associated person whose registration is terminated, revoked, or suspended.

**(b) Initiating Default Proceedings**

(1) To initiate default proceedings against one or more respondents that fail to file a timely answer, the claimant must notify the Director in writing and must send a copy of the notification to all other parties at the same time and in the same manner as the notification was sent to the Director. If there is more than one claimant, all claimants must agree in writing to proceed under this rule against a defaulting respondent before this rule may be used.

(2) If the Director receives written notice from the claimant and determines that the requirements for proceeding under this rule have been met, the Director will:

- Notify all parties that the claim against the defaulting respondent will proceed under this rule; and
- Appoint a single arbitrator in accordance with the Neutral List Selection System to consider the statement of claim and other documents presented by the claimant.

**(c) Hearings**

No hearing shall be held. The arbitrator may request additional information from the claimant before rendering an award.

**(d) Amendments to Increase Relief Requested**

Claimants may not amend a claim to increase the relief requested from the defaulting respondent after the Director has notified the parties that the claim will proceed under this rule.

**(e) Awards**

(1) The arbitrator may not issue an award based solely on the nonappearance of a party. Claimants must present a sufficient basis to support the making of an award. The arbitrator may not award damages in an amount greater than the damages requested in the statement of claim, and may not award any other relief that was not requested in the statement of claim.

(2) The default award shall have no effect on any non-defaulting party.

**(f) Respondent's Answer**

If a defaulting respondent files an answer after the Director has notified the parties that the claim against that respondent will proceed under this rule but before an award has been issued, the proceedings against that respondent under this rule will be terminated and the claim against that respondent will proceed under the regular provisions in the Code.

**PART IX FEES AND AWARDS****12900. Fees Due When a Claim [is] Is Filed****(a) Fees for Claims Filed by Customers, Associated Persons and Other Non-Members**

(1) Customers, associated persons, and other non-members who file a claim, counterclaim, cross claim or third party claim must pay a filing fee in the amount indicated in the schedule below. The Director may defer payment of all or part of the filing fee on a showing of financial hardship. If payment of the fee is not deferred, failure to pay the required amount will result in a deficiency under Rule 12307.

**Filing Fees for Claims Filed by Customers, Associated Persons, and Other Non-Members**

<b><u>Amount of Claim</u></b> <b>(exclusive of interest and expenses)</b>	<b><u>Filing Fee</u></b>
\$.01 to \$1,000	\$50
\$1,000.01 to \$2,500	\$75
\$2,500.01 to \$5,000	\$175
\$5,000.01 to \$10,000	\$325
\$10,000.01 to \$25,000	\$425
\$25,000.01 to \$50,000	\$600
\$50,000.01 to \$100,000	\$975
\$100,000.01 to \$500,000	\$1,425
\$500,000.01 to \$1 million	\$1,575
Over \$ 1 million	\$1,800
Non-Monetary/Not Specified	\$1,250

(2) If the claim does not request or specify money damages, the Director may determine that the filing fee should be more or less than the amount specified in the schedule above, but in any event, the amount of the filing fee may not be less than \$50 or more than \$1,800.

**(b) Fees for Claims Filed by Members**

(1) Members filing a claim, counterclaim, cross claim, or third party claim must pay a filing fee in the amount indicated in the schedule below. Failure to pay the required amount will result in a deficiency under Rule 12307.

**Fees for Claims Filed by Members**

<b><u>Amount of Claim</u></b> <b>(exclusive of interest and expenses)</b>	<b><u>Filing Fee</u></b>
\$.01 to \$1,000	\$225
\$1,000.01 to \$2,500	\$350
\$2,500.01 to \$5,000	\$525
\$5,000.01 to \$10,000	\$750
\$10,000.01 to \$25,000	\$1,050
\$25,000.01 to \$50,000	\$1,450
\$50,000.01 to \$100,000	\$1,750
\$100,000.01 to \$500,000	\$2,125
\$500,000.01 to \$1,000,000	\$2,450
\$1,000,000.01 to \$5,000,000	\$3,200
Over \$5,000,000	\$3,700
Non-Monetary/Not Specified	\$1,500

(2) If the claim does not request or specify money damages, the Director may determine that the filing fee should be more or less than the amount specified in the schedule above, but in any event, the filing fee may not be less than \$225 or more than \$3,700.

**(c) Partial Refund of Filing Fee**

(1) If a claim is settled or withdrawn more than 10 days before the date that the hearing on the merits under Rule 12600 is scheduled to begin, a party paying a filing fee will receive a partial refund of the filing fee in the amount indicated in the schedule below, less any other fees or costs assessed against the party under the Code, including any hearing session fees assessed under Rule 12902. No refund will be paid if the NASD receives notice that a claim is settled or withdrawn within 10 days of the date that the hearing on the merits under Rule 12600 is scheduled to begin.

**Partial Refund for Settlement or Withdrawal****More Than 10 Days Before Hearing on the Merits**

<b><u>Amount of Claim</u></b> <b>(exclusive of interest and expenses)</b>	<b><u>Refund</u></b>
\$.01 to \$1,000	\$25
\$1,000.01 to \$2,500	\$50
\$2,500.01 to \$5,000	\$125
\$5,000.01 to \$10,000	\$250
\$10,000.01 to \$25,000	\$300
\$25,000.01 to \$50,000	\$450
\$50,000.01 to \$100,000	\$750

\$100,000.01 to \$500,000	\$1,125
Over \$500,000	\$1,200
Non-monetary/Not specified	\$1,000

(2) If the claim does not request or specify money damages, and the Director determines that the hearing session fee should be a different amount than the amount specified in the schedule in Rule 12902, the amount of the refund will be the amount of the hearing session fee determined by the Director, less any fees or costs assessed against the party under the Code, including any hearing session fees assessed under Rule 12902.

**(d) Reimbursement of Filing Fees**

In the award, the panel may order a party to reimburse another party for all or part of any filing fee paid.

**12901. Member Surcharge**

**(a) Member Surcharge**

(1) A surcharge in the amount indicated in the schedule below will be assessed against each member that:

- Files a claim, counterclaim, cross claim, or third party claim under the Code;
- Is named as a respondent in a claim, counterclaim, cross claim, or third party claim filed and served under the Code; or
- Employed, at the time the dispute arose, an associated person who is named as a respondent in a claim, counterclaim, cross claim, or third party claim filed and served under the Code.

**Member Surcharge**

<b><u>Amount in Dispute</u></b> <b>(exclusive of interest</b> <b>and expenses)</b>	<b><u>Surcharge</u></b>
Up to \$2,500	\$150
\$2,500.01 - \$5,000	\$200
\$5,000.01 - \$10,000	\$325
\$10,000.01 - \$25,000	\$425
\$25,000.01 - \$30,000	\$600
\$30,000.01 - \$50,000	\$875
\$50,000.01 - \$100,000	\$1,100
\$100,000.01 - \$500,000	\$1,700
\$500,000.01 - \$1,000,000	\$2,250
\$1,000,000.01 - \$5,000,000	\$2,800
\$5,000,000.01 - \$10,000,000	\$3,350
Over \$10,000,000	\$3,750

Non-Monetary/Not Specified \$1,500

(2) If the claim does not request or specify money damages, the Director may determine that the member surcharge should be more or less than the amount specified in the schedule above, but in any event the amount of the member surcharge may not be less than \$150 or more than \$3,750.

(3) If the claim is filed by the member, the surcharge is due when the claim is filed. If the claim is filed against the member, or against an associated person employed by the member at the time of the events giving rise to the dispute, the surcharge is due when the claim is served in accordance with Rule 12300.

(4) No member shall be assessed more than a single surcharge in any arbitration. The panel may not reallocate a surcharge paid by a member to any other party.

**(b) Refund of Member Surcharge**

(1) The Director will refund the surcharge paid by a member in an arbitration filed by a customer if the panel:

- Denies all of a customer’s claims against the member or associated person; and
- Allocates all fees assessed pursuant to Rule 12902(a) against the customer.

(2) The Director may also refund or waive the member surcharge in extraordinary circumstances.

**12902. Hearing Session Fees, and Other Costs and Expenses**

**(a) Hearing Session Fees**

(1) Hearing session fees will be charged for each hearing session. The total amount chargeable to the parties for each hearing session is based on the amount in dispute, as specified in the schedule below. In the award, the panel will determine the amount of each hearing session fee that each party must pay.

**Hearing Session Fees**

<b>Amount of Claim</b>	<b>Hearing Session W/ One Arbitrator</b>	<b>Hearing Session W/ Three Arbitrators</b>
Up to \$2,500	\$ 50	N/A
\$2,500.01 to \$5,000	\$ 125	N/A
\$5,000.01 to \$10,000	\$ 250	N/A
\$10,000.01 to \$25,000	\$ 450	N/A
\$25,000.01 to \$50,000	\$ 450	\$600
\$50,000.01 to \$100,000	\$ 450	\$750

\$100,000.01 to \$500,000	\$ 450	\$1,125
Over \$500,000	\$ 450	\$1,200
Unspecified Damages	N/A	\$1,000

(2) If the claim does not request or specify money damages, the Director may determine that the hearing session fee should be more or less than the amount specified in the schedule above, but in any event the hearing session fee shall not be less than \$50 or more than \$1,200 for each hearing session.

(3) If there is more than one claim in a proceeding, the amount of hearing session fees will be based on the largest claim in the proceeding. If any claims are joined or combined under Rules 12312, 12313, or 12314, the amount of those claims will be aggregated and they will be treated as one claim for purposes of this paragraph.

(4) If hearing session fees are allocated against a customer in connection with a claim filed by a member or associated person, the amount of hearing session fees the customer must pay must be based on the amount actually awarded to the member or associated person, rather than on the amount claimed by the member or associated person. No hearing session fees may be assessed against a customer in connection with a claim filed by a member that is dismissed.

**(b) Payment of Hearing Session Fees**

(1) The panel may assess the hearing session fees in the award, or may require the parties to pay hearing session fees during the course of the arbitration. The total amount that the panel may require the parties to pay for each hearing session during the course of an arbitration may not exceed the total amount chargeable to the parties for each hearing session under the schedule to paragraph (a) of this rule.

(2) Any interim hearing session fee payments made by a party under this rule will be deducted from the total amount of hearing session fees assessed against that party in the award. If the amount of interim payments is more than the amount assessed against the party in the award, the balance will be refunded to that party.

(3) In the award, the amount of one hearing session fee will be deducted from the total amount of hearing session fees assessed against the party who paid the filing fee. If this amount is more than any fees, costs, and expenses assessed against this party under the Code, the balance will be refunded to the party.

**(c) Assessment of Other Costs and Expenses in Award**

In its award, the panel must also determine the amount of any costs and expenses incurred by the parties under the Code or that are within the scope of the agreement of the parties, and which party or parties will pay those costs and expenses.

(d) Assessment of Hearing Session Fees, Costs, and Expenses in Case of Settlement or Withdrawal

If a claim is settled or withdrawn:

- The parties will be subject to an assessment of hearing session fees for hearing sessions already held.
- If NASD receives a settlement or withdrawal notice 10 days or fewer prior to the date that the hearing on the merits under Rule 12600 is scheduled to begin, parties that paid a filing fee under Rule 12900 will not be entitled to any refund of the filing fee.
- The parties will also be responsible for any fee or costs incurred under Rules 12502, 12513, 12601, or 12606 in connection with such hearings. If a case is settled or withdrawn and the parties' agreement fails to allocate such fees and costs, the fees and costs will be allocated as provided by Rule 12701(b).

**(e) Refund Payments**

Any refunds of fees or costs incurred under the Code will be paid directly to the named parties, even if a non-party made a payment on behalf of the named parties.

**12903. Process Fees Paid by Members**

**(a) Each member that is a party to an arbitration in which more than \$25,000, exclusive of interest and expenses, is in dispute must pay:**

- A non-refundable prehearing process fee of \$750, due at the time the parties are sent arbitrator lists in accordance with Rule 12403(b); and
- A non-refundable hearing process fee, due when the parties are notified of the date and location of the hearing on the merits under Rule 12600, as set forth in the schedule below.

**Hearing Process Fee Schedule**

<b><u>Amount of Claim</u></b> <b>(exclusive of interest</b> <b>and expenses)</b>	<b><u>Hearing Process Fee</u></b>
\$1 - \$25,000	\$ 0
\$25,000.01 - \$50,000	\$1,000
\$50,000.01 - \$100,000	\$1,700
\$100,000.01 - \$500,000	\$2,750
\$500,000.01 - \$1,000,000	\$4,000
\$1,000,000.01 - \$5,000,000	\$5,000
More than \$5,000,000	\$5,500
Non-Monetary/Not Specified	\$2,200



(b) If an associated person of a member is a party, the member that employed the associated person at the time the dispute arose will be charged the process fees, even if the member is not a party. No member shall be assessed more than one prehearing and one hearing process fee in any arbitration.

(c) The panel may not reallocate to any other party any prehearing and hearing process fees paid by a member.

#### **12904. Awards**

(a) All awards shall be in writing and signed by a majority of the arbitrators or as required by applicable law. Such awards may be entered as a judgment in any court of competent jurisdiction.

(b) Unless the applicable law directs otherwise, all awards rendered under the Code are final and are not subject to review or appeal.

(c) The Director will serve a copy of the award on each party or the representative of the party. The Director will serve the award by using any method available and convenient to the parties and the Director, and that is reasonably expected to cause the award to be delivered to all parties, or their representative, on the same day. Methods the Director may use include, but are not limited to, first class, registered or certified mail, hand delivery, and facsimile or other electronic transmission.

(d) The panel shall endeavor to render an award within 30 business days from the date the record is closed.

(e) The award shall contain the following:

- The names of the parties;
- The name of the parties' representatives, if any;
- An acknowledgement by the arbitrators that they have each read the pleadings and other materials filed by the parties;
- A summary of the issues, including the type(s) of any security or product, in controversy;
- The damages and other relief requested;
- The damages and other relief awarded;
- A statement of any other issues resolved;
- The allocation of forum fees and any other fees allocable by the panel;
- The names of the arbitrators;

- The dates the claim was filed and the award rendered;
- The number and dates of hearing sessions;
- The location of the hearings; and
- The signatures of the arbitrators.

(f) The award may contain a rationale underlying the award.

(g) All awards shall be made publicly available.

(h) Fees and assessments imposed by the arbitrators under the Code shall be paid immediately upon the receipt of the award by the parties. Payment of such fees shall not be deemed ratification of the award by the parties.

(i) All monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. An award shall bear interest from the date of the award:

- If not paid within 30 days of receipt;
- If the award is the subject of a motion to vacate which is denied; or
- As specified by the panel in the award.

Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<p><b>PART I</b></p> <p><b>INTERPRETIVE MATERIAL, DEFINITIONS, ORGANIZATION AND AUTHORITY</b></p>			<p>The current Code does not contain a separate definitions section, although some rules, such as Rule 10308, include definitions applicable only to the specific rule.</p> <p>Frequent users of the forum have advised that it would be helpful to include a comprehensive definitions section that applies to the entire Code.</p> <p>Some of the definitions are based on the definitions already contained in specific rules, some are based on definitions contained in other NASD rules or By-laws, and some are based on current practice.</p> <p>All references to “rule” in the comments section of this chart refer to proposed rules.</p>

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<p><b>Failure to Act Under Provisions of Code of Arbitration Procedure for Customer Disputes</b></p>	<p><b>IM-12000. Failure to Act Under Provisions of Code of Arbitration Procedure for Customer Disputes</b></p> <p>It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110 for a member or a person associated with a member to:</p> <p>(a) fail to submit a dispute for arbitration under the NASD Code of Arbitration Procedure (“Code”) as required by the Code;</p> <p>(b) fail to comply with any injunctive order issued pursuant to the Code;</p> <p>(c) fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the Code;</p> <p>(d) fail to honor an award, or comply with a written and executed settlement agreement, obtained in connection with an arbitration submitted for disposition pursuant to the procedures specified by NASD, the New York, American, Boston, Cincinnati,</p>		<p>Interpretive Material (IM) 10100 has been re-numbered as IM-12000, and moved to Part I of the Code.</p>

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>Chicago, or Philadelphia Stock Exchanges, the Pacific Exchange, Inc., the Chicago Board Options Exchange, the Municipal Securities Rulemaking Board, or pursuant to the rules applicable to the arbitration of disputes before the American Arbitration Association or other dispute resolution forum selected by the parties where timely motion has not been made to vacate or modify such award pursuant to applicable law;</p> <p>(e) fail to comply with a written and executed settlement agreement, obtained in connection with a mediation submitted for disposition pursuant to the procedures specified by NASD;</p> <p>(f) fail to waive the California Rules of Court, Division VI of the Appendix, entitled, "Ethics Standards for Neutral Arbitrators in Contractual Arbitration" (the "California Standards"), if application of the California Standards has been waived by all parties to the dispute who are:</p>		

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>(1) customers with a claim against a member or an associated person;</p> <p>(2) associated persons with a claim against a member or an associated person;</p> <p>(3) members with a claim against another member; or</p> <p>(4) members with a claim against an associated person that relates exclusively to a promissory note.</p> <p>Written waiver by such parties shall constitute and operate as a waiver for all member firms or associated persons against whom the claim has been filed. This paragraph applies to claims brought in California against all member firms and associated persons, including terminated or otherwise inactive member firms or associated persons.</p> <p>All awards shall be honored by a cash payment to the prevailing party of the exact dollar amount stated in the award. Awards may not be honored</p>		

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>by crediting the prevailing party's account with the dollar amount of the award, unless authorized by the express terms of the award or consented to in writing by the parties. Awards shall be honored upon receipt thereof, or within such other time period as may be prescribed by the award.</p> <p>It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110 for a member to require associated persons to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure.</p>		
<p><b>Definitions</b></p>	<p><b>12100. Definitions</b>            Unless otherwise defined in the Code, terms used in the Code and interpretive material, if defined in the NASD By-Laws, shall have the meaning as defined in the NASD By-Laws.</p> <p><b>(a) Associated Person</b>            The term “associated person” or</p>		<p>In the interest of Plain English, the revised Code uses the term “associated person” to mean “person associated with a member” or “associated person of a member” as defined in NASD By-Laws.</p>

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>“associated person of a member” means a person associated with a member, as that term is defined in paragraph [(p)] <u>(r)</u>.</p>		
	<p>(b) Award An award is a document stating the disposition of a case.</p>		<p><u>NASD is amending Rule 12100 to add this term to the Code.</u></p>
	<p><b>[(b)] <u>(c)</u> Board</b>  The term “Board” means the Board of Directors of NASD Dispute Resolution, Inc.</p>		
	<p><b>[(c)] <u>(d)</u> Claim</b>  The term “claim” means an allegation or request for relief.</p>		<p>In paragraph (j), the term “dispute” is defined to mean “a dispute, claim or controversy.” A dispute may consist of one or more claims. Throughout the Code, the term “claim” is used to refer to a specific allegation or request for relief, while the term “dispute” refers to the entire matter submitted to arbitration.</p>



**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p><b>[(d)] (e) Claimant</b></p> <p>The term “claimant” means a party that files the statement of claim that initiates an arbitration under Rule 12302.</p>		
	<p><b>[(e)] (f) Code</b></p> <p>The term “Code” means the Code of Arbitration Procedure for Customer Disputes. For disputes involving only industry parties, see the NASD Code of Arbitration Procedure for Industry Disputes.</p>		<p>NASD will maintain separate Customer, Industry and Mediation Codes.</p>
	<p><b>[(f)] (g) Counterclaim</b></p> <p>The term “counterclaim” means a claim asserted against a claimant by a respondent.</p>		
	<p><b>[(g)] (h) Cross Claim</b></p> <p>The term “cross claim” means a claim asserted by a respondent against another already-named respondent.</p>		
	<p><b><u>(i) Customer</u></b></p> <p>A customer shall not include a broker</p>		<p><u>NASD is amending Rule 12100 to add this term to the Code.</u></p>

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<u>or dealer.</u>		
	<p><b>[(h)] (j) Day</b></p> <p>Except as otherwise provided, the term “day” means calendar day. If a deadline specified in the Code falls on a Saturday, Sunday or any NASD holiday, the deadline is extended until the next business day.</p>	<p><b>10308(a)(1) "day"</b></p> <p>For purposes of this Rule, the term "day" means calendar day.</p>	
	<p><b>[(i)] (k) Director</b></p> <p>The term “Director” means the Director of NASD Dispute Resolution. Unless the Code provides that the Director may not delegate a specific function, the term includes NASD staff to whom the Director has delegated authority.</p>		
	<p><b>[(j)] (l) Dispute</b></p> <p>The term “dispute” means a dispute, claim or controversy. A dispute may consist of one or more claims.</p>		<p>Throughout the Code, the term “claim” is used to refer to a specific allegation or request for relief, while the term “dispute” refers to the entire matter submitted to arbitration.</p>

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p><b>[(k)] (m) Hearing</b></p> <p>The term "hearing" means the hearing on the merits of an arbitration under Rule 12600.</p>		
	<p><b>[(l)] (n) Hearing Session</b></p> <p>The term "hearing session" means any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing conference.</p>		
	<p><b>[(m)] (o) Member</b></p> <p>For purposes of the Code, the term "member" means any broker or dealer admitted to membership in NASD, whether or not the membership has been terminated or cancelled.</p>		
	<p><b>[(n)] (p) Non-Public Arbitrator</b></p> <p>The term "non-public arbitrator" means a person who is otherwise qualified to serve as an arbitrator and:</p> <p><i>(1) Is or, within the past five years, was:</i></p>	<p><b>[Rule] 10308</b>  <b>(a)(4)"non-public arbitrator"</b></p> <p>The term "non-public arbitrator" means a person who is otherwise qualified to serve as an arbitrator and:</p> <p>(A) is, or within the past 5</p>	<p><a href="#"><u>"Professional work" has been defined in the definition of "non-public arbitrator," pursuant to the relevant portion of IM-10308, which was approved by the SEC on March 7, 2005.</u></a></p>

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>(A) Associated with a broker or a dealer (including a government securities broker or dealer or a municipal securities dealer);</p> <p>(B) Registered under the Commodity Exchange Act;</p> <p>(C) A member of a commodities exchange or a registered futures association; or</p> <p>(D) Associated with a person or firm registered under the Commodity Exchange Act;</p> <p>(2) Is retired from, or spent a substantial part of a career engaging in, any of the business activities listed in paragraph [(n)] (p)(1);</p> <p>(3) Is an attorney, accountant, or other professional who has devoted 20 percent or more of his or her professional work, in the last two years, to clients who are engaged in any of the business activities listed in paragraph [(n)] (p)(1); or</p> <p>(4) Is an employee of a bank or other financial institution and effects transactions in securities, including government or municipal securities, and commodities futures or options or supervises or monitors the</p>	<p>years, was:</p> <p>(i) associated with a broker or a dealer (including a government securities broker or dealer or a municipal securities dealer);</p> <p>(ii) registered under the Commodity Exchange Act;</p> <p>(iii) a member of a commodities exchange or a registered futures association; or</p> <p>(iv) associated with a person or firm registered under the Commodity Exchange Act;</p> <p>(B) is retired from, or spent a substantial part of a career, engaging in any of the business activities listed in subparagraph (4)(A);</p> <p>(C) is an attorney, accountant, or other professional who has devoted 20 percent or more of his or her professional work, in the last two years, to clients who are engaged in any of the business activities listed in subparagraph (4)(A); or</p> <p>(D) is an employee of a bank or</p>	

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>compliance with the securities and commodities laws of employees who engage in such activities.</p> <p>For purposes of this rule, the term “professional work” shall not include mediation services performed by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.</p>	<p>other financial institution and effects transactions in securities, including government or municipal securities, and commodities futures or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.</p> <p style="text-align: center;">* * * *</p> <p><b>IM-10308. Arbitrators Who Also Serve as Mediators</b>  Mediation services performed by mediators who are also arbitrators shall not be included <i>in the definition of “professional work” for purposes of Rule 10308(a)(4)(C), so long as the mediator is acting in the capacity of a mediator and is not representing a party in the mediation.</i></p> <p style="text-align: center;">*****</p>	
	<p><b>[(o)] (q) Panel</b></p> <p>The term “panel” means the arbitration panel, whether it consists</p>		<p>A panel normally consists of one or three arbitrators, depending on the amount in dispute. However, a</p>

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	of one or more arbitrators.		panel could consist of two arbitrators if an arbitrator is removed from a three-arbitrator panel, and the parties agree to proceed with only the remaining arbitrators. See Rule 12411(a).
	<p><b>[(p)] (r) Person Associated with a Member</b></p> <p>The term “person associated with a member” means:</p> <p>(1) A natural person registered under the Rules of NASD; or</p> <p>(2) A sole proprietor, partner, officer, director, or branch manager of a member, or a natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with NASD under the By-Laws or the Rules of NASD.</p>		This is based on Article I, Section dd, of NASD’s By-Laws.

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	For purposes of the Code, a person formerly associated with a member is a person associated with a member.		
	<p><b><u>(s) Pleadings</u></b></p> <p><u>A pleading is a statement describing a party's causes of action or defenses. Documents that are considered pleadings are: a statement of claim, an answer, a counterclaim, a cross claim, a third party claim, and any replies.</u></p>		<p><u>NASD is amending Rule 12100 to add this term to the Code.</u></p>
	<p><b><u>[(q)] (t) Prehearing Conference</u></b></p> <p>The term "prehearing conference" means any hearing session, including an Initial Prehearing Conference, that takes place before the hearing on the merits begins.</p>		
	<p><b><u>[(r)] (u) Public Arbitrator</u></b></p> <p>The term "public arbitrator" means a person who is otherwise qualified to serve as an arbitrator and:</p> <p>(1) Is not engaged in the conduct or activities described in paragraphs [(n)]</p>	<p><b>10308(a)(5) "public arbitrator"</b></p> <p>(A) The term "public arbitrator" means a person who is otherwise qualified to serve as an arbitrator and:</p> <p>(i) is not engaged in the</p>	<p><u>"Revenue" has been defined in the definition of "public arbitrator," pursuant to the relevant portion of IM-10308, which was approved by the SEC on March 7, 2005.</u></p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>(p)(1)-(4);</p> <p>(2) Was not engaged in the conduct or activities described in paragraphs [(n)] (p)(1)-(4) for a total of 20 years or more;</p> <p>(3) Is not an investment adviser;</p> <p>(4) Is not an attorney, accountant, or other professional whose firm derived 10 percent or more of its annual revenue in the past two years from any persons or entities listed in paragraphs [(n)] (p)(1)-(4); and</p> <p>(5) Is not the spouse or a family member of a person who is engaged in the conduct or activities described in paragraphs [(n)] (p)(1)-(4). For the purpose of this rule, the term " family member" means:</p> <p>(A) The parent, stepparent, child or stepchild of any person engaged in the conduct or activities described in paragraphs [(n)] (p)(1)-(4);</p> <p>(B) A member of the household of a person engaged in the conduct or activities described in paragraphs [(n)] (p)(1)-(4);</p>	<p>conduct or activities described in paragraphs (a)(4)(A) through (D);</p> <p>(ii) was not engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D) for a total of 20 years or more;</p> <p><i>(iii) is not an investment adviser;</i></p> <p>(iv) is not an attorney, accountant, or other professional whose firm derived 10 percent or more of its annual revenue in the past 2 years from any persons or entities listed in paragraph (a)(4)(A); and</p> <p>(v) is not the spouse or an immediate family member of a person who is engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D).</p> <p>(B) For the purpose of this Rule, the term "immediate</p>	



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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>(C) A person who receives financial support of more than 50 percent of his or her annual income from a person engaged in the conduct or activities described in paragraphs [(n)] (p)(1)-(4); or</p> <p>(D) A person who is claimed as a dependent for federal income tax purposes by a person engaged in the conduct or activities described in paragraphs [(n)] (p)(1)-(4).</p> <p>For purposes of this rule, the term "revenue" shall not include mediation fees received by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.</p>	<p>family member" means:</p> <p>(i) the parent, stepparent, child, or stepchild, of a person engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D);</p> <p>(ii) a member of the household of a person engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D);</p> <p>(iii) a person who receives financial support of more than 50 percent of his or her annual income from a person engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D); or</p> <p>(iv) a person who is claimed as a dependent for federal income tax purposes by a person engaged in the conduct or activities described in paragraphs (a)(4)(A) through (D).</p> <p style="text-align: center;">* * * *</p> <p><b>IM-10308. Arbitrators Who</b></p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		<p><b>Also Serve as Mediators</b></p> <p style="text-align: center;">****</p> <p>Mediation fees received by mediators who are also arbitrators shall not be included in the definition of “revenue” for purposes of Rule 10308(a)(5)(A)(iv), so long as the mediator is acting in the capacity of a mediator and is not representing a party in the mediation.</p> <p style="text-align: center;">*****</p>	
	<p><b>[(s)] (v) Respondent</b></p> <p>The term “respondent” means a party against whom a statement of claim or third party claim has been filed. A claimant against whom a counterclaim has been filed is not a respondent for purposes of the Code.</p>		
	<p><b>[(t)] (w) Statement of Claim</b></p> <p>The term “statement of claim” means the initial or amended claim filed by the party or parties initiating the arbitration.</p>		

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p><b>[(u)] (x) Third Party Claim</b></p> <p>The term “third party claim” means a claim asserted against a party not already named in the statement of claim or any other previous pleading.</p>		
	<p><b>[(v)] (y) Uniform Submission Agreement</b></p> <p>The term “Uniform Submission Agreement” means the NASD Uniform Submission Agreement. The NASD Uniform Submission Agreement is a document that parties must sign at the outset of an arbitration in which they agree to submit to arbitration under the Code.</p>		
<p><b>Applicability of Code and Incorporation by Reference</b></p>	<p><b>12101. Applicability of Code and Incorporation by Reference</b></p> <p><b>(a) Applicability of Code</b></p> <p>The Code applies to any dispute between a customer and a member or associated person of a member that is submitted to arbitration under Rule 12200 or 12201.</p>	<p><b>10204. Applicability of Uniform Code</b></p> <p>Except as otherwise provided in the Rule 10200 Series, the Rules and procedures applicable to arbitrations concerning industry and clearing controversies shall be those set forth hereinafter under the Rule 10300 Series.</p>	<p>This rule has been amended to reflect the new organization of the Code, including the creation of separate Industry and Customer Codes.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p><b>(b) Incorporation by Reference</b></p> <p>When a dispute is submitted to arbitration under the Code pursuant to an arbitration agreement, the Code is incorporated by reference into the agreement.</p>	<p><b>10331. Incorporation By Reference</b></p> <p>This Code shall be deemed a part of and incorporated by reference in every agreement to arbitrate under the Rules of the Association including a duly executed Submission Agreement.</p>	
<p><b>National Arbitration and Mediation Committee</b></p>	<p><b>12102. National Arbitration and Mediation Committee</b></p> <p>(a) Pursuant to Part V(C)(1)(b) of the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries (“Delegation Plan”), the Board shall appoint a National Arbitration and Mediation Committee (“NAMC”).</p> <p>(1) The NAMC shall consist of no fewer than 10 and no more than 25 members. At least 50 percent of the NAMC shall be Non-Industry members.</p> <p>(2) The Chairperson of the Board shall name the chairperson of the NAMC.</p>	<p><b>10102. National Arbitration and Mediation Committee</b></p> <p>(a) The NASD Dispute Resolution Board of Directors, following the annual election of its members by the NASD Board of Governors, shall appoint a National Arbitration and Mediation Committee of such size and composition, including representation from the public at large, as it shall deem appropriate and in the public interest. The Chairman of the Committee shall be named by the Chairman of the NASD Dispute Resolution Board. The said Committee</p>	<p>The rule is substantially similar to the current rule, but has been updated based on the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>(b) Pursuant to the Delegation Plan, the NAMC shall have the authority to recommend rules, regulations, procedures and amendments relating to arbitration, mediation, and other dispute resolution matters to the Board. All matters recommended by the NAMC to the Board must have been approved by a quorum, which shall consist of a majority of the NAMC, including at least 50 percent of the Non-Industry committee members. If at least 50 percent of the Non-Industry committee members are either (i) present at or (ii) have filed a waiver of attendance for a meeting after receiving an agenda prior to such meeting, the requirement that at least 50 percent of the Non-Industry committee members be present to constitute the quorum shall be waived. The NAMC has such other power and authority as is necessary to carry out the purposes of the Code.</p> <p>(c) The NAMC may meet as frequently as necessary, but must meet at least once a year.</p>	<p>shall establish and maintain rosters of neutrals composed of persons from within and without the securities industry.</p> <p>(b) The Committee shall have the authority to recommend to the NASD Dispute Resolution Board appropriate Rules, regulations, and procedures to govern the conduct of all arbitration, mediation, and other dispute resolution matters before the Association. All Rules, regulations, and procedures and amendments thereto presented by the Committee must be by a majority vote of all the members of the said Committee. It also shall have such other power and authority as is necessary to effectuate the purposes of this Code.</p> <p>(c) The Committee shall meet at least once each year and at such other times as are deemed necessary by the Committee.</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<p><b>Director of Dispute Resolution</b></p>	<p><b>12103. Director of Dispute Resolution</b></p> <p>(a) The Board shall appoint a Director of Dispute Resolution. The Director shall perform all the administrative duties relating to arbitrations submitted under the Code. The Director may delegate his or her duties when it is appropriate, unless the Code provides otherwise.</p> <p>(b) The Director shall consult with the NAMC at the NAMC's request.</p> <p>(c) The President of NASD Dispute Resolution may perform the Director's duties. If the Director is unable to perform his or her duties, the President of NASD Dispute Resolution may appoint an interim Director.</p>	<p><b>10103. Director of Arbitration</b></p> <p>The Board of Governors of the Association shall appoint a Director of Arbitration (Director) who shall be charged with the performance of all administrative duties and functions in connection with matters submitted for arbitration pursuant to this Code. The Director shall be directly responsible to the National Arbitration and Mediation Committee and shall report to it at periodic intervals established by the Committee and at such other times as called upon by the Committee to do so. The duties and functions of the Director may be delegated by the Director, as appropriate. In the event of the incapacitation, resignation, removal, or other permanent or indefinite inability of the Director to perform the duties and responsibilities of the Director, the President or an Executive Vice President of the Association may appoint an interim Director.</p>	<p>To reflect current corporate structure, the rule provides that the President of NASD Dispute Resolution is authorized to perform the Director's duties, and that only the President of NASD Dispute Resolution may appoint an interim director if necessary. (Under the current rule, the President of NASD Dispute Resolution or an Executive Vice President of NASD may appoint an interim Director.) The language in Rule 12103(b) has been changed to reflect current practice. The Director meets with the NAMC, usually every quarter, and updates the Committee on the state of the arbitration forum. At this time, the Director receives feedback and suggestions on arbitration rules and procedures.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>Effect of Arbitration on NASD Regulatory Activities</b>	<p><b>12104. Effect of Arbitration on NASD Regulatory Activities</b></p> <p>(a) Submitting a dispute to arbitration under the Code does not limit or preclude any right, action or determination by NASD that it would otherwise be authorized to adopt, administer or enforce.</p> <p>(b) Only at the conclusion of an arbitration, any arbitrator may refer to NASD for disciplinary investigation any matter that has come to the arbitrator's attention during and in connection with the arbitration, either from the record of the proceeding or from material or communications related to the arbitration, which the arbitrator has reason to believe may constitute a violation of NASD's rules, the federal securities laws, or other applicable rules or laws.</p>	<p><b>10105. Non-Waiver of Association Objects and Purposes</b></p> <p>The submission of any matter to arbitration under this Code shall in no way limit or preclude any right, action or determination by the Association which it would otherwise be authorized to adopt, administer or enforce. If any matter comes to the attention of an arbitrator during and in connection with the arbitrator's participation in a proceeding, either from the record of the proceeding or from material or communications related to the proceeding, that the arbitrator has reason to believe may constitute a violation of the Association's Rules or the federal securities laws, the arbitrator may initiate a referral of the matter to the Association for disciplinary investigation; provided, however, that any such referral should only be</p>	<p>No substantive change.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		initiated by an arbitrator after the matter before him has been settled or otherwise disposed of, or after an award finally disposing of the matter has been rendered pursuant to Rule 10330 of the Code	
<b>Agreement of the Parties</b>	<p><b>12105. Agreement of the Parties</b></p> <p>(a) Except as provided in paragraph (b), if the Code provides that the parties may agree to modify a provision of the Code, or a decision of the Director or the panel, the written agreement of all named parties is required.</p> <p>(b) If the Director or the panel determines that a named party is inactive in the arbitration, or has failed to respond after adequate notice has been given, the Director or the panel may determine that the written agreement of that party is not required while the party is inactive or not responsive.</p>		The new rule will allow active parties in arbitration to exercise control over the arbitration.



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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>PART II</b>  <b>GENERAL ARBITRATION RULES</b>			
<b>Arbitration Under an Arbitration Agreement or the Rules of NASD</b>	<p><b>12200. Arbitration Under an Arbitration Agreement or the Rules of NASD</b></p> <p>Parties must arbitrate a dispute under the Code if:</p> <ul style="list-style-type: none"> <li>• Arbitration under the Code is either: <ul style="list-style-type: none"> <li>(1) Required by a written agreement, or</li> <li>(2) Requested by the customer;</li> </ul> </li> <li>• The dispute is between a customer and a member or associated person of a member; and</li> <li>• The dispute arises in connection with the business activities of the member or the associated person[, except the insurance</li> </ul>	<p><b>10301. Required Submission</b></p> <p>(a) Any dispute, claim, or controversy eligible for submission under the Rule 10100 Series between a customer and a member and/or associated person arising in connection with the business of such member or in connection with the activities of such associated persons shall be arbitrated under this Code, as provided by any duly executed and enforceable written agreement or upon the demand of the customer . . . .</p>	<p>No substantive change.</p> <p>In the interest of having shorter, more readable rules, the substance of current Rule 10301 has been broken into several rules. The remainder of current Rule 10301(a) is now in Rule 12202. For other parts of current Rule 10301, see Rules 12203 and 12204.</p> <p><u>NASD notes that Rule 12200 is substantively the same as Rule 10301 of the current Code and is not intended to change the scope of arbitrable disputes. Therefore, NASD is amending Rule 12200 to remove the “insurance company”</u></p>

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	business activities of a member that is also an insurance company].		<u>exception because the exception is already in Rule 12201.</u>
<b>Elective Arbitration</b>	<p><b>12201. Elective Arbitration</b></p> <p>Parties may arbitrate a dispute under the Code if:</p> <ul style="list-style-type: none"> <li>• The parties agree in writing to submit the dispute to arbitration under the Code after the dispute arises; and</li> <li>• The dispute is between a customer and a member, associated person of a member, or other related party; and</li> <li>• The dispute arises in connection with the business activities of a member or an associated person, except disputes involving the insurance business activities of a member that is also an insurance company.</li> </ul>	<p><b>10101. Matters Eligible for Submission</b></p> <p>This Code of Arbitration Procedure is prescribed and adopted pursuant to Article VII, Section 1(a)(iv) of the By-Laws of the Association for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member, with the exception of disputes involving the insurance business of any member which is also an insurance company:</p> <p>(a) between or among members;</p> <p>(b) between or among members and associated persons;</p> <p>(c) between or among</p>	No substantive change.

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		<p>members or associated persons and public customers, or others; and</p> <p>(d) between or among members, registered clearing agencies with which the Association has entered into an agreement to utilize the Association's arbitration facilities and procedures, and participants, pledgees, or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency</p>	
<p><b>Claims Against Inactive Members</b></p>	<p><b>12202. Claims Against Inactive Members</b></p> <p>A claim by or against a member in one of the following categories is ineligible for arbitration under the Code unless the customer agrees in writing to arbitrate after the claim arises:</p> <ul style="list-style-type: none"> <li>• A member whose membership is terminated, suspended, cancelled or revoked;</li> </ul>	<p><b>10301. Required Submission</b></p> <p>(a) . . . A claim involving a member in the following categories shall be ineligible for submission to arbitration under the Code unless the customer agrees in writing to arbitrate the claim after it has arisen:</p> <p>(1) A member whose membership is terminated, suspended, canceled, or</p>	<p>The phrase “a claim involving a member” has been changed to “a claim by or against a member” to clarify that the rule does not apply to claims that may tangentially involve a member firm that falls into one of the enumerated categories, but that are not by or against such a member firm.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<ul style="list-style-type: none"> <li>• A member that has been expelled from NASD; or</li> <li>• A member that is otherwise defunct.</li> </ul>	revoked; (2) A member that has been expelled from the NASD; or (3) A member that is otherwise defunct.	
<b>Denial of NASD Forum [and Referral to Other Forums]</b>	<p><b>12203. Denial of NASD Forum [and Referral to Other Forums]</b></p> <p>(a) The Director may decline to permit the use of the NASD arbitration forum if the Director determines that, given the purposes of NASD and the intent of the Code, the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives. Only the Director or the President of NASD Dispute Resolution may exercise the Director's authority under this rule.</p> <p>(b) Disputes that arise out of transactions in a readily identifiable market may be referred to the arbitration forum for that market, if the claimant agrees.</p>	<p><b>10301. Required Submission</b></p> <p>(b) Under this Code, the Director of Arbitration, upon approval of the Executive Committee of the National Arbitration and Mediation Committee, or the National Arbitration and Mediation Committee, shall have the right to decline the use of its arbitration facilities in any dispute, claim, or controversy, where, having due regard for the purposes of the Association and the intent of this Code, such dispute, claim, or controversy is not a proper subject matter for arbitration.</p> <p>(c) Claims which arise out of transactions in a readily identifiable market may, with the consent of the Claimant, be referred to the arbitration forum</p>	<p>To give the Director more flexibility in addressing security concerns and other unusual but serious situations that may require immediate resolution, the rule also expands the grounds upon which the Director may deny access to the forum. The requirement that the NAMC or its Executive Committee must approve decisions by the Director to deny the forum has been deleted. However, the rule provides that the Director's authority under this rule may not be delegated or exercised by anyone other than the Director or the President of NASD Dispute Resolution.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		for that market by the Association.	<u>NASD is amending the title of Rule 12203, because NASD does not believe it is appropriate to offer an opinion as to any other remedies that a party might be able to pursue.</u>
<b>Class Action Claims</b>	<p><b>12204. Class Action Claims</b></p> <p>(a) Class action claims may not be arbitrated under the Code.</p> <p>(b) [No claim that is included] <u>Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, [will] shall not be arbitrated under the Code, unless the party bringing the claim [shows] files with NASD one of the following:</u></p> <p><u>(1) a copy of a notice filed with the court in which the class action is pending that [it is not participating] the party will not participate in the class action[,] or in any recovery that may</u></p>	<p><b>10301. Required Submission</b></p> <p>(d) Class Action Claims</p> <p>(1) A claim submitted as a class action shall not be eligible for arbitration under this Code at the Association.</p> <p>(2) Any claim filed by a member or members of a putative or certified class action is also ineligible for arbitration at the Association if the claim is encompassed by a putative or certified class action filed in federal or state court, or is ordered by a court to an arbitral forum not sponsored by a self-regulatory organization for classwide arbitration. However, such claims shall be eligible for arbitration in accordance with paragraph (a) or pursuant to</p>	<p>No substantive change.</p> <p><u>NASD is amending Rule 12204(b) to clarify when a party may opt out of a class action so an individual claim may be arbitrated, and the procedure a party would use to do so.</u></p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p><u>result from the class action</u>, or has withdrawn from the class according to any conditions set by the court[,if any];  <u>or</u>  <u>(2) a notice that the party will not participate in the class action or in any recovery that may result from the class action.</u></p> <p>(c) The Director will refer to a panel any dispute as to whether a claim is part of a class action, unless a party asks the court hearing the class action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.</p> <p>(d) A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:</p> <ul style="list-style-type: none"> <li>• The class certification is denied;</li> <li>• The class is decertified;</li> </ul>	<p>the parties' contractual agreement, if any, if a claimant demonstrates that it has elected not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.</p> <p>Disputes concerning whether a particular claim is encompassed by a putative or certified class action shall be referred by the Director of Arbitration to a panel of arbitrators in accordance with Rule 10302 or Rule 10308, as applicable. Either party may elect instead to petition the court with jurisdiction over the putative or certified class action to resolve such disputes. Any such petition to the court must be filed within ten business days of receipt of notice that the Director of Arbitration is referring the dispute to a panel of arbitrators.</p> <p>(3) No member or associated person shall seek to enforce</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<ul style="list-style-type: none"> <li>• The member of the certified or putative class is excluded from the class by the court; or</li> <li>• The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.</li> </ul> <p>This paragraph does not otherwise affect the enforceability of any rights under the Code or any other agreement.</p>	<p>any agreement to arbitrate against a customer, other member or person associated with a member who has initiated in court a putative class action or is a member of a putative or certified class with respect to any claims encompassed by the class action unless and until: (A) the class certification is denied; (B) the class is decertified; (C) the customer, other member or person associated with a member is excluded from the class by the court; or (D) the customer, other member or person associated with a member elects not to participate in the putative or certified class action or, if applicable, has complied with any conditions for withdrawing from the class prescribed by the court.</p> <p>(4) No member or associated person shall be deemed to have waived any of its rights under this Code or under any agreement to arbitrate to which it is party except to the extent</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		stated in this paragraph.	
<b>Shareholder Derivative Actions</b>	<p><b>12205. Shareholder Derivative Actions</b></p> <p>Shareholder derivative actions may not be arbitrated under the Code.</p>		New rule. Similar to NYSE Rule 600(e).
<b>Time Limits</b>	<p><b>12206. Time Limits</b></p> <p><b>(a) Time Limitation on Submission of Claims</b></p> <p>No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.</p> <p><b>(b) Dismissal under Rule</b></p> <p>Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court. By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims</p>	<p><b>10304. Time Limitation Upon Submission</b></p> <p>(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.</p> <p>(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</p>	No substantive change.



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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>without prejudice and may pursue all of the claims in court.</p> <p><b>(c) Effect of Rule on Time Limits for Filing Claim in Court</b></p> <p>The rule does not extend applicable statutes of limitations. However, where permitted by applicable law, when a claimant files a statement of claim in arbitration, any time limits for the filing of the claim in court will be tolled while NASD retains jurisdiction of the claim.</p> <p><b>(d) Effect of Filing a Claim in Court on Time Limits for Filing in Arbitration</b></p> <p>If a party submits a claim to a court of competent jurisdiction, the six-year time limitation will not run while the court retains jurisdiction of the claim matter.</p>	<p>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.</p> <p style="text-align: center;">* * *</p> <p><b>10307. Tolling of Time Limitation(s) for the Institution of Legal Proceedings and Extension of Time Limitation(s) for Submission to Arbitration</b></p> <p>(a) Where permitted by applicable law, the time limitations which would otherwise run or accrue for the institution of legal proceedings shall be tolled where a duly executed Submission Agreement is filed by the Claimant(s). The tolling shall continue for such period as the Association shall retain jurisdiction upon the matter submitted.</p> <p>(b) The six (6) year time limitation upon submission to</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		<p>arbitration shall not apply when the parties have submitted the dispute, claim or controversy to a court of competent jurisdiction. The six (6) year time limitation shall not run for such period as the court shall retain jurisdiction upon the matter submitted.</p>	
<p><b>Extension of Deadlines</b></p>	<p><b>12207. Extension of Deadlines</b></p> <p>(a) The parties may agree in writing to extend or modify any deadline for:</p> <ul style="list-style-type: none"> <li>• Serving an answer;</li> <li>• Returning arbitrator or chairperson lists;</li> <li>• Responding to motions; or</li> <li>• Exchanging documents or witness lists.</li> </ul> <p>If the parties agree to extend or modify a deadline under this rule, they must notify the Director of the new deadline in writing.</p>	<p><b>10314. Initiation of Proceedings</b></p> <p>(a) (5) The time period to file any pleading, whether such be denominated as a Claim, Answer, Counterclaim, Cross-Claim, Reply, or Third-Party Pleading, may be extended for such further period as may be granted by the Director of Arbitration or with the consent of the initial claimant. Extensions of the time period to file an Answer are disfavored and will not be granted by the Director except in extraordinary circumstances.</p>	<p>The rule is intended to provide more guidance to parties and arbitrators regarding when and under what circumstances deadlines established by the panel and the Code may be modified or extended. It is designed to give parties maximum control over extensions of deadlines set by the Code, but to ensure that the panel retains control over deadlines established by the panel. It also gives the Director limited authority to extend or modify any deadline or time period set by the Code for good cause.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>(b) The panel may extend or modify any deadline listed in paragraph (a), or any other deadline set by the panel, either on its own initiative or upon motion of a party.</p> <p>(c) The Director may extend or modify any deadline or time period set by the Code for good cause. The Director may also extend or modify any deadline or time period set by the panel in extraordinary circumstances.</p>		<p>Although good cause is a lower standard than extraordinary circumstances, which refers to unexpected and uncontrollable events such as a weather-related or security emergency, good cause is not a negligible standard. In the context of the rule, the good cause requirement means that extensions of Code deadlines by the Director are generally disfavored, and that the Director must take into account the effect of the extension on all parties before granting such a request.</p>
<b>Representation of Parties</b>	<p><b>12208. Representation of Parties</b></p> <p>All parties have the right to be represented by counsel during any stage of an arbitration.</p>	<p><b>10316. Representation by Counsel</b></p> <p>All parties shall have the right to representation by counsel at any stage of the proceedings.</p>	No substantive change.
<b>Legal Proceedings</b>	<p><b>12209. Legal Proceedings</b></p> <p>During an arbitration, no party may bring any suit, legal action, or</p>	<p><b>10106. Legal Proceedings</b></p> <p>No party shall, during the arbitration of any matter,</p>	No substantive change.

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	proceeding against any other party that concerns or that would resolve any of the matters raised in the arbitration.	prosecute or commence any suit, action, or proceeding against any other party touching upon any of the matters referred to arbitration pursuant to this Code.	
<b>Ex Parte Communications</b>	<p><b>12210. Ex Parte Communications</b></p> <p>(a) Except as provided in Rule 12211, no party, or anyone acting on behalf of a party, may communicate with any arbitrator outside of a scheduled hearing or conference regarding an arbitration unless all parties or their representatives are present.</p> <p>(b) No party, or anyone acting on behalf of a party, may send or give any written motion, request, submission or other materials directly to any arbitrator, unless the arbitrators and the parties agree, or the Code provides otherwise.</p>		New rule. The rule is based on general ex parte rules applicable in court proceedings, and reflects current NASD practice. The NASD Arbitrators' Manual and NASD arbitrator training materials currently direct arbitrators to avoid ex parte communications with parties, and arbitrators receive training on how and why to do so.
<b>Direct Communication Between Parties and Arbitrators</b>	<p><b>12211. Direct Communication Between Parties and Arbitrators</b></p> <p>(a) This rule provides procedures under which parties and arbitrators may communicate directly.</p>	<p><b>10334. Direct Communication Between Parties and Arbitrators</b></p> <p>(a) This rule provides procedures under which parties</p>	No substantive change from Rule 10334, which the SEC approved on June 30, 2004, after the Code had been filed.

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>(b) Only parties that are represented by counsel may use direct communication under this rule. If, during the proceeding, a party chooses to appear pro se (without counsel), this rule shall no longer apply.</p> <p>(c) All arbitrators and all parties must agree to the use of direct communication during the Initial Prehearing Conference or a later conference or hearing before it can be used.</p> <p>(d) Parties may send the arbitrators only items that are listed in an order.</p> <p>(e) Parties may send items by regular mail, overnight courier, facsimile, or email. All the arbitrators and parties must have facsimile or email capability before such a delivery method may be used.</p> <p>(f) Copies of all materials sent to arbitrators must also be sent at the same time and in the same manner to all parties and the Director. Materials that exceed 15 pages, however, shall be sent to the Director only by regular</p>	<p>and arbitrators may communicate directly.</p> <p>(b) Only parties that are represented by counsel may use direct communication under this Rule. If, during the proceeding, a party chooses to appear pro se (without counsel), this Rule shall no longer apply.</p> <p>(c) All arbitrators and all parties must agree to the use of direct communication during the Initial Prehearing Conference or a later conference or hearing before it can be used.</p> <p>(d) Parties may send the arbitrators only items that are listed in an order.</p> <p>(e) Parties may send items by regular mail, overnight courier, facsimile, or email. All the arbitrators and parties must have facsimile or email capability before such a delivery method may be used.</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>mail or overnight courier.</p> <p>(g) The Director must receive copies of any orders and decisions made as a result of direct communications among the parties and the arbitrators.</p> <p>(h) Parties may not communicate orally with any of the arbitrators outside the presence of all parties.</p> <p>(i) Any party or arbitrator may terminate the direct communication order at any time, after giving written notice to the other arbitrators and the parties.</p>	<p>(f) Copies of all materials sent to arbitrators must also be sent at the same time and in the same manner to all parties and the Director. Materials that exceed 15 pages, however, shall be sent to the Director only by regular mail or overnight courier.</p> <p>(g) The Director must receive copies of any orders and decisions made as a result of direct communications among the parties and the arbitrators.</p> <p>(h) Parties may not communicate orally with any of the arbitrators outside the presence of all parties.</p> <p>(i) Any party or arbitrator may terminate the direct communication order at any time, after giving written notice to the other arbitrators and the parties.</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>Sanctions</b>	<p><b>12212. Sanctions</b></p> <p>(a) The panel may sanction a party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel. Unless prohibited by applicable law, sanctions may include, but are not limited to:</p> <ul style="list-style-type: none"> <li>• Assessing monetary penalties payable to one or more parties;</li> <li>• Precluding a party from presenting evidence;</li> <li>• Making an adverse inference against a party;</li> <li>• Assessing postponement and/or forum fees; and</li> <li>• Assessing attorneys' fees, costs and expenses.</li> </ul> <p>(b) The panel may initiate a disciplinary referral at the conclusion of an arbitration.</p> <p>(c) The panel may dismiss a claim, defense or arbitration with prejudice</p>	<p><b>10305. Dismissal of Proceedings</b></p> <p>(b) The arbitrators may dismiss a claim, defense, or proceeding with prejudice as a sanction for willful and intentional material failure to comply with an order of the arbitrator(s) if lesser sanctions have proven ineffective.</p>	<p>The rule incorporates and codifies the sanctions provisions in the NASD Discovery Guide. The rule is intended to provide more guidance to parties and arbitrators regarding the scope of arbitrator authority to address noncompliance with the Code or orders of the panel. The rule also provides that the panel may sanction a party in egregious situations.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.		
<b>Hearing Locations</b>	<p><b>12213. Hearing Locations</b></p> <p><b>(a) U.S. Hearing Location</b></p> <p>(1) The Director will decide which of NASD's hearing locations will be the hearing location for the arbitration. Generally, the Director will select the hearing location closest to the customer's residence at the time of the events giving rise to the dispute.</p> <p>(2) Before arbitrator lists are sent to the parties under Rule 12403, the parties may agree in writing to a hearing location other than the one selected by the Director.</p> <p>(3) The Director may change the hearing location upon motion of a party, as set forth in Rule 12503.</p> <p><u>(4) After the panel is appointed, the panel may decide a motion relating to changing the hearing</u></p>	<p><b>10315. Determination of Hearing Location</b></p> <p>(a) Designation of Time and Place of Hearing</p> <p>The Director shall determine the time and place of the first meeting of the arbitration panel and the parties, whether the first meeting is a pre-hearing conference or a hearing, and shall give notice of the time and place at least 15 business days prior to the date fixed for the first meeting by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this Rule. The arbitrators shall determine the time and place for all subsequent meetings, whether the meetings are pre-hearing conferences, hearings,</p>	<p>New rule language has been added regarding foreign hearing locations.</p> <p>Paragraph (a) codifies current practice and provides guidance to parties regarding the selection of U.S. hearing locations.</p> <p>Paragraph (b), the rule language on foreign hearing locations, reflects a proposed rule change approved by the SEC on March 7, 2005, addressing this issue after the Code had been filed.</p> <p><u>NASD is amending Rule 12213(a) to add subparagraph (4) to clarify that the panel, once appointed, has the authority to change the</u></p>



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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p><u>location.</u></p> <p><b>(b) Foreign Hearing Location</b></p> <p>(1) If the Director and all parties agree, parties may have their hearing in a foreign hearing location and conducted by foreign arbitrators, provided that the foreign arbitrators have:</p> <p>(A) met NASD background qualifications for arbitrators;</p> <p>(B) received training on NASD arbitration rules and procedures; and</p> <p>(C) satisfied at least the same training and testing requirements as those arbitrators who serve in U. S. locations of NASD.</p> <p>(2) The parties shall pay an additional surcharge for each day of hearings held in a foreign hearing location. The amount of the surcharge will be determined by the Director and must be agreed to by the parties before the foreign hearing location may be used. This surcharge shall be specified in the agreement to use</p>	<p>or any other type of meetings, and shall give notice as the arbitrators may determine. Attendance at a meeting waives notice thereof.</p> <p>(b) Foreign Hearing Location</p> <p>(1) If the Director and all parties agree, parties may have their hearing in a foreign hearing location and conducted by foreign arbitrators, provided that the foreign arbitrators have:</p> <p>(A) met NASD background qualifications for arbitrators;</p> <p>(B) received training on NASD arbitration rules and procedures; and</p> <p><i>(C) satisfied at least the same training and testing requirements as those arbitrators who serve in U. S. locations of NASD.</i></p> <p>(2) The parties shall pay an additional surcharge for each day of hearings held in a foreign hearing location. The amount of the surcharge will be determined by the Director and must be agreed to by the</p>	<p><u>hearing location. This authority is included in Rule 12503(c)(2), and NASD believes that it is logical to include this authority in Rule 12213.</u></p>

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<b>SUBJECT</b>	<b>PROPOSED RULE</b>	<b>CURRENT RULE</b>	<b>COMMENTS</b>
	<p>a foreign hearing location and shall be apportioned equally among the parties, unless they agree otherwise. The foreign arbitrators shall have the authority to apportion this surcharge as provided in Rule 12902(c).</p>	<p>parties before the foreign hearing location may be used. This surcharge shall be specified in the agreement to use a foreign hearing location and shall be apportioned equally among the parties, unless they agree otherwise. The foreign arbitrators shall have the authority to apportion this surcharge as provided in Rules 10205 and 10332.</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>Payment of Arbitrators</b>	<p><b>12214. Payment of Arbitrators</b></p> <p>(a) Except as provided in paragraph (b) and in Rule 12800, NASD will pay the panel an honorarium, as follows:</p> <ul style="list-style-type: none"> <li>• \$200 to each arbitrator for each hearing session in which he or she participates; [and]</li> <li>• [An] <u>an</u> additional \$75 per day to the chairperson for each hearing on the merits;</li> <li>• <u>\$50 for travel to a hearing session that is postponed pursuant to Rule 12601; and</u></li> <li>• <u>\$100 for each arbitrator if a hearing session other than a prehearing conference is postponed within 10 business days before a scheduled hearing session pursuant to Rules 12601(a)(2) and (b)(2).</u></li> </ul> <p>(b) The Director may authorize a higher or additional honorarium for the use of a foreign hearing location.</p> <p>(c) <u>Payment for Deciding Discovery-Related Motions Without a Hearing Session</u></p>	<p><b>IM-10104. Arbitrators' Honorarium</b></p> <p>All persons selected to serve as arbitrators pursuant to the Association's Code of Arbitration Procedure shall be paid an honorarium for each hearing session (including a prehearing conference) in which they participate.</p> <p>The honorarium shall be \$200 for each hearing session and \$75 per day additional honorarium to the chairperson of the panel. The honorarium for a case not requiring a hearing shall be \$125.</p> <p>The honorarium for travel to a canceled hearing session shall be \$50. If a hearing session other than a prehearing conference is adjourned pursuant to Rule 10319(d), each arbitrator shall receive an additional honorarium of \$100.</p> <p>The Director may authorize a higher or additional honorarium for the use of a foreign hearing</p>	<p>The amount of the honorarium in Simplified Arbitrations is in the Simplified Arbitration Rule, 12800.</p> <p>The reference to expenses for travel to a cancelled hearing has been removed from this rule. NASD has a comprehensive policy regarding arbitrator travel expenses. NASD believes that the partial and incomplete reference to travel expenses in the Code may be confusing to parties and arbitrators. NASD's policy for reimbursement of travel expenses is available at <a href="http://www.nasd.com">www.nasd.com</a>.</p> <p>Paragraph (b) has been added to reflect a proposed rule change, approved by the SEC on March 7, 2005, addressing this issue after the Code had been filed.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p><u>(1) NASD will pay each arbitrator an honorarium of \$200 to decide a discovery-related motion without a hearing session. This paragraph does not apply to cases administered under Rule 12800.</u></p> <p><u>(2) For purposes of paragraph (c)(1), a discovery-related motion and any replies or other correspondence relating to the motion shall be considered to be a single motion.</u></p> <p><u>(3) The panel will allocate the cost of the honoraria under paragraph (c)(1) to the parties pursuant to Rules 12902(c).</u></p>	location.	<p><u>Rules 12214 (a) and (c) reflect two proposed rule changes that were approved since the last amendment to the Code was filed.</u></p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>PART III</b>  <b>INITIATING AND RESPONDING TO CLAIMS</b>			
<b>Filing and Serving Documents</b>	<p><b>12300. Filing and Serving Documents</b></p> <p>(a) Initial statements of claim must be filed with the Director, with enough copies for each other party and each arbitrator. The number of arbitrators is determined in accordance with Rule 12401. The Director will serve the statement of claim on the other parties, and send copies of the statement of claim to each arbitrator.</p> <p>(b) The parties must serve all other pleadings and other documents directly on each other party. Parties must serve all pleadings on all parties at the same time and in the same manner, unless the parties agree otherwise.</p> <p>(c) Unless the Code provides otherwise, parties must also file all pleadings and other documents with</p>	<p><b>10314. Initiation of Proceedings</b></p> <p><b>(c) Service and Filing with the Director of Arbitration</b></p> <p>(1) Service may be effected by mail or other means of delivery. Service and filing are accomplished on the date of mailing either by first-class postage pre-paid or by means of overnight mail service or, in the case of other means of service, on the date of delivery. Filing with the Director of Arbitration shall be made on the same date as service on a party</p>	<p>To make rules shorter and easier to read, the substance of current Rule 10314 has been broken into several rules. Please see Rules 12300-12306; Rule 12308; and Rules 12312-12314.</p> <p><i>This rule is intended to provide general information about when and how pleadings must be filed and served.</i></p> <p>Paragraph (f) imposes a new requirement on parties to notify the Director of any changes in address during an arbitration. This provision is intended to streamline the administration of arbitrations and save NASD staff and parties'</p>

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	<p>the Director, with additional copies for each arbitrator. Pleadings and other documents must be filed with the Director at the same time and in the same manner in which they are served on the other parties. Parties filing pleadings and other documents with the Director must include a certificate of service stating the names of the parties served, the date and method of service, and the address(es) to which service was made.</p> <p>(d) Pleadings and other documents may be filed and served by: first class mail; overnight mail or delivery service; hand delivery; facsimile; or any other method, including electronic mail, that is approved or required by the panel.</p> <p>(e) Filing and service are accomplished on the date of mailing either by first-class postage prepaid mail or overnight mail service, or, in the case of other means of service, on the date of delivery. Whenever pleadings and other documents must be filed with the Director and served on the other parties, filing and service</p>		time and resources.

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<b>SUBJECT</b>	<b>PROPOSED RULE</b>	<b>CURRENT RULE</b>	<b>COMMENTS</b>
	<p>must occur on the same day and in the same manner, unless the parties agree or the panel directs otherwise.</p> <p>(f) A party must inform the Director and all other parties in writing of any change of address during an arbitration.</p>		

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<p><b><u>Service on Associated Persons [Currently Associated with a Member]</u></b></p>	<p><b>12301. Service on Associated Persons [Currently Associated with a Member]</b></p> <p>(a) [If a member and a person currently associated with the member are named as respondents to the same arbitration,] The Director will serve the initial statement of claim on [service on the person] an associated person [with the member] directly at the person's residential address or usual place of abode [may be made on the member or directly on the associated person]. If service cannot be completed at the person's residential address or usual place of abode, the Director will serve the initial statement of claim on the associated person at the person's business address.</p> <p>(b) If a member and a person currently associated with the member are named as respondents to the same arbitration, and the Director cannot complete service as provided in paragraph (a), then the Director may serve the member with the initial statement of claim on behalf of the associated person. If service is made</p>	<p><b>[Rule] 10314. Initiation of Proceedings</b></p> <p><b>(c) Service and Filing with the Director of Arbitration</b></p> <p><i>(2) If a member firm and a person associated with the member firm are named parties to an arbitration proceeding at the time of the filing of the Statement of Claim, service on the person associated with the member firm may be made on the associated person or the member firm, which shall perfect service upon the associated person. If the member firm does not undertake to represent the associated person, the member firm shall serve the associated person with the Statement of Claim, shall advise all parties and the Director of Arbitration of that fact, and shall provide such associated person's current address.</i></p>	<p>No substantive change.</p> <p><u>NASD did not intend to make any substantive changes to current Rule 10314, which currently permits (but does not require) the Director to serve statements of claim on active associated persons through their firms when the associated person and the firm are respondents. In practice, however, NASD rarely uses this form of service. Therefore, NASD is amending Rule 12301 to reflect current practice concerning service in the forum and to clarify that the rule applies to initial statements of claim only.</u></p>



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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>on the member, the member must serve the associated person, even if the member will not be representing the associated person in the arbitration. If the member is not representing the associated person in the arbitration, the member must notify, and provide the associated person's current address to, all parties and the Director.</p>		
<p><b>Filing an Initial Statement of Claim</b></p>	<p><b>12302. Filing an Initial Statement of Claim</b></p> <p><b>(a) Filing Claim with the Director</b></p> <p>(1) To initiate an arbitration, a claimant must file the following with the Director:</p> <ul style="list-style-type: none"> <li>• Signed and dated Uniform Submission Agreement; and</li> <li>• A statement of claim specifying the relevant facts and remedies requested.</li> </ul> <p>The claimant may include any additional documents supporting the statement of claim.</p>	<p><b>10314. Initiation of Proceedings</b></p> <p>Except as otherwise provided herein, an arbitration proceeding under this Code shall be instituted as follows:</p> <p><b>(a) Statement of Claim</b></p> <p>(1) The Claimant shall file with the Director of Arbitration an executed Submission Agreement, a Statement of Claim of the controversy in dispute, together with the documents in support of the Claim, and the required deposit. Sufficient additional copies of the Submission</p>	<p>Paragraph (c) of the rule codifies current practice, and provides notice to claimants that they must pay all fees required at the time of filing.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>(2) A claimant may use the online claim notification and filing procedure to complete part of the arbitration claim filing process through the Internet. To commence this process, a claimant may complete a Claim Information Form that can be accessed through <a href="http://www.nasd.com">www.nasd.com</a>. In completing the Claim Information Form, the claimant may attach an electronic version of the statement of claim to the form, provided it does not exceed 50 pages. Once this online form has been completed, an NASD Dispute Resolution Tracking Form will be generated and displayed for the claimant to reproduce as necessary. The claimant shall then file with the Director the rest of the materials required in subparagraph (1) of the rule, along with a hard copy of the NASD Dispute Resolution Tracking Form.</p> <p><b>(b) Number of Copies</b></p> <p>The claimant must file enough copies of the statement of claim, if it has not been submitted electronically, and the signed Uniform Submission Agreement, and any additional</p>	<p>Agreement and the Statement of Claim and supporting documents shall be provided to the Director of Arbitration for each party and each arbitrator. The Statement of Claim shall specify the relevant facts and the remedies sought. The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim.</p> <p>(2) A Claimant or counsel (referred to herein collectively as "Claimant") may use the online claim notification and filing procedure to complete part of the arbitration claim filing process through the Internet. To commence this process, a Claimant may complete a Claim Information Form that can be accessed through an NASD Web site. In completing the Claim Information Form, the Claimant may attach an electronic version of the Statement of</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>materials, for the Director, each arbitrator and each other party.</p> <p><b>(c) Fees</b></p> <p>At the time the statement of claim is filed, the claimant must pay all required filing fees.</p> <p><b>(d) Service by Director</b></p> <p>Unless the statement of claim is deficient under Rule 12307, the Director will send a copy of the Uniform Submission Agreement, the statement of claim, and any additional materials filed by the claimant, to each other party, and to each arbitrator once the panel has been appointed.</p>	<p>Claim to the form, provided it does not exceed 50 pages. Once this online form has been completed, an NASD Dispute Resolution Tracking Form will be generated and displayed for the Claimant to reproduce as necessary. The Claimant shall then file with the Director of Arbitration the rest of the materials required in subparagraph (1), above, along with a hard copy of the NASD Dispute Resolution Tracking Form.</p>	
<p><b>Answering the Statement of Claim</b></p>	<p><b>12303. Answering the Statement of Claim</b></p> <p>(a) Respondent(s) must directly serve each other party with the following documents within 45 days of receipt of the statement of claim:</p> <ul style="list-style-type: none"> <li>• Signed and dated Uniform Submission Agreement; and</li> </ul>	<p><b>10314. Initiation of Proceedings</b></p> <p><b>(b) Answer – Defenses, Counterclaims, and/or Cross-Claims</b></p> <p>(1) Within 45 calendar days from receipt of the Statement of Claim, Respondent(s) shall serve each party with an</p>	<p>Paragraph (b) of the rule provides that parties serving third party claims must include all materials served by the parties or the Director up until that point in the proceeding. This provision is intended to ensure that newly added parties are able to obtain all relevant</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<ul style="list-style-type: none"> <li>• An answer specifying the relevant facts and available defenses to the statement of claim.</li> </ul> <p>The respondent may include any additional documents supporting the answer to the statement of claim. Parties that fail to answer in the time provided may be subject to default proceedings under Rule 12801.</p> <p>(b) The answer to the statement of claim may include any counterclaims against the claimant, cross claims against other respondents, or third party claims, specifying all relevant facts and remedies requested, as well as any additional documents supporting such claim. When serving a third party claim, the respondent must provide each new respondent with copies of all documents previously served by any party, or sent to the parties by the Director.</p> <p>(c) At the same time that the answer to the statement of claim is served on the other parties, the respondent must file copies of the Uniform Submission Agreement, the answer to the statement of claim, and any additional</p>	<p>executed Submission Agreement and a copy of the Respondent's Answer. Respondent's executed Submission Agreement and Answer shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s) along with any deposit required under the schedule of fees. The Answer shall specify all relevant facts and available defenses to the Statement of Claim submitted and may set forth any related Counterclaim the Respondent(s) may have against the Claimant, any Cross-Claim the Respondent(s) may have against any other named Respondent(s), and any Third-Party Claim against any other party or person based upon any existing dispute, claim, or controversy subject to arbitration under this Code.</p> <p style="text-align: center;">* * *</p> <p><b>10314. Initiation of Proceedings</b></p>	<p>materials in a timely manner, and to expedite and streamline the administration of the arbitration. This will not apply to copies of the Code or Discovery Guide, which NASD will continue to provide.</p>

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	<p>documents, with the Director, with enough copies for the Director and each arbitrator.</p> <p>(d) If the answer to the statement of claim contains any counterclaims, cross claims or third party claims, the respondent must pay all required filing fees.</p>	<p><b>(b) Answer – Defenses, Counterclaims, and/or Cross-Claims</b></p> <p>(3) Respondent(s) shall serve each party with a copy of any Third-Party Claim. The Third-Party Claim shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s) along with any deposit required under the schedule of fees.</p>	
<p><b>Answering Counterclaims</b></p>	<p><b>12304. Answering Counterclaims</b></p> <p>(a) A claimant must directly serve any answer to a counterclaim on each other party within 20 days of receipt of the counterclaim. At the same time, the claimant must file the answer to the counterclaim with the Director with additional copies for each arbitrator.</p> <p>(b) The answer must include the relevant facts and available defenses to the counterclaim. The claimant may include any additional documents supporting the answer to the counterclaim.</p>	<p><b>10314. Initiation of Proceedings</b></p> <p><b>(b) Answer – Defenses, Counterclaims, and/or Cross-Claims</b></p> <p>(4) The Claimant shall serve each party with a Reply to a Counterclaim within ten (10) days of receipt of an Answer containing a Counterclaim. The Reply shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s).</p>	<p>As part of the effort to standardize the time limits in the Code, the time for answering counterclaims has been extended from 10 days to 20 days. (Please see Rule 12305, in which the time to answer a cross claim has been shortened from 45 days to 20 days.) NASD believes that parties who have already filed a pleading in an arbitration should have the same amount of time to respond</p>

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			to a cross or counterclaim, and that 10 days (the time the current Code provides for responding to counterclaims) is too short, and 45 days (the time the current Code provides for responding to cross claims) is too long. NASD believes that 20 days is the appropriate amount of time for parties to respond to both counter and cross claims.
<b>Answering Cross Claims</b>	<p><b>12305. Answering Cross Claims</b></p> <p>(a) A respondent must directly serve an answer to a cross claim on each other party within 20 days from the date that the respondent's answer to the statement of claim is due, or from the receipt of the cross claim, whichever is later. At the same time, the respondent must file the answer to the cross claim with the Director with additional copies for each arbitrator.</p> <p>(b) The answer must include the relevant facts and available defenses</p>	<p><b>10314. Initiation of Proceedings</b></p> <p><b>(b) Answer – Defenses, Counterclaims, and/or Cross-Claims</b></p> <p>(2)(C) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who fails to file an Answer within 45 calendar days from receipt of service of a Claim, unless the time to answer has been extended pursuant to</p>	For the reasons explained in the comment section to Rule 12304, the time to answer a cross claim has been shortened from 45 days to 20 days.

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	to the cross claim. The respondent may include any additional documents supporting the answer to the cross claim.	subparagraph (5), below, may, in the discretion of the arbitrators, be barred from presenting any matter, arguments, or defenses at the hearing.	
<b>Answering Third Party Claims</b>	<p><b>12306. Answering Third Party Claims</b></p> <p>(a) A party responding to a third party claim must directly serve all other parties with the following documents within 45 days of receipt of the third party claim:</p> <ul style="list-style-type: none"> <li>• Signed and dated Uniform Submission Agreement; and</li> <li>• An answer specifying the relevant facts and available defenses to the third party claim.</li> </ul> <p>The respondent may include any additional documents supporting the answer to the third party claim.</p> <p>(b) The answer to the third party claim may also include any counterclaims, cross claims, or third party claims, specifying all relevant facts and</p>	<p><b>10314. Initiation of Proceedings</b></p> <p><b>(b) Answer – Defenses, Counterclaims, and/or Cross-Claims</b></p> <p>(3) . . . Third-Party Respondent(s) shall answer in the manner provided for response to the Claim, as provided in subparagraphs (1) and (2) above.</p>	No substantive change.

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	<p>remedies requested. The answer may also include any additional documents supporting such claim. When serving a third party claim, the respondent must provide each new respondent with copies of all documents previously served by any party, or sent to the parties by the Director.</p> <p>(c) At the same time that the answer to the third party claim is served on the other parties, the third party respondent must also file copies of the Uniform Submission Agreement, the answer to the third party claim, and any additional documents, with the Director, with additional copies for each arbitrator.</p> <p>(d) If the answer to the third party claim contains any counterclaim, cross claim or third party claim, the party must also pay all required filing fees.</p>		
<b>Deficient Claims</b>	<p><b>12307. Deficient Claims</b></p> <p>(a) The Director will not serve any claim that is deficient. The reasons a claim may be deficient include the following:</p>		<p>New rule. The rule codifies current deficiency practice. NASD believes that providing guidance to parties in the Code regarding what constitutes</p>



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	<ul style="list-style-type: none"> <li>• A Uniform Submission Agreement was not filed by each claimant;</li> <li>• The Uniform Submission Agreement was not properly signed and dated;</li> <li>• The Uniform Submission Agreement does not name all parties named in the claim;</li> <li>• The claimant did not file the correct number of copies of the Uniform Submission Agreement, statement of claim or supporting documents for service on respondents and for the arbitrators;</li> <li>• The claim does not specify the customer's home address at the time of the events giving rise to the dispute;</li> <li>• The claim does not specify the claimant's or the claimant's representative's current address; or</li> <li>• The claimant did not pay all</li> </ul>		<p>a deficient claim will help parties avoid deficiencies, which will reduce delay and expedite the administration of arbitrations.</p>

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	<p>required filing fees, unless the Director deferred the fees.</p> <p>(b) The Director will notify the claimant in writing if the claim is deficient. If all deficiencies are not corrected within 30 days from the time the claimant receives notice, the Director will close the case without serving the claim, and will not refund any filing fees paid by the claimant.</p> <p>(c) The panel will not consider any counterclaim, cross claim or third party claim that is deficient. The reasons a counterclaim, cross claim or third party claim may be deficient include the reasons listed in paragraph (a). The Director will notify the party making the counterclaim, cross claim or third party claim of the any deficiencies in writing. If all deficiencies are not corrected within 30 days from the time the party making the counterclaim, cross claim or third party claim receives notice of the deficiency, the panel will proceed with the arbitration as though the deficient counterclaim, cross claim or third party claim had not been made.</p>		

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<p><b>Loss of Defenses Due to Untimely or Incomplete Answer</b></p>	<p><b>12308. Loss of Defenses Due to Untimely or Incomplete Answer</b></p> <p>(a) If a party fails to answer any claim within the time period specified in the Code, the panel may, upon motion, bar that party from presenting any defenses or facts at the hearing, unless the time to answer was extended in accordance with the Code. The party may also be subject to default proceedings under Rule 12801.</p> <p>(b) If a party answers a claim that alleges specific facts and contentions with a general denial, or fails to include defenses or relevant facts in its answer that were known to it at the time the answer was filed, the panel may bar that party from presenting the omitted defenses or facts at the hearing.</p>	<p><b>10314. Initiation of Proceedings</b></p> <p><b>(b) Answer – Defenses, Counterclaims, and/or Cross-Claims</b></p> <p>(2)(A) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who pleads only a general denial to a pleading that states specific facts and contentions may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting any facts or defenses at the time of the hearing.</p> <p>(B) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who fails to specify all available defenses and relevant facts in such party's answer may, upon objection by a party, in the discretion of the arbitrators, be barred from presenting such facts or defenses not included in such party's Answer at the</p>	<p>The order of this rule has been reversed, and current paragraphs (2)(A) and (B) have been condensed into one.</p>

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		<p>hearing.</p> <p>(C) A Respondent, Responding Claimant, Cross-Claimant, Cross-Respondent, or Third-Party Respondent who fails to file an Answer within 45 calendar days from receipt of service of a Claim, unless the time to answer has been extended pursuant to subparagraph (5), below, may, in the discretion of the arbitrators, be barred from presenting any matter, arguments, or defenses at the hearing. Such a party may also be subject to default procedures as provided in paragraph (e) below</p>	
<p><b>Amending Pleadings</b></p>	<p><b>12309. Amending Pleadings</b></p> <p><b>(a) Before Panel Appointment</b></p> <p>Except as provided in paragraph (c), a party may amend a pleading at any time before the panel has been appointed.</p>	<p><b>10328. Amendments</b></p> <p>(a) After the filing of any pleadings, if a party desires to file a new or different pleading, such change must be made in writing and filed with the Director of Arbitration with sufficient additional copies for</p>	<p>Under the current Code, parties may amend pleadings at any time prior to panel appointment, but, after panel appointment, they must obtain approval to amend a pleading. This means that between the</p>

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	<p>(1) To amend a statement of claim that has been filed but not yet served by the Director, the claimant must file the amended claim with the Director, with additional copies for each arbitrator and each other party. The Director will then serve the amended claim in accordance with Rules <u>12300 and 12301</u>.</p> <p>(2) To amend any other pleading, a party must serve the amended pleading on each party. At the same time, the party must file the amended pleading with the Director, with additional copies for each arbitrator. If a pleading is amended to add a party to the arbitration, the party amending the pleading must provide each new party with copies of all documents previously served by any party, or sent to the parties by the Director.</p> <p><b>(b) After Panel Appointment</b></p> <p>Once a panel has been appointed, a party may only amend a pleading if the panel grants a motion to amend in accordance with Rule 12503. Motions to amend a pleading must include a copy of the proposed amended</p>	<p>each arbitrator. The party filing a new or different pleading shall serve on all other parties, a copy of the new or different pleading in accordance with the provisions set forth in Rule 10314(b). . . . .</p> <p>(c) After a panel has been appointed, no new or different pleading may be filed except for a responsive pleading as provided for in (a) above or with the panel's consent.</p>	<p>time that the Director consolidates the arbitrator lists and the panel is appointed, a party could amend a pleading to add a party to the proceeding, and the newly-added party would neither be able to participate in NLSS or object to being added to the arbitration. To address this issue, which has been the subject of concern among some users of the forum, the rules governing amending pleadings (12309) and the application of NLSS to newly added parties (12407) have been amended to provide that no party may be added by amendment after ranked lists are due to the Director and before a panel is appointed and approves a request to add the party. Rule 12309(c) also makes clear that the party to be added after</p>

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	<p>pleading. If the panel grants the motion to amend, the amended pleading does not need to be reserved on the other parties, the Director, or the panel, unless the panel determines otherwise.</p> <p><b>(c) Amendments to Add Parties</b></p> <p>Once the ranked arbitrator lists are due to the Director under Rule 12404(c), no party may amend a pleading to add a new party to the arbitration until a panel has been appointed and the panel grants a motion to add the party. Motions to add a party after panel appointment must be served on all parties, including the party to be added, and the party to be added may respond to the motion in accordance with Rule 12503 without waiving any rights or objections under the Code.</p> <p><b>(d) Responding to an Amended Pleading</b></p> <p><u>Any party may file a response to an amended pleading, provided the response is filed and served within 20 days of receipt of the amended</u></p>		<p>panel appointment must be given an opportunity to be heard before the panel can grant the motion to amend. This change will ensure that a party added to an arbitration by amendment either will be able to participate in NLSS, or will be able to object to being added. (Rule 12407 also clarifies that parties added prior to the cut-off date may participate in NLSS, but parties added by amendment after panel appointment do not have the ability to rank and strike arbitrators under NLSS. However, they may challenge an arbitrator for cause under Rule 12409.)</p> <p>NASD is amending Rule 12309(a)(1) to clarify that the service requirements of Rule 12300 also apply to this rule.</p>

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	<p><u>pleading, unless the panel determines otherwise.</u></p>		<p><u>NASD did not intend to change current practice in the Code. The current rules governing answering counterclaims, cross claims, and amended claims do not prohibit a party from responding to any amended pleadings; however, these rules do not specifically permit the practice. Thus, NASD is amending Rule 12309 to clarify that any party has a right to file a response to any amended pleading within 20 days of receipt of the amended pleading, unless the panel determines otherwise.</u></p>
<p><i>Answering Amended Claims</i></p>	<p><b>12310. Answering Amended Claims</b></p> <p>(a) If a claim is amended before it has been answered, the respondent's original time to answer is extended by 20 days.</p> <p>(b) If a claim is amended after it has been answered, but before a panel</p>	<p><b>10328. Amendments</b></p> <p>(a) . . . The other parties may, within ten (10) business days from the receipt of service, file a response with all other parties and the Director of Arbitration in accordance with Rule 10314(b).</p>	<p>As part of the initiative to standardize time limits in the Code, the time to answer an amended pleading has been extended from 10 business <u>days</u> to 20 calendar days.</p>

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	<p>has been appointed, the respondent has 20 days from the time the amended claim is served to serve an amended answer.</p> <p>(c) If a claim is amended after a panel has been appointed, the respondent has 20 days from the time the respondent receives notice that the panel has granted the motion to amend the claim to serve an amended answer.</p> <p>(d) The amended answer must be directly served on each other party. At the same time, the amended answer must also be filed with the Director, with additional copies for each arbitrator.</p> <p>(e) If the amended claim adds a new party to the arbitration, the new party's answer is governed by Rule 12306.</p>		
<p><b>Amendments to Amount in Dispute</b></p>	<p><b>12311. Amendments to Amount in Dispute</b></p> <p>If an amended pleading increases the amount in dispute, all filing fees, surcharges and process fees required by the Code will be recalculated</p>	<p><b>10328. Amendments</b></p> <p>(b) If a new or amended pleading increases the amount in dispute, all filing fees, hearing session deposits, surcharges, and process fees</p>	<p>No substantive change.</p>



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	based on the new amount in dispute.	required under Rules 10332 and 10333 will be recalculated based on the amended amount in dispute.	
<b>Multiple Claimants</b>	<p><b>12312. Multiple Claimants</b></p> <p>(a) One or more parties may join multiple claims together <u>in the same arbitration</u> if the claims contain common questions of law or fact and:</p> <ul style="list-style-type: none"> <li>• The claims assert any right to relief jointly and severally; or</li> <li>• The claims arise out of the same transaction or occurrence, or series of transactions or occurrences.</li> </ul> <p>(b) After all responsive pleadings have been served, claims joined together under paragraph (a) of this rule may be separated into two or more arbitrations by the Director before a panel is appointed, or by the panel after the panel is appointed. <u>A party whose claims were separated by the Director may make a motion to the panel in the lowest numbered case to reconsider the Director's decision.</u></p>	<p><b>10314. Initiation of Proceedings</b></p> <p><b>(d) Joinder and Consolidation Multiple Parties</b></p> <p>(1) Permissive Joinder. All persons may join in one action as claimants if they assert any right to relief jointly, severally, or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all these claimants will arise in the action. All persons may be joined in one action as respondents if there is asserted against them, jointly or severally, any right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences and if any</p>	<p>The provisions relating to joinder and consolidation of multiple parties have been broken into three rules. (See Rules 12312, 12313 and 12314.) Legal terminology has been replaced by shorter, more common phrases. The provisions relating to defenses and awards have been deleted, because NASD believes that they are not necessary, may provide incomplete guidance depending on applicable law, and are more confusing than helpful.</p> <p><u>NASD is amending Rule 12312(a) to make the language consistent with the language in Rule 12313(a).</u></p>

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		<p>questions of law or fact common to all respondents will arise in the action. A claimant or respondent need not assert rights to or defend against all the relief demanded. Judgment may be given for one or more of the claimants according to their respective rights to relief, and against one or more respondents according to their respective liabilities.</p> <p>(2) In arbitrations where there are multiple Claimants, Respondents, and/or Third-Party Respondents, the Director of Arbitration shall be authorized to determine preliminarily whether such parties should proceed in the same or separate arbitrations. Such determination will be considered subsequent to the filing of all responsive pleadings.</p>	<p><u>In the rare instance in which the Director severs claims, NASD believes the rules should be amended to codify current practice. Because there are multiple surviving panels when the Director severs claims, there would be two or more panels reviewing the Director's decision, with potentially conflicting results. To avoid inconsistent results and to expedite the arbitration process, NASD currently forwards any motion to rejoin severed claims to the panel on the lowest numbered case (i.e., the panel from the first-filed claim in the matter that was severed) to decide a motion to re-join the claims. Thus, NASD is amending Rules 12312(b) and 12313(b) to reflect current practice concerning severing claims in the forum.</u></p>

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<p><b>Multiple Respondents</b></p>	<p><b>12313. Multiple Respondents</b></p> <p>(a) One or more parties may name one or more respondents in the same arbitration if the claims contain any questions of law or fact common to all respondents and:</p> <ul style="list-style-type: none"> <li>• The claims are asserted against the respondents jointly and severally; or</li> <li>• The claims arise out of the same transaction or occurrence, or series of transactions or occurrences.</li> </ul> <p>(b) After all responsive pleadings have been served, claims joined together under paragraph (a) of this rule may be separated into two or more arbitrations by the Director before a panel is appointed, or by the panel after the panel is appointed. <u>A party whose claims were separated by the Director may make a motion to the panel in the lowest numbered case to reconsider the Director's decision.</u></p>	<p><b>10314. Initiation of Proceedings</b></p> <p><b>(d) Joinder and Consolidation Multiple Parties</b></p> <p>(1) Permissive Joinder. All persons may join in one action as claimants if they assert any right to relief jointly, severally, or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all these claimants will arise in the action. All persons may be joined in one action as respondents if there is asserted against them, jointly or severally, any right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all respondents will arise in the action. A claimant or respondent need not assert</p>	<p>See comment section to Rule 12312.</p>

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		<p>rights to or defend against all the relief demanded. Judgment may be given for one or more of the claimants according to their respective rights to relief, and against one or more respondents according to their respective liabilities.</p> <p>(2) In arbitrations where there are multiple Claimants, Respondents, and/or Third-Party Respondents, the Director of Arbitration shall be authorized to determine preliminarily whether such parties should proceed in the same or separate arbitrations. Such determination will be considered subsequent to the filing of all responsive pleadings.</p>	

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<b>Combining Claims</b>	<p><b>12314. Combining Claims</b></p> <p>Before ranked arbitrator lists are due to the Director under Rule 12404(c), the Director may combine separate but related claims into one arbitration. Once a panel has been appointed, the panel may reconsider the Director's decision upon motion of a party.</p>	<p><b>10314. Initiation of Proceedings</b></p> <p><b>(d) Joinder and Consolidation Multiple Parties</b></p> <p>(3) The Director of Arbitration shall be authorized to determine preliminarily whether claims filed separately are related and shall be authorized to consolidate such claims for hearing and award purposes.</p> <p>(4) Further determinations with respect to joinder, consolidation, and multiple parties under this paragraph (d) shall be made by the arbitration panel and shall be deemed final.</p>	<p>See comment section to Rule 12312. The rule provides more guidance regarding the time frame for consolidating claims.</p>

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<b>PART IV</b>  <b>APPOINTMENT, DISQUALIFICATION, AND AUTHORITY OF ARBITRATORS</b>			
<b>Neutral List Selection System and Arbitrator Rosters</b>	<p><b>12400. Neutral List Selection System and Arbitrator Rosters</b></p> <p><b>(a) Neutral List Selection System</b></p> <p>The Neutral List Selection System is a computer system that generates, on a random basis, lists of arbitrators from NASD's rosters of arbitrators for the selected hearing location for each proceeding. The parties will select their panel through a process of striking and ranking the arbitrators on lists generated by the Neutral List Selection System.</p> <p><b>(b) Arbitrator[s] Rosters</b></p> <p>NASD maintains the following roster of arbitrators:</p>	<p><b>10308. Selection of Arbitrators</b></p> <p><b>(a) Definitions</b></p> <p><b>(3) "Neutral List Selection System"</b></p> <p>The term "Neutral List Selection System" means the software that maintains the roster of arbitrators and performs various functions relating to the selection of arbitrators.</p>	<p>To make rules shorter and easier to read, the substance of current Rule 10308 has been broken into several rules. See Rules 12400-12409.</p> <p>The definitions in current Rule 10308(a) have been moved to Rule 12100.</p> <p>This rule and the rules that follow include a series of changes to the NLSS system. Those changes include:</p> <ul style="list-style-type: none"> <li>• Shifting to a random (as opposed to the current rotational) system of generating</li> </ul>

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	<ul style="list-style-type: none"> <li>• A roster of non-public arbitrators as defined in Rule 12100[(n)] (<u>p</u>);</li> <li>• A roster of public arbitrators as defined in Rule 12100[(r)] (<u>u</u>); and</li> <li>• A roster of arbitrators who are eligible to serve as chairperson of a panel as described in paragraph (c). <u>Arbitrators who are eligible to serve as chairperson will also be included in the roster of public arbitrators, but will only appear on one list in a case.</u></li> </ul> <p><b>(c) Eligibility for Chairperson Roster</b></p> <p>In customer disputes, chairpersons must be public arbitrators. Arbitrators are eligible for the chairperson roster if they have completed chairperson training provided by NASD or have substantially equivalent training or experience and:</p> <ul style="list-style-type: none"> <li>• Have a law degree and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least two arbitrations administered</li> </ul>		<p>arbitrator names for the lists sent to parties (12400(a)) (approved by the SEC on March 9, 2005);</p> <ul style="list-style-type: none"> <li>• Creating a separate list of public chair-qualified arbitrators from which the chairperson of the panel will be selected (12400(b) and (c)) (currently proposed);</li> <li>• Eliminating the ability of parties to unilaterally request arbitrators with particular expertise (see current Rule 10308(b)(4)(B)) (currently proposed); and</li> <li>• Expanding the number of names of proposed arbitrators provided to the parties, but limiting the number of arbitrators from each</li> </ul>

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	<p>by a self-regulatory organization in which hearings were held; or</p> <ul style="list-style-type: none"> <li>• Have served as an arbitrator through award on at least three arbitrations administered by a self-regulatory organization in which hearings were held.</li> </ul>		<p>list that each party may strike (12403) (currently proposed).</p> <p>NASD believes that these modifications to NLSS will streamline and simplify the arbitrator selection process, and that the creation of a chairperson list will enhance the quality of NASD arbitrations. For purposes of Rule 12400(c), substantially equivalent training or experience would include service as a judge or administrative hearing officer, chairperson training offered by another recognized dispute resolution forum, or the like.</p> <p>In addition, the proposed changes will make the NLSS component of NASD's proposed new computerized case management system, CMS/MATRICS simpler</p>



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			<p>and less expensive to program and implement.</p> <p><u>NASD is amending Rule 12400(b) to clarify that chair-qualified arbitrators will be included in the public arbitrator pool as well as in the public chair pool. NASD notes that this proposed change will not result in duplication of names on the chair and public lists for the same case as the rule filing suggests. The NLSS will be programmed to select the arbitrators such that a specific arbitrator's name will not appear on both lists in the same case. NASD is also amending the title of Rule 12400(b) to correct a typographical error.</u></p>
<b>Number of Arbitrators</b>	<b>12401. Number of Arbitrators</b>  <b>(a) Claims of \$25,000 or Less</b>  If the amount of a claim is \$25,000 or	<b>10308. Selection of Arbitrators</b>  <b>(b)(1) Composition of Arbitration Panel</b>	Under the rule: <ul style="list-style-type: none"> <li>• For claims under \$25,000, the single arbitrator could no</li> </ul>

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	<p>less, exclusive of interest and expenses, the panel will consist of one arbitrator and the claim is subject to the simplified arbitration procedures under Rule 12800.</p> <p><b>(b) Claims of More Than \$25,000 Up To \$50,000</b></p> <p>If the amount of a claim is more than \$25,000 but not more than \$50,000, exclusive of interest and expenses, the panel will consist of one arbitrator unless any party requests a panel of three arbitrators.</p> <p><b>(c) Claims of More Than \$50,000; Unspecified or Non-Monetary Claims</b></p> <p>If the amount of a claim is more than \$50,000, exclusive of interest and expenses, or is unspecified, or if the claim does not request money damages, the panel will consist of three arbitrators, unless the parties agree in writing to one arbitrator.</p>	<p>(A) Claims of \$50,000 or Less</p> <p>If the amount of a claim is \$50,000 or less, the Director shall appoint an arbitration panel composed of one public arbitrator, unless the parties agree to the appointment of a non-public arbitrator.</p> <p>(i) If the amount of a claim is \$25,000 or less and an arbitrator appointed to the case requests that a panel of three arbitrators be appointed, the Director shall appoint an arbitration panel composed of one non-public arbitrator and two public arbitrators, unless the parties agree to a different panel composition.</p> <p>(ii) If the amount of a claim is greater than \$25,000 and not more than \$50,000 and a party in its initial filing or an arbitrator appointed to the case requests that a panel of three arbitrators be appointed, the Director shall appoint an arbitration panel</p>	<p>longer request a three-arbitrator panel; and</p> <ul style="list-style-type: none"> <li>• For claims involving between \$25,000 and \$50,000, any party could still request a three-arbitrator panel, but the single arbitrator could not.</li> </ul> <p>(In a related change, Rule 12402(a) provides that a single arbitrator must be from the chairperson roster unless the parties agree otherwise.)</p> <p>NASD believes that these changes will help to streamline the administration of smaller claims, and minimize the cost of bringing and prosecuting small claims. NASD believes that requiring that single arbitrators be chair-qualified will help ensure the quality of single arbitrator proceedings.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		<p>composed of one non-public arbitrator and two public arbitrators, unless the parties agree to a different panel composition.</p> <p>(B) Claims of More Than \$50,000</p> <p>If the amount of a claim is more than \$50,000, the Director shall appoint an arbitration panel composed of one non-public arbitrator and two public arbitrators, unless the parties agree to a different panel composition.</p>	
<p><b>Composition of Arbitration Panels</b></p>	<p><b>12402. Composition of Arbitration Panels</b></p> <p>(a) If the panel consists of one arbitrator, the arbitrator will be a public arbitrator selected from the <u>public</u> chairperson roster, unless the parties agree in writing otherwise.</p> <p>(b) If the panel consists of three arbitrators, one will be a non-public arbitrator and two will be public arbitrators, one of whom will be</p>	<p><b>10308. Selection of Arbitrators</b></p> <p><b>(b)(1) Composition of Arbitration Panel</b></p> <p>(A) Claims of \$50,000 or Less</p> <p>If the amount of a claim is \$50,000 or less, the Director shall appoint an arbitration panel composed of one public arbitrator, unless the parties</p>	<p>As part of the proposed changes to NLSS, the rule provides that in single arbitrator cases, the single arbitrator will be selected from the new chair-qualified roster (See 12400(b) and (c)), unless the parties agree otherwise. The rule also provides that in three-arbitrator cases, one arbitrator will be selected</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>selected from the <u>public</u> chairperson roster, unless the parties agree in writing otherwise.</p>	<p>agree to the appointment of a non-public arbitrator.</p> <p>(i) If the amount of a claim is \$25,000 or less and an arbitrator appointed to the case requests that a panel of three arbitrators be appointed, the Director shall appoint an arbitration panel composed of one non-public arbitrator and two public arbitrators, unless the parties agree to a different panel composition.</p> <p>(ii) If the amount of a claim is greater than \$25,000 and not more than \$50,000 and a party in its initial filing or an arbitrator appointed to the case requests that a panel of three arbitrators be appointed, the Director shall appoint an arbitration panel composed of one non-public arbitrator and two public arbitrators, unless the parties agree to a different panel composition.</p> <p>(B) Claims of More Than \$50,000 If the amount of a claim is more</p>	<p>from the chair-qualified roster.</p> <p><u>NASD is amending Rule 12402 to add the word "public" to describe the chairperson roster, so that there will be no confusion concerning the composition of the panels under the Code.</u></p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		than \$50,000, the Director shall appoint an arbitration panel composed of one non-public arbitrator and two public arbitrators, unless the parties agree to a different panel composition.	
<b>Generating and Sending Lists to the Parties</b>	<p><b>12403. Generating and Sending Lists to the Parties</b></p> <p><b>(a) Generating Lists</b></p> <p>(1) If the panel consists of one arbitrator, the Neutral List Selection System will generate a list of [seven] <u>eight</u> public arbitrators from the NASD's chairperson roster.</p> <p>(2) If the panel consists of three arbitrators, the Neutral List Selection System will generate:</p> <ul style="list-style-type: none"> <li>• A list of [seven] <u>eight</u> arbitrators from the NASD's non-public arbitrator roster;</li> <li>• A list of [seven] <u>eight</u> arbitrators from the NASD's public arbitrator roster; and</li> </ul>	<p><b>10308. Selection of Arbitrators</b></p> <p><b>(b)(2) One List for Panel of One Arbitrator</b></p> <p>If one arbitrator will serve as the arbitration panel, the Director shall send to the parties one list of public arbitrators, unless the parties agree otherwise.</p> <p><b>(3) Two Lists for Panel of Three Arbitrators</b></p> <p>If three arbitrators will serve as the arbitration panel, the Director shall send two lists to the parties, one with the names of public arbitrators and one with the names of non-public arbitrators. The lists shall contain numbers of public and non-public arbitrators, in a ratio</p>	<p>As part of the proposed changes to NLSS, the rule provides that when the panel consists of three arbitrators, parties would receive a chairperson list as well as non-public and public lists, as applicable, and that each list would contain [seven] <u>eight</u> names.</p> <p>As part of the proposed changes to NLSS, the ability of a party to unilaterally request arbitrators with certain expertise in current Rule 10308(b)(4)(B) has been eliminated.</p> <p>Like the current rule, the proposed rule states that</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<ul style="list-style-type: none"> <li>• A list of [seven] <u>eight</u> public arbitrators from the NASD's chairperson roster.</li> </ul> <p>(3) The Neutral List Selection System will exclude arbitrators from the lists based upon current conflicts of interest identified within the Neutral List Selection System.</p> <p><b>(b) Sending Lists to Parties</b></p> <p>(1) The Director will send the lists generated by the Neutral List Selection System to all parties at the same time, within approximately 30 days after the last answer is due. The parties will also receive employment history for the past 10 years and other background information for each arbitrator listed.</p> <p>(2) If a party requests additional information about an arbitrator, the Director will request the additional information from the arbitrator, and will send any response to all of the parties at the same time. When a party requests additional information, the Director may, but is not required to, toll the time for parties to return the</p>	<p>of approximately two to one, respectively, to the extent possible, based on the roster of available arbitrators.</p> <p><b>(4) Preparation of Lists</b></p> <p>(A) Except as provided in subparagraph (B) below, the Neutral List Selection System shall generate the lists of public and non-public arbitrators on a rotating basis within a designated geographic hearing site and shall exclude arbitrators based upon conflicts of interest identified within the Neutral List Selection System database.</p> <p>(B) If a party requests that the lists include arbitrators with expertise classified in the Neutral List Selection System, the lists may include some arbitrators having the designated expertise.</p> <p><b>(5) Sending of Lists to Parties</b></p> <p>The Director shall send the lists of arbitrators to all parties at the same time approximately 30</p>	<p>NLSS excludes arbitrators from the lists sent to parties based on current conflicts of interest identified by NLSS. NLSS currently checks for conflicts based on matches between arbitrator and party identification numbers and the member conflicts database maintained by NASD. This is a preliminary check that is intended to remove arbitrators from the list who have an obvious conflict with a party based on employment history or other information contained in the database. It does not, nor is it intended to, replace the more detailed check performed by parties once the lists have been sent.</p> <p>NASD is amending Rule 12403 to increase the number of arbitrators on each list to eight, and to</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	ranked lists under Rule 12404(c).	<p>days after the last answer is due.</p> <p><b>(6) Information About Arbitrators</b></p> <p>The Director shall send to the parties employment history for each listed arbitrator for the past 10 years and other background information. If a party requests additional information about an arbitrator, the Director shall send such request to the arbitrator, and shall send the arbitrator's response to all parties at the same time. When a party requests additional information, the Director may, but is not required to, toll the time for the parties to return the ranked lists under paragraph (c)(2).</p>	<p>reduce the number of strikes per each separately represented party to four. By increasing the panel size and reducing the number of strikes, there is a greater likelihood that arbitrators from the original list will remain on the list after the parties exercise their strikes and all lists are consolidated. This change will not eliminate the possibility of computer-generated extended lists, but should reduce the instances of extended lists, thus providing parties with more control in the arbitrator selection process.</p> <p><u>NASD is also proposing to amend Proposed Rule 12403 to clarify that those arbitrators who are eligible to serve as chairperson will be included in the roster of public arbitrators.</u></p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
			<u>but will only appear on one list in a case.</u>
<b>Striking and Ranking Arbitrators</b>	<p><b>12404. Striking and Ranking Arbitrators</b></p> <p>(a) Each separately represented party may strike up to [five] <u>four</u> of the arbitrators from each list for any reason by crossing through the names of the arbitrators. [Two] <u>At least four</u> names must remain on each list.</p> <p>(b) Each separately represented party shall rank all remaining arbitrators on the lists in order of preference, with a "1" indicating the party's first choice, a "2" indicating the party's second choice, and so on. Each list of arbitrators must be ranked separately.</p> <p>(c) The ranked lists must be returned to the Director no more than 20 days after the date upon which the Director sent the lists to the parties. If the Director does not receive a party's ranked lists within that time, the Director will proceed as though the party did not want to strike any arbitrator or have any preferences among the listed arbitrators.</p>	<p><b>10308. Selection of Arbitrators</b></p> <p><b>(c) Striking, Ranking, and Appointing Arbitrators on Lists</b></p> <p><b>(1) Striking and Ranking Arbitrators</b></p> <p>(A) Striking An Arbitrator A party may strike one or more of the arbitrators from each list for any reason.</p> <p>(B) Ranking - Panel of One Arbitrator Each party shall rank all of the arbitrators remaining on the list by assigning each arbitrator a different, sequential, numerical ranking, with a "1" rank indicating the party's first choice, a "2" indicating the party's second choice, and so on.</p> <p>(C) Ranking - Panel of Three</p>	<p>As part of the proposed changes to NLSS, the rule provides that parties would have five strikes, and would have to leave two names on the lists. This change is intended to avoid the possibility that all names will be stricken from the lists, which is intended to minimize the likelihood that the Director will have to appoint an arbitrator not on the original lists sent to parties. (See Rule 12406.)</p> <p><u>See comments under Rule 12403 concerning striking and ranking arbitrators.</u></p>



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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		<p>Arbitrators</p> <p>Each party shall rank all of the public arbitrators remaining on the list by assigning each arbitrator a different, sequential, numerical ranking, with a "1" rank indicating the party's first choice, a "2" indicating the party's second choice, and so on. Each party separately shall rank all of the non-public arbitrators remaining on the list, using the same procedure.</p> <p><b>(2) Period for Ranking Arbitrators; Failure to Timely Strike and Rank</b></p> <p>A party must return to the Director the list or lists with the rankings not later than 20 days after the Director sent the lists to the parties, unless the Director has extended the period. If a party does not timely return the list or lists, the Director shall treat the party as having retained all the arbitrators on the list or lists and as having no preferences.</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>Combining Lists</b>	<p><b>12405. Combining Lists</b></p> <p>For each arbitrator classification (public, non-public, and chairperson), the Director will prepare combined ranked lists of arbitrators based on the parties' numerical rankings, as follows:</p> <ul style="list-style-type: none"> <li>• The Director will add the rankings of all claimants together, and the rankings of all respondents together, to produce separate combined ranked lists for the claimants and the respondents.</li> <li>• The Director will then add the combined rankings of claimants and the respondents together, to produce a single combined ranking number for each arbitrator, excluding all arbitrators stricken by a party.</li> <li>• The Director will create separate combined ranked lists for each arbitrator classification in cases with both public and non-public arbitrators.</li> </ul>	<p><b>10308. Selection of Arbitrators</b></p> <p><b>(c) Striking, Ranking, and Appointing Arbitrators on Lists</b></p> <p><b>(3) Process of Consolidating Parties' Rankings</b></p> <p>The Director shall prepare one or two consolidated lists of arbitrators, as appropriate under paragraph (b)(2) or (b)(3), based upon the parties' numerical rankings. The arbitrators shall be ranked by adding the rankings of all claimants together and all respondents together, including third-party respondents, to produce separate consolidated rankings of the claimants and the respondents. The Director shall then rank the arbitrators by adding the consolidated rankings of the claimants, the respondents, including third-party respondents, and any other party together, to produce a single consolidated ranking number, excluding arbitrators</p>	<p>As part of the proposed changes to NLSS, the rule includes combining of the chairperson list. Otherwise, the process for combining lists remains the same.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		who were stricken by any party.	
<b>Appointment of Arbitrators; Discretion to Appoint Arbitrators Not on List</b>	<p><b>12406. Appointment of Arbitrators; Discretion to Appoint Arbitrators Not on List</b></p> <p>(a) If the panel consists of one arbitrator, the Director will appoint the highest-ranked available arbitrator from the combined chairperson list.</p> <p>(b) If the panel consists of three arbitrators, the Director will appoint:</p> <ul style="list-style-type: none"> <li>• The highest-ranked available non-public arbitrator from the combined non-public arbitrator list;</li> <li>• The highest-ranked available public arbitrator from the combined public arbitrator list, and</li> <li>• The highest-ranked available public arbitrator from the combined chairperson list, who will serve as chairperson of the panel.</li> </ul> <p>(c) If the number of arbitrators available to serve from the combined</p>	<p><b>10308. Selection of Arbitrators</b></p> <p><b>(c) Striking, Ranking, and Appointing Arbitrators on Lists</b></p> <p><b>(4) Appointment of Arbitrators</b></p> <p>(A) Appointment of Listed Arbitrators</p> <p>The Director shall appoint arbitrators to serve on the arbitration panel based on the order of rankings on the consolidated list or lists, subject to availability and disqualification.</p> <p>(B) Discretion to Appoint Arbitrators Not on List</p> <p>If the number of arbitrators available to serve from the consolidated list is not sufficient to fill a panel, the Director shall appoint one or more arbitrators to complete the arbitration</p>	<p>As part of the proposed changes to NLSS, the rule incorporates a chairperson list, and current Rule 10308(c)(5), governing selection of chairperson, has been deleted.</p> <p>In the past, there have been questions regarding when appointment of arbitrators occurs. To address this question, paragraph (d) of the rule clarifies that appointment of arbitrators occurs when the Director sends notice to the parties of the names of the arbitrators on the panel. In addition, the arbitrator oath currently in Rule 10327 has been moved here.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>list(s) is not sufficient to fill an initial panel, the Director will appoint one or more arbitrators of the required classification to complete the panel from names generated randomly by the Neutral List Selection System. If the Director must appoint a non-public arbitrator, the Director may not appoint a non-public arbitrator as defined in Rule 12100[(n)] (p)(2) or (3), unless the parties agree otherwise. The Director will provide the parties information about the arbitrators as provided in Rule 12403 and the parties will have the right to challenge the arbitrators as provided in Rule 12410.</p> <p>(d) Appointment of arbitrators occurs when the Director sends notice to the parties of the names of the arbitrators on the panel. Before making any decision as an arbitrator or attending a hearing session, the arbitrators must execute NASD's arbitrator oath or affirmation.</p>	<p>panel. Unless the parties agree otherwise, the Director may not appoint a non-public arbitrator under paragraphs (a)(4)(B) or (a)(4)(C). The Director shall provide the parties information about the arbitrator as provided in paragraph (b)(6), and the parties shall have the right to object to the arbitrator as provided in paragraph (d)(1).</p> <p><b>(5) Selecting a Chairperson for the Panel</b></p> <p>The parties shall have seven days from the date the Director sends notice of the names of the arbitrators to select a chairperson. If the parties cannot agree, the Director shall appoint a chairperson from the panel as follows:</p> <p>(A) The Director shall appoint as the chairperson the public arbitrator who is the most highly ranked by the parties as long as the person is not an attorney, accountant, or other professional who has devoted 50% or more of his or her professional or business</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		<p>activities, within the last two years, to representing or advising public customers in matters relating to disputed securities or commodities transactions or similar matters.</p> <p>(B) If the most highly ranked public arbitrator is subject to the exclusion set forth in subparagraph (A), the Director shall appoint as the chairperson the other public arbitrator, as long as the person also is not subject to the exclusion set forth in subparagraph (A).</p> <p>(C) If both public arbitrators are subject to the exclusion set forth in subparagraph (A), the Director shall appoint as the chairperson the public arbitrator who is the most highly ranked by the parties.</p>	
<b>Additional Parties</b>	<p><b>12407. Additional Parties</b></p> <p>(a) If a party is added to an arbitration after the Director sends the lists generated by the Neutral List Selection System to the parties, but before parties must return the ranked</p>	<p><b>10308. Selection of Arbitrators</b></p> <p><b>(c) Striking, Ranking, and Appointing Arbitrators on Lists</b></p>	<p>Paragraph (b) of the rule is new. In the current Code, parties may amend pleadings at any time prior to panel appointment, but, after panel appointment, they must obtain approval</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>lists to the Director, the Director will send the lists to the newly added party, with employment history for the past 10 years and other background information for each arbitrator listed. The newly added party may rank and strike the arbitrators in accordance with Rule 12404. If the newly added party returns the lists within 20 days after the date upon which the Director sent the lists to the party, the Director will include the new party's lists when combining rankings under Rule 12405. If the Director does not receive the list within that time, the Director will proceed as though the party did not want to strike any arbitrator or have any preference among the listed arbitrators.</p> <p>(b) Once the ranked lists are due to the Director under Rule 12404, no party may amend a pleading to add a new party to the arbitration until a panel is appointed and grants a motion to add the party. Motions to add a party must be served on all parties, including the party to be added, and the party to be added may respond to the motion in accordance with Rule 12503 without waiving any</p>	<p><b>(6) Additional Parties</b></p> <p>If a party is added to an arbitration proceeding before the Director has consolidated the other parties' rankings, the Director shall send to that party the list or lists of arbitrators and permit the party to strike and rank the arbitrators. The party must return to the Director the list or lists with numerical rankings not later than 20 days after the Director sent the lists to the party. The Director shall then consolidate the rankings as specified in this paragraph (c).</p>	<p>to amend a pleading. This means that between the time that the Director consolidates the arbitrator lists and the panel is appointed, a party could amend a pleading to add a party to the proceeding, and the newly-added party would neither be able to participate in NLSS or object to being added to the arbitration. To address this issue, which has been the subject of concern among some users of the forum, the rules governing amending pleadings (12309) and the application of NLSS to newly added parties (12407) provide that no party may be added by amendment after ranked lists are due to the Director and before a panel is appointed and approves a request to add the party.</p> <p>Rule 12309(c) also makes</p>

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	rights or objections under the Code. If the panel grants the motion to add the party, the newly added party may not strike and rank the arbitrators, but may challenge an arbitrator for cause in accordance with Rule 12410.		<p>clear that the party to be added after panel appointment must be given an opportunity to be heard before the panel can grant the motion to amend. This change will ensure that a party added to an arbitration by amendment either will be able to participate in NLSS, or will be able to object to being added.</p> <p>Rule 12407 also clarifies that parties added prior to the cut-off date may participate in NLSS, but parties added by amendment after panel appointment do not have the ability to rank and strike arbitrators under NLSS. However, they may challenge an arbitrator for cause under Rule 12409.</p>
<b>Disclosures Required of Arbitrators</b>	<b>12408. Disclosures Required of Arbitrators</b>  (a) Before appointing arbitrators to a	<b>10312. Disclosures Required of Arbitrators and Director's Authority to Disqualify</b>	Subparagraph (a)(4) has been added to reflect approval of a proposed rule change by the SEC

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	<p>panel, the Director will notify the arbitrators of the nature of the dispute and the identity of the parties. Each potential arbitrator must make a reasonable effort to learn of, and must disclose to the Director, any circumstances which might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, including:</p> <p>(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;</p> <p>(2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances with any party, any party's representative, or anyone who the arbitrator is told may be a witness in the proceeding, that are likely to affect impartiality or might reasonably create an appearance of partiality or bias;</p> <p>(3) Any such relationship or circumstances involving members of the arbitrator's family or the arbitrator's current employers, partners, or business associates; and</p>	<p>(a) Each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination. Each arbitrator shall disclose:</p> <p>(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;</p> <p>(2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. Persons requested to serve as arbitrators must disclose any such relationships or circumstances that they have with any party or its counsel, or with any individual whom they have been told will be a witness. They must also disclose any such relationship or circumstances involving</p>	<p>on March 7, 2005. Otherwise, there are no substantive changes from current Rule 10312.</p>



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	<p>(4) Any existing or past service as a mediator.</p> <p>(b) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in paragraph (a) is a continuing duty that requires an arbitrator who accepts appointment to an arbitration proceeding to disclose, at any stage of the proceeding, any such interests, relationships, or circumstances that arise, or are recalled or discovered.</p> <p>(c) The Director will inform the parties to the arbitration of any information disclosed to the Director under this rule unless the arbitrator who disclosed the information declines appointment or voluntarily withdraws from the panel as soon as the arbitrator learns of any interest, relationship or circumstance that might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, or the Director removes the arbitrator.</p>	<p>members of their families or their current employers, partners, or business associates.</p> <p>(b) Persons who are requested to accept appointment as arbitrators must make a reasonable effort to inform themselves of any interests, relationships or circumstances described in paragraph (a) above.</p> <p>(c) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in paragraph (a) is a continuing duty that requires a person who accepts appointment as an arbitrator to disclose, at any stage of the arbitration, any such interests, relationships, or circumstances that arise, or are recalled or discovered.</p> <p style="text-align: center;">* * *</p> <p>(e) The Director shall inform the</p>	

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		<p>parties to an arbitration proceeding of any information disclosed to the Director under this Rule unless either the arbitrator who disclosed the information withdraws voluntarily as soon as the arbitrator learns of any interest, relationship, or circumstances described in paragraph (a) that might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, or the Director removes the arbitrator.</p> <p style="text-align: center;">* * * *</p> <p><b>IM-10308. Arbitrators Who Also Serve as Mediators</b></p> <p style="text-align: center;">* * * *</p> <p>Arbitrators who also serve as mediators shall disclose that fact on their arbitrator disclosure forms.</p>	
<b>Arbitrator Recusal</b>	<p><b>12409. Arbitrator Recusal</b></p> <p>Any party may ask an arbitrator to</p>		<p>New rule.</p> <p>The rule provides</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>recuse himself or herself from the panel for good cause. Requests for arbitrator recusal are decided by the arbitrator who is the subject of the request.</p>		<p>guidance to parties on how recusal requests may be made, and decided. The rule provides that, consistent with current case law, the subject of the request for recusal must decide the request.</p>
<p><b>Removal of Arbitrator by Director</b></p>	<p><b>12410. Removal of Arbitrator by Director</b></p> <p><b>(a) Before First Hearing Session Begins</b></p> <p>Before the first hearing session begins, the Director may remove an arbitrator for conflict of interest or bias, either upon request of a party or on the Director's own initiative.</p> <p>(1) The Director will grant a party's request to remove an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration. The interest or bias must be direct, definite, and capable of reasonable demonstration, rather than</p>	<p><b>10308. Selection of Arbitrators</b></p> <p><b>(d) Disqualification and Removal of Arbitrator Due to Conflict of Interest or Bias</b></p> <p><b>(1) Disqualification By Director</b></p> <p>After the appointment of an arbitrator and prior to the commencement of the earlier of (A) the first pre-hearing conference or (B) the first hearing, if the Director or a party objects to the continued service of the arbitrator, the Director shall determine if the arbitrator should be disqualified. If the Director sends a notice to the parties that the arbitrator shall be</p>	<p>No substantive change. The rule combines the substance of current Rules 10308(d), 10312(d), and 10313, which all address disqualification and removal of arbitrators.</p>

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	<p>remote or speculative. Close questions regarding challenges to an arbitrator by a customer under this Rule will be resolved in favor of the customer.</p> <p>(2) The Director must first notify the parties before removing an arbitrator on the Director's own initiative. The Director may not remove the arbitrator if the parties agree in writing to retain the arbitrator within five days of receiving notice of the Director's intent to remove the arbitrator.</p> <p><b>(b) After First Hearing Session Begins</b></p> <p>After the first hearing session begins, the Director may remove an arbitrator based only on information required to be disclosed under Rule 12408 that was not previously known by the parties. The Director may exercise this authority upon request of a party or on the Director's own initiative. Only the Director or the President of NASD Dispute Resolution may exercise the Director's authority under this paragraph (b).</p>	<p>disqualified, the arbitrator will be disqualified unless the parties unanimously agree otherwise in writing and notify the Director not later than 15 days after the Director sent the notice.</p> <p><b>(2) Removal by Director</b></p> <p>After the commencement of the earlier of (A) the first pre-hearing conference or (B) the first hearing, the Director may remove an arbitrator from an arbitration panel based on information that is required to be disclosed pursuant to Rule 10312 and that was not previously disclosed.</p> <p><b>(3) Standards for Deciding Challenges for Cause</b></p> <p>The Director will grant a party's request to disqualify an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has an interest in the outcome of the arbitration. The interest</p>	

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		<p>or bias must be direct, definite, and capable of reasonable demonstration, rather than remote or speculative.</p> <p style="text-align: center;">* * *</p> <p><b>(f) Challenges by Customers</b>            In cases involving public customers, any close questions regarding arbitrator classification or challenges for cause brought by a customer will be resolved in favor of the customer.</p> <p style="text-align: center;">* * *</p> <p><b>10312. Disclosures Required of Arbitrators and Director's Authority to Disqualify</b></p> <p><b>(d) Removal by Director</b></p> <p>(1) The Director may remove an arbitrator based on information that is required to be disclosed pursuant to this Rule.</p> <p>(2) After the commencement of the earlier of (A) the first pre-hearing conference or (B) the first hearing, the Director may remove an arbitrator based only</p>	

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		<p>on information not known to the parties when the arbitrator was selected. The Director's authority under this subparagraph (2) may be exercised only by the Director or the President of NASD Dispute Resolution.</p> <p>(3) The Director will grant a party's request to disqualify an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has an interest in the outcome of the arbitration. The interest or bias must be direct, definite, and capable of reasonable demonstration, rather than remote or speculative.</p>	
<b>Replacement of Arbitrators</b>	<p><b>12411. Replacement of Arbitrators</b></p> <p>(a) If an arbitrator is removed, or becomes otherwise unable or unwilling to serve, the Director will appoint a replacement arbitrator in accordance with this rule, unless the parties agree in writing to proceed with only the remaining arbitrators.</p>	<p><b>10308. Selection of Arbitrators</b></p> <p><b>(d) Disqualification and Removal of Arbitrator Due to Conflict of Interest or Bias</b></p> <p><b>(4) Vacancies Created by Disqualification or</b></p>	<p>Under the current Code, the provisions regarding replacement of arbitrators are contained in several different sections, and contain numerous cross-references to other rules. The rule consolidates the various current rules, but</p>

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	<p>(b) The Director will appoint as a replacement arbitrator the arbitrator who is the most highly ranked available arbitrator of the required classification remaining on the combined list.</p> <p>(c) If there are no available arbitrators of the required classification on the consolidated list, the Director will appoint an arbitrator of the required classification to complete the panel from names generated by the Neutral List Selection System. The Director will provide the parties information about the arbitrator as provided in Rule 12403, and the parties shall have the right to object to the arbitrator as provided in Rule 12410.</p> <p>(d) If the Director must appoint a non-public arbitrator under paragraph (c), the Director may not appoint a non-public arbitrator as defined in Rule 12100[(n)] (p)(2) or (3), unless the parties agree otherwise.</p>	<p><b>Resignation</b></p> <p>Prior to the commencement of the earlier of (A) the first pre-hearing conference or (B) the first hearing, if an arbitrator appointed to an arbitration panel is disqualified or is otherwise unable or unwilling to serve, the Director shall appoint from the consolidated list of arbitrators the arbitrator who is the most highly ranked available arbitrator of the proper classification remaining on the list. If there are no available arbitrators of the proper classification on the consolidated list, the Director shall appoint an arbitrator of the proper classification subject to the limitation set forth in paragraph (c)(4)(B). The Director shall provide the parties information about the arbitrator as provided in paragraph (b)(6), and the parties shall have the right to object to the arbitrator as provided in paragraph (d)(1).</p> <p style="text-align: center;">* * *</p>	<p>contains no substantive change, other than extending the option of electing to proceed with only the remaining arbitrators to all stages of the proceeding, but eliminating the five-day limitation on electing that option, both of which are contained in current Rule 10313.</p> <p>NASD believes that parties should have the right to jointly decide to proceed with only the remaining arbitrators regardless of when the replacement occurs, and that the parties should be able to elect that option up until the time the appointment of the replacement arbitrator occurs.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		<p><b>(c) Striking, Ranking, and Appointing Arbitrators on Lists</b></p> <p><b>(4) Appointment of Arbitrators</b></p> <p>(B) Discretion to Appoint Arbitrators Not on List</p> <p>If the number of arbitrators available to serve from the consolidated list is not sufficient to fill a panel, the Director shall appoint one or more arbitrators to complete the arbitration panel. Unless the parties agree otherwise, the Director may not appoint a non-public arbitrator under paragraphs (a)(4)(B) or (a)(4)(C). The Director shall provide the parties information about the arbitrator as provided in paragraph (b)(6), and the parties shall have the right to object to the arbitrator as provided in paragraph (d)(1).</p> <p style="text-align: center;">* * *</p> <p><b>10308. Selection of Arbitrators</b></p>	



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		<p><b>(a) Definitions</b></p> <p><b>(4) "non-public arbitrator"</b>  The term "non-public arbitrator" means a person who is otherwise qualified to serve as an arbitrator and:</p> <p>(A) is, or within the past three years, was:</p> <p>(i) associated with a broker or a dealer (including a government securities broker or dealer or a municipal securities dealer);</p> <p>(ii) registered under the Commodity Exchange Act;</p> <p>(iii) a member of a commodities exchange or a registered futures association; or</p> <p>(iv) associated with a person or firm registered under the Commodity Exchange Act;</p> <p>(B) is retired from engaging in any of the business activities listed in subparagraph (4)(A);</p> <p>(C) is an attorney, accountant, or other professional who has devoted 20 percent or more of</p>	

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		<p>his or her professional work, in the last two years, to clients who are engaged in any of the business activities listed in subparagraph (4)(A); or</p> <p>(D) is an employee of a bank or other financial institution and effects transactions in securities, including government or municipal securities, and commodities futures or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.</p> <p style="text-align: center;">* * *</p> <p><b>10313. Disqualification or Other Disability of Arbitrators</b></p> <p>(a) In the event that any arbitrator, after the commencement of the earlier of (1) the first pre-hearing conference or (2) the first hearing but prior to the rendition of the award, should become disqualified, resign, die, refuse or otherwise be</p>	

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		<p>unable to perform as an arbitrator, 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.</p> <p>(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</p>	

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		<p>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.</p>	
<p><b>Director's Discretionary Authority</b></p>	<p><b>12412. Director's Discretionary Authority</b></p> <p>The Director may exercise discretionary authority and make any decision that is consistent with the purposes of the Code to facilitate the appointment of arbitrators and the resolution of arbitrations.</p>	<p><b>10308. Selection of Arbitrators</b></p> <p><b>(e) Discretionary Authority</b></p> <p>The Director may exercise discretionary authority and make any decision that is consistent with the purposes of this Rule and the Rule 10000 Series to facilitate the appointment of arbitration panels and the resolution of arbitration disputes.</p>	<p>No substantive change.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>Jurisdiction of Panel and Authority to Interpret the Code</b>	<p><b>12413. Jurisdiction of Panel and Authority to Interpret the Code</b></p> <p>The panel has the authority to interpret and determine the applicability of all provisions under the Code. Such interpretations are final and binding upon the parties.</p>	<p><b>10324. Interpretation of Provisions of Code and Enforcement of Arbitrator Rulings</b></p> <p>The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.</p>	<p>No substantive change.</p>
<b>Determinations of Arbitration Panel</b>	<p><b>12414. Determinations of Arbitration Panel</b></p> <p>All rulings and determinations of the panel must be made by a majority of the arbitrators, unless the parties agree, or the Code or applicable law provides, otherwise.</p>	<p><b>10325. Determination of Arbitrators</b></p> <p>All rulings and determinations of the panel shall be by a majority of the arbitrators.</p>	<p>The rule reflects that under the Code, and applicable law, some decisions may be made by a single member of a three-arbitrator panel. For example, Rule 12503 provides that some motions may be decided by a single arbitrator. Also, applicable law may permit a single arbitrator to issue a subpoena. (See Rule 12512.)</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>PART V</b>  <b>PREHEARING PROCEDURES AND DISCOVERY</b>			
<b>Initial Prehearing Conference</b>	<p><b>12500. Initial Prehearing Conference</b></p> <p>(a) After the panel is appointed, the Director will schedule an Initial Prehearing Conference before the panel, except as provided in paragraph (c) of this rule.</p> <p>(b) The Initial Prehearing Conference will generally be held by telephone. Unless the parties agree otherwise, the Director must notify each party of the time and place of the Initial Prehearing Conference at least 20 days before it takes place.</p> <p>(c) At the Initial Prehearing Conference, the panel will set discovery, briefing, and motions deadlines, schedule subsequent hearing sessions, and address other preliminary matters. The parties may agree to forgo the Initial Prehearing Conference only if they jointly provide</p>		<p>New rule; codifies current practice.</p> <p>The rule would codify NASD's current practice of scheduling an initial prehearing conference in every case unless the parties provide certain scheduling and other information. The practice streamlines and expedites the administration of arbitrations. The rule will provide guidance to parties regarding NASD procedure.</p>

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	<p>the Director with the following information, in writing, with additional copies for each arbitrator, before the Initial Prehearing Conference is scheduled to be held:</p> <ul style="list-style-type: none"> <li>• A statement that the parties accept the panel;</li> <li>• Whether any other prehearing conferences will be held, and if so, for each prehearing conference, a minimum of four mutually agreeable dates and times, and whether the chairperson or the full panel will preside;</li> <li>• A minimum of four sets of mutually agreeable hearing dates;</li> <li>• A discovery schedule;</li> <li>• A list of all anticipated motions, with filing and response due dates; and</li> <li>• A determination regarding whether briefs will be submitted, and, if so, the due date for the briefs and any reply briefs.</li> </ul>		

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<b>Other Prehearing Conferences</b>	<p><b>12501. Other Prehearing Conferences</b></p> <p>(a) <u>A prehearing conference may be scheduled upon the joint request of the parties or at the discretion of the Director. The Director will set the time and place of the prehearing conference and appoint a person to preside.</u></p> <p>(b) At a party's request, or at the discretion of the panel, the panel may schedule one or more additional prehearing conferences regarding any outstanding preliminary matters, including:</p> <ul style="list-style-type: none"> <li>• Discovery disputes;</li> <li>• Motions;</li> <li>• Witness lists and subpoenas;</li> <li>• Stipulations of fact;</li> <li>• Unresolved scheduling issues;</li> <li>• Contested issues on which the parties will submit briefs; and</li> </ul>	<p><b>10321. General Provisions Governing Pre-Hearing Proceedings</b></p> <p><b>(d) Pre-Hearing Conference</b></p> <p>(1) Upon the written request of a party, an arbitrator, or at the discretion of the Director of Arbitration, a pre-hearing conference shall be scheduled. The Director of Arbitration shall set the time and place of a pre-hearing conference and appoint a person to preside. The pre-hearing conference may be held by telephone conference call. The presiding person shall seek to achieve agreement among the parties on any issue which relates to the pre-hearing process or to the hearing, including but not limited to exchange of information, exchange or production of documents, identification of witnesses, identification and exchange of hearing documents, stipulation of facts, identification and briefing of</p>	<p>No substantive change.</p> <p><u>Rule 12501 does not grant the Director the explicit authority to hold an IPHC before the panel is selected. On rare occasions, parties may need to request a prehearing conference before the panel is appointed to resolve discovery disputes at an earlier stage in the arbitration process or to discuss jurisdictional issues. Thus, NASD is amending Rule 12501 to reinstate similar language from the current code.</u></p>



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	<ul style="list-style-type: none"> <li>• Any other matter that will simplify or expedite the arbitration.</li> </ul> <p>(c) The panel will determine the time and place of any additional prehearing conferences. Prehearing conferences will generally be held by telephone. Unless the full panel is required under Rule 12503, prehearing conferences may be held before a single arbitrator, generally the chairperson.</p>	<p>contested issues, and any other matters which will expedite the arbitration proceedings.</p> <p>(2) Any issues raised at the pre-hearing conference that are not resolved may be referred to a single member of the arbitration panel for decision.</p>	
<b>Recording Prehearing Conferences</b>	<p><b>12502. Recording Prehearing Conferences</b></p> <p>(a) Except as provided in Rule 12504, prehearing conferences will not be tape-recorded unless the panel determines otherwise, either on its own initiative or upon motion of a party.</p> <p>(b) If a prehearing conference is tape-recorded, the Director will provide a copy of the tape to any party upon request for a nominal fee.</p>		<p>New rule. The rule will provide guidance to parties and arbitrators regarding when and under what circumstances prehearing conferences are recorded.</p>
<b>Motions</b>	<p><b>12503. Motions</b></p> <p><b>(a) Motions</b></p>		<p>New rule. Although the current Code does not address motions, parties are using motions in</p>

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	<p>(1) A party may make motions in writing, or orally during any hearing session. Before making a motion, a party must make an effort to resolve the matter that is the subject of the motion with the other parties. Every motion, whether written or oral, must include a description of the efforts made by the moving party to resolve the matter before making the motion.</p> <p>(2) Written motions are not required to be in any particular form, and may take the form of a letter, legal motion, or any other form that the panel decides is acceptable. Written motions must be served directly on each other party, at the same time and in the same manner. Written motions must also be filed with the Director, with additional copies for each arbitrator, at the same time and in the same manner in which they are served on the parties.</p> <p>(3) Except as provided by Rule 12504, written motions must be served at least 20 days before a scheduled hearing, unless the panel decides otherwise.</p>		<p>arbitration with increasing frequency. The lack of guidance in the Code regarding how and when motions may be made, the time for responding to motions, and who decides motions, has created confusion among parties and arbitrators. The rule would provide guidance to parties and arbitrators, and help to establish procedural uniformity in the forum.</p> <p>Paragraph (a)(2) makes clear that written motions do not need to be formal or take any specific form, but may simply be letters, or any other form the panel decides is acceptable.</p>

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	<p>(4) Motions to amend a pleading after panel appointment pursuant to Rule 12309(b) must be accompanied by copies of the proposed amended pleading when the motion is served on the other parties and filed with the Director. If the panel grants the motion, the amended pleading does not have to be served again, unless the panel determines otherwise. If a party moves to amend a pleading to add a party, the motion must be served on all parties, including the party to be added, and the party to be added may respond to the motion in accordance with paragraph Rule 12309(c) without waiving any rights or objections under the Code.</p> <p><b>(b) Responding to Motions</b></p> <p>Except as provided by Rule 12504, parties have 10 days from the receipt of a written motion to respond to the motion, unless the moving party agrees to an extension of time, or the Director or the panel decides otherwise. Responses to written motions must be served directly on each other party, at the same time and in the same manner. Responses</p>		

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	<p>to written motions must also be filed with the Director, with additional copies for each arbitrator, at the same time and in the same manner in which they are served on the parties.</p> <p><b>(c) Authority to Decide Motions</b></p> <p>(1) The Director decides motions relating to use of the forum under Rule 12203 and removal of an arbitrator under Rule 12410.</p> <p>(2) Motions relating to combining or separating claims or arbitrations, or changing the hearing location, are decided by the Director before a panel is appointed, and by the panel after the panel is appointed.</p> <p>(3) Discovery-related motions are decided by one arbitrator, generally the chairperson. The arbitrator may refer such motions to the full panel either at his or her own initiative, or at the request of a party. The arbitrator must refer motions relating to privilege to the full panel at the request of a party.</p> <p>(4) Motions for arbitrator recusal under</p>		

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	<p>Rule 12409 are decided by the arbitrator who is the subject of the request.</p> <p>(5) The full panel decides all other motions, including motions relating to the eligibility of a claim under Rule 12206, or to decide a claim or arbitration before a hearing under Rule 12504, unless the Code provides or the parties agree otherwise.</p>		
<p><b>Motions to Decide Claims Before a Hearing on the Merits</b></p>	<p><b>12504. Motions to Decide Claims Before a Hearing on the Merits</b></p> <p>(a) Except as provided in Rule 12206, motions to decide a claim before a hearing are discouraged and may only be granted in extraordinary circumstances.</p> <p>(b) Motions under this rule must be made in writing. Unless the parties agree or the panel determines otherwise, motions under this rule must be served at least 60 days before a scheduled hearing, and parties have 45 days to respond to the motion.</p> <p>(c) Motions under this rule will be</p>		<p>New rule.</p> <p>Currently, the Code does not address the authority of the panel to decide dispositive motions before a hearing on the merits. Consequently, arbitrator decisions with respect to it lack uniformity, and the issue of arbitrator authority to decide such motions has generated confusion and collateral litigation.</p> <p>Generally, NASD believes that parties have the right to a hearing in arbitration. However, NASD also</p>

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	<p>decided by the full panel. The panel may not grant a motion under this rule unless a prehearing conference on the motion is held, or waived by the parties. Prehearing conferences to consider motions under this rule will be tape-recorded.</p> <p>(d) The panel may issue sanctions under Rule 12212 if it determines that a party filed a motion under this rule in bad faith.</p>		<p>acknowledges that in certain extraordinary circumstances, it would be unfair to require a party to proceed to a hearing.</p> <p>To strike the appropriate balance between discouraging dispositive motions, but allowing them in certain circumstances, the rule would:</p> <ul style="list-style-type: none"> <li>• provide that, except for motions relating to the eligibility of claims under the Code's six year time limit (12206), motions that would resolve a claim before a hearing on the merits are discouraged, and may only be granted in extraordinary circumstances;</li> <li>• require that a prehearing conference before the full panel must be held to discuss the motion</li> </ul>

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			<p>before the panel could decide it; and</p> <ul style="list-style-type: none"> <li>• allow the panel to issue sanctions against a party for making a dispositive motion in bad faith.</li> </ul>
<p><b>Cooperation of Parties in Discovery</b></p>	<p><b>12505. Cooperation of Parties in Discovery</b></p> <p>The parties must cooperate to the fullest extent practicable in the [voluntary] exchange of documents and information to expedite the arbitration.</p>	<p><b>10321. General Provisions Governing Pre-Hearing Proceedings</b></p> <p><b>(a) Requests for Documents and Information</b></p> <p>The parties shall cooperate to the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration.</p>	<p>One of the most frequent comments made by users of the NASD forum is that the NASD's Discovery Guidelines are routinely ignored, resulting in significant delay and the frequent need for arbitrator intervention in the discovery process.</p> <p>To address these concerns, the revised Code would codify the discovery procedures currently outlined in the NASD Discovery Guide in Rules 12505-12511. The rules would extend the time parties have to respond to Document Production Lists and other</p>

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			<p>requests, but would also provide more serious consequences when parties fail to respond, or when parties frivolously object to production of documents or information.</p> <p>NASD is amending Rule 12505 to remove the word “voluntary” to ensure that parties understand the importance of complying with the discovery process.</p>
<p><b>Document Production Lists</b></p>	<p><b>12506. Document Production Lists</b></p> <p><b>(a) Applicability of Document Production Lists</b></p> <p>When the Director serves the statement of claim, the Director will provide the NASD Discovery Guide and Document Production Lists to the parties. Document Production Lists 1 and 2 describe the documents that are presumed to be discoverable in all arbitrations between a customer and a member or associated person. Other Document Production Lists may also</p>		<p>New rule. Based on NASD Discovery Guidelines.</p> <p>The rule would clarify that it is mandatory for parties to either produce documents on relevant document production lists, to explain why production is not possible, or to object.</p> <p>To address concerns of many frequent users of</p>



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	<p>apply, depending on the specific cause(s) of action alleged.</p> <p><b>(b) Time for Responding to Document Production Lists</b></p> <p>(1) Unless the parties agree otherwise, within 60 days of the date that the answer to the statement of claim is due, or, for parties added by amendment or third party claim, within 60 days of the date that their answer is due, parties must either:</p> <ul style="list-style-type: none"> <li>• Produce to all other parties all documents in their possession or control that are described in the Document Production Lists 1 and 2, and any other Document Production List that is applicable based on the cause(s) of action alleged;</li> <li>• Identify and explain the reason that specific documents described in Document Production Lists 1 and 2, and any other Document Production List that is applicable based on the cause(s) of action alleged, cannot be produced within the required time, and state</li> </ul>		<p>the forum that the current time frame to respond to discovery is unrealistic, and may therefore lead to unnecessary disputes, the rule also would extend the initial time to respond to discovery lists from 30 to 60 days.</p> <p>Paragraph (c) has been added to this rule to include language from the Discovery Guide that was inadvertently omitted.</p> <p><u>NASD believes that the expectation for parties to act in good faith is implied in the discovery provisions of the current Code and Customer Code. To avoid any ambiguity concerning the applicability of a “good faith” standard, however, NASD is amending Rules 12506 and 12507 to expressly provide a “good faith” standard for compliance, so that frivolous delays.</u></p>

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	<p>when the documents will be produced; or</p> <ul style="list-style-type: none"> <li>• Object as provided in Rule 12508.</li> </ul> <p><u>(2) A party must act in good faith when complying with subparagraph (1) of this rule. “Good faith” means that a party must use its best efforts to produce all documents required or agreed to be produced. If a document cannot be produced in the required time, a party must establish a reasonable timeframe to produce the document.</u></p> <p><b>(c) Redacted Information</b></p> <p>For purposes of this rule and Rule 12507, if a party redacts any portion of a document prior to production, the redacted pages (or range of pages) shall be labeled “redacted.”</p>		<p><u>unreasonable timeframes, or bad-faith objections would be subject to sanctions under the Code.</u></p>
<p><b>Other Discovery Requests</b></p>	<p><b>12507. Other Discovery Requests</b></p> <p><b>(a) Making Other Discovery Requests</b></p> <p>(1) Parties may also request additional documents or information</p>	<p><b>10321. General Provisions Governing Pre-Hearing Proceedings</b></p> <p><b>(a) Requests for Documents and Information</b></p> <p>The parties shall cooperate to</p>	<p>To address concerns of many frequent users of the forum that the current time frame to respond to discovery is unrealistic, and may therefore lead to unnecessary disputes, the</p>

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	<p>from any party by serving a written request directly on the party. Requests for information are generally limited to identification of individuals, entities, and time periods related to the dispute; such requests should be reasonable in number and not require narrative answers or fact finding. Standard interrogatories are generally not permitted in arbitration.</p> <p>(2) [Such] Other discovery requests may be served:</p> <ul style="list-style-type: none"> <li>• On the claimant, or any respondent named in the initial statement of claim, 45 days or more after the Director serves the statement of claim; and</li> <li>• On any party subsequently added to the arbitration, 45 days or more after the statement of claim is served on that party.</li> </ul> <p>At the same time, the party must serve copies of the request on all other parties. Any request for documents or information not described in applicable Document Production Lists should be specific</p>	<p>the fullest extent practicable in the voluntary exchange of documents and information to expedite the arbitration. Any request for documents or other information should be specific, relate to the matter in controversy, and afford the party to whom the request is made a reasonable period of time to respond without interfering with the time set for the hearing.</p> <p><b>(b) Document Production and Information Exchange</b></p> <p>(1) Any party may serve a written request for information or documents ("information request") upon another party 45 calendar days or more after service of the Statement of Claim by the Director of Arbitration or upon filing of the Answer, whichever is earlier. The requesting party shall serve the information request on all parties and file a copy with the Director of Arbitration.</p>	<p>rule would extend the initial time to respond to discovery lists from 30 to 60 days.</p> <p><u>See comments on "good faith standard" under Rule 12506.</u></p> <p><u>NASD is also amending Rule 12507(a) to incorporate the language of Section V (Information Requests) from the Discovery Guide.</u></p>

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	<p>and relate to the matter in controversy.</p> <p><b>(b) Responding to Other Discovery Requests</b></p> <p><u>(1)</u> Unless the parties agree otherwise, within 60 days from the date a discovery request other than the Document Production Lists is received, the party receiving the request must either:</p> <ul style="list-style-type: none"> <li>• Produce the requested documents or information to all other parties;</li> <li>• Identify and explain the reason that specific requested documents or information cannot be produced within the required time, and state when the documents will be produced; or</li> <li>• Object as provided in Rule 12508.</li> </ul> <p><u>(2) A party must act in good faith when complying with subparagraph (1) of this rule. “Good faith” means that a party must use its best efforts to produce all documents or information required or agreed to be produced. If</u></p>	<p>The parties shall endeavor to resolve disputes regarding an information request prior to serving any objection to the request. Such efforts shall be set forth in the objection.</p>	

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	<p><u>a document or information cannot be produced in the required time, a party must establish a reasonable timeframe to produce the document or information.</u></p>		
<p><b>Objecting to Discovery; Waiver of Objection</b></p>	<p><b>12508. Objecting to Discovery; Waiver of Objection</b></p> <p>(a) If a party objects to producing any document described in Document Production Lists 1 or 2, any other applicable Document Production List, or any document or information requested under Rule 12507, it must specifically identify which document or requested information it is objecting to and why. Objections must be in writing, and must be served on all other parties at the same time and in the same manner. Objections should not be filed with the Director. Parties must produce all applicable listed documents, or other requested documents or information not specified in the objection.</p> <p>(b) Any objection not made within the required time is waived unless the panel determines that the party had substantial justification for failing to</p>	<p><b>10321. General Provisions Governing Pre-Hearing Proceedings</b></p> <p><b>(b) Document Production and Information Exchange</b></p> <p>(2) Unless a greater time is allowed by the requesting party, information requests shall be satisfied or objected to within thirty (30) calendar days from the date of service. Any objection to an information request shall be served by the objecting party on all parties and filed with the Director of Arbitration.</p>	<p>The rule would provide more guidance regarding the procedures for objecting to a discovery request.</p>

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	make the objection within the required time.		
<b>Motions to Compel Discovery</b>	<p><b>12509. Motions to Compel Discovery</b></p> <p>(a) A party may make a motion asking the panel to order another party to produce documents or information if the other party has:</p> <ul style="list-style-type: none"> <li>• Failed to comply with Rule 12506 or 12507; or</li> <li>• Objected to the production of documents or information under Rule 12508.</li> </ul> <p>(b) Motions to compel discovery must be made, and will be decided, in accordance with Rule 12503. Such motions must include the disputed document request or list, a copy of any objection thereto, and a description of the efforts of the moving party to resolve the issue before making the motion.</p>	<p><b>10321. General Provisions Governing Pre-Hearing Proceedings</b></p> <p><b>(b) Document Production and Information Exchange</b></p> <p>(3) Any response to objections to an information request shall be served on all parties and filed with the Director of Arbitration within ten (10) calendar days of receipt of the objection.</p>	The rule would provide more guidance regarding the procedures for resolving discovery disputes.
<b>Depositions</b>	<p><b>12510. Depositions</b></p> <p>Depositions are strongly discouraged</p>		New rule. Based on NASD Discovery Guide.

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	<p>in arbitration. Upon motion of a party, the panel may permit depositions, but only under very limited circumstances, including:</p> <ul style="list-style-type: none"> <li>• To preserve the testimony of ill or dying witnesses;</li> <li>• To accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing;</li> <li>• To expedite large or complex cases; and</li> <li>• If the panel determines that extraordinary circumstances exist.</li> </ul>		
<p><b>Discovery Sanctions</b></p>	<p><b>12511. Discovery Sanctions</b></p> <p>(a) Failure to cooperate in the exchange of documents and information as required under the Code may result in sanctions. The panel may issue sanctions against any party in accordance with Rule 12212(a) for:</p>		<p>New rule. Based on NASD Discovery Guide.</p> <p>The rule would codify the authority of arbitrators to address non-compliance with discovery rules or orders. NASD believes this provision will help alleviate discovery abuse</p>

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	<ul style="list-style-type: none"> <li>• Failing to comply with the discovery provisions of the Code, unless the panel determines that there is substantial justification for the failure to comply; or</li> <li>• Frivolously objecting to the production of requested documents or information.</li> </ul> <p>(b) The panel may dismiss a claim, defense or proceeding with prejudice in accordance with Rule 12212(c) for intentional and material failure to comply with a discovery order of the panel if prior warnings or sanctions have proven ineffective.</p>		in NASD arbitrations.
<b>Subpoenas</b>	<p><b>12512. Subpoenas</b></p> <p>(a) To the extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas. Subpoenas for documents or the appearance of witnesses may be issued as provided by law.</p>	<p><b>10322. Subpoenas and Power to Direct Appearances</b></p> <p><b>(a) Subpoenas</b></p> <p>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</p>	The rule has been modified to require that if a subpoena is issued, the issuing party must send copies to all other parties at the same time and in the same manner as the subpoena was issued. This is intended to ensure that parties receive notice



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	(b) If a subpoena is issued, the issuing party must send copies of the subpoena to all other parties at the same time and in the same manner in which the subpoena was issued.	upon its issuance. Parties shall produce witnesses and present proofs to the fullest extent possible without resort to the subpoena process.	of the subpoena in a timely manner.
<b>Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas</b>	<p><b>12513. Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas</b></p> <p>(a) Upon motion of a party, the panel may order the following without the use of subpoenas:</p> <ul style="list-style-type: none"> <li>• The appearance of any employee or associated person of a member of NASD; or</li> <li>• The production of any documents in the possession or control of such persons or members.</li> </ul> <p>(b) Unless the panel directs otherwise, the party requesting the appearance of witnesses by, or the production of documents from, non-parties under this rule shall pay the reasonable costs of the appearance and/or production.</p>	<p><b>10322. Subpoenas and Power to Direct Appearances</b></p> <p><b>(b) Power to Direct Appearances and Production of Documents</b></p> <p>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</p>	No substantive change.

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		production.	
<p><b>Exchange of Documents and Witness Lists Before Hearing</b></p>	<p><b>12514. Exchange of Documents and Witness Lists Before Hearing</b></p> <p><b>(a) Documents and Other Materials</b></p> <p>At least 20 days before the first scheduled hearing date, all parties must provide all other parties with copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced. The parties should not file the documents with the Director or the arbitrators before the hearing.</p> <p><b>(b) Witness Lists</b></p> <p>At least 20 days before the first scheduled hearing date, all parties must provide each other party with the names and business affiliations of all witnesses they intend to present at the hearing. At the same time, [each party] <u>all parties</u> must file their witness lists with the Director, with enough copies for each arbitrator.</p> <p><b>(c) Exclusion of Documents or</b></p>	<p><b>10321. General Provisions Governing Pre-Hearing Proceedings</b></p> <p><b>(a) Pre-Hearing Exchange</b></p> <p>At least twenty (20) calendar days prior to the first scheduled hearing date, all parties shall serve on each other copies of documents in their possession they intend to present at the hearing and shall identify witnesses they intend to present at the hearing. The arbitrators may exclude from the arbitration any documents not exchanged or witnesses not identified. This paragraph does not require service of copies of documents or identification of witnesses which parties may use for cross-examination or rebuttal.</p>	<p>Frequent users of the forum have advised NASD that the current document exchange procedures often result in the exchange of material that has already been exchanged, which can cause delay and add to the cost of arbitration without significantly assisting parties in preparing for hearing.</p> <p>Under the rule, parties would only be required to exchange copies of documents that have not already been produced to the other parties. This would save parties time, reduce cost, and would still ensure that parties exchange documents that they intend to use at the hearing.</p> <p>The rule also makes clear that the documents are</p>

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	<p><b>Witnesses</b></p> <p>Parties may not present any documents or other materials not produced and or any witnesses not identified in accordance with this rule at the hearing, unless the panel determines that good cause exists for the failure to produce the document or identify the witness. Good cause includes the need to use documents or call witnesses for rebuttal or impeachment purposes based on developments during the hearing. <u>Documents and lists of witnesses in defense of a claim are not considered rebuttal or impeachment information and, therefore, must be exchanged by the parties.</u></p>		<p>not to be filed with the Director or the arbitrators before the hearing.</p> <p>To make witness lists more useful, the rule would require that witness lists include the names and business affiliations of any witnesses the parties intend to present at the hearing.</p> <p>The rule would also strengthen the consequences of non-compliance with the rule, by creating a presumption that parties may not present any documents not produced, or witnesses not identified, in accordance with the rule, unless the panel determines that good cause exists.</p> <p>NASD is amending Rule 12514(b) to correct a grammatical error.</p>

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			<p><u>And NASD is amending Rule 12514(c) to clarify the types of documents that would not be considered rebuttal information, and therefore, should be exchanged. In amending the rule, NASD would be codifying current practice as the proposed language is currently contained in a form letter that is sent to parties advising them of the hearing date and location.</u></p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>PART VI</b>  <b>HEARINGS; EVIDENCE; CLOSING THE RECORD</b>			
<b>Required Hearings</b>	<p><b>12600. Required Hearings</b></p> <p>(a) Hearings will be held, unless:</p> <ul style="list-style-type: none"> <li>• The arbitration is administered under Rule 12800 or Rule 12801;</li> <li>• The parties agree otherwise in writing; or</li> <li>• The arbitration has been settled, withdrawn or dismissed.</li> </ul> <p>(b) The panel will decide the time and date of the hearing at the initial prehearing conference or otherwise in another manner.</p> <p>(c) The Director will notify the parties of the time and place at least [10] <u>20</u> days before the hearing begins, unless the parties agree to a shorter time.</p>	<p><b>10303. Hearing Requirements—Waiver of Hearing</b></p> <p>(a) Any dispute, claim or controversy except as provided in Rule 10203 (Simplified Industry Arbitration) or Rule 10302 (Simplified Arbitration), shall require a hearing unless all parties waive such hearing in writing and request that the matter be resolved solely upon the pleadings and documentary evidence.</p> <p>(b) Notwithstanding a written waiver of a hearing by the parties, a majority of the arbitrators may call for and conduct a hearing. In addition, any arbitrator may</p>	<p>The rule would clarify that hearings are held in most arbitrations, but that hearings are not required to be held if: the arbitration is administered under the Simplified Arbitration rule; the parties agree to waive the hearing; or the arbitration has been settled, withdrawn or dismissed. (See Rules 12700, 12701, and 12702.)</p> <p>The rule also incorporates the substance of current Rule 10315 regarding scheduling of hearings. The rule leaves the manner of notification to the Director's discretion, and eliminates the</p>

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		<p>request the submission of further evidence.</p> <p style="text-align: center;">* * *</p> <p><b>10315. Determination of Hearing Location</b></p> <p>(a) Designation of Time and Place of Hearing</p> <p>The Director shall determine the time and place of the first meeting of the arbitration panel and the parties, whether the first meeting is a pre-hearing conference or a hearing, and shall give notice of the time and place at least 15 business days prior to the date fixed for the first meeting by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this Rule. The arbitrators shall determine the time and place for all subsequent meetings, whether the meetings are pre-hearing conferences, hearings, or any other type of meetings,</p>	<p>reference to the “place” of the first hearing, because that is now covered by Rule 12213, regarding selection of hearing locations.</p> <p>[To expedite the administration of arbitrations, the rule also shortens the notice time from 15 business days to 10 calendar days.]</p> <p><u>To standardize this timeframe with others in the Code, NASD is amending Rule 12600(c) to increase the notice period from 10 to 20 days to give parties more notice before a hearing begins.</u></p>

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		and shall give notice as the arbitrators may determine. Attendance at a meeting waives notice thereof.	
<b>Postponement of Hearings</b>	<p><b>12601. Postponement of Hearings</b></p> <p><b>(a) [When a Hearing May Be Postponed] <u>Postponement of Hearings</u></b></p> <p><b><u>(1) When a Hearing Shall Be Postponed</u></b></p> <p>A hearing shall be postponed by agreement of the parties.</p> <p><b><u>(2) When a Hearing May Be Postponed</u></b></p> <p>A hearing may be postponed [only]:</p> <ul style="list-style-type: none"> <li>• [By agreement of the parties;]</li> <li>• By the Director, in extraordinary circumstances;</li> <li>• By the panel, in its own discretion; or</li> <li>• By the panel, upon motion of a party. The panel may not grant a</li> </ul>	<p><b>10319. Adjournments</b></p> <p>(a) The arbitrator(s) may, in their discretion, adjourn any hearing(s) either upon their own initiative or upon the request of any party to the arbitration.</p> <p>(b) If an adjournment requested by a party is granted after arbitrators have been appointed, the party requesting the adjournment shall pay a fee equal to the initial deposit of hearing session fees for the first adjournment and twice the initial deposit of hearing session fees, not to exceed \$1,500, for a second or subsequent adjournment requested by that party. The arbitrators may waive these fees in their discretion. If more than one party requests the adjournment, the arbitrators shall allocate the fees among</p>	<p>Paragraph (a) of the rule has been amended to provide that the panel may not grant requests to postpone a hearing that are made within 10 days of a scheduled hearing session unless the panel determines that good cause exists. This provision is intended to reduce the number of last minute requests for postponements, a practice that many users of the forum believe results in unnecessary delay and unfairness to parties.</p> <p>In paragraph (b) of the rule, the fee would no longer increase for a second or subsequent request by the same party. This change is intended to simplify the rule and to</p>

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	<p>motion to postpone a hearing made within 10 days of the date that the hearing is scheduled to begin, unless the panel determines that good cause exists.</p> <p><b>(b) Postponement Fees</b></p> <p>(1) Except as otherwise provided, a postponement fee will be charged for each postponement agreed to by the parties, or granted upon request of one or more parties. The fee will equal the applicable hearing session fee under Rule 12902. The panel may allocate the fee among the party or parties that agreed to or requested the postponement. The panel may also assess part or all of any postponement fees against a party that did not request the postponement, if the panel determines that the non-requesting party caused or contributed to the need for the postponement. The panel may waive the fees.</p> <p><u>(2) If a postponement request is made by one or more parties and granted within three business days before a</u></p>	<p>the requesting parties.</p> <p>(c) Upon receiving a third request consented to by all parties for an adjournment, the arbitrator(s) may dismiss the arbitration without prejudice to the Claimant filing a new arbitration.</p> <p>(d) If an adjournment request is made by one or more parties and granted within three business days before a scheduled hearing session, the party or parties making the request shall pay an additional fee of \$100 per arbitrator. If more than one party requests the adjournment, the arbitrators shall allocate the \$100 per arbitrator fee among the requesting parties. The arbitrators may allocate all or portion of the \$100 per arbitrator fee to the non-requesting party or parties, if the arbitrators determine that the non-requesting party or parties caused or contributed to the need for the adjournment. In the event that a request</p>	<p>avoid confusion when one party requesting a postponement has made a previous request, but one or more of the other parties requesting the same postponement have not.</p> <p>The rule also gives the panel the authority to allocate the postponement fees among non-requesting parties if the panel determines that the non-requesting party caused or contributed to the need for the postponement.</p> <p>In paragraph (c) of the rule, the panel may dismiss the arbitration without prejudice if all parties jointly request more than two postponements. The change is intended to clarify that arbitrators have the authority to dismiss the arbitration upon a</p>



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	<p><u>scheduled hearing session, the party or parties making the request shall pay an additional fee of \$100 per arbitrator. If more than one party requests the postponement, the arbitrators shall allocate the \$100 per arbitrator fee among the requesting parties. The arbitrators may allocate all or portion of the \$100 per arbitrator fee to the non-requesting party or parties, if the arbitrators determine that the non-requesting party or parties caused or contributed to the need for the postponement. In the event that a request results in the postponement of consecutively scheduled hearing sessions, the additional fee will be assessed only for the first of the consecutively scheduled hearing sessions. In the event that an extraordinary circumstance prevents a party or parties from making a timely postponement request, arbitrators may use their discretion to waive the fee, provided verification of such circumstance is received.</u></p> <p><u>(3) No postponement fee will be charged if a hearing is postponed:</u></p>	<p>results in the adjournment of consecutively scheduled hearing sessions, the additional fee will be assessed only for the first of the consecutively scheduled hearing sessions. In the event that an extraordinary circumstance prevents a party or parties from making a timely adjournment request, arbitrators may use their discretion to waive the fee, provided verification of such circumstance is received.</p>	<p>fourth or subsequent request. The current rule might be interpreted to limit the arbitrators' authority to the third joint request.</p> <p><u>NASD is amending Rule 12601 to expressly distinguish between when a hearing may be postponed and when a hearing must be postponed. Also, NASD is adding language from a proposed rule change, SR-NASD-2003-164, that was approved by the SEC, but inadvertently omitted from the last amendment to the Code.</u></p>

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	<ul style="list-style-type: none"> <li>• Because the parties agree to submit the matter to mediation at NASD;</li> <li>• By the panel in its own discretion; or</li> <li>• By the Director in extraordinary circumstances.</li> </ul> <p><b>(c) Dismissal of Arbitration Due to Multiple Postponements</b></p> <p>If all parties jointly request, or agree to, more than two postponements, the panel may dismiss the arbitration without prejudice.</p>		
<p><b>Attendance at Hearings</b></p>	<p><b>12602. Attendance at Hearings</b></p> <p>The parties and their representatives are entitled to attend all hearings. <u>Absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings.</u> The panel will decide who else may attend any or all of the hearings.</p>	<p><b>10317. Attendance at Hearings</b></p> <p>The attendance or presence of all persons at hearings including witnesses shall be determined by the arbitrators. However, all parties to the arbitration and their counsel shall be entitled to attend all hearings.</p>	<p>No substantive change.</p> <p><u>NASD believes that expert witnesses should be allowed to attend all hearings. However, the panel has the discretion to allow other persons to attend the hearing (e.g., an individual assisting an elderly or disabled party) or to bar someone who may be disruptive to the proceeding. Therefore,</u></p>

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			<p><u>NASD is amending Rule 12602 to clarify that expert witnesses should be permitted to attend all hearings.</u></p>
<p><b>Failure to Appear</b></p>	<p><b>12603. Failure to Appear</b></p> <p>If a party fails to appear at a hearing after having been notified of the time, date and place of the hearing, the panel may determine that the hearing may go forward, and may render an award as though all parties had been present.</p>	<p><b>10318. Failure to Appear</b></p> <p>If any of the parties, after due notice, fails to appear at a hearing or at any continuation of a hearing session, the arbitrators may, in their discretion, proceed with the arbitration of the controversy. In such cases, all awards shall be rendered as if each party had entered an appearance in the matter submitted.</p>	<p>No substantive change.</p>
<p><b>Evidence</b></p>	<p><b>12604. Evidence</b></p> <p>(a) The panel will decide what evidence to admit. The panel is not required to follow state or federal rules of evidence.</p> <p>(b) Production of documents in discovery does not create a presumption that the documents are admissible at the hearing. A party may state objections to the</p>	<p><b>10323. Evidence</b></p> <p>The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence.</p>	<p>Paragraph (a) of the rule clarifies that the panel determines the admissibility of evidence and that the panel is not required to follow state or federal rules of evidence.</p> <p>Paragraph (b) of the rule has been added to clarify that a document produced in discovery is not</p>

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	introduction of any document as evidence at the hearing to the same extent that any other objection may be raised in arbitration.		automatically admissible at the hearing. The admissibility of any document can be challenged.
<b>Witness Oath</b>	<p><b>12605. Witness Oath</b></p> <p>All witnesses must testify under oath or affirmation.</p>	<p><b>10327. Oaths of the Arbitrators and Witnesses</b></p> <p>Prior to the commencement of the first session, an oath or affirmation shall be administered to the arbitrators. All testimony shall be under oath or affirmation.</p>	The arbitrator oath requirement has been moved to Rule 12406(d), governing appointment of arbitrators.
<b>Record of Proceedings</b>	<p><b>12606. Record of Proceedings</b></p> <p><b>(a) Tape Recording</b></p> <p>(1) Except as provided in paragraph (b), the Director will make a tape recording of every hearing. The Director will provide a copy of the tape to any party upon request for a nominal fee.</p> <p>(2) The panel may order the parties to provide a transcription of the tape recording. If the panel orders a transcription, copies of the transcription must be provided to each</p>	<p><b>10326. Record of Proceedings</b></p> <p>(a) A verbatim record by stenographic reporter or a tape recording of all arbitration hearings shall be kept. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request unless the arbitrators direct otherwise. The arbitrators may also direct that the record be transcribed. If the record is</p>	This rule has been amended to reflect current practice, to eliminate possible confusion regarding the official record, and to give parties more specific guidance on how proceedings will be recorded and how the cost of the record will be allocated among the parties.

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	<p>arbitrator and each party. The panel will determine which party or parties must pay the cost of making the transcription and copies.</p> <p>(3) The tape recording is the official record of the proceeding, even if it is transcribed.</p> <p><b>(b) Stenographic Record</b></p> <p>(1) Any party may make a stenographic record of the hearing. Even if a stenographic record is made, the tape recording will be the official record of the proceeding, unless the panel determines otherwise. If the panel determines in advance that the stenographic record will be the official record, the Director will not make a tape recording.</p> <p>(2) If the stenographic record is the official record of the proceeding, a copy must be provided to the Director, each arbitrator, and each other party. The cost of making and copying the stenographic record will be borne by the party electing to make the stenographic record, unless the panel decides that one or more other parties</p>	<p>transcribed at the request of any party, a copy shall be provided to the arbitrators.</p> <p>(b) A verbatim record of mediation conducted pursuant to the Rule 10400 Series shall not be kept.</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	should bear all or part of the costs.		
<b>Order of Presentation of Evidence and Arguments</b>	<b>12607. Order of Presentation of Evidence and Arguments</b>  Generally, the claimant shall present its case, followed by the respondent's defense. The panel has the discretion to vary the order in which the hearing is conducted, provided that each party is given a fair opportunity to present its case.	<b>IM-10317. Closing Arguments</b>  In response to recent questions concerning the order of closing argument in arbitration proceedings conducted under the auspices of the National Association of Securities Dealers, Inc., it is the practice in these proceedings to allow claimants to proceed first in closing argument, with rebuttal argument being permitted. Claimants may reserve their entire closing for rebuttal. The hearing procedures may, however, be varied in the discretion of the arbitrators, provided all parties are allowed a full and fair opportunity to present their respective cases.	This rule expands the scope of current IM-10317 to provide guidance to parties regarding the order of proceedings.
<b>Closing The Record</b>	<b>12608. Closing the Record</b>  (a) The panel will decide when the record is closed. Once the record is closed, no further submissions will be accepted from any party.		New rule. The current Code contains a rule (10329) that allows the panel to reopen the hearings before the award is rendered. This implies that the panel had finished

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>(b) In cases in which no hearing is held, the record is presumed to be closed when the Director sends the pleadings to the panel, unless the panel requests, or agrees to accept, additional submissions from any party. If so, the record is presumed to be closed when the last such submission is due.</p> <p>(c) In cases in which a hearing is held, the panel will generally close the record at the end of the last hearing session, unless the panel requests, or agrees to accept, additional submissions from any party. If so, the panel will inform the parties when the submissions are due and when the record will close.</p>		<p>hearing the case and was in the process of determining the award. However, the current Code does not have a rule stating when the panel can close the record and begin deliberating to determine the award. Thus, the rule has been added to reflect current practice and provide an explanation on how a panel decides to close a record.</p>
<p><b>Reopening the Record</b></p>	<p><b>12609. Reopening the Record</b></p> <p>The panel may reopen the record on its own initiative or upon motion of any party at any time before the award is rendered, unless prohibited by applicable law.</p>	<p><b>10329. Reopening of Hearings</b></p> <p>Where permitted by applicable law, the hearings may be reopened by the arbitrators on their own motion or at the discretion of the arbitrators upon application of a party at any time before the award is rendered.</p>	<p>No substantive change.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>PART VII</b>  <b>TERMINATION OF AN ARBITRATION BEFORE AWARD</b>			
<b>Dismissal of Proceedings Prior to Award</b>	<p><b>12700. Dismissal of Proceedings Prior to Award</b></p> <p>(a) The panel must dismiss an arbitration or a claim at the joint request of the parties to that arbitration or claim. The dismissal will be with or without prejudice, depending on the request of the parties.</p> <p>(b) The panel may dismiss a claim or an arbitration:</p> <ul style="list-style-type: none"> <li>• Upon motion of a party under Rule 12206 or Rule 12504; or</li> <li>• On its own initiative under Rule 12212(c) or Rule 12601(c).</li> </ul>	<p><b>10305. Dismissal of Proceedings</b></p> <p>(a) At any time during the course of an arbitration, the arbitrators may either upon their own initiative or at the request of a party, dismiss the proceeding and refer the parties to their judicial remedies, or to any dispute resolution forum agreed to by the parties, without prejudice to any claims or defenses available to any party.</p> <p>(b) The arbitrators may dismiss a claim, defense, or proceeding with prejudice as a sanction for willful and intentional material failure to comply with an order of the arbitrator(s) if lesser sanctions have proven</p>	<p>The new rule cross-references the sections of the Code that authorize the panel to dismiss a claim prior to award in certain circumstances: Rule 12206 (six-year eligibility rule); Rule 12504 (motions to dismiss prior to award); Rule 12212 (sanctions); and Rule 12601 (postponements).</p>



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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		ineffective.	
<b>Settlement</b>	<p><b>12701. Settlement</b></p> <p>(a) Parties to an arbitration may agree to settle their dispute at any time. Parties who settle must notify the Director. The Director will continue to administer the arbitration, and fees may continue to accrue, until the Director receives written notice of the settlement. The parties do not need to disclose the terms of the settlement agreement to the Director or to NASD Dispute Resolution, but members and associated persons may have reporting obligations under the rules of NASD.</p> <p>(b) Settling parties will remain responsible for fees incurred under the Code. If parties to a settlement fail to agree on the allocation of any outstanding fees, those fees will be divided equally among the settling parties, except member surcharges and prehearing and hearing process fees required by the Code, which will remain the responsibility of the member party or parties.</p>	<p><b>10306. Settlements</b></p> <p>(a) Parties to an arbitration may agree to settle their dispute at any time.</p> <p>(b) If the parties agree to settle their dispute, they will remain responsible for payment of fees incurred, including fees for previously scheduled hearing sessions and fees incurred as a result of adjournments, pursuant to Rule 10319.</p> <p>(c) The terms of a settlement agreement do not need to be disclosed to the Association. However, if the parties fail to agree on the allocation of outstanding fees, the fees shall be divided equally among all parties.</p>	<p>The rule clarifies that parties must notify the Director in writing that a settlement has been reached to prevent any additional fees from accruing.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>Withdrawal of Claims</b>	<p><b>12702. Withdrawal of Claims</b></p> <p>(a) Before a claim has been answered by a party, the claimant may withdraw the claim against that party with or without prejudice.</p> <p>(b) After a claim has been answered by a party, the claimant may only withdraw it against that party with prejudice unless the panel decides, or the claimant and that party agree, otherwise.</p>		<p>New rule. This rule is intended to provide guidance to parties and arbitrators regarding withdrawals and to prevent prejudice to a party that has filed an answer.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>PART VIII</b>  <b>SIMPLIFIED ARBITRATION AND DEFAULT PROCEEDINGS</b>			
<b>Simplified Arbitration</b>	<p><b>12800. Simplified Arbitration</b></p> <p><b>(a) Applicability of Rule</b></p> <p>This rule applies to arbitrations involving \$25,000 or less, exclusive of interest and expenses. Except as otherwise provided in this rule, all provisions of the Code apply to such arbitrations.</p> <p><b>(b) Single Arbitrator</b></p> <p>All arbitrations administered under this rule will be decided by a single public arbitrator appointed from the NASD's chairperson roster in accordance with the Neutral List Selection System, unless parties agree in writing otherwise.</p> <p><b>(c) Hearings</b></p>	<p><b>10302. Simplified Arbitration</b></p> <p>(a) Any dispute, claim, or controversy arising between a public customer(s) and an associated person or a member subject to arbitration under this Code involving a dollar amount not exceeding \$25,000, exclusive of attendant costs and interest, shall be arbitrated as hereinafter provided.</p> <p>(b) The Claimant shall file with the Director of Arbitration an executed Submission Agreement and a copy of the Statement of Claim of the controversy in dispute and the required deposit, together with documents in support of the Claim. Sufficient additional copies of the Submission Agreement and the Statement</p>	<p>The simplified arbitration rule has been significantly shortened and simplified. Currently, in addition to the procedures that are unique to simplified arbitrations, Rule 10302 repeats some, but not all, of the general provisions that apply to both regular and simplified cases. The rule includes only those provisions that are unique to simplified cases.</p> <p>The rule does not include special time limits or deadlines for pleadings in simplified cases as the current rule does, because the time limits would now be the same as those in regular cases. Frequent</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>(1) No hearing will be held in arbitrations administered under this rule unless the customer requests a hearing.</p> <p>(2) If no hearing is held, no initial prehearing conference or other prehearing conference will be held, and the arbitrator will render an award based on the pleadings and other materials submitted by the parties. If a hearing is held, the regular provisions of the Code relating to prehearings and hearings, including fee provisions, will apply.</p> <p><b>(d) Discovery and Additional Evidence</b></p> <p>(1) Document Production Lists, described in Rule 12506, do not apply to arbitrations subject to this rule. However, the arbitrator may, in his or her discretion, choose to use relevant portions of the Document Production Lists in a manner consistent with the expedited nature of simplified proceedings.</p> <p>(2) The parties may request documents and other information from</p>	<p>of Claim and supporting documents shall be provided to the Director of Arbitration for each party and the arbitrator. The Statement of Claim shall specify the relevant facts, the remedies sought and whether a hearing is demanded.</p> <p>(c) The Claimant shall pay a non-refundable filing fee and shall remit a hearing session deposit as specified in Rule 10332 of this Code upon the filing of the Submission Agreement. The final disposition of the fee or deposit shall be determined by the arbitrator.</p> <p>(d) The Director of Arbitration shall endeavor to serve promptly by mail or otherwise on the Respondent(s) one (1) copy of the Submission Agreement and one (1) copy of the Statement of Claim. Within twenty (20) calendar days from receipt of the Statement of Claim, Respondent(s) shall serve each party with an executed Submission</p>	<p>users of the forum, as well as NASD staff, report that the time limits in simplified cases are routinely extended under the current rule. Requests for extensions would now be governed by the same rule (Rule 12207) as in other cases. Rule 12207 provides that deadlines set by the Code may be extended by the Director for good cause. In simplified cases, the Director would consider the expedited nature of simplified cases in determining whether good cause existed in a given case. NASD believes that this approach will simplify and streamline the administration of simplified cases, and, because extensions are routine under the current Code, will not result in significant delay in the administration of simplified cases.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>each other. All requests for the production of documents and other information must be served on all other parties, and filed with the Director, within 30 days from the date that the last answer is due. Any response or objection to a discovery request must be served on all other parties and filed with the Director within 10 days of the receipt of the requests. The arbitrator will resolve any discovery disputes.</p> <p><b>(e) Increases in Amount in Dispute</b></p> <p>If any pleading increases the amount in dispute to more than \$25,000, the arbitration will no longer be administered under this rule, and the regular provisions of the Code will apply. If an arbitrator has been appointed, that arbitrator will remain on the panel. If a three-arbitrator panel is required or requested under Rule 12401, the remaining arbitrators will be appointed by the Director in accordance with Rule 12406(b). If no arbitrator has been appointed, the entire panel will be appointed in accordance with the Neutral List Selection System.</p>	<p>Agreement and a copy of Respondent's Answer. Respondent's executed Submission Agreement and Answer shall also be filed with the Director of Arbitration with sufficient additional copies for the arbitrator(s) along with any deposit required under the schedule of fees for customer disputes. The Answer shall designate all available defenses to the Claim and may set forth any related Counterclaim and/or related Third-Party Claim the Respondent(s) may have against the Claimant or any other person. If the Respondent(s) has interposed a Third-Party Claim, the Respondent(s) shall serve the Third- Party Respondent with an executed Submission Agreement, a copy of the Respondent's Answer containing the Third-Party Claim, and a copy of the original Claim filed by the Claimant. The Third-Party Respondent shall respond in</p>	<p>Under the rule, the single arbitrator would be selected from the chairperson roster, unless the parties agreed otherwise.</p> <p>The rule would eliminate the ability of the single arbitrator to require a hearing. The customer could still request a hearing.</p> <p>Under the rule, the single arbitrator would no longer be able to request a three-arbitrator panel, and the arbitrator would no longer have the option of dismissing without prejudice a counterclaim or other responsive pleading that increased the amount in dispute above the simplified case threshold.</p> <p>If a pleading increased the amount in dispute above the threshold, the case</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p><b>(f) Arbitrator Honoraria</b></p> <p>NASD will pay the arbitrator an honorarium of \$125 for each arbitration administered under this rule.</p>	<p>the manner herein provided for response to the Claim. If the Respondent(s) files a related Counterclaim exceeding \$25,000 exclusive of attendant costs and interest, the arbitrator may refer the Claim, Counterclaim and/or Third-Party Claim, if any, to a panel of three (3) arbitrators in accordance with Rule 10308 or, he may dismiss the Counterclaim and/or Third-Party Claim without prejudice to the Counterclaimant(s) and/or Third-Party Claimant(s) pursuing the Counterclaim and/or Third-Party Claim in a separate proceeding. The costs to the Claimant under either proceeding shall in no event exceed the total amount specified in Rule 10332.</p> <p>(e) All parties shall serve on all other parties and the Director of Arbitration, with sufficient additional copies for the arbitrator(s), a copy of the Answer, Counterclaim, Third-Party Claim, Amended Claim, or other responsive pleading, if</p>	<p>would be administered under the regular provisions of the Code.</p> <p>Both changes are intended to streamline and simplify the administration of arbitrations.</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		<p>any. The Claimant, if a Counterclaim is asserted against him, shall within ten (10) calendar days either (1) serve on each party and on the Director of Arbitration, with sufficient additional copies for the arbitrator(s), a Reply to any Counterclaim or, (2) if the amount of the Counterclaim exceeds the Claim, shall have the right to file a statement withdrawing the Claim. If the Claimant withdraws the Claim, the proceedings shall be discontinued without prejudice to the rights of the parties.</p> <p>(f) The dispute, claim or controversy shall be submitted to a single public arbitrator knowledgeable in the securities industry appointed by the Director of Arbitration. Unless the public customer demands or consents to a hearing, or the arbitrator calls a hearing, the arbitrator shall decide the dispute, claim or controversy solely upon the pleadings and evidence filed by the parties. If a hearing is necessary, such</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		<p>hearing shall be held as soon as practicable at a locale selected by the Director of Arbitration.</p> <p>(g) The Director of Arbitration may grant extensions of time to file any pleading upon a showing of good cause.</p> <p>(h)</p> <p>(1) The arbitrator shall be authorized to require the submission of further documentary evidence as he, in his sole discretion, deems advisable.</p> <p>(2) If a hearing is demanded or consented to in accordance with paragraph (f), the General Provisions Governing Pre-Hearing Proceedings under Rule 10321 shall apply.</p> <p>(3) If no hearing is demanded or consented to, all requests for document production shall be submitted in writing to the Director of Arbitration within ten (10) business days of notification of the identity of the arbitrator selected to decide the case. The requesting party</p>	



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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		<p>shall serve simultaneously its request for document production on all parties. Any response or objections to the requested document production shall be served on all parties and filed with the Director of Arbitration within five (5) business days of receipt of the requests for production. The appointed arbitrator shall resolve all requests under this Rule on the papers submitted.</p> <p>(i) Upon the request of the arbitrator, the Director of Arbitration shall appoint two (2) additional arbitrators to the panel which shall decide the matter in controversy.</p> <p>(j) In any case where there is more than one (1) arbitrator, the majority shall be public arbitrators.</p> <p>(k) In his discretion, the arbitrator may, at the request of any party, permit such party to submit additional documentation relating to the pleadings.</p> <p>(l) Except as otherwise</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		provided herein, the general arbitration rules of the Association shall be applicable to proceedings instituted under this Rule.	
	<p><b>12801. Default Proceedings</b></p> <p><b>(a) Applicability of Rule</b></p> <p>A claimant may request default proceedings against any respondent that falls within one of the following categories and fails to file an answer within the time provided by the Code.</p> <ul style="list-style-type: none"> <li>• A member whose membership has been terminated, suspended, canceled, or revoked;</li> <li>• A member that has been expelled from the NASD;</li> <li>• A member that is otherwise defunct; or</li> <li>• An associated person whose registration is terminated, revoked, or suspended.</li> </ul> <p><b>(b) Initiating Default Proceedings</b></p>	<p><b>10314. Initiation of Proceedings</b></p> <p><b>(e) Default Procedures</b></p> <p>(1) A Respondent, Cross-Respondent, or Third-Party Respondent that fails to file an Answer within 45 calendar days from receipt of service of a Claim, unless the time to answer has been extended pursuant to paragraph (b)(5), may be subject to default procedures, as provided in this paragraph, if it is:</p> <p>(A) a member whose membership has been terminated, suspended, canceled, or revoked;</p> <p>(B) a member that has been expelled from the NASD;</p> <p>(C) a member that is otherwise</p>	No substantive change.

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>(1) To initiate default proceedings against one or more respondents that fail to file a timely answer, the claimant must notify the Director in writing and must send a copy of the notification to all other parties at the same time and in the same manner as the notification was sent to the Director. If there is more than one claimant, all claimants must agree in writing to proceed under this rule against a defaulting respondent before this rule may be used.</p> <p>(2) If the Director receives written notice from the claimant and determines that the requirements for proceeding under this rule have been met, the Director will:</p> <ul style="list-style-type: none"> <li>• Notify all parties that the claim against the defaulting respondent will proceed under this rule; and</li> <li>• Appoint a single arbitrator in accordance with the Neutral List Selection System to consider the statement of claim and other documents presented by the claimant.</li> </ul>	<p>defunct; or</p> <p>(D) an associated person whose registration is terminated, revoked, or suspended.</p> <p>(2) If all Claimants elect to use these default procedures, the Claimant(s) shall notify the Director in writing and shall send a copy of such notification to all other parties at the same time and in the same manner as the notification was sent to the Director.</p> <p>(3) If the case meets the requirements for proceeding under default procedures, the Director shall notify all parties.</p> <p>(4) The Director shall appoint a single arbitrator pursuant to Rule 10308 to consider the Statement of Claim and other documents presented by the Claimant(s). The arbitrator may request additional information from the Claimant(s) before rendering an award. No hearing shall be held, and the default award shall have no effect on</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p><b>(c) Hearings</b></p> <p>No hearing shall be held. The arbitrator may request additional information from the claimant before rendering an award.</p> <p><b>(d) Amendments to Increase Relief Requested</b></p> <p>Claimants may not amend a claim to increase the relief requested from the defaulting respondent after the Director has notified the parties that the claim will proceed under this rule.</p> <p><b>(e) Awards</b></p> <p>(1) The arbitrator may not issue an award based solely on the nonappearance of a party. Claimants must present a sufficient basis to support the making of an award. The arbitrator may not award damages in an amount greater than the damages requested in the statement of claim, and may not award any other relief that was not requested in the statement of claim.</p>	<p>any non-defaulting party.</p> <p>(5) The Claimant(s) may not amend the claim to increase the relief requested after the Director has notified the parties that the claim will proceed under default procedures.</p> <p>(6) An arbitrator may not make an award based solely on the non-appearance of a party. The party who appears must present a sufficient basis to support the making of an award in that party's favor. The arbitrator may not award damages in an amount greater than the damages requested in the Statement of Claim, and may not award any other relief that was not requested in the Statement of Claim.</p> <p>(7) If the Respondent files an Answer after the Director has notified the parties that the claim will proceed under default procedures but before an award has been rendered, the proceedings under this paragraph shall be terminated and the case will proceed under</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>(2) The default award shall have no effect on any non-defaulting party.</p> <p><b>(f) Respondent's Answer</b></p> <p>If a defaulting respondent files an answer after the Director has notified the parties that the claim against that respondent will proceed under this rule but before an award has been issued, the proceedings against that respondent under this rule will be terminated and the claim against that respondent will proceed under the regular provisions in the Code.</p>	<p>the regular procedures.</p>	

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>PART IX</b>  <b>FEES AND AWARDS</b>			
<b>Fees Due When a Claim [is] <u>Is</u> Filed</b>	<p><b>12900. Fees Due When a Claim [is] <u>Is</u> Filed</b></p> <p><b>(a) Fees for Claims Filed by Customers, Associated Persons and Other Non-Members</b></p> <p>(1) Customers, associated persons, and other non-members who file a claim, counterclaim, cross claim or third party claim must pay a filing fee in the amount indicated in the schedule below. The Director may defer payment of all or part of the filing fee on a showing of financial hardship. If payment of the fee is not deferred, failure to pay the required amount will result in a deficiency under Rule 12307.</p> <p>(See table – Fee for Claims Filed by Customers, Associated Persons and Other Non-Members – Exhibit 5).</p> <p>(2) If the claim does not request or</p>	<p><b>10332. Schedule of Fees for Customer Disputes</b></p> <p>(a) At the time of filing a Claim, Counterclaim, Third-Party Claim or Cross-Claim, a party shall pay a non-refundable filing fee and shall remit a hearing session deposit to the Association in the amounts indicated in the schedules below unless such fee or deposit is specifically waived by the Director of Arbitration. Where multiple hearing sessions are required, the arbitrators may require any of the parties to make additional hearing deposits for each additional hearing session. In no event shall the amount deposited by all parties per hearing session exceed the amount of the largest initial hearing deposit made by any</p>	<p>One of the most frequent criticisms of the current Code is that the fee schedules are difficult to understand, particularly with respect to what claimants must pay at the time of filing.</p> <p>Currently, claimants must pay a non-refundable filing fee, and an initial hearing session deposit that may be refundable under certain circumstances. In addition, parties also must pay hearing session fees for each hearing session. Although the filing fee and the initial hearing session deposit are both due upon filing, they are presented in the Code as separate fees, making it hard for some parties to understand the</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>specify money damages, the Director may determine that the filing fee should be more or less than the amount specified in the schedule above, but in any event, the amount of the filing fee may not be less than \$50 or more than \$1,800.</p> <p><b>(b) Fees for Claims Filed by Members</b></p> <p>(1) Members filing a claim, counterclaim, cross claim, or third party claim must pay a filing fee in the amount indicated in the schedule below. Failure to pay the required amount will result in a deficiency under Rule 12307.</p> <p>(See table – Fee for Claims Filed by Members – Exhibit 5).</p> <p>(2) If the claim does not request or specify money damages, the Director may determine that the filing fee should be more or less than the amount specified in the schedule above, but in any event, the filing fee may not be less than \$225 or more than \$3,700.</p>	<p>party under the schedules below.</p> <p>(b) A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less. The forum fee for a pre-hearing conference with an arbitrator shall be the amount set forth in the schedules below as a hearing session deposit for a hearing with a single arbitrator.</p> <p>(c) The arbitrators, in their awards, shall determine the amount chargeable to the parties as forum fees and shall determine who shall pay such forum fees. Forum fees chargeable to the parties shall be assessed on a per hearing session basis, and the aggregate for each hearing session may equal but shall not exceed the amount of the largest initial hearing deposit deposited by any party, except in a case <i>where claims have</i></p>	<p>total amount due upon filing.</p> <p>To address this issue, the filing fee and the hearing session deposit have been combined into one single fee that is paid when a claim is filed. Although what is now the refundable hearing session deposit would no longer be paid separately, an amount equal to the current hearing session deposit or a portion thereof may be refunded if the case is settled at least 10 days prior to the hearing on the merits. (Under the current Code, the initial hearing session deposit may be refunded if the case is settled eight days prior to the hearing on the merits; this has been changed to 10 days as part of the overall effort to standardize the time frames used in the Code.)</p>

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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p><b>(c) Partial Refund of Filing Fee</b></p> <p>(1) If a claim is settled or withdrawn more than 10 days before the date that the hearing on the merits under Rule 12600 is scheduled to begin, a party paying a filing fee will receive a partial refund of the filing fee in the amount indicated in the schedule below, less any other fees or costs assessed against the party under the Code, including any hearing session fees assessed under Rule 12902. No refund will be paid if the NASD receives notice that a claim is settled or withdrawn within 10 days of the date that the hearing on the merits under Rule 12600 is scheduled to begin.</p> <p>(See table – Partial Refund for Settlement or Withdrawal More Than Ten Days Before Hearing on the Merits – Exhibit 5).</p> <p>(2) If the claim does not request or specify money damages, and the Director determined that the hearing session fee should be a different amount than the amount specified in the schedule in Rule 12902, the</p>	<p>been joined subsequent to filing in which case hearing session fees shall be computed as provided in paragraph (d). The arbitrator(s) may determine in the award that a party shall reimburse to another party any non-refundable filing fee it has paid. If a customer is assessed forum fees in connection with an industry claim, forum fees assessed against the customer shall be based on the hearing deposit required under the industry claims schedule for the amount awarded to industry parties to be paid by the customer and not based on the size of the industry claim. No fees shall be assessed against a customer in connection with an industry claim that is dismissed; however, in cases where there is also a customer claim, the customer may be assessed forum fees based on the customer claim under the procedure set out above. Amounts deposited by a party shall be applied against forum fees, if any. In addition to forum</p>	<p>The consolidation of the filing fee and the hearing session deposit is intended to make it easier for claimants to understand how much they have to pay when they file a claim and what, if any, portion of that fee may be refunded.</p> <p>In addition, several sets of brackets in the filing fee schedule would be condensed. Currently, there are 14 separate fee brackets in the customer filing fee schedule. Some of the fees for different brackets are the same; others are separated by amounts ranging from \$25-\$100. The result is a schedule that is confusing and difficult to read. To simplify the schedule, the customer filing fee brackets would be reorganized as follows: the \$25,000-\$30,000 bracket (\$600) and the \$30,000-50,000 bracket (\$625)</p>



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SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>amount of the refund will be the amount of the hearing session fee determined by the Director, less any fees or costs assessed against the party under the Code, including any hearing session fees assessed under Rule 12902.</p> <p><b>(d) Reimbursement of Filing Fees</b></p> <p>In the award, the panel may order a party to reimburse another party for all or part of any filing fee paid.</p>	<p>fees, the arbitrator(s) may determine in the award the amount of costs incurred pursuant to Rules 10319, 10321, 10322, and 10326 and, unless applicable law directs otherwise, other costs and expenses of the parties and arbitrator(s) which are within the scope of the agreement of the parties. The arbitrator(s) shall determine by whom such costs shall be borne. If the hearing session fees are not assessed against a party who had made a hearing deposit, the hearing deposit will be refunded unless the arbitrators determine otherwise.</p> <p>(d) For claims filed separately which are subsequently joined or consolidated under Rule 10314(d), the hearing deposit and forum fees assessable per hearing session after joinder or consolidation shall be based on the cumulative amount in dispute. The arbitrator(s) shall determine by whom such fees shall be borne.</p>	<p>would be combined, and the filing fee for the new bracket would be \$600; and the \$1 million - \$3 million bracket (\$1,700), the \$3 million - \$5 million bracket (\$1,800), the \$5 million - \$10 million bracket (\$1,800) and the over \$10 million bracket (\$1,800) would be combined, and the filing fee for the new bracket would be \$1,800.</p> <p>The changes would not result in a change in the total amount of fees paid by customers or associated persons when filing a claim, except that for claims of \$30,000 to \$50,000, the customer's overall filing fees would decrease by \$50, and for claims of \$1 million to \$3 million, the customer's overall filing fees would increase by \$100. Corresponding changes would be made to the member filing fee</p>

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		<p>(e) If the dispute, claim, or controversy does not involve, disclose, or specify a money claim, the non-refundable filing fee for a public customer shall be \$250 and the non-refundable filing fee for an industry party shall be \$500. The hearing session deposit to be remitted by a party shall be \$1,000 or such greater or lesser amount as the Director of Arbitration or the panel of arbitrators may require, but shall not exceed the maximum amount specified in the schedule.</p> <p>(f) The Association shall retain the total initial amount deposited as hearing session deposits by all the parties in any matter submitted and settled or withdrawn within eight business days of the first scheduled hearing session other than a pre-hearing conference.</p> <p>(g) Any matter submitted and</p>	<p>schedule.</p>

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		<p>thereafter settled or withdrawn subsequent to the commencement of the first hearing session, including a pre-hearing conference with an arbitrator, shall be subject to an assessment of forum fees and costs incurred pursuant to Rules 10319, 10321, 10322, and 10326 based on hearing sessions held and scheduled within eight business days after the Association receives notice that the matter has been settled or withdrawn. The arbitrator(s) shall determine by whom such forum fees and costs shall be borne.</p> <p>(h) Reserved</p> <p>(i) Reserved</p> <p>(j) Reserved</p> <p>(k) Schedule of Fees</p> <p>For purposes of the schedule of fees, the term "claim" includes Claims, Counterclaims, Third-Party Claims, and Cross-</p>	

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
		<p>Claims. Any such claim made by a customer or associated person is treated as a customer claim for purposes of the schedule of fees. Any such claim made by a member is an industry claim.</p> <p><i><a href="#">(See Customer or Associated Person Claimant Table in NASD Manual.)</a></i></p>	
<p><b>Member Surcharge</b></p>	<p><b>12901. Member Surcharge</b></p> <p><b>(a) Member Surcharge</b></p> <p>(1) A surcharge in the amount indicated in the schedule below will be assessed against each member that:</p> <ul style="list-style-type: none"> <li>• Files a claim, counterclaim, cross claim, or third party claim under the Code;</li> <li>• Is named as a respondent in a claim, counterclaim, cross claim, or third party claim filed and served under the Code; or</li> <li>• Employed, at the time the dispute arose, an associated person who is named as a respondent in a claim, counterclaim, cross claim,</li> </ul>	<p><b>10333. Member Surcharge and Process Fees</b></p> <p>(a) Member Surcharge</p> <p>(1) Each member that is named as a party to an arbitration proceeding, whether in a Claim, Counterclaim, Cross-Claim or Third-Party Claim, shall be assessed a surcharge pursuant to the schedule below when the Director of Arbitration perfects service of the claim naming the member on any party to the proceeding.</p> <p>(2) For each associated person who is named, the surcharge</p>	<p>No substantive change.</p>

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>or third party claim filed and served under the Code.</p> <p>(See table – Member Surcharge – Exhibit 5).</p> <p>(2) If the claim does not request or specify money damages, the Director may determine that the member surcharge should be more or less than the amount specified in the schedule above, but in any event the amount of the member surcharge may not be less than \$150 or more than \$3,750.</p> <p>(3) If the claim is filed by the member, the surcharge is due when the claim is filed. If the claim is filed against the member, or against an associated person employed by the member at the time of the events giving rise to the dispute, the surcharge is due when the claim is served in accordance with Rule 12300.</p> <p>(4) No member shall be assessed more than a single surcharge in any arbitration. The panel may not reallocate a surcharge paid by a member to any other party.</p>	<p>shall be assessed against the member or members that employed the associated person at the time of the events which gave rise to the dispute, claim or controversy. No member shall be assessed more than a single surcharge in any arbitration proceeding.</p> <p>(3) The surcharge shall not be chargeable to any other party under Rules 10332(c) and 10205(c) of the Code. The Director will refund the surcharge paid by a member in an arbitration filed by a customer if the arbitration panel: (A) denies all of a customer's claims against the member or associated person; and (B) allocates all forum fees assessed pursuant to Rule 10332(c) against the customer. The Director may also refund or cancel the member surcharge in extraordinary circumstances.</p> <p><a href="#">(See Table in NASD Manual.)</a></p> <p>(4) For purposes of this Rule, service is perfected when the</p>	

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p><b>(b) Refund of Member Surcharge</b></p> <p>(1) The Director will refund the surcharge paid by a member in an arbitration filed by a customer if the panel:</p> <ul style="list-style-type: none"> <li>• Denies all of a customer's claims against the member or associated person; and</li> <li>• Allocates all fees assessed pursuant to Rule 12902(a) against the customer.</li> </ul> <p>(2) The Director may also refund or waive the member surcharge in extraordinary circumstances.</p>	<p>Director of Arbitration properly serves the Respondents to such proceeding under Rule 10314 of the Code.</p> <p>(5) If the dispute, claim, or controversy does not involve, disclose, or specify a money claim, the non-refundable surcharge shall be \$1,500 or such greater or lesser amount as the Director of Arbitration or the panel of arbitrators may require, but shall not exceed the maximum amount specified in the schedule.</p>	

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<b>Hearing Session Fees, and Other Costs and Expenses</b>	<p><b>12902. Hearing Session Fees, and Other Costs and Expenses</b></p> <p><b>(a) Hearing Session Fees</b></p> <p>(1) Hearing session fees will be charged for each hearing session. The total amount chargeable to the parties for each hearing session is based on the amount in dispute, as specified in the schedule below. In the award, the panel will determine the amount of each hearing session fee that each party must pay.</p> <p>(See table – Hearing Session Fees – Exhibit 5).</p> <p>(2) If the claim does not request or specify money damages, the Director may determine that the hearing session fee should be more or less than the amount specified in the schedule above, but in any event the hearing session fee shall not be less than \$50 or more than \$1,200 for each hearing session.</p> <p>(3) If there is more than one claim in a proceeding, the amount of hearing session fees will be based on the</p>	<p><b>10332. Schedule of Fees for Customer Disputes</b></p> <p>(b) A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with an arbitrator, which lasts four (4) hours or less. The forum fee for a pre-hearing conference with an arbitrator shall be the amount set forth in the schedules below as a hearing session deposit for a hearing with a single arbitrator.</p> <p>(c) The arbitrators, in their awards, shall determine the amount chargeable to the parties as forum fees and shall determine who shall pay such forum fees. Forum fees chargeable to the parties shall be assessed on a per hearing session basis, and the aggregate for each hearing session may equal but shall not exceed the amount of the largest initial hearing deposit deposited by any party, except in a case where claims have</p>	<p>See comments to Rule 12900.</p> <p><u>NASD did not intend to increase the charge for submitting a claim to arbitration. NASD is, therefore, amending Rule 12902(b) to clarify that the hearing session fee paid in the filing fee will be credited in the award to the party who paid the filing fee.</u></p> <p><u>Also, NASD does not believe it should be the arbiter between party and counsel regarding who owes money to whom. Thus, NASD is amending Rule 12902 to add subparagraph (e) to clarify that refunds will be paid directly to the named parties, even if a non-party made a payment on behalf of the named parties.</u></p>

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>largest claim in the proceeding. If any claims are joined or combined under Rules 12312, 12313, or 12314, the amount of those claims will be aggregated and they will be treated as one claim for purposes of this paragraph.</p> <p>(4) If hearing session fees are allocated against a customer in connection with a claim filed by a member or associated person, the amount of hearing session fees the customer must pay must be based on the amount actually awarded to the member or associated person, rather than on the amount claimed by the member or associated person. No hearing session fees may be assessed against a customer in connection with a claim filed by a member that is dismissed.</p> <p><b>(b) Payment of Hearing Session Fees</b></p> <p>(1) The panel may assess the hearing session fees in the award, or may require the parties to pay hearing session fees during the course of the arbitration. The total amount that the</p>	<p>been joined subsequent to filing in which case hearing session fees shall be computed as provided in paragraph (d). The arbitrator(s) may determine in the award that a party shall reimburse to another party any non-refundable filing fee it has paid. If a customer is assessed forum fees in connection with an industry claim, forum fees assessed against the customer shall be based on the hearing deposit required under the industry claims schedule for the amount awarded to industry parties to be paid by the customer and not based on the size of the industry claim. No fees shall be assessed against a customer in connection with an industry claim that is dismissed; however, in cases where there is also a customer claim, the customer may be assessed forum fees based on the customer claim under the procedure set out above. Amounts deposited by a party shall be applied against forum fees, if any. In addition to forum</p>	



**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>panel may require the parties to pay for each hearing session during the course of an arbitration may not exceed the total amount chargeable to the parties for each hearing session under the schedule to paragraph (a) of this rule.</p> <p>(2) Any interim hearing session fee payments made by a party under this rule will be deducted from the total amount of hearing session fees assessed against that party in the award. If the amount of interim payments is more than the amount assessed against the party in the award, the balance will be refunded to that party.</p> <p><u>(3) In the award, the amount of one hearing session fee will be deducted from the total amount of hearing session fees assessed against the party who paid the filing fee. If this amount is more than any fees, costs, and expenses assessed against this party under the Code, the balance will be refunded to the party.</u></p> <p><b>(c) Assessment of Other Costs and Expenses in Award</b></p>	<p>fees, the arbitrator(s) may determine in the award the amount of costs incurred pursuant to Rules 10319, 10321, 10322, and 10326 and, unless applicable law directs otherwise, other costs and expenses of the parties and arbitrator(s) which are within the scope of the agreement of the parties. The arbitrator(s) shall determine by whom such costs shall be borne. If the hearing session fees are not assessed against a party who had made a hearing deposit, the hearing deposit will be refunded unless the arbitrators determine otherwise.</p> <p>(d) For claims filed separately which are subsequently joined or consolidated under Rule 10314(d), the hearing deposit and forum fees assessable per hearing session after joinder or consolidation shall be based on the cumulative amount in dispute. The arbitrator(s) shall determine by whom such fees shall be borne.</p>	

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>In its award, the panel must also determine the amount of any costs and expenses incurred by the parties under the Code or that are within the scope of the agreement of the parties, and which party or parties will pay those costs and expenses.</p> <p><b>(d) Assessment of Hearing Session Fees, Costs, and Expenses in Case of Settlement or Withdrawal</b></p> <p>If a claim is settled or withdrawn:</p> <ul style="list-style-type: none"> <li>• The parties will be subject to an assessment of hearing session fees for hearing sessions already held.</li> <li>• If NASD receives a settlement or withdrawal notice 10 days or fewer prior to the date that the hearing on the merits under Rule 12600 is scheduled to begin, parties that paid a filing fee under Rule 12900 will not be entitled to any refund of the filing fee.</li> <li>• The parties will also be responsible for any fee or costs</li> </ul>	<p>(f) The Association shall retain the total initial amount deposited as hearing session deposits by all the parties in any matter submitted and settled or withdrawn within eight business days of the first scheduled hearing session other than a pre-hearing conference.</p> <p>(g) Any matter submitted and thereafter settled or withdrawn subsequent to the commencement of the first hearing session, including a pre-hearing conference with an arbitrator, shall be subject to an assessment of forum fees and costs incurred pursuant to Rules 10319, 10321, 10322, and 10326 based on hearing sessions held and scheduled within eight business days after the Association receives notice that the matter has been settled or withdrawn. The arbitrator(s) shall determine by whom such forum fees and costs shall be borne.</p>	

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>incurred under Rules 12502, 12513, 12601, or 12606 in connection with such hearings. If a case is settled or withdrawn and the parties' agreement fails to allocate such fees and costs, the fees and costs will be allocated as provided by Rule 12701(b).</p> <p><b><u>(e) Refund Payments</u></b></p> <p><u>Any refunds of fees or costs incurred under the Code will be paid directly to the named parties, even if a non-party made a payment on behalf of the named parties.</u></p>		
<p><b>Process Fees Paid by Members</b></p>	<p><b>12903. Process Fees Paid by Members</b></p> <p>(a) Each member that is a party to an arbitration in which more than \$25,000, exclusive of interest and expenses, is in dispute must pay:</p> <ul style="list-style-type: none"> <li>• A non-refundable prehearing process fee of \$750, due at the time the parties are sent arbitrator lists in accordance with Rule 12403(b); and</li> </ul>	<p><b>10333. Member Surcharge and Process Fees</b></p> <p>(b) Prehearing and Hearing Process Fees</p> <p>(1) Each member that is a party to an arbitration proceeding in which more than \$25,000 is in dispute will pay:</p> <p style="padding-left: 40px;">(A) a non-refundable prehearing process fee of \$750, due at the time the parties are</p>	<p>No substantive change.</p>

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**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<ul style="list-style-type: none"> <li>• A non-refundable hearing process fee, due when the parties are notified of the date and location of the hearing on the merits under Rule 12600, as set forth in the schedule below. (See table – Hearing Process Fee Schedule – Exhibit 5).</li> </ul> <p>(b) If an associated person of a member is a party, the member that employed the associated person at the time the dispute arose will be charged the process fees, even if the member is not a party. No member shall be assessed more than one prehearing and one hearing process fee in any arbitration.</p> <p>(c) The panel may not reallocate to any other party any prehearing and hearing process fees paid by a member.</p>	<p>sent arbitrator lists in accordance with Rule 10308(b)(5); and</p> <p>(B) a non-refundable hearing process fee, due when the parties are notified of the date and location of the first hearing session, as set forth in the schedule below.</p> <p>(2) If an associated person of a member is a party, the member that employed the associated person at the time of the events which gave rise to the dispute, claim or controversy will be charged the process fees, even if the member is not a party. No member shall be assessed more than one prehearing and one hearing process fee in any arbitration proceeding.</p> <p>(3) The prehearing and hearing process fees shall not be chargeable to any other party under Rules 10332(c) and 10205(c) of the Code. <a href="#">(See Hearing Process Fee Schedule table in NASD Manual.)</a></p>	

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
<p><b>Awards</b></p>	<p><b>12904. Awards</b></p> <p>(a) All awards shall be in writing and signed by a majority of the arbitrators or as required by applicable law. Such awards may be entered as a judgment in any court of competent jurisdiction.</p> <p>(b) Unless the applicable law directs otherwise, all awards rendered under the Code are final and are not subject to review or appeal.</p> <p>(c) The Director will serve a copy of the award on each party or the representative of the party. The Director will serve the award by using any method available and convenient to the parties and the Director, and that is reasonably expected to cause the award to be delivered to all parties, or their representative, on the same day. Methods the Director may use include, but are not limited to, first class, registered or certified mail, hand delivery, and facsimile or other electronic transmission.</p> <p>(d) The panel shall endeavor to render an award within 30 business days from the date the record is closed.</p>	<p><b>10330. Awards</b></p> <p>(a) All awards shall be in writing and signed by a majority of the arbitrators or in such manner as is required by applicable law. Such awards may be entered as a judgment in any court of competent jurisdiction.</p> <p>(b) Unless the applicable law directs otherwise, all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal.</p> <p>(c) The Director will serve a copy of the award on each party, or the representative of the party. The Director will serve the award by using any method available and convenient to the parties and the Director, and that is reasonably expected to cause the award to be delivered to all parties, or their counsel, on the same day. Methods the Director may use include, but are not limited to, registered or certified mail, hand delivery, and facsimile or other electronic transmission.</p>	<p>No substantive change.</p>

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>(e) The award shall contain the following:</p> <ul style="list-style-type: none"> <li>• The names of the parties;</li> <li>• The name of the parties' representatives, if any;</li> <li>• An acknowledgement by the arbitrators that they have each read the pleadings and other materials filed by the parties;</li> <li>• A summary of the issues, including the type(s) of any security or product, in controversy;</li> <li>• The damages and other relief requested;</li> <li>• The damages and other relief awarded;</li> <li>• A statement of any other issues resolved;</li> <li>• The allocation of forum fees and any other fees allocable by the panel;</li> </ul>	<p>(d) The arbitrator(s) shall endeavor to render an award within thirty (30) business days from the date the record is closed.</p> <p>(e) The award shall contain the names of the parties, the name of counsel, if any, a summary of the issues, including the type(s) of any security or product, in controversy, the damages and other relief requested, the damages and other relief awarded, a statement of any other issues resolved, the names of the arbitrators, the dates the claim was filed and the award rendered, the number and dates of hearing sessions, the location of the hearings, and the signatures of the arbitrators concurring in the award.</p> <p>(f) All awards and their contents shall be made publicly available.</p> <p>(g) Fees and assessments imposed by the arbitrators under Rules 10205 and 10332 shall be paid immediately upon the receipt of the award by the</p>	

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<ul style="list-style-type: none"> <li>• The names of the arbitrators;</li> <li>• The dates the claim was filed and the award rendered;</li> <li>• The number and dates of hearing sessions;</li> <li>• The location of the hearings; and</li> <li>• The signatures of the arbitrators.</li> </ul> <p>(f) The award may contain a rationale underlying the award.</p> <p>(g) All awards shall be made publicly available.</p> <p>(h) Fees and assessments imposed by the arbitrators under the Code shall be paid immediately upon the receipt of the award by the parties. Payment of such fees shall not be deemed ratification of the award by the parties.</p> <p>(i) All monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. An award shall bear interest from the date of the award:</p> <ul style="list-style-type: none"> <li>• If not paid within 30 days of</li> </ul>	<p>parties. Payment of such fees shall not be deemed ratification of the award by the parties.</p> <p>(h) All monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. An award shall bear interest from the date of the award: (1) if not paid within thirty (30) days of receipt, (2) if the award is the subject of a motion to vacate which is denied, or (3) as specified by the arbitrator(s) in the award. Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).</p>	

**COMPARISON CHART OF**  
**CURRENT AND PROPOSED NASD ARBITRATION CODES FOR CUSTOMER DISPUTES**

SUBJECT	PROPOSED RULE	CURRENT RULE	COMMENTS
	<p>receipt;</p> <ul style="list-style-type: none"> <li>• If the award is the subject of a motion to vacate which is denied; or</li> <li>• As specified by the panel in the award.</li> </ul> <p>Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).</p>		



## **Text of Amended Discovery Guide**

**Below is the text of NASD's Discovery Guide as amended to reflect changes to the NASD Code of Arbitration Procedure described in SR-NASD-2003-158. Proposed new language is underlined; proposed deletions are in brackets.**

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### **DISCOVERY GUIDE**

This Discovery Guide and Document Production Lists supplement the discovery rules contained in NASD Code of Arbitration Procedure for Customer Disputes ("NASD Customer Code.") (See Rules 12505-12511.)

No requirement under the Discovery Guide supersedes any record retention requirement of any federal or state law or regulation or any rule of a self-regulatory organization.

The Discovery Guide, including the Document Production Lists serves as a guide for the parties and the arbitrators; it is not intended to remove flexibility from arbitrators or parties in a given case. Arbitrators can order the production of documents not provided for by the Document Production Lists or alter the production schedule described in the Discovery Guide. Nothing in the Discovery Guide precludes the parties from voluntarily agreeing to an exchange of documents in a manner different from that set forth in the Discovery Guide. NASD encourages the parties to agree to the voluntary exchange of documents and information and to stipulate to various matters. The fact that an item appears on a Document Production List does not shift the burden of establishing or defending any aspect of a claim.

The arbitrators and the parties should consider the documents described in Document Production Lists 1 and 2 presumptively discoverable. Absent a written objection, documents on Document Production Lists 1 and 2 shall be exchanged by the parties within the time frames set forth in the NASD Customer Code. The arbitrators and parties also should consider the additional documents identified in Document Production Lists 3 through 14, respectively, discoverable, as indicated, for cases alleging the following causes of action: churning, failure to supervise, misrepresentation/omission, negligence/breach of fiduciary duty, unauthorized trading, and unsuitability. For the general document production and for each of these causes of action, there are separate Document Production Lists for firms/Associated Person(s) and for customers.

#### **Confidentiality**

If a party objects to document production on grounds of privacy or confidentiality, the arbitrator(s) or one of the parties may suggest a stipulation between the parties that the document(s) in question will not be disclosed or used in any manner outside of the arbitration of the particular case, or the arbitrator(s) may issue a confidentiality order. The arbitrator(s) shall not issue an order or use a confidentiality agreement to require parties to produce documents otherwise subject to an established privilege. Objections to the production of documents, based on an established privilege, should be raised in accordance with the time frame for objections set forth in the NASD Customer Code.

### **Affirmation In The Event That There Are No Responsive Documents or Information**

If a party responds that no responsive information or documents exist, the customer or the appropriate person in the brokerage firm who has personal knowledge (i.e., the person who has conducted a physical search), upon the request of the requesting party, must: 1) state in writing that he/she conducted a good faith search for the requested information or documents; 2) describe the extent of the search; and 3) state that, based on the search, no such information or documents exist.

### **[Information Requests**

Like requests for documents, parties may serve requests for information pursuant to Rule 12507. Requests for information are generally limited to identification of individuals, entities, and time periods related to the dispute; such requests should be reasonable in number and not require exhaustive answers or fact finding. Standard interrogatories, as utilized in state and federal courts, are generally not permitted in arbitration.]

### **Admissibility**

Production of documents in discovery does not create a presumption that the documents are admissible at the hearing. A party may state objections to the introduction of any document as evidence at the hearing to the same extent that any other objection may be raised in arbitration.

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### **DOCUMENT PRODUCTION LISTS**

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#### **LIST 1**

#### **DOCUMENTS TO BE PRODUCED IN ALL CUSTOMER CASES<sup>144</sup>**

FIRM/ASSOCIATED PERSON(S):

- 1) All agreements with the customer, including, but not limited to, account opening documents, cash, margin, and option agreements, trading authorizations, powers of attorney, or discretionary authorization agreements, and new account forms.

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<sup>144</sup> Only named parties must produce documents pursuant to the guidelines set forth herein. However, non-parties may be required to produce documents pursuant to a subpoena or an arbitration panel order to direct the production of documents (see Rule 12513). In addition, the arbitration chairperson may use the Document Production Lists as guidance for discovery issues involving non-parties.

2) All account statements for the customer's account(s) during the time period and/or relating to the transaction(s) at issue.

3) All confirmations for the customer's transaction(s) at issue. As an alternative, the firm/Associated Person(s) should ascertain from the claimant and produce those confirmations that are at issue and are not within claimant's possession, custody, or control.

4) All "holding (posting) pages" for the customer's account(s) at issue or, if not available, any electronic equivalent.

5) All correspondence between the customer and the firm/Associated Person(s) relating to the transaction(s) at issue.

6) All notes by the firm/Associated Person(s) or on his/her behalf, including entries in any diary or calendar, relating to the customer's account(s) at issue.

7) All recordings and notes of telephone calls or conversations about the customer's account(s) at issue that occurred between the Associated Person(s) and the customer (and any person purporting to act on behalf of the customer), and/or between the firm and the Associated Person(s).

8) All Forms RE-3, U-4, and U-5, including all amendments, all customer complaints identified in such forms, and all customer complaints of a similar nature against the Associated Person(s) handling the account(s) at issue.

9) All sections of the firm's Compliance Manual(s) related to the claims alleged in the statement of claim, including any separate or supplemental manuals governing the duties and responsibilities of the Associated Person(s) and supervisors, any bulletins (or similar notices) issued by the compliance department, and the entire table of contents and index to each such Manual.

10) All analyses and reconciliations of the customer's account(s) during the time period and/or relating to the transaction(s) at issue.

11) All records of the firm/Associated Person(s) relating to the customer's account(s) at issue, such as, but not limited to, internal reviews and exception and activity reports which reference the customer's account(s) at issue.

12) Records of disciplinary action taken against the Associated Person(s) by any regulator or employer for all sales practices or conduct similar to the conduct alleged to be at issue.

\* \* \*

## **LIST 2**

### **DOCUMENTS TO BE PRODUCED IN ALL CUSTOMER CASES**

CUSTOMER:

1) All customer and customer-owned business (including partnership or corporate) federal income tax returns, limited to pages 1 and 2 of Form 1040, Schedules B, D, and E, or the equivalent for any other type of return, for the three years prior to the first transaction at issue in the statement of claim through the date the statement of claim was filed.

2) Financial statements or similar statements of the customer's assets, liabilities and/or net worth for the period(s) covering the three years prior to the first transaction at issue in the statement of claim through the date the statement of claim was filed.

3) Copies of all documents the customer received from the firm/Associated Person(s) and from any entities in which the customer invested through the firm/Associated Person(s), including monthly statements, opening account forms, confirmations, prospectuses, annual and periodic reports, and correspondence.

4) Account statements and confirmations for accounts maintained at securities firms other than the respondent firm for the three years prior to the first transaction at issue in the statement of claim through the date the statement of claim was filed.

5) All agreements, forms, information, or documents relating to the account(s) at issue signed by or provided by the customer to the firm/Associated Person(s).

6) All account analyses and reconciliations prepared by or for the customer relating to the account(s) at issue.

7) All notes, including entries in diaries or calendars, relating to the account(s) at issue.

8) All recordings and notes of telephone calls or conversations about the customer's account(s) at issue that occurred between the Associated Person(s) and the customer (and any person purporting to act on behalf of the customer).

9) All correspondence between the customer (and any person acting on behalf of the customer) and the firm/Associated Person(s) relating to the account(s) at issue.

10) Previously prepared written statements by persons with knowledge of the facts and circumstances related to the account(s) at issue, including those by accountants, tax advisors, financial planners, other Associated Person(s), and any other third party.

11) All prior complaints by or on behalf of the customer involving securities matters and the firm's/Associated Person(s)' response(s).

12) Complaints/Statements of Claim and Answers filed in all civil actions involving securities matters and securities arbitration proceedings in which the customer has been a party, and all final decisions and awards entered in these matters.

13) All documents showing action taken by the customer to limit losses in the transaction(s) at issue.

**LIST 3**

**CHURNING**

FIRM/ASSOCIATED PERSON(S)

1) All commission runs relating to the customer's account(s) at issue or, in the alternative, a consolidated commission report relating to the customer's account(s) at issue.

2) All documents reflecting compensation of any kind, including commissions, from all sources generated by the Associated Person(s) assigned to the customer's account(s) for the two months preceding through the two months following the transaction(s) at issue, or up to 12 months, whichever is longer. The firm may redact all information identifying customers who are not parties to the action, except that the firm/Associated Person(s) shall provide at least the last four digits of the non-party customer account number for each transaction.

3) Documents sufficient to describe or set forth the basis upon which the Associated Person(s) was compensated during the years in which the transaction(s) or occurrence(s) in question occurred, including: a) any bonus or incentive program; and b) all compensation and commission schedules showing compensation received or to be received based upon volume, type of product sold, nature of trade (e.g., agency v. principal), etc.

\* \* \*

**LIST 4**

**CHURNING**

CUSTOMER

No additional documents identified.

\* \* \*

**LIST 5**

**FAILURE TO SUPERVISE**

FIRM/ASSOCIATED PERSON(S):

1) All commission runs and other reports showing compensation of any kind relating to the customer's account(s) at issue or, in the alternative, a consolidated commission report relating to the customer's account(s) at issue.

2) All exception reports and supervisory activity reviews relating to the Associated Person(s) and/or the customer's account(s) that were generated not earlier than one year before or not later than one year after the transaction(s) at issue, and all other documents reflecting supervision of the Associated Person(s) and the customer's account(s) at issue.

3) Those portions of internal audit reports at the branch in which the customer maintained his/her account(s) that: (a) focused on the Associated Person(s) or the transaction(s) at issue; and (b) were generated not earlier than one year before or not later than one year after the transaction(s) at issue and discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the statement of claim.

4) Those portions of examination reports or similar reports following an examination or an inspection conducted by a state or federal agency or a self-regulatory organization that focused on the Associated Person(s) or the transaction(s) at issue or that discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the statement of claim.

\* \* \*

**LIST 6**

**FAILURE TO SUPERVISE**

CUSTOMER

No additional documents identified.

\* \* \*

**LIST 7**

**MISREPRESENTATION/OMISSIONS**

FIRM/ASSOCIATED PERSON(S)

Copies of all materials prepared or used by the firm/Associated Person(s) relating to the transactions or products at issue, including research reports, prospectuses, and other offering documents, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents that contains sufficient detail for the claimant to identify each document listed. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

\* \* \*

**LIST 8**

**MISREPRESENTATION/OMISSIONS**

CUSTOMER

1) Documents sufficient to show the customer's ownership in or control over any business entity, including general and limited partnerships and closely held corporations.

2) Copy of the customer's resume.

3) Documents sufficient to show the customer's complete educational and employment background or, in the alternative, a description of the customer's educational and employment background if not set forth in a resume produced under item 2.

\* \* \*

## **LIST 9**

### **NEGLIGENCE/BREACH OF FIDUCIARY DUTY**

#### **FIRM/ASSOCIATED PERSON(S)**

Copies of all materials prepared or used by the firm/Associated Person(s) relating to the transactions or products at issue, including research reports, prospectuses, and other offering documents, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents that contains sufficient detail for the claimant to identify each document listed. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

## **LIST 10**

### **NEGLIGENCE/BREACH OF FIDUCIARY DUTY**

#### **CUSTOMER**

1) Documents sufficient to show the customer's ownership in or control over any business entity, including general and limited partnerships and closely held corporations.

2) Copy of the customer's resume.

3) Documents sufficient to show the customer's complete educational and employment background or, in the alternative, a description of the customer's educational and employment background if not set forth in a resume produced under item 2.

\* \* \*

## **LIST 11**

### **UNAUTHORIZED TRADING**

#### **FIRM/ASSOCIATED PERSON(S)**

1) Order tickets for the customer's transaction(s) at issue.

2) Copies of all telephone records, including telephone logs, evidencing telephone contact between the customer and the firm/Associated Person(s).

3) All documents relied upon by the firm/Associated Person(s) to establish that the customer authorized the transaction(s) at issue.

**LIST 12**

**UNAUTHORIZED TRADING**

**CUSTOMER**

1. Copies of all telephone records, including telephone logs, evidencing telephone contact between the customer and the firm/Associated Person(s).

2. All documents relied upon by the customer to show that the transaction(s) at issue was made without his/her knowledge or consent.

\* \* \*

**LIST 13**

**UNSUITABILITY**

**FIRM/ASSOCIATED PERSON(S)**

1) Copies of all materials prepared, used, or reviewed by the firm/Associated Person(s) related to the transactions or products at issue, including but not limited to research reports, prospectuses, other offering documents, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

2) Documents sufficient to describe or set forth the basis upon which the Associated Person(s) was compensated in any manner during the years in which the transaction(s) or occurrence(s) in question occurred, including, but not limited to: a) any bonus or incentive program; and b) all compensation and commission schedules showing compensation received or to be received based upon volume, type of product sold, nature of trade (e.g., agency v. principal), etc.

**LIST 14**

**UNSUITABILITY**

**CUSTOMER**

1) Documents sufficient to show the customer's ownership in or control over any business entity, including general and limited partnerships and closely held corporations.



2) Written documents relied upon by the customer in making the investment decision(s) at issue.

3) Copy of the customer's resume.

4) Documents sufficient to show the customer's complete educational and employment background or, in the alternative, a description of the customer's educational and employment background if not set forth in a resume produced under item 3.

**NASD**  
**CODE OF ARBITRATION PROCEDURE**  
**FOR**  
**CUSTOMER DISPUTES**

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**PART I INTERPRETIVE MATERIAL, DEFINITIONS, ORGANIZATION AND AUTHORITY**

**IM-12000. Failure to Act Under Provisions of Code of Arbitration Procedure for Customer Disputes**

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110 for a member or a person associated with a member to:

(a) fail to submit a dispute for arbitration under the NASD Code of Arbitration Procedure ("Code") as required by the Code;

(b) fail to comply with any injunctive order issued pursuant to the Code;

(c) fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the Code;

(d) fail to honor an award, or comply with a written and executed settlement agreement, obtained in connection with an arbitration submitted for disposition pursuant to the procedures specified by NASD, the New York, American, Boston, Cincinnati, Chicago, or Philadelphia Stock Exchanges, the Pacific Exchange, Inc., the Chicago Board Options Exchange, the Municipal Securities Rulemaking Board, or pursuant to the rules applicable to the arbitration of disputes before the American Arbitration Association or other dispute resolution forum selected by the parties where timely motion has not been made to vacate or modify such award pursuant to applicable law;

(e) fail to comply with a written and executed settlement agreement, obtained in connection with a mediation submitted for disposition pursuant to the procedures specified by NASD;

(f) fail to waive the California Rules of Court, Division VI of the Appendix, entitled, "Ethics Standards for Neutral Arbitrators in Contractual Arbitration" (the "California Standards"), if application of the California Standards has been waived by all parties to the dispute who are:

(1) customers with a claim against a member or an associated person;

(2) associated persons with a claim against a member or an associated person;

(3) members with a claim against another member; or

(4) members with a claim against an associated person that relates exclusively to a promissory note.

Written waiver by such parties shall constitute and operate as a waiver for all member firms or associated persons against whom the claim has been filed. This paragraph applies to claims brought in California against all member firms and associated persons, including terminated or otherwise inactive member firms or associated persons.

All awards shall be honored by a cash payment to the prevailing party of the exact dollar amount stated in the award. Awards may not be honored by crediting the prevailing party's account with the dollar amount of the award, unless authorized by the express terms of the award or consented to in writing by the parties. Awards shall be honored upon receipt thereof, or within such other time period as may be prescribed by the award.

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110 for a member to require associated persons to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure.

## **12100. Definitions**

*Unless otherwise defined in the Code, terms used in the Rules and interpretive material, if defined in the NASD By-Laws, shall have the meaning as defined in the NASD By-Laws.*

### **(a) Associated Person**

The term "associated person" or "associated person of a member" means a person associated with a member, as that term is defined in paragraph (r).

### **(b) Award**

An award is a document stating the disposition of a case.

### **(c) Board**

The term "Board" means the Board of Directors of NASD Dispute Resolution, Inc.

### **(d) Claim**

The term "claim" means an allegation or request for relief.

### **(e) Claimant**

The term "claimant" means a party that files the statement of claim that initiates an arbitration under Rule 12302.

### **(f) Code**

The term "Code" means the Code of Arbitration Procedure for Customer Disputes. For disputes involving only industry parties, see the NASD Code of Arbitration Procedure for Industry Disputes.

### **(g) Counterclaim**

The term "counterclaim" means a claim asserted against a claimant by a respondent.



**(h) Cross Claim**

The term “cross claim” means a claim asserted by a respondent against another already-named respondent.

**(i) Customer**

A customer shall not include a broker or dealer.

**(j) Day**

Except as otherwise provided, the term “day” means calendar day. If a deadline specified in the Code falls on a Saturday, Sunday or any NASD holiday, the deadline is extended until the next business day.

**(k) Director**

The term “Director” means the Director of NASD Dispute Resolution. Unless the Code provides that the Director may not delegate a specific function, the term includes NASD staff to whom the Director has delegated authority.

**(l) Dispute**

The term “dispute” means a dispute, claim or controversy. A dispute may consist of one or more claims.

**(m) Hearing**

The term “hearing” means the hearing on the merits of an arbitration under Rule 12600.

**(n) Hearing Session**

The term “hearing session” means any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing conference.

**(o) Member**

For purposes of the Code, the term “member” means any broker or dealer admitted to membership in NASD, whether or not the membership has been terminated or cancelled.

**(p) Non-Public Arbitrator**

The term “non-public arbitrator” means a person who is otherwise qualified to serve as an arbitrator and:

- (1) Is or, within the past five years, was:

- (A) Associated with a broker or a dealer (including a government securities broker or dealer or a municipal securities dealer);
- (B) Registered under the Commodity Exchange Act;
- (C) A member of a commodities exchange or a registered futures association; or
- (D) Associated with a person or firm registered under the Commodity Exchange Act;

(2) Is retired from, or spent a substantial part of a career engaging in, any of the business activities listed in paragraph (p)(1);

(3) Is an attorney, accountant, or other professional who has devoted 20 percent or more of his or her professional work, in the last two years, to clients who are engaged in any of the business activities listed in paragraph (p)(1); or

(4) Is an employee of a bank or other financial institution and effects transactions in securities, including government or municipal securities, and commodities futures or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.

For purposes of this rule, the term “professional work” shall not include mediation services performed by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.

#### **(q) Panel**

The term “panel” means the arbitration panel, whether it consists of one or more arbitrators.

#### **(r) Person Associated with a Member**

The term “person associated with a member” means:

(1) A natural person registered under the Rules of NASD; or

(2) A sole proprietor, partner, officer, director, or branch manager of a member, or a natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with NASD under the By-Laws or the Rules of NASD.

For purposes of the Code, a person formerly associated with a member is a person associated with a member.

#### **(s) Pleadings**

A pleading is a statement describing a party’s causes of action or defenses. Documents that are considered pleadings are: a statement of claim, an answer, a counterclaim, a cross claim, a third party claim, and any replies.

**(t) Prehearing Conference**

The term “prehearing conference” means any hearing session, including an Initial Prehearing Conference, that takes place before the hearing on the merits begins.

**(u) Public Arbitrator**

The term “public arbitrator” means a person who is otherwise qualified to serve as an arbitrator and:

(1) Is not engaged in the conduct or activities described in paragraphs (p)(1)-(4);

(2) Was not engaged in the conduct or activities described in paragraphs (p)(1)-(4) for a total of 20 years or more;

(3) Is not an investment adviser;

(4) Is not an attorney, accountant, or other professional whose firm derived 10 percent or more of its annual revenue in the past two years from any persons or entities listed in paragraphs (p)(1)-(4); and

(5) Is not the spouse or a family member of a person who is engaged in the conduct or activities described in paragraphs (p)(1)-(4). For the purposes of this rule, the term “family member” means:

(A) The parent, stepparent, child, or stepchild of any person engaged in the conduct or activities described in paragraphs (p)(1)-(4);

(B) A member of the household of a person engaged in the conduct or activities described in paragraphs (p)(1)-(4);

(C) A person who receives financial support of more than 50 percent of his or her annual income from a person engaged in the conduct or activities described in paragraphs (p)(1)-(4); or

(D) A person who is claimed as a dependent for federal income tax purposes by a person engaged in the conduct or activities described in paragraphs (p)(1)-(4).

For purposes of this rule, the term “revenue” shall not include mediation fees received by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.

**(v) Respondent**

The term “respondent” means a party against whom a statement of claim or third party claim has been filed. A claimant against whom a counterclaim has been filed is not a respondent for purposes of the Code.

**(w) Statement of Claim**

The term “statement of claim” means the initial or amended claim filed by the party or parties initiating the arbitration.

**(x) Third Party Claim**

The term “third party claim” means a claim asserted against a party not already named in the statement of claim or any other previous pleading.

**(y) Uniform Submission Agreement**

The term “Uniform Submission Agreement” means the NASD Uniform Submission Agreement. The NASD Uniform Submission Agreement is a document that parties must sign at the outset of an arbitration in which they agree to submit to arbitration under the Code.

**12101. Applicability of Code and Incorporation by Reference**

**(a) Applicability of Code**

The Code applies to any dispute between a customer and a member or associated person of a member that is submitted to arbitration under Rule 12200 or 12201.

**(b) Incorporation by Reference**

When a dispute is submitted to arbitration under the Code pursuant to an arbitration agreement, the Code is incorporated by reference into the agreement.

**12102. National Arbitration and Mediation Committee**

(a) Pursuant to Part V(C)(1)(b) of the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries (“Delegation Plan”), the Board shall appoint a National Arbitration and Mediation Committee (“NAMC”).

(2) The NAMC shall consist of no fewer than 10 and no more than 25 members. At least 50 percent of the NAMC shall be Non-Industry members.

(2) The Chairperson of the Board shall name the chairperson of the NAMC.

(b) Pursuant to the Delegation Plan, the NAMC shall have the authority to recommend rules, regulations, procedures and amendments relating to arbitration, mediation, and other dispute resolution matters to the Board. All matters recommended by the NAMC to the Board must have been approved by a quorum, which shall consist of a majority of the NAMC, including at least 50 percent of the Non-Industry committee members. If at least 50 percent of the Non-Industry committee members are either (i) present at or (ii) have filed a waiver of attendance for a meeting after receiving an

agenda prior to such meeting, the requirement that at least 50 percent of the Non-Industry committee members be present to constitute the quorum shall be waived. The NAMC has such other power and authority as is necessary to carry out the purposes of the Code.

(d) The NAMC may meet as frequently as necessary, but must meet at least once a year.

#### **12103. Director of Dispute Resolution**

(a) The Board shall appoint a Director of Dispute Resolution. The Director shall perform all the administrative duties relating to arbitrations submitted under the Code. The Director may delegate his or her duties when it is appropriate, unless the Code provides otherwise.

(b) The Director shall consult with the NAMC at the NAMC's request.

(c) The President of NASD Dispute Resolution may perform the Director's duties. If the Director is unable to perform his or her duties, the President of NASD Dispute Resolution may appoint an interim Director.

#### **12104. Effect of Arbitration on NASD Regulatory Activities**

(a) Submitting a dispute to arbitration under the Code does not limit or preclude any right, action or determination by NASD that it would otherwise be authorized to adopt, administer or enforce.

(b) Only at the conclusion of an arbitration, any arbitrator may refer to NASD for disciplinary investigation any matter that has come to the arbitrator's attention during and in connection with the arbitration, either from the record of the proceeding or from material or communications related to the arbitration, which the arbitrator has reason to believe may constitute a violation of NASD's rules, the federal securities laws, or other applicable rules or laws.

#### **12105. Agreement of the Parties**

(a) Except as provided in paragraph (b), if the Code provides that the parties may agree to modify a provision of the Code, or a decision of the Director or the panel, the written agreement of all named parties is required.

(b) If the Director or the panel determines that a named party is inactive in the arbitration, or has failed to respond after adequate notice has been given, the Director or the panel may determine that the written agreement of that party is not required while the party is inactive or not responsive.

## **PART II GENERAL ARBITRATION RULES**

### **12200. Arbitration Under an Arbitration Agreement or the Rules of NASD**

Parties must arbitrate a dispute under the Code if:

- Arbitration under the Code is either:
  - (1) Required by a written agreement, or
  - (2) Requested by the customer;
- The dispute is between a customer and a member or associated person of a member; and
- The dispute arises in connection with the business activities of the member or the associated person.

### **12201. Elective Arbitration**

Parties may arbitrate a dispute under the Code if:

- The parties agree in writing to submit the dispute to arbitration under the Code after the dispute arises; and
- The dispute is between a customer and a member, associated person of a member, or other related party; and
- The dispute arises in connection with the business activities of a member or an associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

### **12202. Claims Against Inactive Members**

A claim by or against a member in one of the following categories is ineligible for arbitration under the Code unless the customer agrees in writing to arbitrate after the claim arises:

- A member whose membership is terminated, suspended, cancelled or revoked;
- A member that has been expelled from NASD; or
- A member that is otherwise defunct.

**12203. Denial of NASD Forum**

(a) The Director may decline to permit the use of the NASD arbitration forum if the Director determines that, given the purposes of NASD and the intent of the Code, the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives. Only the Director or the President of NASD Dispute Resolution may exercise the Director's authority under this rule.

(b) Disputes that arise out of transactions in a readily identifiable market may be referred to the arbitration forum for that market, if the claimant agrees.

**12204. Class Action Claims**

(a) Class action claims may not be arbitrated under the Code.

(b) Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, unless the party bringing the claim files with NASD one of the following:

(1) a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or

(2) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

(c) The Director will refer to a panel any dispute as to whether a claim is part of a class action, unless a party asks the court hearing the class action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(d) A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

- The class certification is denied;
- The class is decertified;
- The member of the certified or putative class is excluded from the class by the court; or
- The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.

This paragraph does not otherwise affect the enforceability of any rights under the Code or any other agreement.

**12205. Shareholder Derivative Actions**

Shareholder derivative actions may not be arbitrated under the Code.

**12206. Time Limits**

**(a) Time Limitation on Submission of Claims**

No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.

**(b) Dismissal under Rule**

Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court. By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

**(c) Effect of Rule on Time Limits for Filing Claim in Court**

The rule does not extend applicable statutes of limitations. However, where permitted by applicable law, when a claimant files a statement of claim in arbitration, any time limits for the filing of the claim in court will be tolled while NASD retains jurisdiction of the claim.

**(d) Effect of Filing a Claim in Court on Time Limits for Filing in Arbitration**

If a party submits a claim to a court of competent jurisdiction, the six-year time limitation will not run while the court retains jurisdiction of the claim matter.

**12207. Extension of Deadlines**

(a) The parties may agree in writing to extend or modify any deadline for:

- Serving an answer;
- Returning arbitrator or chairperson lists;
- Responding to motions; or
- Exchanging documents or witness lists.

If the parties agree to extend or modify a deadline under this rule, they must notify the Director of the new deadline in writing.



(b) The panel may extend or modify any deadline listed in paragraph (a), or any other deadline set by the panel, either on its own initiative or upon motion of a party.

(c) The Director may extend or modify any deadline or time period set by the Code for good cause. The Director may also extend or modify any deadline or time period set by the panel in extraordinary circumstances.

#### **12208. Representation of Parties**

All parties have the right to be represented by counsel during any stage of an arbitration.

#### **12209. Legal Proceedings**

During an arbitration, no party may bring any suit, legal action, or proceeding against any other party that concerns or that would resolve any of the matters raised in the arbitration.

#### **12210. Ex Parte Communications**

(a) Except as provided in Rule 12211, no party, or anyone acting on behalf of a party, may communicate with any arbitrator outside of a scheduled hearing or conference regarding an arbitration unless all parties or their representatives are present.

(b) No party, or anyone acting on behalf of a party, may send or give any written motion, request, submission or other materials directly to any arbitrator, unless the arbitrators and the parties agree, or the Code provides otherwise.

#### **12211. Direct Communication Between Parties and Arbitrators**

(a) This rule provides procedures under which parties and arbitrators may communicate directly.

(b) Only parties that are represented by counsel may use direct communication under this rule. If, during the proceeding, a party chooses to appear *pro se* (without counsel), this rule shall no longer apply.

(c) All arbitrators and all parties must agree to the use of direct communication during the Initial Prehearing Conference or a later conference or hearing before it can be used.

(d) Parties may send the arbitrators only items that are listed in an order.

(e) Parties may send items by regular mail, overnight courier, facsimile, or email. All the arbitrators and parties must have facsimile or email capability before such a delivery method may be used.

(f) Copies of all materials sent to arbitrators must also be sent at the same time and in the same manner to all parties and the Director. Materials that exceed 15 pages, however, shall be sent to the Director only by regular mail or overnight courier.

(g) The Director must receive copies of any orders and decisions made as a result of direct communications among the parties and the arbitrators.

(h) Parties may not communicate orally with any of the arbitrators outside the presence of all parties.

(i) Any party or arbitrator may terminate the direct communication order at any time, after giving written notice to the other arbitrators and the parties.

## **12212. Sanctions**

(a) The panel may sanction a party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel.

Unless prohibited by applicable law, sanctions may include, but are not limited to:

- Assessing monetary penalties payable to one or more parties;
- Precluding a party from presenting evidence;
- Making an adverse inference against a party;
- Assessing postponement and/or forum fees; and
- Assessing attorneys' fees, costs and expenses.

(b) The panel may initiate a disciplinary referral at the conclusion of an arbitration.

(c) The panel may dismiss a claim, defense or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.

## **12213. Hearing Locations**

### **(a) U.S. Hearing Location**

(1) The Director will decide which of NASD's hearing locations will be the hearing location for the arbitration. Generally, the Director will select the hearing location closest to the customer's residence at the time of the events giving rise to the dispute.

(2) Before arbitrator lists are sent to the parties under Rule 12403, the parties may agree in writing to a hearing location other than the one selected by the Director.

(3) The Director may change the hearing location upon motion of a party, as set forth in Rule 12503.

(4) After the panel is appointed, the panel may decide a motion relating to changing the hearing location.

#### **(b) Foreign Hearing Location**

(1) If the Director and all parties agree, parties may have their hearing in a foreign hearing location and conducted by foreign arbitrators, provided that the foreign arbitrators have:

(A) met NASD background qualifications for arbitrators;

(B) received training on NASD arbitration rules and procedures; and

(C) satisfied at least the same training and testing requirements as those arbitrators who serve in U. S. locations of NASD.

(2) The parties shall pay an additional surcharge for each day of hearings held in a foreign hearing location. The amount of the surcharge will be determined by the Director and must be agreed to by the parties before the foreign hearing location may be used. This surcharge shall be specified in the agreement to use a foreign hearing location and shall be apportioned equally among the parties, unless they agree otherwise. The foreign arbitrators shall have the authority to apportion this surcharge as provided in Rule 12902(c).

#### **12214. Payment of Arbitrators**

(a) Except as provided in paragraph (b) and in Rule 12800, NASD will pay the panel an honorarium, as follows:

- \$200 to each arbitrator for each hearing session in which he or she participates;
- an additional \$75 per day to the chairperson for each hearing on the merits;
- \$50 for travel to a hearing session that is postponed pursuant to Rule 12601; and
- \$100 for each arbitrator if a hearing session other than a prehearing conference is postponed within three business days before a scheduled hearing session pursuant to Rules 12601(a)(2) and (b)(2).

(b) The Director may authorize a higher or additional honorarium for the use of a foreign hearing location.

(c) Payment for Deciding Discovery-Related Motions Without a Hearing Session

(1) NASD will pay each arbitrator an honorarium of \$200 to decide a discovery-related motion without a hearing session. This paragraph does not apply to cases administered under Rule 12800.

(2) For purposes of paragraph (c)(1), a discovery-related motion and any replies or other correspondence relating to the motion shall be considered to be a single motion.

(3) The panel will allocate the cost of the honoraria under paragraph (c)(1) to the parties pursuant to Rules 12902(c).

### **PART III INITIATING AND RESPONDING TO CLAIMS**

#### **12300. Filing and Serving Documents**

(a) Initial statements of claim must be filed with the Director, with enough copies for each other party and each arbitrator. The number of arbitrators is determined in accordance with Rule 12401. The Director will serve the statement of claim on the other parties, and send copies of the statement of claim to each arbitrator.

(b) The parties must serve all other pleadings and other documents directly on each other party. Parties must serve all pleadings on all parties at the same time and in the same manner, unless the parties agree otherwise.

(c) Unless the Code provides otherwise, parties must also file all pleadings and other documents with the Director, with additional copies for each arbitrator. Pleadings and other documents must be filed with the Director at the same time and in the same manner in which they are served on the other parties. Parties filing pleadings and other documents with the Director must include a certificate of service stating the names of the parties served, the date and method of service, and the address(es) to which service was made.

(d) Pleadings and other documents may be filed and served by: first class mail; overnight mail or delivery service; hand delivery; facsimile; or any other method, including electronic mail, that is approved or required by the panel.

(e) Filing and service are accomplished on the date of mailing either by first-class postage prepaid mail or overnight mail service, or, in the case of other means of service, on the date of delivery. Whenever pleadings and other documents must be filed with the Director and served on the other parties, filing and service must occur on the same day and in the same manner, unless the parties agree or the panel directs otherwise.

(f) A party must inform the Director and all other parties in writing of any change of address during an arbitration.

#### **12301. Service on Associated Persons**

(a) The Director will serve the initial statement of claim on an associated person directly at the person's residential address or usual place of abode. If service cannot be completed at the person's residential address or usual place of abode, the Director will serve the initial statement of claim on the associated person at the person's business address.

(b) If a member and a person currently associated with the member are named as respondents to the same arbitration, and the Director cannot complete service as provided in paragraph (a), then the Director may serve the member with the initial statement of claim on behalf of the associated person. If service is made on the member, the member must serve the associated person, even if the member will not be representing the associated person in the arbitration. If the member is not representing the associated person in the arbitration, the member must notify, and provide the associated person's current address to, all parties and the Director.

## **12302. Filing an Initial Statement of Claim**

### **(a) Filing Claim with the Director**

(1) To initiate an arbitration, a claimant must file the following with the Director:

- Signed and dated Uniform Submission Agreement; and
- A statement of claim specifying the relevant facts and remedies requested.

The claimant may include any additional documents supporting the statement of claim.

(2) A claimant may use the online claim notification and filing procedure to complete part of the arbitration claim filing process through the Internet. To commence this process, a claimant may complete a Claim Information Form that can be accessed through [www.nasd.com](http://www.nasd.com). In completing the Claim Information Form, the claimant may attach an electronic version of the statement of claim to the form, provided it does not exceed 50 pages. Once this online form has been completed, an NASD Dispute Resolution Tracking Form will be generated and displayed for the claimant to reproduce as necessary. The claimant shall then file with the Director the rest of the materials required in subparagraph (1) of the rule, along with a hard copy of the NASD Dispute Resolution Tracking Form.

### **(b) Number of Copies**

The claimant must file enough copies of the statement of claim, if it has not been submitted electronically, and the signed Uniform Submission Agreement, and any additional materials, for the Director, each arbitrator and each other party.

### **(c) Fees**

At the time the statement of claim is filed, the claimant must pay all required filing fees.

### **(d) Service by Director**

Unless the statement of claim is deficient under Rule 12307, the Director will send a copy of the Uniform Submission Agreement, the statement of claim, and any additional materials filed by the claimant, to each other party, and to each arbitrator once the panel has been appointed.

**12303. Answering the Statement of Claim**

(a) Respondent(s) must directly serve each other party with the following documents within 45 days of receipt of the statement of claim:

- Signed and dated Uniform Submission Agreement; and
- An answer specifying the relevant facts and available defenses to the statement of claim.

The respondent may include any additional documents supporting the answer to the statement of claim. Parties that fail to answer in the time provided may be subject to default proceedings under Rule 12801.

(b) The answer to the statement of claim may include any counterclaims against the claimant, cross claims against other respondents, or third party claims, specifying all relevant facts and remedies requested, as well as any additional documents supporting such claim. When serving a third party claim, the respondent must provide each new respondent with copies of all documents previously served by any party, or sent to the parties by the Director.

(c) At the same time that the answer to the statement of claim is served on the other parties, the respondent must file copies of the Uniform Submission Agreement, the answer to the statement of claim, and any additional documents, with the Director, with enough copies for the Director and each arbitrator.

(d) If the answer to the statement of claim contains any counterclaims, cross claims or third party claims, the respondent must pay all required filing fees.

**12304. Answering Counterclaims**

(a) A claimant must directly serve any answer to a counterclaim on each other party within 20 days of receipt of the counterclaim. At the same time, the claimant must file the answer to the counterclaim with the Director with additional copies for each arbitrator.

(b) The answer must include the relevant facts and available defenses to the counterclaim. The claimant may include any additional documents supporting the answer to the counterclaim.

**12305. Answering Cross Claims**

(a) A respondent must directly serve an answer to a cross claim on each other party within 20 days from the date that the respondent's answer to the statement of claim is due, or from the receipt of the cross claim, whichever is later. At the same time, the respondent must file the answer to the cross claim with the Director with additional copies for each arbitrator.

(b) The answer must include the relevant facts and available defenses to the cross claim. The respondent may include any additional documents supporting the answer to the cross claim.

### **12306. Answering Third Party Claims**

(a) A party responding to a third party claim must directly serve all other parties with the following documents within 45 days of receipt of the third party claim:

- Signed and dated Uniform Submission Agreement; and
- An answer specifying the relevant facts and available defenses to the third party claim.

The respondent may include any additional documents supporting the answer to the third party claim.

(b) The answer to the third party claim may also include any counterclaims, cross claims, or third party claims, specifying all relevant facts and remedies requested. The answer may also include any additional documents supporting such claim. When serving a third party claim, the respondent must provide each new respondent with copies of all documents previously served by any party, or sent to the parties by the Director.

(c) At the same time that the answer to the third party claim is served on the other parties, the third party respondent must also file copies of the Uniform Submission Agreement, the answer to the third party claim, and any additional documents, with the Director, with additional copies for each arbitrator.

(d) If the answer to the third party claim contains any counterclaim, cross claim or third party claim, the party must also pay all required filing fees.

### **12307. Deficient Claims**

(a) The Director will not serve any claim that is deficient. The reasons a claim may be deficient include the following:

- A Uniform Submission Agreement was not filed by each claimant;
- The Uniform Submission Agreement was not properly signed and dated;
- The Uniform Submission Agreement does not name all parties named in the claim;
- The claimant did not file the correct number of copies of the Uniform Submission Agreement, statement of claim or supporting documents for service on respondents and for the arbitrators;



- The claim does not specify the customer's home address at the time of the events giving rise to the dispute;
- The claim does not specify the claimant's or the claimant's representative's current address; or
- The claimant did not pay all required filing fees, unless the Director deferred the fees.

(b) The Director will notify the claimant in writing if the claim is deficient. If all deficiencies are not corrected within 30 days from the time the claimant receives notice, the Director will close the case without serving the claim, and will not refund any filing fees paid by the claimant.

(c) The panel will not consider any counterclaim, cross claim or third party claim that is deficient. The reasons a counterclaim, cross claim or third party claim may be deficient include the reasons listed in paragraph (a). The Director will notify the party making the counterclaim, cross claim or third party claim of the any deficiencies in writing. If all deficiencies are not corrected within 30 days from the time the party making the counterclaim, cross claim or third party claim receives notice of the deficiency, the panel will proceed with the arbitration as though the deficient counterclaim, cross claim or third party claim had not been made.

#### **12308. Loss of Defenses Due to Untimely or Incomplete Answer**

(a) If a party fails to answer any claim within the time period specified in the Code, the panel may, upon motion, bar that party from presenting any defenses or facts at the hearing, unless the time to answer was extended in accordance with the Code. The party may also be subject to default proceedings under Rule 12801.

(b) If a party answers a claim that alleges specific facts and contentions with a general denial, or fails to include defenses or relevant facts in its answer that were known to it at the time the answer was filed, the panel may bar that party from presenting the omitted defenses or facts at the hearing.

#### **12309. Amending Pleadings**

##### **(a) Before Panel Appointment**

Except as provided in paragraph (c), a party may amend a pleading at any time before the panel has been appointed.

(1) To amend a statement of claim that has been filed but not yet served by the Director, the claimant must file the amended claim with the Director, with additional copies for each arbitrator and each other party. The Director will then serve the amended claim in accordance with Rules 12300 and 12301.

(2) To amend any other pleading, a party must serve the amended pleading on each party. At the same time, the party must file the amended

pleading with the Director, with additional copies for each arbitrator. If a pleading is amended to add a party to the arbitration, the party amending the pleading must provide each new party with copies of all documents previously served by any party, or sent to the parties by the Director.

**(b) After Panel Appointment**

Once a panel has been appointed, a party may only amend a pleading if the panel grants a motion to amend in accordance with Rule 12503. Motions to amend a pleading must include a copy of the proposed amended pleading. If the panel grants the motion to amend, the amended pleading does not need to be re-served on the other parties, the Director, or the panel, unless the panel determines otherwise.

**(c) Amendments to Add Parties**

Once the ranked arbitrator lists are due to the Director under Rule 12404(c), no party may amend a pleading to add a new party to the arbitration until a panel has been appointed and the panel grants a motion to add the party. Motions to add a party after panel appointment must be served on all parties, including the party to be added, and the party to be added may respond to the motion in accordance with Rule 12503 without waiving any rights or objections under the Code.

**(d) Responding to an Amended Pleading**

Any party may file a response to an amended pleading, provided the response is filed and served within 20 days of receipt of the amended pleading, unless the panel determines otherwise.

**12310. Answering Amended Claims**

(a) If a claim is amended before it has been answered, the respondent's original time to answer is extended by 20 days.

(b) If a claim is amended after it has been answered, but before a panel has been appointed, the respondent has 20 days from the time the amended claim is served to serve an amended answer.

(c) If a claim is amended after a panel has been appointed, the respondent has 20 days from the time the respondent receives notice that the panel has granted the motion to amend the claim to serve an amended answer.

(d) The amended answer must be directly served on each other party. At the same time, the amended answer must also be filed with the Director, with additional copies for each arbitrator.

(e) If the amended claim adds a new party to the arbitration, the new party's answer is governed by Rule 12306.

### **12311. Amendments to Amount in Dispute**

If an amended pleading increases the amount in dispute, all filing fees, surcharges and process fees required by the Code will be recalculated based on the new amount in dispute.

### **12312. Multiple Claimants**

(a) One or more parties may join multiple claims together in the same arbitration if the claims contain common questions of law or fact and:

- The claims assert any right to relief jointly and severally; or
- The claims arise out of the same transaction or occurrence, or series of transactions or occurrences.

(b) After all responsive pleadings have been served, claims joined together under paragraph (a) of this rule may be separated into two or more arbitrations by the Director before a panel is appointed, or by the panel after the panel is appointed. A party whose claims were separated by the Director may make a motion to the panel in the lowest numbered case to reconsider the Director's decision.

### **12313. Multiple Respondents**

(a) One or more parties may name one or more respondents in the same arbitration if the claims contain any questions of law or fact common to all respondents and:

- The claims are asserted against the respondents jointly and severally; or
- The claims arise out of the same transaction or occurrence, or series of transactions or occurrences.

(b) After all responsive pleadings have been served, claims joined together under paragraph (a) of this rule may be separated into two or more arbitrations by the Director before a panel is appointed, or by the panel after the panel is appointed. A party whose claims were separated by the Director may make a motion to the panel in the lowest numbered case to reconsider the Director's decision.

### **12314. Combining Claims**

Before ranked arbitrator lists are due to the Director under Rule 12404(c), the Director may combine separate but related claims into one arbitration. Once a panel has been appointed, the panel may reconsider the Director's decision upon motion of a party.

**Part IV            appointment, Disqualification, And Authority of Arbitrators**

**12400. Neutral List Selection System and Arbitrator Rosters**

**(f) Neutral List Selection System**

The Neutral List Selection System is a computer system that generates, on a random basis, lists of arbitrators from NASD's rosters of arbitrators for the selected hearing location for each proceeding. The parties will select their panel through a process of striking and ranking the arbitrators on lists generated by the Neutral List Selection System.

**(b) Arbitrator Rosters**

NASD maintains the following roster of arbitrators:

- A roster of non-public arbitrators as defined in Rule 12100 (p);
- A roster of public arbitrators as defined in Rule 12100 (u); and
- A roster of arbitrators who are eligible to serve as chairperson of a panel as described in paragraph (c). Arbitrators who are eligible to serve as chairperson will also be included in the roster of public arbitrators, but will only appear on one list in a case.

**(c) Eligibility for Chairperson Roster**

In customer disputes, chairpersons must be public arbitrators. Arbitrators are eligible for the chairperson roster if they have completed chairperson training provided by NASD or have substantially equivalent training or experience and:

- Have a law degree and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least two arbitrations administered by a self-regulatory organization in which hearings were held; or
- Have served as an arbitrator through award on at least three arbitrations administered by a self-regulatory organization in which hearings were held.

**12401. Number of Arbitrators**

**(a) Claims of \$25,000 or Less**

If the amount of a claim is \$25,000 or less, exclusive of interest and expenses, the panel will consist of one arbitrator and the claim is subject to the simplified arbitration procedures under Rule 12800.

**(b) Claims of More Than \$25,000 Up To \$50,000**

If the amount of a claim is more than \$25,000 but not more than \$50,000, exclusive of interest and expenses, the panel will consist of one arbitrator unless any party requests a panel of three arbitrators.

**(c) Claims of More Than \$50,000; Unspecified or Non-Monetary Claims**

If the amount of a claim is more than \$50,000, exclusive of interest and expenses, or is unspecified, or if the claim does not request money damages, the panel will consist of three arbitrators, unless the parties agree in writing to one arbitrator.

**12402. Composition of Arbitration Panels**

(a) If the panel consists of one arbitrator, the arbitrator will be a public arbitrator selected from the public chairperson roster, unless the parties agree in writing otherwise.

(b) If the panel consists of three arbitrators, one will be a non-public arbitrator and two will be public arbitrators, one of whom will be selected from the public chairperson roster, unless the parties agree in writing otherwise.

**12403. Generating and Sending Lists to the Parties**

**(a) Generating Lists**

(1) If the panel consists of one arbitrator, the Neutral List Selection System will generate a list of eight public arbitrators from the NASD's chairperson roster.

(2) If the panel consists of three arbitrators, the Neutral List Selection System will generate:

- A list of eight arbitrators from the NASD's non-public arbitrator roster;
- A list of eight arbitrators from the NASD's public arbitrator roster; and
- A list of eight public arbitrators from the NASD's chairperson roster.

(3) If the panel consists of three arbitrators, the Neutral List Selection System will generate the chairperson list first. Chair-qualified arbitrators who were not selected for the chairperson list will be eligible for selection on the public list. An individual arbitrator cannot appear on both the chairperson list and the public list for the same case.

(4) The Neutral List Selection System will exclude arbitrators from the lists based upon current conflicts of interest identified within the Neutral List Selection System.

**(b) Sending Lists to Parties**

(1) The Director will send the lists generated by the Neutral List Selection System to all parties at the same time, within approximately 30 days after the last answer is due. The parties will also receive employment history for the past 10 years and other background information for each arbitrator listed.

(2) If a party requests additional information about an arbitrator, the Director will request the additional information from the arbitrator, and will send any response to all of the parties at the same time. When a party requests additional information, the Director may, but is not required to, toll the time for parties to return the ranked lists under Rule 12404(c).

**12404. Striking and Ranking Arbitrators**

(a) Each separately represented party may strike up to four of the arbitrators from each list for any reason by crossing through the names of the arbitrators. At least four names must remain on each list.

(b) Each separately represented party shall rank all remaining arbitrators on the lists in order of preference, with a “1” indicating the party’s first choice, a “2” indicating the party’s second choice, and so on. Each list of arbitrators must be ranked separately.

(c) The ranked lists must be returned to the Director no more than 20 days after the date upon which the Director sent the lists to the parties. If the Director does not receive a party’s ranked lists within that time, the Director will proceed as though the party did not want to strike any arbitrator or have any preferences among the listed arbitrators.

**12405. Combining Lists**

For each arbitrator classification (public, non-public, and chairperson), the Director will prepare combined ranked lists of arbitrators based on the parties’ numerical rankings, as follows:

- The Director will add the rankings of all claimants together, and the rankings of all respondents together, to produce separate combined ranked lists for the claimants and the respondents.
- The Director will then add the combined rankings of claimants and the respondents together, to produce a single combined ranking number for each arbitrator, excluding all arbitrators stricken by a party.
- The Director will create separate combined ranked lists for each arbitrator classification in cases with both public and non-public arbitrators.

**12406. Appointment of Arbitrators; Discretion to Appoint Arbitrators Not on List**

(a) If the panel consists of one arbitrator, the Director will appoint the highest-ranked available arbitrator from the combined chairperson list.

(b) If the panel consists of three arbitrators, the Director will appoint:

- The highest-ranked available non-public arbitrator from the combined non-public arbitrator list;
- The highest-ranked available public arbitrator from the combined public arbitrator list, and
- The highest-ranked available public arbitrator from the combined chairperson list, who will serve as chairperson of the panel.

(c) If the number of arbitrators available to serve from the combined list(s) is not sufficient to fill an initial panel, the Director will appoint one or more arbitrators of the required classification to complete the panel from names generated randomly by the Neutral List Selection System. If the Director must appoint a non-public arbitrator, the Director may not appoint a non-public arbitrator as defined in Rule 12100 (p)(2) or (3), unless the parties agree otherwise. The Director will provide the parties information about the arbitrators as provided in Rule 12403 and the parties will have the right to challenge the arbitrators as provided in Rule 12410.

(d) Appointment of arbitrators occurs when the Director sends notice to the parties of the names of the arbitrators on the panel. Before making any decision as an arbitrator or attending a hearing session, the arbitrators must execute NASD's arbitrator oath or affirmation.

#### **12407. Additional Parties**

(a) If a party is added to an arbitration after the Director sends the lists generated by the Neutral List Selection System to the parties, but before parties must return the ranked lists to the Director, the Director will send the lists to the newly added party, with employment history for the past 10 years and other background information for each arbitrator listed. The newly added party may rank and strike the arbitrators in accordance with Rule 12404. If the newly added party returns the lists within 20 days after the date upon which the Director sent the lists to the party, the Director will include the new party's lists when combining rankings under Rule 12405. If the Director does not receive the list within that time, the Director will proceed as though the party did not want to strike any arbitrator or have any preference among the listed arbitrators.

(b) Once the ranked lists are due to the Director under Rule 12404, no party may amend a pleading to add a new party to the arbitration until a panel is appointed and grants a motion to add the party. Motions to add a party must be served on all parties, including the party to be added, and the party to be added may respond to the motion in accordance with Rule 12503 without waiving any rights or objections under the Code. If the panel grants the motion to add the party, the newly added party may not strike and rank the arbitrators, but may challenge an arbitrator for cause in accordance with Rule 12410.

**12408. Disclosures Required of Arbitrators**

(a) Before appointing arbitrators to a panel, the Director will notify the arbitrators of the nature of the dispute and the identity of the parties. Each potential arbitrator must make a reasonable effort to learn of, and must disclose to the Director, any circumstances which might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, including:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances with any party, any party's representative, or anyone who the arbitrator is told may be a witness in the proceeding, that are likely to affect impartiality or might reasonably create an appearance of partiality or bias;

(3) Any such relationship or circumstances involving members of the arbitrator's family or the arbitrator's current employers, partners, or business associates; and

(4) Any existing or past service as a mediator.

(b) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in paragraph (a) is a continuing duty that requires an arbitrator who accepts appointment to an arbitration proceeding to disclose, at any stage of the proceeding, any such interests, relationships, or circumstances that arise, or are recalled or discovered.

(c) The Director will inform the parties to the arbitration of any information disclosed to the Director under this rule unless the arbitrator who disclosed the information declines appointment or voluntarily withdraws from the panel as soon as the arbitrator learns of any interest, relationship or circumstance that might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, or the Director removes the arbitrator.

**12409. Arbitrator Recusal**

Any party may ask an arbitrator to recuse himself or herself from the panel for good cause. Requests for arbitrator recusal are decided by the arbitrator who is the subject of the request.

**12410. Removal of Arbitrator by Director**

**(a) Before First Hearing Session Begins**



Before the first hearing session begins, the Director may remove an arbitrator for conflict of interest or bias, either upon request of a party or on the Director's own initiative.

(1) The Director will grant a party's request to remove an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration. The interest or bias must be direct, definite, and capable of reasonable demonstration, rather than remote or speculative. Close questions regarding challenges to an arbitrator by a customer under this rule will be resolved in favor of the customer.

(2) The Director must first notify the parties before removing an arbitrator on the Director's own initiative. The Director may not remove the arbitrator if the parties agree in writing to retain the arbitrator within five days of receiving notice of the Director's intent to remove the arbitrator.

**(b) After First Hearing Session Begins**

After the first hearing session begins, the Director may remove an arbitrator based only on information required to be disclosed under Rule 12408 that was not previously known by the parties. The Director may exercise this authority upon request of a party or on the Director's own initiative. Only the Director or the President of NASD Dispute Resolution may exercise the Director's authority under this paragraph (b).

**12411. Replacement of Arbitrators**

(a) If an arbitrator is removed, or becomes otherwise unable or unwilling to serve, the Director will appoint a replacement arbitrator in accordance with this rule, unless the parties agree in writing to proceed with only the remaining arbitrators.

(b) The Director will appoint as a replacement arbitrator the arbitrator who is the most highly ranked available arbitrator of the required classification remaining on the combined list.

(c) If there are no available arbitrators of the required classification on the consolidated list, the Director will appoint an arbitrator of the required classification to complete the panel from names generated by the Neutral List Selection System. The Director will provide the parties information about the arbitrator as provided in Rule 12403, and the parties shall have the right to object to the arbitrator as provided in Rule 12410.

(d) If the Director must appoint a non-public arbitrator under paragraph (c), the Director may not appoint a non-public arbitrator as defined in Rule 12100(p)(2) or (3), unless the parties agree otherwise.

**12412. Director's Discretionary Authority**

The Director may exercise discretionary authority and make any decision that is consistent with the purposes of the Code to facilitate the appointment of arbitrators and the resolution of arbitrations.

**12413. Jurisdiction of Panel and Authority to Interpret the Code**

The panel has the authority to interpret and determine the applicability of all provisions under the Code. Such interpretations are final and binding upon the parties.

**12414. Determinations of Arbitration Panel**

All rulings and determinations of the panel must be made by a majority of the arbitrators, unless the parties agree, or the Code or applicable law provides, otherwise.

## **PART V      PREHEARING PROCEDURES AND DISCOVERY**

### **12500. Initial Prehearing Conference**

(a) After the panel is appointed, the Director will schedule an Initial Prehearing Conference before the panel, except as provided in paragraph (c) of this rule.

(b) The Initial Prehearing Conference will generally be held by telephone. Unless the parties agree otherwise, the Director must notify each party of the time and place of the Initial Prehearing Conference at least 20 days before it takes place.

(c) At the Initial Prehearing Conference, the panel will set discovery, briefing, and motions deadlines, schedule subsequent hearing sessions, and address other preliminary matters. The parties may agree to forgo the Initial Prehearing Conference only if they jointly provide the Director with the following information, in writing, with additional copies for each arbitrator, before the Initial Prehearing Conference is scheduled to be held:

- A statement that the parties accept the panel;
- Whether any other prehearing conferences will be held, and if so, for each prehearing conference, a minimum of four mutually agreeable dates and times, and whether the chairperson or the full panel will preside;
- A minimum of four sets of mutually agreeable hearing dates;
- A discovery schedule;
- A list of all anticipated motions, with filing and response due dates; and
- A determination regarding whether briefs will be submitted, and, if so, the due date for the briefs and any reply briefs.

### **12501. Other Prehearing Conferences**

(a) A prehearing conference may be scheduled upon the joint request of the parties or at the discretion of the Director. The Director will set the time and place of the prehearing conference and appoint a person to preside.

(b) At a party's request, or at the discretion of the panel, the panel may schedule one or more additional prehearing conferences regarding any outstanding preliminary matters, including:

- Discovery disputes;
- Motions;
- Witness lists and subpoenas;
- Stipulations of fact;

- Unresolved scheduling issues;
- Contested issues on which the parties will submit briefs; and
- Any other matter that will simplify or expedite the arbitration.

(c) The panel will determine the time and place of any additional prehearing conferences. Prehearing conferences will generally be held by telephone. Unless the full panel is required under Rule 12503, prehearing conferences may be held before a single arbitrator, generally the chairperson.

### **12502. Recording Prehearing Conferences**

(a) Except as provided in Rule 12504, prehearing conferences will not be tape-recorded unless the panel determines otherwise, either on its own initiative or upon motion of a party.

(b) If a prehearing conference is tape-recorded, the Director will provide a copy of the tape to any party upon request for a nominal fee.

### **12503. Motions**

#### **(a) Motions**

(1) A party may make motions in writing, or orally during any hearing session. Before making a motion, a party must make an effort to resolve the matter that is the subject of the motion with the other parties. Every motion, whether written or oral, must include a description of the efforts made by the moving party to resolve the matter before making the motion.

(2) Written motions are not required to be in any particular form, and may take the form of a letter, legal motion, or any other form that the panel decides is acceptable. Written motions must be served directly on each other party, at the same time and in the same manner. Written motions must also be filed with the Director, with additional copies for each arbitrator, at the same time and in the same manner in which they are served on the parties.

(3) Except as provided by Rule 12504, written motions must be served at least 20 days before a scheduled hearing, unless the panel decides otherwise.

(4) Motions to amend a pleading after panel appointment pursuant to Rule 12309(b) must be accompanied by copies of the proposed amended pleading when the motion is served on the other parties and filed with the Director. If the panel grants the motion, the amended pleading does not have to be served again, unless the panel determines otherwise. If a party moves to amend a pleading to add a party, the motion must be served on all parties, including the party to be added, and the party to be added may respond to the

motion in accordance with paragraph Rule 12309(c) without waiving any rights or objections under the Code.

**(b) Responding to Motions**

Except as provided by Rule 12504, parties have 10 days from the receipt of a written motion to respond to the motion, unless the moving party agrees to an extension of time, or the Director or the panel decides otherwise. Responses to written motions must be served directly on each other party, at the same time and in the same manner. Responses to written motions must also be filed with the Director, with additional copies for each arbitrator, at the same time and in the same manner in which they are served on the parties.

**(c) Authority to Decide Motions**

(1) The Director decides motions relating to use of the forum under Rule 12203 and removal of an arbitrator under Rule 12410.

(2) Motions relating to combining or separating claims or arbitrations, or changing the hearing location, are decided by the Director before a panel is appointed, and by the panel after the panel is appointed.

(3) Discovery-related motions are decided by one arbitrator, generally the chairperson. The arbitrator may refer such motions to the full panel either at his or her own initiative, or at the request of a party. The arbitrator must refer motions relating to privilege to the full panel at the request of a party.

(4) Motions for arbitrator recusal under Rule 12409 are decided by the arbitrator who is the subject of the request.

(5) The full panel decides all other motions, including motions relating to the eligibility of a claim under Rule 12206, or to decide a claim or arbitration before a hearing under Rule 12504, unless the Code provides or the parties agree otherwise.

**12504. Motions to Decide Claims Before a Hearing on the Merits**

(a) Except as provided in Rule 12206, motions to decide a claim before a hearing are discouraged and may only be granted in extraordinary circumstances.

(b) Motions under this rule must be made in writing. Unless the parties agree or the panel determines otherwise, motions under this rule must be served at least 60 days before a scheduled hearing, and parties have 45 days to respond to the motion.

(c) Motions under this rule will be decided by the full panel. The panel may not grant a motion under this rule unless a prehearing conference on the motion is held, or waived by the parties. Prehearing conferences to consider motions under this rule will be tape-recorded.

(d) The panel may issue sanctions under Rule 12212 if it determines that a party filed a motion under this rule in bad faith.

### **12505. Cooperation of Parties in Discovery**

The parties must cooperate to the fullest extent practicable in the exchange of documents and information to expedite the arbitration.

### **12506. Document Production Lists**

#### **(a) Applicability of Document Production Lists**

When the Director serves the statement of claim, the Director will provide the NASD Discovery Guide and Document Production Lists to the parties. Document Production Lists 1 and 2 describe the documents that are presumed to be discoverable in all arbitrations between a customer and a member or associated person. Other Document Production Lists may also apply, depending on the specific cause(s) of action alleged.

#### **(b) Time for Responding to Document Production Lists**

(1) Unless the parties agree otherwise, within 60 days of the date that the answer to the statement of claim is due, or, for parties added by amendment or third party claim, within 60 days of the date that their answer is due, parties must either:

- Produce to all other parties all documents in their possession or control that are described in the Document Production Lists 1 and 2, and any other Document Production List that is applicable based on the cause(s) of action alleged;
- Identify and explain the reason that specific documents described in Document Production Lists 1 and 2, and any other Document Production List that is applicable based on the cause(s) of action alleged, cannot be produced within the required time, and state when the documents will be produced; or
- Object as provided in Rule 12508.

(2) A party must act in good faith when complying with subparagraph (1) of this rule. "Good faith" means that a party must use its best efforts to produce all documents required or agreed to be produced. If a document cannot be produced in the required time, a party must establish a reasonable timeframe to produce the document.

**(c) Redacted Information**

For purposes of this rule and Rule 12507, if a party redacts any portion of a document prior to production, the redacted pages (or range of pages) shall be labeled “redacted.”

**12507. Other Discovery Requests**

**(a) Making Other Discovery Requests**

(1) Parties may also request additional documents or information from any party by serving a written request directly on the party. Requests for information are generally limited to identification of individuals, entities, and time periods related to the dispute; such requests should be reasonable in number and not require narrative answers or fact finding. Standard interrogatories are generally not permitted in arbitration.

(2) Other discovery requests may be served:

- On the claimant, or any respondent named in the initial statement of claim, 45 days or more after the Director serves the statement of claim; and
- On any party subsequently added to the arbitration, 45 days or more after the statement of claim is served on that party.

At the same time, the party must serve copies of the request on all other parties. Any request for documents or information not described in applicable Document Production Lists should be specific and relate to the matter in controversy.

**(b) Responding to Other Discovery Requests**

(1) Unless the parties agree otherwise, within 60 days from the date a discovery request other than the Document Production Lists is received, the party receiving the request must either:

- Produce the requested documents or information to all other parties;
- Identify and explain the reason that specific requested documents or information cannot be produced within the required time, and state when the documents will be produced; or
- Object as provided in Rule 12508.

(2) A party must act in good faith when complying with subparagraph (1) of this rule. “Good faith” means that a party must use its best efforts to produce all documents or information required or agreed to be produced. If a document

or information cannot be produced in the required time, a party must establish a reasonable timeframe to produce the document or information.

### **12508. Objecting to Discovery; Waiver of Objection**

(a) If a party objects to producing any document described in Document Production Lists 1 or 2, any other applicable Document Production List, or any document or information requested under Rule 12507, it must specifically identify which document or requested information it is objecting to and why. Objections must be in writing, and must be served on all other parties at the same time and in the same manner. Objections should not be filed with the Director. Parties must produce all applicable listed documents, or other requested documents or information not specified in the objection.

(b) Any objection not made within the required time is waived unless the panel determines that the party had substantial justification for failing to make the objection within the required time.

### **12509. Motions to Compel Discovery**

(a) A party may make a motion asking the panel to order another party to produce documents or information if the other party has:

- Failed to comply with Rule 12506 or 12507; or
- Objected to the production of documents or information under Rule 12508.

(b) Motions to compel discovery must be made, and will be decided, in accordance with Rule 12503. Such motions must include the disputed document request or list, a copy of any objection thereto, and a description of the efforts of the moving party to resolve the issue before making the motion.

### **12510. Depositions**

Depositions are strongly discouraged in arbitration. Upon motion of a party, the panel may permit depositions, but only under very limited circumstances, including:

- To preserve the testimony of ill or dying witnesses;
- To accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing;
- To expedite large or complex cases; and
- If the panel determines that extraordinary circumstances exist.



### **12511. Discovery Sanctions**

(a) Failure to cooperate in the exchange of documents and information as required under the Code may result in sanctions. The panel may issue sanctions against any party in accordance with Rule 12212(a) for:

- Failing to comply with the discovery provisions of the Code, unless the panel determines that there is substantial justification for the failure to comply; or
- Frivolously objecting to the production of requested documents or information.

(b) The panel may dismiss a claim, defense or proceeding with prejudice in accordance with Rule 12212(c) for intentional and material failure to comply with a discovery order of the panel if prior warnings or sanctions have proven ineffective.

### **12512. Subpoenas**

(a) To the extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas. Subpoenas for documents or the appearance of witnesses may be issued as provided by law.

(b) If a subpoena is issued, the issuing party must send copies of the subpoena to all other parties at the same time and in the same manner in which the subpoena was issued.

### **12513. Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas**

(a) Upon motion of a party, the panel may order the following without the use of subpoenas:

- The appearance of any employee or associated person of a member of NASD; or
- The production of any documents in the possession or control of such persons or members.

(b) Unless the panel directs otherwise, the party requesting the appearance of witnesses by, or the production of documents from, non-parties under this rule shall pay the reasonable costs of the appearance and/or production.

### **12514. Exchange of Documents and Witness Lists Before Hearing**

#### **(a) Documents and Other Materials**

At least 20 days before the first scheduled hearing date, all parties must provide all other parties with copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced. The

parties should not file the documents with the Director or the arbitrators before the hearing.

**(b) Witness Lists**

At least 20 days before the first scheduled hearing date, all parties must provide each other party with the names and business affiliations of all witnesses they intend to present at the hearing. At the same time, all parties must file their witness lists with the Director, with enough copies for each arbitrator.

**(c) Exclusion of Documents or Witnesses**

Parties may not present any documents or other materials not produced and or any witnesses not identified in accordance with this rule at the hearing, unless the panel determines that good cause exists for the failure to produce the document or identify the witness. Good cause includes the need to use documents or call witnesses for rebuttal or impeachment purposes based on developments during the hearing. Documents and lists of witnesses in defense of a claim are not considered rebuttal or impeachment information and, therefore, must be exchanged by the parties.

**PART VI HEARINGS; EVIDENCE; CLOSING THE RECORD**

**12600. Required Hearings**

(a) Hearings will be held, unless:

- The arbitration is administered under Rule 12800 or Rule 12801;
- The parties agree otherwise in writing; or
- The arbitration has been settled, withdrawn or dismissed.

(g) The panel will decide the time and date of the hearing at the initial prehearing conference or otherwise in another manner.

(c) The Director will notify the parties of the time and place at least 20 days before the hearing begins, unless the parties agree to a shorter time.

**12601. Postponement of Hearings**

**(c) Postponement of Hearings**

**(1) When a Hearing Shall Be Postponed**

A hearing shall be postponed by agreement of the parties.

**(2) When a Hearing May Be Postponed**

A hearing may be postponed:

- By the Director, in extraordinary circumstances;
- By the panel, in its own discretion; or
- By the panel, upon motion of a party. The panel may not grant a motion to postpone a hearing made within 10 days of the date that the hearing is scheduled to begin, unless the panel determines that good cause exists.

**(b) Postponement Fees**

(1) Except as otherwise provided, a postponement fee will be charged for each postponement agreed to by the parties, or granted upon request of one or more parties. The fee will equal the applicable hearing session fee under Rule 12902. The panel may allocate the fee among the party or parties that agreed to or requested the postponement. The panel may also assess part or all of any postponement fees against a party that did not request the postponement, if the panel determines that the non-requesting party caused or contributed to the need for the postponement. The panel may waive the fees.

(2) If a postponement request is made by one or more parties and granted within three business days before a scheduled hearing session, the party or parties making the request shall pay an additional fee of \$100 per arbitrator. If more than one party requests the postponement, the arbitrators shall allocate the \$100 per arbitrator fee among the requesting parties. The arbitrators may allocate all or portion of the \$100 per arbitrator fee to the non-requesting party or parties, if the arbitrators determine that the non-requesting party or parties caused or contributed to the need for the postponement. In the event that a request results in the postponement of consecutively scheduled hearing sessions, the additional fee will be assessed only for the first of the consecutively scheduled hearing sessions. In the event that an extraordinary circumstance prevents a party or parties from making a timely postponement request, arbitrators may use their discretion to waive the fee, provided verification of such circumstance is received.

(3) No postponement fee will be charged if a hearing is postponed:

- Because the parties agree to submit the matter to mediation at NASD;
- By the panel in its own discretion; or
- By the Director in extraordinary circumstances.

**(c) Dismissal of Arbitration Due to Multiple Postponements**

If all parties jointly request, or agree to, more than two postponements, the panel may dismiss the arbitration without prejudice.

**12602. Attendance at Hearings**

The parties and their representatives are entitled to attend all hearings. Absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings. The panel will decide who else may attend any or all of the hearings.

**12603. Failure to Appear**

If a party fails to appear at a hearing after having been notified of the time, date and place of the hearing, the panel may determine that the hearing may go forward, and may render an award as though all parties had been present.

**12604. Evidence**

(a) The panel will decide what evidence to admit. The panel is not required to follow state or federal rules of evidence.

(b) Production of documents in discovery does not create a presumption that the documents are admissible at the hearing. A party may state objections to the introduction of any document as evidence at the hearing to the same extent that any other objection may be raised in arbitration.

**12605. Witness Oath**

All witnesses must testify under oath or affirmation.

**12606. Record of Proceedings**

**(a) Tape Recording**

(1) Except as provided in paragraph (b), the Director will make a tape recording of every hearing. The Director will provide a copy of the tape to any party upon request for a nominal fee.

(2) The panel may order the parties to provide a transcription of the tape recording. If the panel orders a transcription, copies of the transcription must be provided to each arbitrator and each party. The panel will determine which party or parties must pay the cost of making the transcription and copies.

(3) The tape recording is the official record of the proceeding, even if it is transcribed.

**(b) Stenographic Record**

(1) Any party may make a stenographic record of the hearing. Even if a stenographic record is made, the tape recording will be the official record of the proceeding, unless the panel determines otherwise. If the panel determines in advance that the stenographic record will be the official record, the Director will not make a tape recording.

(2) If the stenographic record is the official record of the proceeding, a copy must be provided to the Director, each arbitrator, and each other party. The cost of making and copying the stenographic record will be borne by the party electing to make the stenographic record, unless the panel decides that one or more other parties should bear all or part of the costs.

**12607. Order of Presentation of Evidence and Arguments**

Generally, the claimant shall present its case, followed by the respondent's defense. The panel has the discretion to vary the order in which the hearing is conducted, provided that each party is given a fair opportunity to present its case.

**12608. Closing the Record**

(a) The panel will decide when the record is closed. Once the record is closed, no further submissions will be accepted from any party.

(b) In cases in which no hearing is held, the record is presumed to be closed when the Director sends the pleadings to the panel, unless the panel requests, or agrees to accept, additional submissions from any party. If so, the record is presumed to be closed when the last such submission is due.

(c) In cases in which a hearing is held, the panel will generally close the record at the end of the last hearing session, unless the panel requests, or agrees to accept, additional submissions from any party. If so, the panel will inform the parties when the submissions are due and when the record will close.

**12609. Reopening The Record**

The panel may reopen the record on its own initiative or upon motion of any party at any time before the award is rendered, unless prohibited by applicable law.

## **PART VII      TERMINATION OF AN ARBITRATION BEFORE AWARD**

### **12700. Dismissal of Proceedings Prior to Award**

(a) The panel must dismiss an arbitration or a claim at the joint request of the parties to that arbitration or claim. The dismissal will be with or without prejudice, depending on the request of the parties.

(b) The panel may dismiss a claim or an arbitration:

- Upon motion of a party under Rule 12206 or Rule 12504; or
- On its own initiative under Rule 12212(c) or Rule 12601(c).

### **12701. Settlement**

(a) Parties to an arbitration may agree to settle their dispute at any time. Parties who settle must notify the Director. The Director will continue to administer the arbitration, and fees may continue to accrue, until the Director receives written notice of the settlement. The parties do not need to disclose the terms of the settlement agreement to the Director or to NASD Dispute Resolution, but members and associated persons may have reporting obligations under the rules of NASD.

(b) Settling parties will remain responsible for fees incurred under the Code. If parties to a settlement fail to agree on the allocation of any outstanding fees, those fees will be divided equally among the settling parties, except member surcharges and prehearing and hearing process fees required by the Code, which will remain the responsibility of the member party or parties.

### **12702. Withdrawal of Claims**

(a) Before a claim has been answered by a party, the claimant may withdraw the claim against that party with or without prejudice.

(b) After a claim has been answered by a party, the claimant may only withdraw it against that party with prejudice unless the panel decides, or the claimant and that party agree, otherwise.

**PART VIII SIMPLIFIED ARBITRATION AND DEFAULT PROCEEDINGS**

**12800. Simplified Arbitration**

**(a) Applicability of Rule**

This rule applies to arbitrations involving \$25,000 or less, exclusive of interest and expenses. Except as otherwise provided in this rule, all provisions of the Code apply to such arbitrations.

**(b) Single Arbitrator**

All arbitrations administered under this rule will be decided by a single public arbitrator appointed from the NASD's chairperson roster in accordance with the Neutral List Selection System, unless the parties agree in writing otherwise.

**(c) Hearings**

(1) No hearing will be held in arbitrations administered under this rule unless the customer requests a hearing.

(2) If no hearing is held, no initial prehearing conference or other prehearing conference will be held, and the arbitrator will render an award based on the pleadings and other materials submitted by the parties. If a hearing is held, the regular provisions of the Code relating to prehearings and hearings, including fee provisions, will apply.

**(d) Discovery and Additional Evidence**

(1) Document Production Lists, described in Rule 12506, do not apply to arbitrations subject to this rule. However, the arbitrator may, in his or her discretion, choose to use relevant portions of the Document Production Lists in a manner consistent with the expedited nature of simplified proceedings.

(2) The parties may request documents and other information from each other. All requests for the production of documents and other information must be served on all other parties, and filed with the Director, within 30 days from the date that the last answer is due. Any response or objection to a discovery request must be served on all other parties and filed with the Director within 10 days of the receipt of the requests. The arbitrator will resolve any discovery disputes.

**(e) Increases in Amount in Dispute**

If any pleading increases the amount in dispute to more than \$25,000, the arbitration will no longer be administered under this rule, and the regular provisions of the Code will apply. If an arbitrator has been appointed, that arbitrator will remain on the panel. If a three-arbitrator panel is required or requested under Rule 12401, the remaining arbitrators will be appointed by the Director in accordance with Rule 12406(b). If no arbitrator has been appointed, the entire panel will be appointed in accordance with the Neutral List Selection System.



**(f) Arbitrator Honoraria**

NASD will pay the arbitrator an honorarium of \$125 for each arbitration administered under this rule.

**12801. Default Proceedings**

**(a) Applicability of Rule**

A claimant may request default proceedings against any respondent that falls within one of the following categories and fails to file an answer within the time provided by the Code.

- A member whose membership has been terminated, suspended, canceled, or revoked;
- A member that has been expelled from the NASD;
- A member that is otherwise defunct; or
- An associated person whose registration is terminated, revoked, or suspended.

**(b) Initiating Default Proceedings**

(1) To initiate default proceedings against one or more respondents that fail to file a timely answer, the claimant must notify the Director in writing and must send a copy of the notification to all other parties at the same time and in the same manner as the notification was sent to the Director. If there is more than one claimant, all claimants must agree in writing to proceed under this rule against a defaulting respondent before this rule may be used.

(2) If the Director receives written notice from the claimant and determines that the requirements for proceeding under this rule have been met, the Director will:

- Notify all parties that the claim against the defaulting respondent will proceed under this rule; and
- Appoint a single arbitrator in accordance with the Neutral List Selection System to consider the statement of claim and other documents presented by the claimant.

**(c) Hearings**

No hearing shall be held. The arbitrator may request additional information from the claimant before rendering an award.

**(d) Amendments to Increase Relief Requested**

Claimants may not amend a claim to increase the relief requested from the defaulting respondent after the Director has notified the parties that the claim will proceed under this rule.

**(e) Awards**

(1) The arbitrator may not issue an award based solely on the nonappearance of a party. Claimants must present a sufficient basis to support the making of an award. The arbitrator may not award damages in an amount greater than the damages requested in the statement of claim, and may not award any other relief that was not requested in the statement of claim.

(2) The default award shall have no effect on any non-defaulting party.

**(f) Respondent's Answer**

If a defaulting respondent files an answer after the Director has notified the parties that the claim against that respondent will proceed under this rule but before an award has been issued, the proceedings against that respondent under this rule will be terminated and the claim against that respondent will proceed under the regular provisions in the Code.

**PART IX FEES AND AWARDS**

**12900. Fees Due When a Claim Is Filed**

**(a) Fees for Claims Filed by Customers, Associated Persons and Other Non-Members**

(1) Customers, associated persons, and other non-members who file a claim, counterclaim, cross claim or third party claim must pay a filing fee in the amount indicated in the schedule below. The Director may defer payment of all or part of the filing fee on a showing of financial hardship. If payment of the fee is not deferred, failure to pay the required amount will result in a deficiency under Rule 12307.

**Filing Fees for Claims Filed by Customers, Associated Persons, and Other Non-Members**

<b><u>Amount of Claim</u> (exclusive of interest and expenses)</b>	<b><u>Filing Fee</u></b>
\$.01 to \$1,000	\$50
\$1,000.01 to \$2,500	\$75
\$2,500.01 to \$5,000	\$175
\$5,000.01 to \$10,000	\$325
\$10,000.01 to \$25,000	\$425
\$25,000.01 to \$50,000	\$600
\$50,000.01 to \$100,000	\$975
\$100,000.01 to \$500,000	\$1,425
\$500,000.01 to \$1 million	\$1,575
Over \$ 1 million	\$1,800
Non-Monetary/Not Specified	\$1,250

(2) If the claim does not request or specify money damages, the Director may determine that the filing fee should be more or less than the amount specified in the schedule above, but in any event, the amount of the filing fee may not be less than \$50 or more than \$1,800.

**(b) Fees for Claims Filed by Members**

(1) Members filing a claim, counterclaim, cross claim, or third party claim must pay a filing fee in the amount indicated in the schedule below. Failure to pay the required amount will result in a deficiency under Rule 12307.

**Fees for Claims Filed by Members**

<b><u>Amount of Claim</u></b> <b>(exclusive of interest and expenses)</b>	<b><u>Filing Fee</u></b>
\$.01 to \$1,000	\$225
\$1,000.01 to \$2,500	\$350
\$2,500.01 to \$5,000	\$525
\$5,000.01 to \$10,000	\$750
\$10,000.01 to \$25,000	\$1,050
\$25,000.01 to \$50,000	\$1,450
\$50,000.01 to \$100,000	\$1,750
\$100,000.01 to \$500,000	\$2,125
\$500,000.01 to \$1,000,000	\$2,450
\$1,000,000.01 to \$5,000,000	\$3,200
Over \$5,000,000	\$3,700
Non-Monetary/Not Specified	\$1,500

(2) If the claim does not request or specify money damages, the Director may determine that the filing fee should be more or less than the amount specified in the schedule above, but in any event, the filing fee may not be less than \$225 or more than \$3,700.

**(c) Partial Refund of Filing Fee**

(1) If a claim is settled or withdrawn more than 10 days before the date that the hearing on the merits under Rule 12600 is scheduled to begin, a party paying a filing fee will receive a partial refund of the filing fee in the amount indicated in the schedule below, less any other fees or costs assessed against the party under the Code, including any hearing session fees assessed under Rule 12902. No refund will be paid if the NASD receives notice that a claim is settled or withdrawn within 10 days of the date that the hearing on the merits under Rule 12600 is scheduled to begin.

**Partial Refund for Settlement or Withdrawal****More Than 10 Days Before Hearing on the Merits**

<b><u>Amount of Claim</u></b> <b>(exclusive of interest and expenses)</b>	<b><u>Refund</u></b>
\$.01 to \$1,000	\$25
\$1,000.01 to \$2,500	\$50
\$2,500.01 to \$5,000	\$125
\$5,000.01 to \$10,000	\$250
\$10,000.01 to \$25,000	\$300
\$25,000.01 to \$50,000	\$450
\$50,000.01 to \$100,000	\$750

\$100,000.01 to \$500,000	\$1,125
Over \$500,000	\$1,200
Non-monetary/Not specified	\$1,000

(2) If the claim does not request or specify money damages, and the Director determines that the hearing session fee should be a different amount than the amount specified in the schedule in Rule 12902, the amount of the refund will be the amount of the hearing session fee determined by the Director, less any fees or costs assessed against the party under the Code, including any hearing session fees assessed under Rule 12902.

(d) Reimbursement of Filing Fees

In the award, the panel may order a party to reimburse another party for all or part of any filing fee paid.

**12901. Member Surcharge**

**(a) Member Surcharge**

(1) A surcharge in the amount indicated in the schedule below will be assessed against each member that:

- Files a claim, counterclaim, cross claim, or third party claim under the Code;
- Is named as a respondent in a claim, counterclaim, cross claim, or third party claim filed and served under the Code; or
- Employed, at the time the dispute arose, an associated person who is named as a respondent in a claim, counterclaim, cross claim, or third party claim filed and served under the Code.

**Member Surcharge**

<b><u>Amount in Dispute</u></b> <b>(exclusive of interest</b> <b>and expenses)</b>	<b><u>Surcharge</u></b>
Up to \$2,500	\$150
\$2,500.01 - \$5,000	\$200
\$5,000.01 - \$10,000	\$325
\$10,000.01 - \$25,000	\$425
\$25,000.01 - \$30,000	\$600
\$30,000.01 - \$50,000	\$875
\$50,000.01 - \$100,000	\$1,100
\$100,000.01 - \$500,000	\$1,700
\$500,000.01 - \$1,000,000	\$2,250
\$1,000,000.01 - \$5,000,000	\$2,800
\$5,000,000.01 - \$10,000,000	\$3,350
Over \$10,000,000	\$3,750

Non-Monetary/Not Specified \$1,500

(2) If the claim does not request or specify money damages, the Director may determine that the member surcharge should be more or less than the amount specified in the schedule above, but in any event the amount of the member surcharge may not be less than \$150 or more than \$3,750.

(3) If the claim is filed by the member, the surcharge is due when the claim is filed. If the claim is filed against the member, or against an associated person employed by the member at the time of the events giving rise to the dispute, the surcharge is due when the claim is served in accordance with Rule 12300.

(4) No member shall be assessed more than a single surcharge in any arbitration. The panel may not reallocate a surcharge paid by a member to any other party.

**(b) Refund of Member Surcharge**

(1) The Director will refund the surcharge paid by a member in an arbitration filed by a customer if the panel:

- Denies all of a customer’s claims against the member or associated person; and
- Allocates all fees assessed pursuant to Rule 12902(a) against the customer.

(2) The Director may also refund or waive the member surcharge in extraordinary circumstances.

**12902. Hearing Session Fees, and Other Costs and Expenses**

**(c) Hearing Session Fees**

(1) Hearing session fees will be charged for each hearing session. The total amount chargeable to the parties for each hearing session is based on the amount in dispute, as specified in the schedule below. In the award, the panel will determine the amount of each hearing session fee that each party must pay.

**Hearing Session Fees**

<b>Amount of Claim</b>	<b>Hearing Session W/ One Arbitrator</b>	<b>Hearing Session W/ Three Arbitrators</b>
Up to \$2,500	\$ 50	N/A
\$2,500.01 to \$5,000	\$ 125	N/A
\$5,000.01 to \$10,000	\$ 250	N/A
\$10,000.01 to \$25,000	\$ 450	N/A
\$25,000.01 to \$50,000	\$ 450	\$600

\$50,000.01 to \$100,000	\$ 450	\$750
\$100,000.01 to \$500,000	\$ 450	\$1,125
Over \$500,000	\$ 450	\$1,200
Unspecified Damages	N/A	\$1,000

(2) If the claim does not request or specify money damages, the Director may determine that the hearing session fee should be more or less than the amount specified in the schedule above, but in any event the hearing session fee shall not be less than \$50 or more than \$1,200 for each hearing session.

(3) If there is more than one claim in a proceeding, the amount of hearing session fees will be based on the largest claim in the proceeding. If any claims are joined or combined under Rules 12312, 12313, or 12314, the amount of those claims will be aggregated and they will be treated as one claim for purposes of this paragraph.

(4) If hearing session fees are allocated against a customer in connection with a claim filed by a member or associated person, the amount of hearing session fees the customer must pay must be based on the amount actually awarded to the member or associated person, rather than on the amount claimed by the member or associated person. No hearing session fees may be assessed against a customer in connection with a claim filed by a member that is dismissed.

**(d) Payment of Hearing Session Fees**

(1) The panel may assess the hearing session fees in the award, or may require the parties to pay hearing session fees during the course of the arbitration. The total amount that the panel may require the parties to pay for each hearing session during the course of an arbitration may not exceed the total amount chargeable to the parties for each hearing session under the schedule to paragraph (a) of this rule.

(2) Any interim hearing session fee payments made by a party under this rule will be deducted from the total amount of hearing session fees assessed against that party in the award. If the amount of interim payments is more than the amount assessed against the party in the award, the balance will be refunded to that party.

(3) In the award, the amount of one hearing session fee will be deducted from the total amount of hearing session fees assessed against the party who paid the filing fee. If this amount is more than any fees, costs, and expenses assessed against this party under the Code, the balance will be refunded to the party.

**(c) Assessment of Other Costs and Expenses in Award**

In its award, the panel must also determine the amount of any costs and expenses incurred by the parties under the Code or that are within the scope of the agreement of the parties, and which party or parties will pay those costs and expenses.

(d) Assessment of Hearing Session Fees, Costs, and Expenses in Case of Settlement or Withdrawal

If a claim is settled or withdrawn:

- The parties will be subject to an assessment of hearing session fees for hearing sessions already held.
- If NASD receives a settlement or withdrawal notice 10 days or fewer prior to the date that the hearing on the merits under Rule 12600 is scheduled to begin, parties that paid a filing fee under Rule 12900 will not be entitled to any refund of the filing fee.
- The parties will also be responsible for any fee or costs incurred under Rules 12502, 12513, 12601, or 12606 in connection with such hearings. If a case is settled or withdrawn and the parties' agreement fails to allocate such fees and costs, the fees and costs will be allocated as provided by Rule 12701(b).

**(e) Refund Payments**

Any refunds of fees or costs incurred under the Code will be paid directly to the named parties, even if a non-party made a payment on behalf of the named parties.

**12903. Process Fees Paid by Members**

(a) Each member that is a party to an arbitration in which more than \$25,000, exclusive of interest and expenses, is in dispute must pay:

- A non-refundable prehearing process fee of \$750, due at the time the parties are sent arbitrator lists in accordance with Rule 12403(b); and
- A non-refundable hearing process fee, due when the parties are notified of the date and location of the hearing on the merits under Rule 12600, as set forth in the schedule below.

**Hearing Process Fee Schedule**

<b><u>Amount of Claim</u></b> <b>(exclusive of interest and expenses)</b>	<b><u>Hearing Process Fee</u></b>
\$1 - \$25,000	\$ 0
\$25,000.01 - \$50,000	\$1,000
\$50,000.01 - \$100,000	\$1,700
\$100,000.01 - \$500,000	\$2,750
\$500,000.01 - \$1,000,000	\$4,000
\$1,000,000.01 - \$5,000,000	\$5,000
More than \$5,000,000	\$5,500



Non-Monetary/Not Specified

\$2,200

(b) If an associated person of a member is a party, the member that employed the associated person at the time the dispute arose will be charged the process fees, even if the member is not a party. No member shall be assessed more than one prehearing and one hearing process fee in any arbitration.

(c) The panel may not reallocate to any other party any prehearing and hearing process fees paid by a member.

#### **12904. Awards**

(a) All awards shall be in writing and signed by a majority of the arbitrators or as required by applicable law. Such awards may be entered as a judgment in any court of competent jurisdiction.

(b) Unless the applicable law directs otherwise, all awards rendered under the Code are final and are not subject to review or appeal.

(c) The Director will serve a copy of the award on each party or the representative of the party. The Director will serve the award by using any method available and convenient to the parties and the Director, and that is reasonably expected to cause the award to be delivered to all parties, or their representative, on the same day. Methods the Director may use include, but are not limited to, first class, registered or certified mail, hand delivery, and facsimile or other electronic transmission.

(d) The panel shall endeavor to render an award within 30 business days from the date the record is closed.

(e) The award shall contain the following:

- The names of the parties;
- The name of the parties' representatives, if any;
- An acknowledgement by the arbitrators that they have each read the pleadings and other materials filed by the parties;
- A summary of the issues, including the type(s) of any security or product, in controversy;
- The damages and other relief requested;
- The damages and other relief awarded;
- A statement of any other issues resolved;
- The allocation of forum fees and any other fees allocable by the panel;

- The names of the arbitrators;
- The dates the claim was filed and the award rendered;
- The number and dates of hearing sessions;
- The location of the hearings; and
- The signatures of the arbitrators.

(f) The award may contain a rationale underlying the award.

(g) All awards shall be made publicly available.

(h) Fees and assessments imposed by the arbitrators under the Code shall be paid immediately upon the receipt of the award by the parties. Payment of such fees shall not be deemed ratification of the award by the parties.

(i) All monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. An award shall bear interest from the date of the award:

- If not paid within 30 days of receipt;
- If the award is the subject of a motion to vacate which is denied; or
- As specified by the panel in the award.

Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).

On October 15, 2003, NASD filed SR-NASD-2003-158 to reorganize the customer portion of the NASD Code of Arbitration Procedure (Code), simplify the language, codify current practices, and implement several substantive changes. NASD filed Amendment No. 1 to the proposed rule change on January 3, 2005. Amendment No. 2 was filed on January 19, 2005, and Amendment No. 3 on April 8, 2005. Amendment No. 4, which was a partial amendment, was filed on June 10, 2005.

NASD is filing this partial Amendment No. 5 to make the following changes to the rule filing:

1. On page 4 of Amendment No. 3, under "Procedures of the Self Regulatory Organization," please amend the second paragraph as follows (new language is underlined, deletions in brackets):

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. Once approved, the Customer Code will apply to: 1) all claims filed on or after the effective date, and 2) all claims in which a new or amended list of arbitrators has not been generated and sent to the parties. Under the first criterion, if a claim is filed on or after the effective date of the Customer Code, the Customer Code will govern all aspects of the arbitration.

Under the second criterion, if a claim was filed before the effective date, but the initial or amended list has not been generated and sent to parties by the effective date, the Customer Code will govern the list selection process only, including appointment, removal, and replacement, if necessary. The current Code will control the remaining aspects of the arbitration, unless all the parties agree in writing to permit the claims to be governed by the Customer Code in its entirety (except for provisions that would be moot as a result of the status of the case). For cases in which a list was generated under the current Code, but a completely new list is required to be sent to the parties after the effective date of the Customer Code, the subsequent, new list will be generated under the Customer Code.<sup>145</sup> The current Code will continue to control the remaining aspects of the arbitration, unless the parties agree otherwise.

NASD believes that using list generation as the event for determining the effective dates of certain provisions of the Customer Code is consistent with the approach taken when the Neutral List Selection System (NLSS) was introduced and approved in 1998.<sup>146</sup> At that time, NASD made list selection changes effective based on the status of list preparation. NASD believes that a similar approach is appropriate under the current proposal, because it will provide the benefits of the new list selection method to the greatest number of parties as

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<sup>145</sup> For example, if a panel ordered a change of venue after the effective date of the Customer Code, the new list would be generated under the Customer Code, even if the original list were generated under the Code.

<sup>146</sup> See File No. SR-NASD-98-48, Amendment No. 4 to the Proposed Rule Change Relating to the Selection of Arbitrators in Arbitrations Involving Public Customers.

quickly as possible. Moreover, NASD is planning to activate MATRICS,<sup>147</sup> a Web-based arbitration case management system, to implement the provisions of the Customer Code. Once MATRICS becomes operational, the current version of NLSS will no longer be functional; thus, it will not be possible to generate lists of arbitrators using the provisions of the current Code. For these reasons, NASD believes that the proposed effective date criteria for the Customer Code represent the most efficient way to implement the proposal without disrupting the arbitration process for the parties, arbitrators or staff.

2. On pages 26-27 and 57-58 of Amendment No. 3, under “Dispositive Motions (Proposed Rule 12504),” please amend the second paragraph as follows (new language is underlined, deletions in brackets):

Generally, NASD believes that parties have the right to a hearing in arbitration. However, NASD also acknowledges that in certain extraordinary circumstances it would be unfair to require a party to proceed to a hearing. Specifically, the proposed rule would:

- Provide that, except for motions relating to the eligibility of claims under the Code’s six year time limit, motions that would resolve a claim before a hearing on the merits are discouraged, and may only be granted in extraordinary circumstances;
- Require that a prehearing conference before the full panel must be held to discuss the motion before the panel could grant it; and
- Allow the panel to issue sanctions against a party for making a dispositive motion in bad faith.

For purposes of this rule, if a party demonstrates affirmatively the legal defenses of, for example, accord and satisfaction, arbitration and award, settlement and release, or the running of an applicable statute of repose, the panel may consider these defenses to be extraordinary circumstances. In such cases, the panel may dismiss the arbitration claim before a hearing on the merits if the panel finds that there are no material facts in dispute concerning the defense raised, and there are no determinations of credibility to be made concerning the evidence presented.

NASD believes that this rule proposal, which was developed over several years with input from [industry and] public, industry, and arbitrator/mediator members of the NAMC, will provide necessary guidance to parties and arbitrators, and make the administration of arbitrations more uniform and transparent. NASD believes that the rule strikes the appropriate balance between allowing the dismissal of

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<sup>147</sup> NASD Dispute Resolution is upgrading its computer technology platform, in what is known as the MATRICS Computer Project. MATRICS stands for Mediation and Arbitration Tracking and Retrieval Interactive Case System. MATRICS will replace two legacy case management systems: CRAFTIS and NLSS. CRAFTIS is the legacy software application that NASD Dispute Resolution uses to support its case administration functions. It uses an old technology platform and is not Web-based. NLSS is the computer program NASD Dispute Resolution uses to appoint arbitrators.

claims in limited, extraordinary circumstances and reinforcing the general principle that parties are entitled to a hearing in arbitration.

3. On pages 34, 64 and 65 of Amendment No. 3, please make the following changes:

On page 34, under “Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)” (new language is underlined, deletions in brackets):

[Not applicable.]

NASD requests that the Commission find good cause pursuant to Section 19(b)(2) for approving the proposed rule change prior to the 30th day after its publication in the Federal Register. NASD believes that the proposed changes in Amendment No. 5 are nonsubstantive because they do not change the purpose or intent of the proposed rules. The proposed changes address issues raised by commenters and will make the Customer Code easier to understand and use, thereby making the arbitration process more transparent for parties. Moreover, NASD believes that the proposed changes will provide additional guidance to parties, arbitrators and staff concerning the procedures of its forum, which should result in the efficient and economical administration of claims.

For the reasons above, and because NASD believes the proposed changes do not significantly affect the protection of investors or the public interest or impose any significant burden on competition, NASD requests the Commission to accelerate the effectiveness of the proposed rule change prior to the 30th day after its publication in the Federal Register.

On page 64, under Section III, “Date Of Effectiveness Of The Proposed Rule Change And Timing For Commission Action,” insert the following as the first paragraph (new language is underlined, deletions in brackets):

NASD has requested that the Commission find good cause pursuant to Section 19(b)(2) for approving the proposed rule change prior to the 30th day after publication in the Federal Register. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the NASD and, in particular, the requirements of Section 15A and the rules and regulations thereunder. The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of notice of filing thereof in that accelerated approval will benefit users of NASD’s arbitration forum. First, the proposed changes in Amendment No. 5 are nonsubstantive because they do not change the purpose or intent of the proposed rules. Second, the proposed changes address issues raised by commenters and will make the Customer Code easier to understand and use, thereby making the arbitration process more transparent for parties. Last, the proposed changes provide additional guidance to parties, arbitrators and staff concerning the procedures of its forum, which should result in the efficient and economical administration of claims.

On page 65, under Section IV, "Solicitation of Comments," insert the following sentence as the penultimate paragraph of the section (new language is underlined, deletions in brackets):

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change be, and hereby is, approved.