

Notice to Members

DECEMBER 2005

SUGGESTED ROUTING

Legal and Compliance

GUIDANCE

NASD Code of Arbitration Procedure Mediation Rules

SEC Approves a Proposed Rule Change to Revise the
Mediation Rules of the NASD Code of Arbitration
Procedure; **Effective January 30, 2006**

KEY TOPICS

Code of Arbitration Procedure
Mediation

Executive Summary

The Securities and Exchange Commission (SEC) has approved a proposed rule change to revise the mediation rules of the NASD Code of Arbitration Procedure (Code) to simplify the language and to reorganize these rules into a separate code for mediations (Mediation Code).¹

The text of the amendment is set forth in Attachment A. The amendment will become effective on January 30, 2006 and will apply to any matters filed in mediation with NASD on or after January 30, 2006.

Questions/Further Information

Questions regarding this *Notice* may be directed to Mignon McLemore, Assistant Chief Counsel, NASD Dispute Resolution, at (202) 728-8151 or mignon.mclemore@nasd.com; or Kenneth Andrichik, Senior Vice President and Director of Mediation and Business Strategies, Dispute Resolution, NASD, at (212) 858-3915 or ken.andrichik@nasd.com.

Background and Discussion

The revision of the mediation rules is part of a comprehensive plan to reorganize and simplify the Code. NASD has proposed to reorganize its dispute resolution rules in a more logical, user-friendly way, including creating two separate Codes for customer and industry arbitrations,² and one for mediations. The proposed rule change establishes a separate Mediation Code by rewriting the mediation rules using plain English, in accordance with the SEC's

plain English guidelines.³

NASD did not make any substantive changes to its current rules governing mediations in the proposed rule change. The Mediation Code does, however, contain a new comprehensive definitions rule, which includes definitions of terms used throughout the Mediation Code. NASD believes that this addition to the Mediation Code will provide useful clarification for parties and mediators. There are no substantive changes to the Mediation Code, and the procedures for filing a matter in mediation remain unchanged.

Effective Date Provisions

The amendment described in this Notice will become effective on January 30, 2006. The amendment will apply to any matters filed in mediation with NASD on or after January 30, 2006.

Endnotes

- 1 Exchange Act Release No. 52705 (Oct. 31, 2005) (File No. SR-NASD-2004-013), 70 Federal Register 67525 (Nov. 7, 2005).
- 2 NASD has filed two proposed rule changes with the SEC to revise the Customer and Industry Portions of the Code. See Securities Exchange Act Rel. No. 34-51856 (June 15, 2005); 70 Fed. Reg. 36442 (June 23, 2005) (Customer Code) and Securities Exchange Act Rel. No. 34-51857

(June 15, 2005); 70 Fed. Reg. 36430 (June 23, 2005) (Industry Code).

- 3 NASD intends to renumber the rules in the Mediation Code to be consistent with the Customer Code and Industry Code when they are approved and become effective.

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ATTACHMENT A

New language is underlined; deletions in brackets.

Code of Arbitration Procedure

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[10400 – 10407 Mediation Rules] – (Deleted in their entirety.)

10400. NASD CODE OF MEDIATION PROCEDURE

10401. Definitions

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.

(a) Board

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

(b) Code

The term “Code” means the NASD Code of Mediation Procedure.

(c) Director

The term “Director” in the Rule 10400 Series refers to the Director of Mediation at NASD Dispute Resolution. Unless the Code or any other NASD rule provides otherwise, the term includes NASD staff to whom the Director of Mediation has delegated authority.

(d) Matter

The term “matter” means a dispute, claim, or controversy.

(e) NAMC

The term “NAMC” means the National Arbitration and Mediation Committee of the Board of Directors of NASD Dispute Resolution, Inc.

(f) NASD

Unless the Code specifies otherwise, the term “NASD” includes NASD, Inc., and NASD Dispute Resolution, Inc.

(g) Reserved.

(h) Reserved.

(i) Submission Agreement

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

10402. Applicability of Code

The Code applies to any matter submitted to mediation at NASD.

10403. 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 ten 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 this Code.

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

10404. Director of Mediation

The Board shall appoint a Director of Mediation to administer mediations under the Code. The Director will consult with the NAMC on the administration of mediations, as necessary.

The Director may delegate his or her duties when appropriate, unless the Code provides otherwise.

10405. Mediation Under the Code

(a) Mediation under the Code is voluntary, and requires the written agreement of all parties. No party may be compelled to participate in a mediation or to settle a matter by NASD, or by any mediator appointed to mediate a matter pursuant to the Code.

(b) If all parties agree, any matter that is eligible for arbitration under the NASD Code of Arbitration Procedure, or any part of any such matter, or any dispute related to such matter, including procedural issues, may be submitted for mediation under the Code.

(c) A matter is submitted to mediation when the Director receives an executed Submission Agreement from each party.

(d) The Director shall have the sole authority to determine if a matter is eligible to be submitted for mediation.

10406. Effect of Mediation on Arbitration Proceedings

(a) Unless the parties agree otherwise, the submission of a matter for mediation will not stay or otherwise delay the arbitration of a matter pending at NASD. If all parties agree to stay an arbitration in order to mediate the matter, the arbitration will be stayed, notwithstanding any provision to the contrary in this Code or any other NASD rule.

(b) If mediation is conducted through NASD, no adjournment fees will be charged for staying the arbitration in order to mediate.

10407. Mediator Selection

(a) A mediator may be selected:

- By the parties from a list supplied by the Director;
- By the parties from a list or other source of their own choosing; or
- By the Director if the parties do not select a mediator after submitting a matter to mediation.

(b) For any mediator assigned or selected from a list provided by NASD, the parties will be provided with information relating to the mediator's employment, education, and professional background, as well as information on the mediator's experience, training, and credentials as a mediator.

(c) Any mediator selected or assigned to mediate a matter shall comply with the provisions of Rule 10312(a), (b), and (c) of the NASD Code of Arbitration Procedure, unless, with respect to a mediator selected from a source other than a list provided by NASD, the parties elect to waive such disclosure.

(d) No mediator may serve as an arbitrator of any matter pending in NASD arbitration in which he served as a mediator; nor may the mediator represent any party or participant to the mediation in any subsequent NASD arbitration relating to the subject matter of the mediation.

10408. Limitation on Liability

NASD, its employees, and any mediator named to mediate a matter under the Code shall not be liable for any act or omission in connection with a mediation administered under the Code.

10409. Mediation Ground Rules

(a) The following Ground Rules govern the mediation of a matter. The parties to a mediation may agree to amend any or all of the Ground Rules at any time. The Ground Rules are intended to be standards of conduct for the parties and the mediator.

(b) Mediation is voluntary and any party may withdraw from mediation at any time prior to the execution of a written settlement agreement by giving written notice of withdrawal to the mediator, the other parties, and the Director.

(c) The mediator shall act as a neutral, impartial, facilitator of the mediation process and shall not have any authority to determine issues, make decisions or otherwise resolve the matter.

(d) Following the selection of a mediator, the mediator, all parties and their representatives will meet in person or by conference call for all mediation sessions, as determined by the mediator or by mutual agreement of the parties. The mediator shall facilitate, through joint sessions, caucuses and/or other means, discussions between the parties, with the goal of assisting the parties in reaching their own resolution of the matter. The mediator shall determine the procedure for the conduct of the mediation. The parties and their representatives agree to cooperate with the mediator in ensuring that the mediation is conducted expeditiously, to make all reasonable efforts to be available for mediation sessions, and to be represented at all scheduled mediation sessions either in person or through a person with authority to settle the matter.

(e) The mediator may meet with and communicate separately with each party or the party's representative. The mediator shall notify all other parties of any such separate meetings or other communications.

(f) The parties agree to attempt, in good faith, to negotiate a settlement of the matter submitted to mediation. Notwithstanding that a matter is being mediated, the parties may engage in direct settlement discussions and negotiations separate from the mediation process.

(g) Mediation is intended to be private and confidential.

(1) The parties and the mediator agree not to disclose, transmit, introduce, or otherwise use opinions, suggestions, proposals, offers, or admissions obtained or disclosed during the mediation by any party or the mediator as evidence in any action at law, or other proceeding, including a lawsuit or arbitration, unless authorized in writing by all other parties to the mediation or compelled by law, except that the fact that a mediation has occurred shall not be considered confidential.

(2) Notwithstanding the foregoing, the parties agree and acknowledge that the provisions of this paragraph shall not operate to shield from disclosure to NASD or any other regulatory authority, documentary or other information that NASD or other regulatory authority would be entitled to obtain or examine in the exercise of its regulatory responsibilities.

(3) The mediator will not transmit or otherwise disclose confidential information provided by one party to any other party unless authorized to do so by the party providing the confidential information.

10410. Mediation Fees

(a) Filing Fees: Cases Filed Directly in Mediation

Each party to a matter submitted directly to a mediation administered under the Code must pay an administrative fee to NASD in the amounts indicated in the schedule below, unless such fee is specifically waived by the Director.

<u>Amount in Controversy</u>	<u>Customer and Associated Person Fee</u>	<u>Member Fee</u>
<u>\$.01-\$25,000</u>	<u>\$ 50</u>	<u>\$150</u>
<u>\$25,000.01-\$100,000</u>	<u>\$150</u>	<u>\$300</u>
<u>Over \$100,000</u>	<u>\$300</u>	<u>\$500</u>

(b) Filing Fees: Cases Initially Filed in Arbitration

When a matter is initially filed in arbitration and subsequently submitted to mediation under the Code, each party must pay an administrative fee to NASD in the amounts indicated in the schedule below, unless such fee is specifically waived by the Director.

<u>Amount in Controversy</u>	<u>Customer and Associated Person Fee</u>	<u>Member Fee</u>
<u>\$.01-\$25,000</u>	<u>\$ 0</u>	<u>\$ 0</u>
<u>\$25,000.01-\$100,000</u>	<u>\$100</u>	<u>\$150</u>
<u>Over \$100,000</u>	<u>\$250</u>	<u>\$500</u>

(c) Mediator Fees and Expenses

The parties to a mediation administered under the Code must pay all of the mediator's charges, including the mediator's travel and other expenses. The charges shall be specified in the Submission Agreement and shall be apportioned equally among the parties unless they agree otherwise. Each party shall deposit with NASD its proportional share of the anticipated mediator charges and expenses, as determined by the Director, prior to the first mediation session.

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