

change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.<sup>13</sup>

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-ISE-2005-19 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-ISE-2005-19. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE., Washington, DC 20549. Copies of the filing also will be available for inspection and copying at the principal offices of the ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2005-19 and should be submitted on or before July 21, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>14</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51915; File No. SR-NASD-2003-168]

#### **Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, and 3 Thereto Relating to the Release of Information Through the Public Disclosure Program**

June 23, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 21, 2003, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. NASD amended the proposed rule change on September 28, 2004, March 8, 2005, and April 12, 2005. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

NASD is proposing to amend NASD IM-8310-2 to enhance investor protection by expanding the types of information NASD makes available through its public disclosure program; to address fairness and privacy concerns by excluding certain information currently disclosed through the program based on the status or disposition of the event; to provide, upon written request and subject to terms and conditions established by NASD, a compilation of publicly available information about NASD members; and to make conforming changes. The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].

\* \* \* \* \*

<sup>14</sup> 17 CFR 200.30-3(a)(12).

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

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

#### **IM-8310-2. NASD BrokerCheck Disclosure Program [Release of Disciplinary and Other Information Through the Public Disclosure Program]**

(a) In response to a written inquiry, electronic inquiry, or telephonic inquiry via a toll-free telephone listing, [the Association] NASD shall release information [contained in the Central Registration Depository] regarding a current or former member, an associated person, or a person who was associated with a member within the preceding two years, through [the] NASD's [Public Disclosure Program] *BrokerCheck* program. [Such information shall include:]

[(1) the person's employment history and other business experience required to be reported on Form U-4;]

[(2) currently approved registrations for the member or associated person;]

[(3) the main office, legal status, and type of business engaged in by the member; and]

[(4) an event or proceeding—

(A) required to be reported under item 14 on Form U-4;

(B) required to be reported under item 11 on Form BD; or

(C) reported on Form U-6.]

[The Association also shall make available through the Public Disclosure Program certain arbitration decisions against a member involving a securities or commodities dispute with a public customer. In addition, the Association shall make available in response to telephonic inquiries via the Public Disclosure Program's toll-free telephone listing whether a particular member is subject to the provisions of Rule 3010(b)(2). The Association shall not release through the Public Disclosure Program social security numbers, residential history information, or physical description information, or information that the Association is otherwise prohibited from releasing under Federal law.]

(b) *Except as otherwise provided in paragraph (c) below, NASD shall release:*

(1) *any information reported on the most recently filed Form U4, Form U5, Form U6, Form BD, and Form BDW (collectively "Registration Forms");*

(2) *currently approved registrations;*

(3) *certain summary information about arbitration awards against a member involving a securities or commodities dispute with a public customer;*

(4) *the most recently submitted comment, if any, provided to NASD by the person who is covered by the BrokerCheck program, in the form and*

<sup>13</sup> See *supra* note 3.

in accordance with the procedures established by NASD, for inclusion with the information provided through the BrokerCheck program. Only comments that relate to the information provided through the BrokerCheck program will be included;

(5) information as to qualifications examinations passed by the person and date passed. NASD will not release information regarding examination scores or failed examinations;

(6) in response to telephonic inquiries via the BrokerCheck toll-free telephone listing, whether a particular member is subject to the provisions of Rule 3010(b)(2) ("Taping Rule");

(7) the information last reported on Registration Forms relating to customer complaints that are more than two (2) years old and that have not been settled or adjudicated, and customer complaints, arbitrations or litigations that have been settled for an amount less than \$10,000 (collectively, "Historic Complaints"), if the most recent Historic Complaint or currently reported customer complaint, arbitration or litigation is: Less than ten (10) years old and the person has a total of three (3) or more currently disclosable regulatory actions; currently reported customer complaints, arbitrations or litigations; Historic Complaints; or any combination thereof; and

(8) the name and succession history for current or former members.

(c) NASD shall not release:

(1) information reported as a Social Security number, residential history, or physical description; information that NASD is otherwise prohibited from releasing under Federal law; or information that is provided solely for use by regulators. NASD reserves the right to exclude, on a case-by-case basis, information that contains confidential customer information, offensive or potentially defamatory language or information that raises significant identity theft, personal safety or privacy concerns that are not outweighed by investor protection concerns;

(2) information reported on Registration Forms relating to regulatory investigations or proceedings if NASD has determined that the reported regulatory investigation or proceeding was vacated or withdrawn by the instituting authority;

(3) "Internal Review Disclosure" information reported on Section 7 of the Form U5;

(4) "Reason for Termination" information reported on Section 3 of Form U5;

(5) Form U5 information for fifteen (15) days following the filing of such information;

(6) the most recent information reported on a Registration Form, if NASD has determined that:

(A) the information was reported in error by a member, regulator or other appropriate authority;

(B) the information has been determined by regulators, through amendments to the uniform registration forms, to be no longer relevant to securities registration or licensure, regardless of the disposition of the event or the date the event occurred;

(7) information provided on Schedule E of Form BD.

(d) Upon written request, NASD may provide a compilation of information about NASD members, subject to terms and conditions established by NASD and after execution of a licensing agreement prepared by NASD. NASD may charge commercial users of such information reasonable fees as determined by NASD. Such compilations shall consist solely of information selected by NASD from Forms BD and BDW and shall be limited to information that is otherwise publicly available from the Commission.

### **IM-8310-3. Release of Disciplinary Complaints, Decisions and Other Information**

[(b)](a) [The Association] NASD shall, in response to a request, release to the requesting party a copy of any identified disciplinary complaint or disciplinary decision issued by [the Association] NASD or any subsidiary or Committee thereof; provided, however, that each copy of:

(1) a disciplinary complaint shall be accompanied by the following statement: "The issuance of a disciplinary complaint represents the initiation of a formal proceeding by [the Association] NASD in which findings as to the allegations in the complaint have not been made and does not represent a decision as to any of the allegations contained in the complaint. Because this complaint is unadjudicated, you may wish to contact the respondent before drawing any conclusions regarding the allegations in the complaint."

(2) a disciplinary decision that is released prior to the expiration of the time period provided under the Rule 9000 Series for appeal or call for review within [the Association] NASD or while such an appeal or call for review is pending, shall be accompanied by a statement that the findings and sanctions imposed in the decision may be increased, decreased, modified, or reversed by [the Association] NASD.

(3) a final decision of [the Association] NASD that is released prior

to the time period provided under the Act for appeal to the Commission or while such an appeal is pending, shall be accompanied by a statement that the findings and sanctions of [the Association] NASD are subject to review and modification by the Commission; and

(4) a final decision of [the Association] NASD that is released after the decision is appealed to the Commission shall be accompanied by a statement as to whether the effectiveness of the sanctions has been stayed pending the outcome of proceedings before the Commission.

[c](b)(1) [The Association] NASD shall release to the public information with respect to any disciplinary complaint initiated by the Department of Enforcement or the Department of Market Regulation of NASD [Regulation, Inc.], the NASD Regulation, Inc. Board of Directors, or the NASD Board of Governors containing an allegation of a violation of a designated statute, rule or regulation of the Commission, NASD, or Municipal Securities Rulemaking Board, as determined by the NASD Regulation, Inc. Board of Directors (a "Designated Rule"), and may also release such information with respect to any disciplinary complaint or group of disciplinary complaints that involve a significant policy or enforcement determination where the release of information is deemed by the President of NASD [Regulation, Inc.] *Regulatory Policy and Oversight* to be in the public interest.

(2) Information released to the public pursuant to subparagraph [c](b)(1) shall be accompanied by the statement required under subparagraph [(b)](a)(1).

[(d)](c)(1) NASD shall release to the public information with respect to any disciplinary decision issued pursuant to the Rule 9000 Series imposing a suspension, cancellation or expulsion of a member; or suspension or revocation of the registration of a person associated with a member; or suspension or barring of a member or person associated with a member from association with all members; or imposition of monetary sanctions of \$10,000 or more upon a member or person associated with a member; or containing an allegation of a violation of a Designated Rule; and may also release such information with respect to any disciplinary decision or group of decisions that involve a significant policy or enforcement determination where the release of information is deemed by the President of NASD *Regulatory Policy and Oversight* to be in the public interest. NASD also may release to the public information with respect to any

disciplinary decision issued pursuant to the Rule 9550 Series imposing a suspension or cancellation of the member or a suspension or bar of the association of a person with a member, unless NASD determines otherwise. NASD may, in its discretion, determine to waive the requirement to release information with respect to a disciplinary decision under those extraordinary circumstances where the release of such information would violate fundamental notions of fairness or work an injustice. NASD also shall release to the public information with respect to any temporary cease and desist order issued pursuant to the Rule 9800 Series. NASD may release to the public information on any disciplinary decision issued pursuant to the Rule 9000 Series, not specifically enumerated in this paragraph, regardless of sanctions imposed, so long as the names of the parties and other identifying information is redacted.

(A) NASD shall release to the public, in unredacted form, information with respect to any disciplinary decision issued pursuant to the Rule 9300 Series that does not meet one or more of the criteria in [IM-8310-2(d)(1)] *IM-8310-2(c)(1)* for the release of information to the public, provided that the underlying decision issued pursuant to the Rule 9200 Series meets one or more of the criteria in [IM-8310-2(d)(1)] *IM-8310-2(c)(1)* for the release of information to the public, and information regarding such decision has been released to the public in unredacted form.

(B) In the event there is more than one respondent in a disciplinary decision issued pursuant to the Rule 9000 Series, and sanctions imposed on one or more, but not all, of the respondents meets one or more of the criteria in [Rule IM-8310-2(d)(1)] *IM-8310-2(c)(1)* for the release of information to the public, NASD shall release to the public, in unredacted form, information with respect to the respondent(s) who meet such criteria, and may release to the public, in redacted form, information with respect to the respondent(s) who do not meet such criteria. Notwithstanding the foregoing, NASD shall release to the public, in unredacted form, information with respect to any respondent in a disciplinary decision issued pursuant to the Rule 9300 Series if the sanctions imposed on such respondent in the underlying decision issued pursuant to the Rule 9200 Series meet one or more of the criteria for release of information to the public, and information with respect to that respondent has been released in unredacted form.

(2) Information released to the public pursuant to subparagraph [(d)] [(d)](c)(1) shall be accompanied by a statement to the extent required for that type of information under subparagraphs [(b)] (a)(2)-(4).

[(e)](d) If a decision issued pursuant to the Rule 9000 Series other than by the National Adjudicatory Council is not appealed to or called for review by the National Adjudicatory Council, the decision shall become effective on a date set by [the Association] NASD but not before the expiration of 45 days after the date of decision.

[(f)](e) Notwithstanding [paragraph e] paragraph (d), expulsions and bars imposed pursuant to the provisions of Rules 9216 and 9270 shall become effective upon approval or acceptance by the National Adjudicatory Council, and information regarding any sanctions imposed pursuant to those Rules may be released to the public pursuant to paragraph [(d)] (c) immediately upon such approval or acceptance.

[(g)](f) No change in text.

[(h)](g) If a decision of [the Association] NASD imposing monetary sanctions of \$10,000 or more or a penalty of expulsion, revocation, suspension and/or barring of a member from being associated with all members is appealed to the Commission, notice thereof shall be given to the membership and to the press as soon as possible after receipt by [the Association] NASD of notice from the Commission of such appeal and [the Association's] NASD's notice shall state whether the effectiveness of the Board's decision has been stayed pending the outcome of proceedings before the Commission.

[(i)](h) In the event an appeal to the courts is filed from a decision by the Commission in a case previously appealed to it from a decision of [the Association] NASD, involving the imposition of monetary sanctions of \$10,000 or more or a penalty of expulsion, revocation, suspension and/or barring of a member from being associated with all members, notice thereof shall be given to the membership as soon as possible after receipt by [the Association] NASD of a formal notice of appeal. Such notice shall include a statement whether the order of the Commission has been stayed.

[(j)](i) Any order issued by the Commission of revocation or suspension of a member's broker/dealer registration with the Commission; or the suspension or expulsion of a member from [the Association] NASD; or the suspension or barring of a member or person associated with a member from

association with all broker/dealers or membership; or the imposition of monetary sanctions of \$10,000 or more shall be released to the public through a notice containing the effective date thereof sent as soon as possible after receipt by [the Association] NASD of the order of the Commission.

[(k)](j) Cancellations of membership or registration pursuant to [the Association's] NASD's By-Laws, Rules and Interpretative Material shall be released to the public as soon after the effective date of the cancellation as possible.

[(l)](k) Releases to the public referred to in paragraphs [(c)](b) and [(d)](c) above shall identify the NASD Rules and By-Laws [of the Association] or the SEC Rules violated, and shall describe the conduct constituting such violation. Releases may also identify the member with which an individual was associated at the time the violations occurred if such identification is determined by [the Association] NASD to be in the public interest.

\* \* \* \* \*

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

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change, as amended, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

#### 1. Purpose

The purpose of the proposed rule change is to amend NASD IM-8310-2 to enhance investor protection by expanding the types of information that NASD makes publicly available through its BrokerCheck program and to address fairness and privacy concerns by excluding certain information that is currently disclosed based on the status or disposition of the event. The proposed rule change also addresses NASD's release of compilations of publicly available information about NASD members. In addition, the proposed rule change makes conforming changes to IM-8310-2.

### Background

IM-8310-2(a) governs the information NASD releases to the public via its BrokerCheck program, which NASD established in 1988 to provide the public with information on the professional background, business practices, and conduct of NASD members and their associated persons. In 1990, with NASD's support, Congress passed legislation requiring NASD to establish and maintain a toll-free telephone number to respond to inquiries about members and associated persons. In 1998, NASD began providing certain administrative information, such as registration and employment history, online via NASD's Web site. In 2000, the Commission approved the most recent changes to IM-8310-2(a), which (1) established a two-year period for disclosure of information about persons formerly registered with NASD; (2) authorized release of information about terminated persons and firms that is provided on the Form U6 (the form regulators use to report disciplinary actions), if such matters would be required to be reported on Form U4 ("Uniform Application for Securities Industry Registration or Transfer") or Form BD ("Uniform Application for Broker-Dealer Registration"); and (3) provided for delivery of automated disclosure reports, which include information as reported by filers on the uniform forms.

In 2002, NASD initiated a comprehensive review of the information that NASD makes publicly available under IM-8310-2. This review included an evaluation of NASD's BrokerCheck program from the perspective of public investors regarding their experience in obtaining information as well as their assessment of the value of the information they received. NASD subsequently issued *Notice to Members* 02-74 (November 2002), seeking comment on, among other things, the possible expansion of information NASD makes available to the public.<sup>3</sup>

### Proposed Rule Change

#### *Information NASD Proposes to Release*

With respect to current or former members, NASD proposes to release all administrative information reported on the most recently filed Form BD and Form BDW ("Uniform Application for Broker-Dealer Withdrawal"), except for social security numbers; residential history information; physical

description information; information that NASD is otherwise prohibited from releasing under Federal law; or information provided solely for use by regulators. Additionally, NASD would reserve the right to exclude, on a case-by-case basis, administrative or disclosure information that contains confidential customer information, offensive or potentially defamatory language, or information that raises significant identity theft, personal safety or privacy concerns. These disclosures would include, in addition to information currently released through the BrokerCheck program with respect to current and former members, information regarding control persons, direct and indirect owners, and information reported on Schedule D of Form BD, as well as certain information reported on Form BDW. NASD also proposes to release the most recently filed information reported by any regulator via the Form U6.

NASD also proposes to release summary information about certain arbitration awards against a member involving a securities or commodities dispute with a public customer. NASD currently releases summary information concerning arbitration awards issued by NASD arbitrators. NASD intends to continue to work with other regulators regarding disclosure of arbitration awards issued in other forums.

With respect to associated persons or persons who were associated with a member within the preceding two years, NASD proposes to release any administrative information reported on the most recently filed Form U4, except for social security numbers; residential history information; physical description information; information that NASD is otherwise prohibited from releasing under Federal law; or information provided solely for use by regulators. Again, NASD would reserve the right to exclude, on a case-by-case basis, administrative or disclosure information that contains confidential customer information, offensive or potentially defamatory language, or information that raises significant identity theft, personal safety or privacy concerns. NASD also proposes to release information with respect to the qualification examinations passed by an associated person and the date passed; however, NASD would not release examination scores or information regarding failed examinations.

Also, in the case of associated persons or persons who were associated with a member within the preceding two years, NASD proposes to release the most recently filed disclosure information reported on Form U4 and Form U5,

including the most recently filed disclosure information reported by any regulator via the Form U6, with certain exceptions, as described below.

NASD also proposes to provide associated persons or persons who were associated with a member within the preceding two years with the opportunity to provide a brief comment that would be included in the information NASD releases through the BrokerCheck program. Only comments that relate to the information provided through the BrokerCheck program would be included. Any such person who wishes to submit a comment would be required to submit a signed, notarized affidavit in the form specified by NASD. NASD would publish instructions for submitting comments on its Web site for such persons.<sup>4</sup> NASD would review the affidavit to confirm relevance and compliance with the established instructions and add the comment (if it met these criteria) to the written report provided through the BrokerCheck program. The person submitting the comment would be able to replace or delete the comment in the same way. These comments also would be made available through the CRD system to participating regulators, and to any member firms that the person who submitted the comment is associated with or is seeking to be associated with, for as long as such information is available through the BrokerCheck program.<sup>5</sup> Persons who are currently registered with a member firm would continue to be required to amend Form U4, where possible, instead of submitting a comment.

#### *Information NASD Proposes Not to Release*

NASD proposes not to release information about current or former members, associated persons or persons who were associated with a member within the preceding two years that has been reported on Forms U4, U5, U6, BD, and BDW relating to regulatory proceedings and investigations if the

<sup>4</sup> Consistent with current practice, NASD would reserve the right to reject comments or redact information from a comment or a report, on a case-by-case basis, that contains confidential customer information, offensive or potentially defamatory language or information that raises significant identity theft, personal safety or privacy concerns that are not outweighed by investor protection concerns. NASD, in rare circumstances, has excluded or redacted information in cases involving stalking or terroristic threats.

<sup>5</sup> The availability of such comments through the CRD system would parallel the availability of a report on a broker through the BrokerCheck program. For example, such comments would no longer be available through the CRD system if the broker has been out of the industry for more than two years.

<sup>3</sup> See Section C below for a discussion of the comments received on *Notice to Members* 02-74 (November 2002).

reported regulatory proceeding or investigation was vacated or withdrawn by the instituting authority. Additionally, NASD proposes not to release the most recent information reported on Forms U4, U5, U6, BD, and BDW if: (1) the information was reported in error by a member, regulator or other appropriate authority; or (2) the information has been determined by regulators, through amendments to the uniform registration forms, to be no longer relevant to securities registration or licensure, regardless of the disposition of the event or the date the event occurred.

With respect to information reported on the Form U5, NASD proposes not to release Form U5 information for 15 days following the filing of such information with NASD, in order to give persons on whose behalf the Form U5 was submitted an opportunity to file a Form U4 or submit a comment to NASD for inclusion with the information released pursuant to the BrokerCheck program regarding disclosure information reported on Form U5 and any amendments thereto. NASD would then release both the Form U5 disclosure and the person's comment, if any, to a requestor. NASD also proposes to continue its current practice of not releasing "Internal Review Disclosure" information reported by members, associated persons, or regulators on the most recently filed Form U5<sup>6</sup> or the reason for termination provided in response to Question 3 on Form U5. However, under proposed IM-8310-2, information regarding certain terminations for cause (*i.e.*, those that meet the criteria in current Question 7F on Form U5) would be disclosed through the program. NASD currently does not release information reported on Schedule E of the Form BD. Under the proposed rule change, NASD would continue not to release this information.

#### *Customer Complaint Information*

The proposed rule change also would address the reporting of Historic Complaints, *i.e.*, customer complaints that are more than two years old and have not been settled or adjudicated, or customer complaints, arbitrations, or litigation that have been settled for an amount less than \$10,000. NASD proposes to release Historic Complaints only when the person has a total of

three or more currently disclosed regulatory actions; currently reported customer complaint, arbitration, or litigation disclosures; or Historic Complaint disclosures, or any combination thereof.<sup>7</sup> Even then, if the most recent Historic Complaint or currently reported customer complaint disclosure (including any arbitration or litigation disclosure) is more than 10 years old, NASD proposes not to release any Historic Complaint information.

When the criteria for releasing Historic Complaints is met, *i.e.*, the person has a total of three or more currently reported regulatory action disclosures; currently reported customer complaint, arbitration, or litigation disclosures; Historic Complaint disclosures; or any combination thereof, all Historic Complaints, regardless of age, would be released provided that at least one of the currently reported customer complaint, arbitration, or litigation disclosures (if any) or Historic Complaints was filed within the past 10 years. Under such an approach, public investors would be able to determine for themselves whether a particular broker has demonstrated a pattern of conduct over the years and the significance, if any, they should attach to the Historic Complaint information.

#### *Compilation of Information*

The rule change also proposes that, upon written request, NASD may provide a compilation of information about NASD members, subject to terms and conditions established by NASD, and after execution of a licensing agreement prepared by NASD. NASD would be permitted to charge commercial users of such compilations reasonable fees as determined by NASD. Such compilations of information would consist of information selected by NASD from Forms BD and BDW and would be limited to information that is otherwise publicly available from the Commission.

#### *Conforming Changes*

The proposed rule change would conform subparagraph numbers in

NASD IM-8210-2 as required by these amendments. Finally, NASD no longer refers to itself or its subsidiary, NASD Regulation, Inc., using its full corporate name, "the Association," "the NASD" or "NASD Regulation, Inc." Instead, NASD uses "NASD" unless otherwise appropriate for corporate or regulatory reasons. Accordingly, the proposed rule change would replace several references to "Association" in the text of the proposed rule change with "NASD."

#### *Electronic Delivery of Written Reports*

In connection with the proposed changes to NASD IM-8310-2, and the overall objectives of the public information review, NASD also considered the manner in which it releases information to the public via the BrokerCheck program. Currently, NASD makes written reports available by U.S. mail in printed (hard copy) form and by email in an electronic format upon receipt of a request via email or the established toll-free number. However, a number of practical issues have arisen regarding email delivery. For example, many Internet service providers limit the size of attachments that can be received by an individual via email. This limit effectively prevents NASD from providing written reports on the largest NASD-registered firms via email. Instead, NASD must send the reports via U.S. mail. As a result, investors are required to wait, sometimes for several days, before receiving the requested reports. The email limit also restricts NASD's opportunity to include explanatory material that would tend to increase the size of the report beyond the email size limits.

Accordingly, NASD plans to enhance the electronic delivery of written reports sent in response to inquiries via email or through the established toll-free number by replacing the current delivery approach with a link to a controlled-access server that would allow access to the requested report through a secure Internet session. Access to the information would be limited to the written report requested, and only the individual making the request would be granted access to the database. A requestor also would be able to view investor education materials that would aid him or her in understanding the written report. This planned electronic distribution system would allow NASD to provide investors with more immediate access to the requested information. This change would eliminate the additional step of emailing the requestor a passcode and requiring the requestor to reenter that passcode. Additionally, this change

<sup>6</sup> Although the response to the internal review question and related information reported on the associated disclosure reporting page would not be released, if the matter subject to the internal review is or becomes reportable under the investigation, termination or other disclosure questions, the disclosure made pursuant to these other disclosure questions would be released.

<sup>7</sup> NASD currently calculates the two-year period for disclosure of a customer complaint as of the date the customer complaint was first reported on Form U4 or Form U5. Under the proposed rule change, and consistent with the current interpretation of Form U4 and Form U5, NASD would consider this two-year period to begin on the date on which the member received the complaint, both for purposes of reportability on Form U4 and Form U5 and for purposes of disclosure pursuant to IM-8310-2. Accordingly, under the proposed rule change, a customer complaint that has not been settled or adjudicated within the past two years from the date on which the member received the complaint would cease to be reported on Forms U4 and U5 and would also become a Historic Complaint.

should enable NASD to have the flexibility it needs to provide a report delivery solution that is more user-friendly, and that more efficiently meets investor needs in light of changing technology, while still providing safeguards against data piracy. NASD also would continue to accept requests for reports via the existing toll-free number and provide hard copy reports to those requestors.

## 2. Statutory Basis

NASD believes that the proposed rule change, as amended, is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>8</sup> which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and Section 15A(i), which requires that NASD establish and maintain a toll-free telephone listing to receive inquiries regarding disciplinary actions involving its members and their associated persons and promptly respond to such inquiries in writing. NASD states that the proposed rule change is designed to accomplish these ends by broadening the types and, on balance, the amount of information released to the investing public through NASD's BrokerCheck program. At the same time, it would establish a principled basis for disclosure that would meet NASD's investor protection objectives, while fairly addressing the proprietary interests of firms and the privacy interests of their associated persons.

NASD would announce adoption of the proposed rule change in a *Notice to Members* to be published no later than 60 days following Commission approval. Because the proposed rule change would require changes to the software application supporting NASD's BrokerCheck program, NASD would announce the effective date in a subsequent *Notice to Members*.

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

NASD does not believe that the proposed rule change, as amended, would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

#### *Notice to Members 02-74: Proposed Amendments Relating to Types of Information NASD Makes Public*

In NASD *Notice to Members* 02-74 (November 2002), NASD requested comment on a broad range of issues relating to information NASD makes public. This discussion will be limited to the comments that were received in connection with NASD's public disclosure program. There were a total of 58 commenters. Those who commented on NASD's public disclosure program were generally in favor of timely and accurate disclosure to the investing public, but they were also concerned about striking a fair balance between the need for quality disclosure and the legitimate privacy interests of firms and associated persons. NASD believes that it has addressed those concerns in the proposed rule change.

For example, NASD would not release social security numbers, residential history information, physical description information, information that NASD is otherwise prohibited from releasing under Federal law, or information provided solely for use by regulators. NASD would reserve the right to exclude, on a case-by-case basis, information that contains confidential customer information, offensive or potentially defamatory language, or information that raises significant identity theft, personal safety or privacy concerns. With respect to qualification examination information, NASD proposes to release information only as to examinations passed by an associated person and date passed and would not release information regarding examination scores or failed examinations. In addition, NASD proposes not to release "Internal Review Disclosure" information reported on the most recently filed Form U5.

Further, under proposed IM-8310-2, NASD would not release information reported by members, associated persons, or regulators, including information relating to regulatory proceedings, investigations, civil judicial actions, customer complaints, arbitrations, or litigation if the member or associated person prevailed in a final, adjudicatory proceeding as to the matter reported; the reported regulatory action, investigation, or criminal proceeding was dismissed, vacated or withdrawn by the authority instituting the action or proceeding; the information was reported in error by a member,

regulator, or the appropriate authority; or the information was determined by regulators, through amendments to the uniform registration forms, to be no longer relevant to securities registration or licensure, regardless of the disposition of the event or the date the event occurred. With respect to criminal proceedings, NASD would not release information reported by members, associated persons, or regulators if the information was reported in error by a member, regulator, or the appropriate authority; or the information was determined by regulators, through amendments to the uniform registration forms, to be no longer relevant to securities registration or licensure, regardless of the disposition of the event or the date the event occurred.

A number of commenters were concerned about the potential release of information that is no longer reportable on the current uniform forms. Under the proposed rule change, NASD would not release any disclosure that is no longer reportable on the current uniform forms such as bankruptcies that are more than 10 years old or liens that have been satisfied, except for Historic Complaints where the stated criteria, as further discussed below, have been met.

With respect to Historic Complaints, proposed IM-8310-2 would define "Historic Complaints" as the last filed information relating to customer complaints reported on a Form U4, Form U5, or Form U6 that are more than two years old that have not been settled or adjudicated, or customer complaints, arbitrations, or litigation that have been settled for an amount less than \$10,000. Among other things, commenters expressed the view that releasing Historic Complaints would be unhelpful and potentially misleading, on the basis that such information was outdated and no longer relevant.

In response to these commenters, NASD proposes to release historic customer complaint information only where the individual's record has demonstrated a pattern, as defined in proposed IM-8310-2. Proposed IM-8310-2 would provide that an individual must have a total of three or more currently disclosed regulatory actions; currently reported customer complaint, arbitration, or litigation disclosures; Historic Complaints; or any combination thereof, before NASD would consider releasing Historic Complaint information. If an individual has three or more disclosures, as described above, NASD would examine the age of any currently reported customer complaint, arbitration or litigation disclosure(s) and the age of any Historic Complaints. If the most

<sup>8</sup> 15 U.S.C. 78o-3(b)(6).

recent Historic Complaint or currently reported customer complaint disclosure (including arbitration or litigation disclosure) is more than 10 years old, NASD proposes not to release any Historic Complaint information.

NASD would release Historic Complaints only when the person has a total of three or more currently disclosed regulatory actions; currently reported customer complaint, arbitration, or litigation disclosures; Historic Complaint disclosures; or any combination thereof, and at least one of the currently reported customer complaint disclosures (including arbitration or litigation disclosures) or Historic Complaints was filed within the past 10 years. In that case, all Historic Complaints, regardless of age, would be released. Releasing Historic Complaint disclosures on this basis would enable public investors to make an informed assessment as to whether a particular broker has demonstrated a pattern of conduct over the years. NASD believes that providing this information would allow public investors to determine for themselves the significance, if any, of the Historic Complaint(s).

NASD has also taken into account some commenters' concern about releasing Form U5 information, given the potential for public disclosure of allegedly defamatory material and the possibility that a broker may be in the process of suing his or her previous member firm over information reported on a Form U5 in connection with a wrongful termination or a defamation claim. Commenters also expressed the view that reasons for release from employment should not be public information unless the reason is reportable on the Form U4. NASD notes that proposed IM-8310-2 proposes to release only disclosure information reported on the Form U5. This means that under the proposed rule change, responses to current Question 3 (Full Termination) on the Form U5, regarding "Reason for Termination," would not be released, but information regarding terminations for cause that meet the criteria in current Question 7F on the Form U5 or current Question 14J on the Form U4 would be released.

A number of commenters suggested that brokers should be given the opportunity to respond before the information is released to the public. NASD has addressed commenters' concerns by proposing to delay the release of Form U5 information for 15 days, in order to give the broker an opportunity to file a Form U4 or submit a comment to NASD regarding any such disclosure. Both the Form U5 disclosure

and the broker's response would then be released to the public.

NASD proposes to provide associated persons or persons who were associated with a member within the preceding two years with the opportunity to provide a brief comment that would be included in the information NASD releases through the BrokerCheck program. Only comments that relate to the information provided through the BrokerCheck program would be included. Any such person who wishes to submit a comment would be required to submit a signed, notarized affidavit in the form specified by NASD. NASD would publish instructions for submitting comments on its Web site for such persons.<sup>9</sup> The person submitting the comment would be able to replace or delete the comment in the same way. These comments would be made available through the CRD system to participating regulators, and to any member firms that the person who submitted the comment is associated with or is seeking to be associated with, for as long as such information is available through the BrokerCheck program. Persons who are currently registered with a member firm would be required to amend Form U4, where possible, instead of submitting a comment.

*Notice to Members 02-74* also asked for comment on publishing comparative information, i.e., putting information released to the public in context. The Notice stated that expanding the information available through the BrokerCheck program to include certain comparative information would help an investor better understand and evaluate the information on the specific broker or firm he or she may be interested in or how his or her broker or firm compares to the rest of the industry. This comparative information would not rate brokers or firms or specifically advise an investor whether or not to conduct business with a particular broker or firm. The commenters generally opposed this concept, stating that comparative information would confuse or potentially mislead the public.

In response, NASD notes that it does not intend to include comparative information with respect to particular persons or members in reports that would be available through the program and, therefore, publication of

comparative information would not be part of the proposed rule change to IM-8310-2. NASD plans instead to make educational materials and/or explanatory information available via the NASD Web site and through other means that would help investors understand the information they are receiving. This informational material may include generic statistical or comparative information.

*Notice to Members 03-76: NASD Seeks Comments on Enhanced Access to NASD BrokerCheck (Formerly Known as NASD's Public Disclosure Program)*

In *Notice to Members 03-76* (December 2003), NASD sought comment on proposed enhancements to the existing approach for the electronic delivery of written reports (email) used by the BrokerCheck program and received six comment letters in response. Generally, commenters expressed support for the proposed approach. Four commenters supported enhancing access in the manner described in the *Notice*. Another commenter supported enhancing access, but requested that NASD provide limited, direct Internet access to the information through a system that would allow persons to see limited portions of each member's records. One commenter did not support the proposed enhancement, stating that NASD should correct existing limitations in the current system, and specifically noting that, in his experience, the system's search engine appears to work better if the searcher has less information than more. This commenter also stated that the system was not helpful in finding information on branches and non-branch locations. NASD believes that its proposed enhancement to the electronic delivery of reports through the BrokerCheck program would improve the delivery of information through the BrokerCheck program and also give investors the opportunity to request and review a greater number of reports in a shorter period of time. The proposed delivery system also would give NASD the flexibility to more easily provide contextual and other investor education material as part of the program. NASD continues to consider additional ways to improve the delivery of information through BrokerCheck in response to investor needs.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i)

<sup>9</sup> Consistent with current practice, NASD would reserve the right to reject comments or redact information, on a case-by-case basis, that contains confidential customer information, offensive or potentially defamatory language or information that raises significant identity theft, personal safety or privacy concerns that are not outweighed by investor protection concerns.



as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, as amended, or

B. institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2003-168 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9309.

All submissions should refer to File Number SR-NASD-2003-168. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All

submissions should refer to File Number SR-NASD-2003-168 and should be submitted on or before July 21, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. E5-3437 Filed 6-29-05; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51921; File No. SR-NASD-2005-046]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Amending the Arbitration Fees Applicable to Certain Statutory Employment Discrimination Claims

June 24, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 8, 2005, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. On April 25, 2005, NASD filed Amendment No. 1 ("Amendment No. 1") to the proposed rule change.<sup>3</sup> On June 23, 2005, NASD filed Amendment No. 2 ("Amendment No. 2") to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to amend the NASD Code of Arbitration Procedure ("Code") to amend the arbitration fees applicable to certain statutory employment discrimination claims.

<sup>10</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> Amendment No. 1 replaces the original rule filing its entirety.

<sup>4</sup> See Amendment No. 2. Amendment No. 2 clarified certain aspects of the rule text.

Below is the text of the proposed rule change.<sup>5</sup> Proposed new language is in *italics*.

\* \* \* \* \*

#### 10217. Fees

(a) *For any claim of statutory employment discrimination submitted to arbitration that is subject to a predispute arbitration agreement, a party who is a current or former associated person shall pay a non-refundable filing fee according to the schedule of fees set forth in Rule 10332, provided that:*

(1) *In no event shall such a person pay more than \$200 for a filing fee;*

(2) *A member that is a party to such an arbitration proceeding under this rule shall pay the remainder of all applicable arbitration fees set forth in Rule 10332; and*

(3) *No party shall be required to remit a hearing session deposit.*

(b) *The arbitration fees described in paragraph (a)(2) are not subject to allocation in the award. The panel, however, may assess to a party who is a current or former associated person those costs incurred under Rules 10319, 10321, 10322, and 10326.*

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

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

###### 1. Purpose

The purpose of the proposed rule change is to limit the arbitration filing fees applicable to certain statutory employment discrimination claims.

The Rule 10210 Series contains special rules applicable to the

<sup>5</sup> The rule change proposed in this filing will be renumbered as appropriate following Commission approval of the pending revisions to the NASD Code of Arbitration Procedure for Customer Disputes, see Securities Exchange Act Release No. 51856 (June 15, 2005), 70 FR 36442 (June 23, 2005) (SR-NASD-2003-158); and the NASD Code of Arbitration Procedure for Industry Disputes, see Securities Exchange Act Release No. 51857 (June 15, 2005), 70 FR 36430 (June 23, 2005) (SR-NASD-2004-011).