OMB APPROVAL	
OMB Number:	3235-0045
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Estimated average burden hours per response	38

Page 1 of 29

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. SR - 2005 - 079
Amendment No. 1

Proposed Rule Change by National Association of Securities Dealers

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial	Amendment	Withdrawal
☐	☑	☐

Section 19(b)(2)	Section 19(b)(3)(A)	Section 19(b)(3)(B)
☑	☐	☐

Pilot	Extension of Time Period for Commission Action	Date Expires
☐	☐	

Rule

☐ 19b-4(f)(1) ☐ 19b-4(f)(2) ☐ 19b-4(f)(3) ☐ 19b-4(f)(4) ☐ 19b-4(f)(5) ☐ 19b-4(f)(6)

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

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	John	Last Name	Nachmann
Title	Counsel		
E-mail	john.nachmann@nasd.com		
Telephone	(202) 728-8273	Fax	(301) 527-4754

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

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

Date 03/29/2006

By Jean I. Feeney
(Name)

Vice President and Chief Counsel
NASD Dispute Resolution
(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

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

Add Remove View

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

Add Remove View

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

Add Remove View

Exhibit Sent As Paper Document ☐

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

Add Remove View

Exhibit Sent As Paper Document ☐

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

Add Remove View

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

Add Remove View

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

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. ("NASD Dispute Resolution"), is filing with the Securities and Exchange Commission ("SEC" or "Commission") Amendment No. 1 to SR-NASD-2005-079, a proposed rule change to revise Rule 10322 of the NASD Code of Arbitration Procedure, which pertains to subpoenas and the power to direct appearances. The purpose of this Amendment No. 1 is 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.[1]

Below is the text of the proposed rule change.[2] Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

10322. Subpoenas and Power to Direct Appearances

(a) [**Subpoenas**]

To the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas. [The] [a]Arbitrators [and any counsel of record to the proceeding] shall have the [power of the subpoena process as

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1 See Securities Exchange Act Release No. 51981 (July 6, 2005), 70 FR 40411 (July 13, 2005).

2 The rules proposed in this filing will be renumbered as appropriate following Commission approval of the pending revisions to the NASD Code of Arbitration Procedure for Customer Disputes; 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).

provided by law. All parties shall be given a copy of a subpoena upon its issuance. Parties shall produce witnesses and present proofs to the fullest extent possible without resort to the subpoena process.] authority to issue subpoenas for the production of documents or the appearance of witnesses.

(b) A party may make a written motion asking an arbitrator to issue a subpoena. The motion, along with the subpoena, must be served directly on each other party, at the same time and in the same manner. The motion and subpoena must also be filed with the Director, with an additional copy for the arbitrator, at the same time and in the same manner in which they are served on the parties.

(c) In the event a party receiving such a motion objects to the scope or propriety of the subpoena, that party shall, within 10 days of service of the motion, file with the Director, with copies to all other parties, written objections. The party seeking the issuance of the subpoena may respond thereto. The arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena.

(d) In the event that a subpoena is issued, the party that requested the subpoena must serve the subpoena at the same time and in the same manner to all parties and the entity receiving the subpoena.

(e) Any party that receives documents in response to a subpoena served upon a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 days following receipt of the request. The party requesting the documents shall be responsible for the reasonable costs associated with the production of the copies.

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

(f) [The] An arbitrator[(s)] shall be empowered without resort to the subpoena process to direct the appearance of any person employed by 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] an arbitrator[(s)] directs otherwise, the party requesting the appearance of a person or the production of documents under this Rule shall bear all reasonable costs of such appearance and/or production.

* * * * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

(a) The proposed rule change was approved by the Board of Directors of NASD Dispute Resolution at its meetings on April 20, 2005, and February 1, 2006, which authorized the filing of the rule change with the SEC. Counsel for The Nasdaq Stock Market and NASD Regulatory Policy and Oversight have been provided an opportunity to consult with respect to the proposed rule change, pursuant to the Plan of Allocation and Delegation of Functions by the NASD to its Subsidiaries. The NASD Board of Governors had an opportunity to review the proposed rule change at its meetings on April 21, 2005, and February 2, 2006. No other action by the NASD is necessary for the filing of the proposed rule change. Section 1(a)(ii) of Article VII of the NASD By-Laws permits the NASD Board of Governors to adopt amendments to NASD Rules without recourse to the membership for approval.

NASD will announce the effective date of the proposed rule change in a Notice to

Members to be published no later than 60 days following Commission approval. The effective date will be no later than 30 days following publication of the Notice to Members announcing Commission approval.

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

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

(a) Purpose

Rule Filing History

On June 17, 2005, NASD filed with the Commission proposed rule change SR-NASD-2005-079, which proposed amendments to Rule 10322. On July 13, 2005, the Commission published for comment the proposed rule change in the Federal Register.[3] Based on comments received in response to the publication of the proposed rule change in the Federal Register, NASD is filing this Amendment No. 1 to SR-NASD-2005-079 to respond to the comments received and to make revisions to the rule change as described herein.

Proposal

As described in the original rule filing, NASD proposed to revise Rule 10322 of the Code of Arbitration Procedure ("Code") to provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery. NASD additionally proposed clarifying the requirements regarding the service of subpoenas by specifying that a party that issues a subpoena must serve a copy of the subpoena to all parties and the entity receiving the subpoena on the same day.

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[3] See Securities Exchange Act Release No. 51981 (July 6, 2005), 70 FR 40411 (July 13, 2005).

Comments on the Proposed Rule Change

The Commission received 12 comment letters in response to the publication of the proposed rule in the Federal Register.[4] NASD's response to the issues raised in these letters is set forth below.

Several commenters to NASD's proposal stated that only arbitrators should have the authority to issue subpoenas in arbitration.[5] Some of these commenters believed that this limitation should apply only to discovery subpoenas while other commenters suggested that it apply to all subpoenas. In support of their position, a number of these commenters noted that the Federal Arbitration Act provides only arbitrators, and not attorneys, with the authority to issue subpoenas.[6] Furthermore, one commenter noted that

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4 Comment letters were submitted by Richard Skora, dated July 12, 2005 ("Skora Letter"); Seth E. Lipner, Deutsch & Lipner, dated July 13, 2005 ("Lipner Letter"); Steve Buchwalter, Law Offices of Steve A. Buchwalter, P.C., dated July 13, 2005 ("Buchwalter Letter"); Steven B. Caruso, Maddox Hargett & Caruso, P.C., dated July 19, 2005 ("Caruso Letter"); Dennis M. Pape, dated July 20, 2005 ("Pape Letter"); Al Van Kampen, Rohde & Van Kampen PLLC, dated July 25, 2005 ("Van Kampen Letter"); Phil Cutler, Cutler Nylander & Hayton, dated August 1, 2005 ("Cutler Letter"); Avery B. Goodman, A.B. Goodman Law Firm, Ltd., dated August 1, 2005 and August 2, 2005 ("Goodman Letters"); Jill Gross, Director, Barbara Black, Director, and Richard Downey, Student Intern, Pace Investor Rights Project, dated August 2, 2005 ("Gross Letter"); Tim Canning, dated August 3, 2005 ("Canning Letter"); and Rosemary J. Shockman, President, Public Investors Arbitration Bar Association, dated August 4, 2005 ("Shockman Letter").

5 See Lipner, Buchwalter, Van Kampen, Canning, and Shockman Letters.

6 In fact, there is a split of opinion among the federal appellate courts as to whether arbitrators may issue discovery subpoenas or only subpoenas for attendance or production of documents at a hearing. Compare In re Matter of Arbitration Between Security Life Ins. Co. of America, 228 F.3d 865, 870-871 (8th Cir. 2000) ("Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.") with Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3rd Cir. 2004) ("The power to require a non-party 'to bring' items 'with him' clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier. In addition . . . a non-party may be compelled 'to bring' items 'with him' only when the non-party is summoned 'to attend before [the arbitrator] as a witness.'"). Furthermore, while the Fourth Circuit, like the Third Circuit, found that the FAA does not grant an arbitrator the authority to subpoena a non-party for purposes of pre-hearing discovery, it did establish the possibility that a party might, "under unusual circumstances," petition the district court to compel

only arbitrators have the authority to issue subpoenas under the Uniform Arbitration Act and the Revised Uniform Arbitration Act.[7] Lastly, two commenters noted that, under the laws of several states, attorneys do not have the authority to issue subpoenas.

NASD has determined that the proposed rule should be revised to allow only arbitrators to issue subpoenas, whether for discovery or for the appearance at a hearing before the arbitrators, but for reasons other than those suggested by the commenters. NASD believes that providing arbitrators with greater control over the issuance of subpoenas will help to protect investors, associated persons, and other parties from abuse in the discovery process. In addition, the establishment of a uniform, nationwide rule will reduce potential confusion for parties and their counsel regarding whether they have the ability to issue subpoenas, minimize gamesmanship in the subpoena process, and make the rule easier to administer.

One commenter who does not support the proposed rule change stated that arbitrators should be required to give written explanations of all discovery decisions.[8] In addition, this commenter indicated that NASD should enforce current Rule 10322 with respect to the requirement that parties produce witnesses and present documents to the fullest extent possible without resort to the subpoena process.

NASD respectfully disagrees that arbitrators should be required to give written explanations of all discovery decisions, because such a requirement would significantly increase the time and costs associated with the discovery process. With respect to the

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pre-arbitration discovery upon a showing of "special need or hardship." Comsat Corp. v. National Science Foundation, 190 F.3d 269 (4th Cir. 1999).

7 See Lipner Letter.

8 See Skora Letter.

commenter's assertion regarding the enforcement of Rule 10322, NASD does expect all parties to cooperate to the fullest extent possible without the use of subpoenas, and arbitrators may sanction parties for discovery abuse or make a disciplinary referral at the end of the case if such cooperation is not provided.

One commenter suggested several changes to the proposed rule.[9] First, the commenter stated that the term "fullest" (which is in current Rule 10322) should be included in paragraph (a) of the proposed rule to ensure that parties do not avoid their discovery responsibilities in arbitration. Second, the commenter asserted that the proposal should be amended to specify that service of a subpoena must be made in the exact same manner on everyone. Third, the commenter indicated that a party that receives documents in response to a non-party subpoena should be required to provide copies of the documents to opposing counsel within five days of receipt of the documents.

NASD agrees with this commenter that the term "fullest" should be added in paragraph (a) of the rule to emphasize that, to the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas. NASD also agrees that the method of service of a subpoena should be the same on all parties and the non-party receiving the subpoena and proposes to amend paragraph (d) of the rule to reflect this requirement. Lastly, NASD agrees with the commenter that documents received in response to a non-party subpoena should be made available to other parties. NASD does not believe, however, that a party that receives documents in response to a non-party subpoena should be required automatically to

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[9] See Caruso Letter.

provide copies to another party since that party may have no interest in them or may not want to incur potentially significant copying costs. Therefore, NASD proposes to require a party to provide notice to all other parties that it has received documents in response to a non-party subpoena and to provide copies of those documents only at the request of another party.[10] Once a party receives a request for copies of documents that were received in response to a non-party subpoena, that party will have ten calendar days to provide the copies to the requesting party. NASD believes that a ten calendar day time frame is more appropriate than the one suggested by the commenter because it will allow enough time to copy a potentially voluminous amount of records, and it is also a time frame that is frequently used in the proposed Code revision.

One commenter who does not support the rule proposal indicated that it would, in effect, only impact member firms since customers rarely need documents from non-parties in arbitration.[11] In addition, this commenter expressed concern that arbitrators will not review subpoenas promptly.

NASD respectfully disagrees with this commenter. The proposed rule will apply equally to all parties that use NASD's forum. Even though broker-dealers may use non-party subpoenas more often than do customers or associated persons, the proposed rule will be applied to all parties equally, thereby ensuring that NASD's forum is fair for everyone. NASD does not believe that the proposal will significantly delay the discovery process, as arbitrators will receive training specifically addressing subpoenas once the SEC approves the proposed rule change. Furthermore, parties that volunteer to use

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[10] A party would have five calendar days after the receipt of subpoenaed documents from a non-party to provide notice to all other parties.

[11] See Pape Letter.

NASD's discovery arbitrator pilot program may recognize a further reduction in the time needed for the review of subpoenas, especially in complex cases that involve numerous subpoenas.

One commenter, who supports the proposal, raised an issue that was not addressed in the original rule filing.[12] This commenter stated that NASD should revise Rule 10322 to establish a witness fee for non-parties and to prevent employees of a party from being reimbursed by an opposing party for testifying.

NASD respectfully disagrees with this commenter because the reimbursement of witnesses for testifying at a hearing historically has not been a significant issue in NASD's forum. Consequently, NASD is only proposing non-substantive changes to the paragraph of the rule addressing costs involving the appearance of witnesses or the production of documents.

One commenter supports the rule, but indicates that parties should be given at least ten days to oppose the issuance of a subpoena.[13] This commenter also stated that a non-party subpoena should be issued only if the documents relate to the matter in controversy and are not available from the parties.

NASD notes that a provision giving ten days to object to the issuance of a subpoena is currently included in the rule proposal. Arbitrators will use their discretion to determine whether or not to issue a subpoena, or whether to limit the scope of a subpoena before it is issued.

Lastly, NASD notes that some issues raised by several commenters, such as the

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[12] See Goodman Letter.

[13] See Canning Letter.

issuance of a subpoena by an attorney before a panel has ruled on an objection to the subpoena, are not addressed herein as they became moot as a result of the revisions to the rule proposal discussed above.[14]

(b) Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule will make the arbitration subpoena process more orderly and efficient, thereby improving the forum for all parties.

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

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

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments on the proposed rule change were solicited by the Commission in response to the publication of SR-NASD-2005-079, which proposed to amend Rule 10322 of the NASD Code of Arbitration Procedure primarily to provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery.[15] The Commission received 12 comment letters in response to the Federal

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[14] See Lipner, Caruso, Gross, Canning, and Shockman Letters.

[15] See Securities Exchange Act Release No. 51981 (July 6, 2005), 70 FR 40411 (July 13, 2005).

Register publication of SR-NASD-2005-079.[16] The comments are summarized above.

6. Extension of Time Period for Commission Action

NASD does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

NASD requests that the Commission find good cause pursuant to Section 19(b)(2) of the Act for approving the proposed rule change prior to the 30th day after its publication in the Federal Register. The changes to the rule language made by Amendment No. 1 address concerns raised by commenters on the proposal that was previously noticed for comment,[17] and NASD believes that accelerated approval will benefit all parties in its forum by making the arbitration subpoena process more orderly and efficient. Therefore, NASD requests that the Commission accelerate the effectiveness of the proposed rule change prior to the 30th day after its publication in the Federal Register.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

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

4. Full text of the rule change marked to show additions to and deletions from the rule text proposed in the original rule filing.

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[16] See supra note 4.

[17] See Securities Exchange Act Release No. 51981 (July 6, 2005), 70 FR 40411 (July 13, 2005).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-NASD-2005-079)

SELF-REGULATORY ORGANIZATIONS

Proposed Rule Change by National Association of Securities Dealers, Inc. to Revise Rule 10322 of the NASD Code of Arbitration Procedure, which Pertains to Subpoenas and the Power to Direct Appearances

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on March 29, 2006, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission") Amendment No. 1 to the proposed rule change[3] as described in Items I, II, and III below, which Items have been prepared by NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. For the reasons discussed below, the Commission is granting accelerated approval of Amendment No. 1 to the proposed rule change.

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

NASD is proposing to revise Rule 10322 of the NASD Code of Arbitration Procedure, which pertains to subpoenas and the power to direct appearances.

Below is the text of the proposed rule change.[4] Proposed new language is

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 On June 17, 2005, NASD filed SR-NASD-2005-079 with the Commission.

4 The rules proposed in this filing will be renumbered as appropriate following Commission approval of the pending revisions to the NASD Code of Arbitration Procedure for Customer Disputes; see Securities

underlined; proposed deletions are in brackets.

* * * * *

10322. Subpoenas and Power to Direct Appearances

(a) [**Subpoenas**]

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

(b) A party may make a written motion asking an arbitrator to issue a subpoena. The motion, along with the subpoena, must be served directly on each other party, at the same time and in the same manner. The motion and subpoena must also be filed with the Director, with an additional copy for the arbitrator, at the same time and in the same manner in which they are served on the parties.

(c) In the event a party receiving such a motion objects to the scope or propriety of the subpoena, that party shall, within 10 days of service of the motion, file with the Director, with copies to all other parties, written objections. The party seeking the issuance of the subpoena may respond thereto. The arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena.

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).

(d) In the event that a subpoena is issued, the party that requested the subpoena must serve the subpoena at the same time and in the same manner to all parties and the entity receiving the subpoena.

(e) Any party that receives documents in response to a subpoena served upon a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 days following receipt of the request. The party requesting the documents shall be responsible for the reasonable costs associated with the production of the copies.

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

(f) [The] An arbitrator[(s)] shall be empowered without resort to the subpoena process to direct the appearance of any person employed by 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] an arbitrator[(s)] directs otherwise, the party requesting the appearance of a person or the production of documents under this Rule shall bear all reasonable costs of such appearance and/or production.

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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

Rule Filing History

On June 17, 2005, NASD filed with the Commission proposed rule change SR-NASD-2005-079, which proposed amendments to Rule 10322. On July 13, 2005, the Commission published for comment the proposed rule change in the Federal Register.[5] Based on comments received in response to the publication of the proposed rule change in the Federal Register, NASD is filing this Amendment No. 1 to SR-NASD-2005-079 to respond to the comments received and to make revisions to the rule change as described herein.

Proposal

As described in the original rule filing, NASD proposed to revise Rule 10322 of the Code of Arbitration Procedure ("Code") to provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery. NASD additionally proposed clarifying the requirements regarding the service of subpoenas by specifying that a party that issues a subpoena must serve a copy of the subpoena to all parties and the entity receiving the subpoena on the same day.

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[5] See Securities Exchange Act Release No. 51981 (July 6, 2005), 70 FR 40411 (July 13, 2005).

Comments on the Proposed Rule Change

The Commission received 12 comment letters in response to the publication of the proposed rule in the Federal Register.[6] NASD's response to the issues raised in these letters is set forth below.

Several commenters to NASD's proposal stated that only arbitrators should have the authority to issue subpoenas in arbitration.[7] Some of these commenters believed that this limitation should apply only to discovery subpoenas while other commenters suggested that it apply to all subpoenas. In support of their position, a number of these commenters noted that the Federal Arbitration Act provides only arbitrators, and not attorneys, with the authority to issue subpoenas.[8] Furthermore, one commenter noted that only arbitrators have

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6 Comment letters were submitted by Richard Skora, dated July 12, 2005 ("Skora Letter"); Seth E. Lipner, Deutsch & Lipner, dated July 13, 2005 ("Lipner Letter"); Steve Buchwalter, Law Offices of Steve A. Buchwalter, P.C., dated July 13, 2005 ("Buchwalter Letter"); Steven B. Caruso, Maddox Hargett & Caruso, P.C., dated July 19, 2005 ("Caruso Letter"); Dennis M. Pape, dated July 20, 2005 ("Pape Letter"); Al Van Kampen, Rohde & Van Kampen PLLC, dated July 25, 2005 ("Van Kampen Letter"); Phil Cutler, Cutler Nylander & Hayton, dated August 1, 2005 ("Cutler Letter"); Avery B. Goodman, A.B. Goodman Law Firm, Ltd., dated August 1, 2005 and August 2, 2005 ("Goodman Letters"); Jill Gross, Director, Barbara Black, Director, and Richard Downey, Student Intern, Pace Investor Rights Project, dated August 2, 2005 ("Gross Letter"); Tim Canning, dated August 3, 2005 ("Canning Letter"); and Rosemary J. Shockman, President, Public Investors Arbitration Bar Association, dated August 4, 2005 ("Shockman Letter").

7 See Lipner, Buchwalter, Van Kampen, Canning, and Shockman Letters.

8 In fact, there is a split of opinion among the federal appellate courts as to whether arbitrators may issue discovery subpoenas or only subpoenas for attendance or production of documents at a hearing. Compare In re Matter of Arbitration Between Security Life Ins. Co. of America, 228 F.3d 865, 870-871 (8th Cir. 2000) ("Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe this interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing.") with Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3rd Cir. 2004) ("The power to require a non-party 'to bring' items 'with him' clearly applies only to situations in which the non-party accompanies the items to the arbitration proceeding, not to situations in which the items are simply sent or brought by a courier. In addition . . . a non-party may be compelled 'to bring' items 'with him' only when the non-party is summoned 'to attend before [the arbitrator] as a witness."). Furthermore, while the Fourth Circuit, like the Third Circuit, found that the FAA does not grant an arbitrator the authority to subpoena a non-party for purposes of pre-hearing discovery, it did establish the possibility that a party might, "under unusual

the authority to issue subpoenas under the Uniform Arbitration Act and the Revised Uniform Arbitration Act.[9] Lastly, two commenters noted that, under the laws of several states, attorneys do not have the authority to issue subpoenas.

NASD has determined that the proposed rule should be revised to allow only arbitrators to issue subpoenas, whether for discovery or for the appearance at a hearing before the arbitrators, but for reasons other than those suggested by the commenters. NASD believes that providing arbitrators with greater control over the issuance of subpoenas will help to protect investors, associated persons, and other parties from abuse in the discovery process. In addition, the establishment of a uniform, nationwide rule will reduce potential confusion for parties and their counsel regarding whether they have the ability to issue subpoenas, minimize gamesmanship in the subpoena process, and make the rule easier to administer.

One commenter who does not support the proposed rule change stated that arbitrators should be required to give written explanations of all discovery decisions.[10] In addition, this commenter indicated that NASD should enforce current Rule 10322 with respect to the requirement that parties produce witnesses and present documents to the fullest extent possible without resort to the subpoena process.

NASD respectfully disagrees that arbitrators should be required to give written explanations of all discovery decisions, because such a requirement would significantly increase the time and costs associated with the discovery process. With respect to the

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circumstances," petition the district court to compel pre-arbitration discovery upon a showing of "special need or hardship." Comsat Corp. v. National Science Foundation, 190 F.3d 269 (4th Cir. 1999).

9 See Lipner Letter.

10 See Skora Letter.

commenter's assertion regarding the enforcement of Rule 10322, NASD does expect all parties to cooperate to the fullest extent possible without the use of subpoenas, and arbitrators may sanction parties for discovery abuse or make a disciplinary referral at the end of the case if such cooperation is not provided.

One commenter suggested several changes to the proposed rule.[11] First, the commenter stated that the term "fullest" (which is in current Rule 10322) should be included in paragraph (a) of the proposed rule to ensure that parties do not avoid their discovery responsibilities in arbitration. Second, the commenter asserted that the proposal should be amended to specify that service of a subpoena must be made in the exact same manner on everyone. Third, the commenter indicated that a party that receives documents in response to a non-party subpoena should be required to provide copies of the documents to opposing counsel within five days of receipt of the documents.

NASD agrees with this commenter that the term "fullest" should be added in paragraph (a) of the rule to emphasize that, to the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas. NASD also agrees that the method of service of a subpoena should be the same on all parties and the non-party receiving the subpoena and proposes to amend paragraph (d) of the rule to reflect this requirement. Lastly, NASD agrees with the commenter that documents received in response to a non-party subpoena should be made available to other parties. NASD does not believe, however, that a party that receives documents in response to a non-party subpoena should be required automatically to provide copies to another party since that party may have no interest in them or may not want to incur potentially significant copying costs.

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[11] See Caruso Letter.

Therefore, NASD proposes to require a party to provide notice to all other parties that it has received documents in response to a non-party subpoena and to provide copies of those documents only at the request of another party.[12] Once a party receives a request for copies of documents that were received in response to a non-party subpoena, that party will have ten calendar days to provide the copies to the requesting party. NASD believes that a ten calendar day time frame is more appropriate than the one suggested by the commenter because it will allow enough time to copy a potentially voluminous amount of records, and it is also a time frame that is frequently used in the proposed Code revision.

One commenter who does not support the rule proposal indicated that it would, in effect, only impact member firms since customers rarely need documents from non-parties in arbitration.[13] In addition, this commenter expressed concern that arbitrators will not review subpoenas promptly.

NASD respectfully disagrees with this commenter. The proposed rule will apply equally to all parties that use NASD's forum. Even though broker-dealers may use non-party subpoenas more often than do customers or associated persons, the proposed rule will be applied to all parties equally, thereby ensuring that NASD's forum is fair for everyone. NASD does not believe that the proposal will significantly delay the discovery process, as arbitrators will receive training specifically addressing subpoenas once the SEC approves the proposed rule change. Furthermore, parties that volunteer to use NASD's discovery

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[12] A party would have five calendar days after the receipt of subpoenaed documents from a non-party to provide notice to all other parties.

[13] See Pape Letter.

arbitrator pilot program may recognize a further reduction in the time needed for the review of subpoenas, especially in complex cases that involve numerous subpoenas.

One commenter, who supports the proposal, raised an issue that was not addressed in the original rule filing.[14] This commenter stated that NASD should revise Rule 10322 to establish a witness fee for non-parties and to prevent employees of a party from being reimbursed by an opposing party for testifying.

NASD respectfully disagrees with this commenter because the reimbursement of witnesses for testifying at a hearing historically has not been a significant issue in NASD's forum. Consequently, NASD is only proposing non-substantive changes to the paragraph of the rule addressing costs involving the appearance of witnesses or the production of documents.

One commenter supports the rule, but indicates that parties should be given at least ten days to oppose the issuance of a subpoena.[15] This commenter also stated that a non-party subpoena should be issued only if the documents relate to the matter in controversy and are not available from the parties.

NASD notes that a provision giving ten days to object to the issuance of a subpoena is currently included in the rule proposal. Arbitrators will use their discretion to determine whether or not to issue a subpoena, or whether to limit the scope of a subpoena before it is issued.

Lastly, NASD notes that some issues raised by several commenters, such as the issuance of a subpoena by an attorney before a panel has ruled on an objection to the

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[14] See Goodman Letter.

[15] See Canning Letter.

subpoena, are not addressed herein as they became moot as a result of the revisions to the rule proposal discussed above.[16]

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule will make the arbitration subpoena process more orderly and efficient, thereby improving the forum for all parties.

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

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

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments on the proposed rule change were solicited by the Commission in response to the publication of SR-NASD-2005-079, which proposed to amend Rule 10322 of the NASD Code of Arbitration Procedure primarily to provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery.[17] The Commission received 12 comment letters in response to the Federal

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[16] See Lipner, Caruso, Gross, Canning, and Shockman Letters.

[17] See Securities Exchange Act Release No. 51981 (July 6, 2005), 70 FR 40411 (July 13, 2005).

Register publication of SR-NASD-2005-079.[18] The comments are summarized above.

III. DATE OF EFFECTIVENESS OF THE PROPOSED RULE CHANGE AND TIMING FOR COMMISSION ACTION

NASD has requested that the Commission find good cause pursuant to Section 19(b)(2) of the Act 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 NASD and, in particular, the requirements of Section 15A of the Act 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 make the arbitration subpoena process more orderly and efficient, thereby improving the NASD forum for all parties.

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

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[18] See supra note 6.

IV. SOLICITATION OF COMMENTS

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

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2005-079 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASD-2005-079. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the principal office of NASD. All comments received will be

posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to the File Number SR-NASD-2005-079 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[19]

Margaret H. McFarland
Deputy Secretary

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

For the Division of Market Regulation

by:_____

(DATE)

[19] 17 CFR 200.30-3(a)(12).

Exhibit 4

Exhibit 4 shows the full text of rule change marking changes from the original rule filing, SR-NASD-2005-079, to this Amendment No. 1, with the language in the original filing shown as if adopted, and the new language in this Amendment No. 1 marked to show additions and deletions.

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

10322. Subpoenas and Power to Direct Appearances

(a) To the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas. Arbitrators [and any counsel of record may issue subpoenas as provided by law.] shall have the authority to issue subpoenas for the production of documents or the appearance of witnesses.

(b) [No subpoenas seeking discovery shall be issued to or served upon non-parties to an arbitration unless, at least 10 days prior to the issuance or service of the subpoena, the party seeking to issue or serve the subpoena sends notice of intention to serve the subpoena, together with a copy of the subpoena, to all parties to the arbitration.] A party may make a written motion asking an arbitrator to issue a subpoena. The motion, along with the subpoena, must be served directly on each other party, at the same time and in the same manner. The motion and subpoena must also be filed with the Director, with an additional copy for the arbitrator, at the same time and in the same manner in which they are served on the parties.

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

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

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

(e) Any party that receives documents in response to a subpoena served upon a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 days following receipt of the request. The party requesting the documents shall be responsible for the reasonable costs associated with the production of the copies.

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

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

[(h)] (f) [The] An arbitrator[(s)] shall be empowered without resort to the subpoena process to direct the appearance of any person employed by 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] an arbitrator[(s)] directs otherwise, the party requesting the appearance of a person or the production of documents under this Rule shall bear all reasonable costs of such appearance and/or production.