

## OMB APPROVAL

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Page 1 of 7

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

File No. SR - 2005 - 079  
Amendment No. 2

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

|                                     |                                                                               |                                        |                                                                                                                      |                                                                                                                      |                                                 |
|-------------------------------------|-------------------------------------------------------------------------------|----------------------------------------|----------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------|-------------------------------------------------|
| Initial<br><input type="checkbox"/> | Amendment<br><input checked="" type="checkbox"/>                              | Withdrawal<br><input type="checkbox"/> | Section 19(b)(2)<br><input checked="" type="checkbox"/>                                                              | Section 19(b)(3)(A)<br><input type="checkbox"/>                                                                      | Section 19(b)(3)(B)<br><input type="checkbox"/> |
|                                     |                                                                               |                                        | Rule                                                                                                                 |                                                                                                                      |                                                 |
| Pilot<br><input type="checkbox"/>   | Extension of Time Period<br>for Commission Action<br><input type="checkbox"/> | Date Expires<br><input type="text"/>   | <input type="checkbox"/> 19b-4(f)(1)<br><input type="checkbox"/> 19b-4(f)(2)<br><input type="checkbox"/> 19b-4(f)(3) | <input type="checkbox"/> 19b-4(f)(4)<br><input type="checkbox"/> 19b-4(f)(5)<br><input type="checkbox"/> 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  Last Name   
Title   
E-mail   
Telephone  Fax

**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 By   
(Name)

(Title)

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

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

**Form 19b-4 Information**

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change**

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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

**Exhibit 3 - Form, Report, or Questionnaire**

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

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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

On June 17, 2005, NASD filed SR-NASD-2005-079 to revise Rule 10322 of the NASD Code of Arbitration Procedure, which pertains to subpoenas and the power to direct appearances. NASD filed Amendment No. 1 to the proposed rule change on March 29, 2006, which replaced and superseded the original rule filing in its entirety.

NASD is filing this partial Amendment No. 2 to make the following changes to the rule filing:

1. Please replace the proposed text of Rule 10322(b), which appears on pages 4 and 15 of the rule filing, with the following:

A party may make a written motion requesting that an arbitrator issue a subpoena to a party or a non-party. The motion must include a draft subpoena and must be filed with the Director, with an additional copy for the arbitrator. The requesting party must serve the motion and draft subpoena on each other party, at the same time and in the same manner as on the Director. The requesting party may not serve the motion or draft subpoena on a non-party.

2. Please replace the proposed text of Rule 10322(c), which appears on pages 4 and 15 of the rule filing, with the following:

If a party receiving a motion and draft subpoena objects to the scope or propriety of the subpoena, that party shall, within 10 days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the subpoena may respond to the objections. The arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena regardless of whether any objections are made.

3. Please replace the proposed text of Rule 10322(d), which appears on pages 4 and 16 of the rule filing, with the following:

If the arbitrator issues a subpoena, the party that requested the subpoena must serve the subpoena at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the subpoena.

4. Please replace the proposed text of Rule 10322(e), which appears on pages 4 and 16 of the rule filing, with the following:

Any party that receives documents in response to a subpoena served on 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.

5. Please amend the second sentence of the section titled “Rule Filing History,” which appears on pages 6 and 17 of the rule filing, as follows (new language is underlined (other than the Federal Register reference), deletions are in brackets):

Based on comments received in response to the publication of the proposed rule change in the Federal Register, NASD [is filing this] filed Amendments Nos. 1 and 2 to SR-NASD-2005-079 to respond to the comments received and to make revisions to the rule change as described herein.

6. Please insert the following as the second paragraph under the section titled “Proposal” on pages 6 and 17 of the rule filing:

NASD is amending the proposal set forth in the original rule filing to allow only arbitrators to issue subpoenas, whether for discovery or for the appearance at a hearing before the arbitrators. In addition, NASD is proposing 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 at the request of another party. NASD is also clarifying that, in most cases, a public arbitrator will rule on all motions requesting a subpoena. Lastly, NASD is proposing some minor changes to the original proposal, including rewriting certain portions of the rule text in plain English.

7. Please insert the following as the second full paragraph on pages 8 and 19 of the rule filing:

Under most circumstances, the arbitrator responsible for deciding discovery-related motions will be the chairperson of the panel. Thus, except in certain intra-industry cases, the arbitrator ruling on a motion requesting a subpoena will be a public arbitrator. In those situations where the chairperson is unable to rule promptly on the motion for a subpoena, another public arbitrator on the panel shall decide the motion. A non-public arbitrator will rule on a motion requesting a subpoena only in those intra-industry cases where the panel is composed exclusively of non-public arbitrators.

8. At appropriate locations in the rule filing, the filing should be amended to indicate that NASD is not requesting that the Commission find good cause pursuant to Section 19(b)(2) of the Act for approving the proposed rule change prior to the 30<sup>th</sup> day after its publication in the Federal Register.

**Exhibit 4**

**Exhibit 4 shows the full text of the rule change marking changes from Amendment No. 1 to the original rule filing, SR-NASD-2005-079, to Amendment No. 2 with the language in Amendment No. 1 shown as if adopted, and the new language in this Amendment No. 2 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 shall have the authority to issue subpoenas for the production of documents or the appearance of witnesses.

(b) A party may make a written motion [asking] requesting that an arbitrator [to] issue a subpoena to a party or a non-party. The motion[, ] must include a draft subpoena and must be filed with the Director, with an additional copy for the arbitrator. The requesting party must serve the motion and [along with the] draft subpoena[, must be served directly] on each other party, at the same time and in the same manner as on the Director. The requesting party may not serve the motion [and] or draft 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] on a non-party.

(c) [In the event] If a party receiving [such] a motion and draft subpoena objects to the scope or propriety of the subpoena, that party shall, within 10 days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies [to] on all other parties[, written objections] at the same time and in the same manner as on the Director. The party [seeking the issuance of] that

requested the subpoena may respond [thereto] to the objections. The arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena regardless of whether any objections are made.

(d) [In the event that] If the arbitrator issues a subpoena, [is issued,] the party that requested the subpoena must serve the subpoena at the same time and in the same manner [to] on all parties and, if applicable, [the entity] on any non-party receiving the subpoena.

(e) Any party that receives documents in response to a subpoena served [upon] on 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) An arbitrator 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 an arbitrator 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.