OMB APPROVAL

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Page 1 of	24	WASHING	EXCHANGE COMM GTON, D.C. 20549 Form 19b-4	ISSION	File No. SR - 2007 - 02:	2
•	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)
	Extension of Time Period for Commission Action	Date Expires		19b-4(f)(2) 19	b-4(f)(4) b-4(f)(5) b-4(f)(6)	
Exhibit 2 Se	ent As Paper Document	Exhibit 3 Sent As Pap	per Document			
The prop the admi had been Contact Provide the prepared						
Telephon	(202) 728-8151	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 03/16/2007  By Jean I. Feeney  Vice President and Chief Counsel, NASD Dispute						
- , 00	(Name)		Resolution	Cilici Courisei, NACD Di	opuio	
this form.	king the button at right will digit A digital signature is as legally b and once signed, this form canno	pinding as a physical	Jean Feeney	(Title) jean.feeney@nasd.com		

#### SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 For complete Form 19b-4 instructions please refer to the EFFS website. The self-regulatory organization must provide all required information, presented in a Form 19b-4 Information clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the Remove proposal is consistent with the Act and applicable rules and regulations under the Act. The Notice section of this Form 19b-4 must comply with the guidelines for **Exhibit 1 - Notice of Proposed Rule Change** 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 Add Remove (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) Copies of notices, written comments, transcripts, other communications. If such Exhibit 2 - Notices, Written Comments. documents cannot be filed electronically in accordance with Instruction F, they shall **Transcripts, Other Communications** be filed in accordance with Instruction G. Add Remove View Exhibit Sent As Paper Document Exhibit 3 - Form, Report, or Questionnaire 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 Add Remove View referred to by the proposed rule change. Exhibit Sent As Paper Document The full text shall be marked, in any convenient manner, to indicate additions to and **Exhibit 4 - Marked Copies** 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 Add Remove View it has been working. The self-regulatory organization may choose to attach as Exhibit 5 proposed **Exhibit 5 - Proposed Rule Text** 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 Add Remove View considered part of the proposed rule change. If the self-regulatory organization is amending only part of the text of a lengthy **Partial Amendment** 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 View 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. <u>Text of Proposed Rule Change</u>

(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") a proposed rule change to amend the NASD Code of

Mediation Procedure ("Mediation Code") to re-number the rules, update cross references,

and re-insert rule language that had been reserved.

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

\* \* \* \* \*

#### NASD CODE OF MEDIATION PROCEDURE

#### [10401] 14100. Definitions

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

#### (a) Board

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

#### (b) Code

The term "Code" means the NASD Code of Mediation Procedure.

#### (c) Director

The term "Director" in the Rule [10400] <u>14000</u> Series refers to the Director of Mediation at NASD Dispute Resolution. Unless the Code or any other NASD rule provides otherwise, the term includes NASD staff to whom the Director of Mediation has delegated authority.

#### (d) Matter

The term "matter" means a dispute, claim, or controversy.

#### (e) NAMC

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

#### (f) NASD

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

## (g) [Reserved.] NASD Customer Code

The term "NASD Customer Code" means the NASD Code of Arbitration Procedure for Customer Disputes.

#### (h) [Reserved.] NASD Industry Code

The term "NASD Industry Code" means the NASD Code of Arbitration Procedure for Industry Disputes.

## (i) Submission Agreement

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

## [10402] <u>14101</u>. Applicability of Code

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

### [10403] 14102. National Arbitration and Mediation Committee

- (a) Pursuant to Part V(C)(1)(b) of the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries ("Delegation Plan"), the Board shall appoint a National Arbitration and Mediation Committee ("NAMC").
  - (1) The NAMC shall consist of no fewer than ten and no more than 25 members. At least 50 percent of the NAMC shall be Non-Industry members.
  - (2) The Chairperson of the Board shall name the Chairperson of the NAMC.
- (b) Pursuant to the Delegation Plan, the NAMC shall have the authority to recommend rules, regulations, procedures and amendments relating to arbitration, mediation, and other dispute resolution matters to the Board. All matters recommended by the NAMC to the Board must have been approved by a quorum, which shall consist of a majority of the NAMC, including at least 50 percent of the Non-Industry committee members. If at least 50 percent of the Non-Industry committee members are either (i) present at or (ii) have filed a waiver of attendance for a meeting after receiving an agenda

prior to such meeting, the requirement that at least 50 percent of the Non-Industry committee members be present to constitute the quorum shall be waived. The NAMC has such other power and authority as is necessary to carry out the purposes of this Code.

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

## [10404] <u>14103</u>. Director of Mediation

- (a) The Board shall appoint a Director of Mediation to administer mediations under the Code. The Director will consult with the NAMC on the administration of mediations, as necessary.
- (b) The Director may delegate his or her duties when appropriate, unless the Code provides otherwise.

## [10405] <u>14104</u>. Mediation [U]<u>u</u>nder the Code

- (a) Mediation under the Code is voluntary, and requires the written agreement of all parties. No party may be compelled to participate in a mediation or to settle a matter by NASD, or by any mediator appointed to mediate a matter pursuant to the Code.
- (b) If all parties agree, any matter that is eligible for arbitration under the <u>NASD</u> <u>Customer Code or NASD Industry Code</u> [NASD Code of Arbitration Procedure], or any part of any such matter, or any dispute related to such matter, including procedural issues, may be submitted for mediation under the Code.
- (c) A matter is submitted to mediation when the Director receives an executed Submission Agreement from each party.
- (d) The Director shall have the sole authority to determine if a matter is eligible to be submitted for mediation.

#### [10406] 14105. Effect of Mediation on Arbitration Proceedings

- (a) Unless the parties agree otherwise, the submission of a matter for mediation will not stay or otherwise delay the arbitration of a matter pending at NASD. If all parties agree to stay an arbitration in order to mediate the matter, the arbitration will be stayed, notwithstanding any provision to the contrary in this Code or any other NASD rule.
- (b) If mediation is conducted through NASD, no <u>postponement</u> [adjournment] fees will be charged for staying the arbitration in order to mediate.

#### [10407] 14106. Mediator Selection

- (a) A mediator may be selected:
  - By the parties from a list supplied by the Director;
  - By the parties from a list or other source of their own choosing; or

- By the Director if the parties do not select a mediator after submitting a matter to mediation.
- (b) For any mediator assigned or selected from a list provided by NASD, the parties will be provided with information relating to the mediator's employment, education, and professional background, as well as information on the mediator's experience, training, and credentials as a mediator.
- (c) Any mediator selected or assigned to mediate a matter shall comply with the provisions of NASD Customer Code Rule 12408 or NASD Industry Code Rule 13408 [Rule 10312(a), (b), and (c) of the NASD Code of Arbitration Procedure], unless, with respect to a mediator selected from a source other than a list provided by NASD, the parties elect to waive such disclosure.
- (d) No mediator may serve as an arbitrator of any matter pending in NASD arbitration in which he served as a mediator; nor may the mediator represent any party or participant to the mediation in any subsequent NASD arbitration relating to the subject matter of the mediation.

## [10408] <u>14107</u>. Limitation on Liability

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

#### [10409] 14108. Mediation Ground Rules

- (a) The following Ground Rules govern the mediation of a matter. The parties to a mediation may agree to amend any or all of the Ground Rules at any time. The Ground Rules are intended to be standards of conduct for the parties and the mediator.
- (b) Mediation is voluntary and any party may withdraw from mediation at any time prior to the execution of a written settlement agreement by giving written notice of withdrawal to the mediator, the other parties, and the Director.
- (c) The mediator shall act as a neutral, impartial, facilitator of the mediation process and shall not have any authority to determine issues, make decisions or otherwise resolve the matter.
- (d) Following the selection of a mediator, the mediator, all parties and their representatives will meet in person or by conference call for all mediation sessions, as determined by the mediator or by mutual agreement of the parties. The mediator shall facilitate, through joint sessions, caucuses and/or other means, discussions between the parties, with the goal of assisting the parties in reaching their own resolution of the matter. The mediator shall determine the procedure for the conduct of the mediation. The parties and their representatives agree to cooperate with the mediator in ensuring that the mediation is conducted expeditiously, to make all reasonable efforts to be available for mediation sessions, and to be represented at all scheduled mediation sessions either in person or through a person with authority to settle the matter.

- (e) The mediator may meet with and communicate separately with each party or the party's representative. The mediator shall notify all other parties of any such separate meetings or other communications.
- (f) The parties agree to attempt, in good faith, to negotiate a settlement of the matter submitted to mediation. Notwithstanding that a matter is being mediated, the parties may engage in direct settlement discussions and negotiations separate from the mediation process.
  - (g) Mediation is intended to be private and confidential.
  - (1) The parties and the mediator agree not to disclose, transmit, introduce, or otherwise use opinions, suggestions, proposals, offers, or admissions obtained or disclosed during the mediation by any party or the mediator as evidence in any action at law, or other proceeding, including a lawsuit or arbitration, unless authorized in writing by all other parties to the mediation or compelled by law, except that the fact that a mediation has occurred shall not be considered confidential.
  - (2) Notwithstanding the foregoing, the parties agree and acknowledge that the provisions of this paragraph shall not operate to shield from disclosure to NASD or any other regulatory authority, documentary or other information that NASD or other regulatory authority would be entitled to obtain or examine in the exercise of its regulatory responsibilities.
  - (3) The mediator will not transmit or otherwise disclose confidential information provided by one party to any other party unless authorized to do so by the party providing the confidential information.

### [10410] <u>14109</u>. Mediation Fees

(a) Filing Fees: Cases Filed Directly in Mediation

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

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

(b) Filing Fees: Cases Initially Filed in Arbitration

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

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

## (c) Mediator Fees and Expenses

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

\* \* \* \* \*

- (b) Not applicable.
- (c) Not applicable.

## 2. <u>Procedures of the Self-Regulatory Organization</u>

(a) The proposed rule change was approved by the Board of Directors of NASD Dispute Resolution at its meeting on November 12, 2003, which authorized the filing of the rule change with the SEC. Counsel for the Nasdaq Stock Market and NASD Regulation 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 meeting on November 13, 2003. 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 has filed the proposed rule change for immediate effectiveness. The effective date will be 30 days after the date of filing.

(b) Questions regarding this rule filing may be directed to Mignon McLemore, Assistant Chief Counsel, NASD Dispute Resolution, at (202) 728-8151.

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

#### (a) Purpose

In 1998, the SEC launched an initiative to encourage issuers and self-regulatory organizations to use "plain English" in disclosure documents and other materials used by investors. In response, NASD undertook to rewrite the NASD Code of Arbitration Procedure ("old Code") in "plain English." This undertaking became the Code Revision Project (Project).

NASD began to implement the Project in 2003 when it filed with the SEC a proposed rule change to the old Code to reorganize the rules, simplify the language, codify current practices, and implement several substantive changes. The proposal reorganized NASD's old dispute resolution rules (Rules 10000 et seq.) into three separate procedural codes: the NASD Code of Arbitration Procedure for Customer Disputes ("Customer Code"); the NASD Code of Arbitration Procedure for Industry Disputes ("Industry Code"); and the NASD Code of Mediation Procedure ("Mediation Code"). The three new Codes would replace the old Code in its entirety.

<sup>&</sup>lt;sup>1</sup> <u>See</u> Securities Exchange Act Release No. 51856 (June 15, 2005), 70 FR 36442 (June 23, 2005) (File No. SR-NASD-2003-158) (Notice of Filing of Proposed Rule Change and Amendments Nos. 1, 2, 3, and 4 Thereto to Amend NASD Code of Arbitration Procedure for Customer Disputes).

<sup>&</sup>lt;sup>2</sup> In 2004, NASD filed the Industry and Mediation Codes separately. <u>See</u> Securities Exchange Act Release No. 51857 (June 15, 2005), 70 FR 36430 (June 23, 2005) (File No. SR-NASD-2004-011) (Notice of Filing of Proposed Rule Change and Amendments Nos. 1, 2, 3, and 4 Thereto to Amend NASD Code of Arbitration Procedure for Industry Disputes); and <u>see</u> Securities Exchange Act Release No. 51855 (June 15, 2005), 70 FR 36440 (June 23, 2005) (File No. SR-NASD-2004-013) (Notice of Filing of Proposed Rule Change and Amendments Nos. 1 and 2 Thereto to Amend NASD Arbitration Rules for Mediation Proceedings).

On October 31, 2005, the SEC approved the Mediation Code.<sup>3</sup> It became effective on January 30, 2006.<sup>4</sup> On January 24, 2007, the SEC approved the Customer Code and Industry Code.<sup>5</sup> The Customer and Industry Codes will become effective on April 16, 2007.<sup>6</sup>

The Mediation Code became effective before the Customer and Industry Codes were approved. NASD implemented the Mediation Code by replacing the old rules governing mediation (Rules 10400 et seq.) in the old Code with the rules of the Mediation Code. To minimize confusion and to assist the users of the dispute resolution forum, NASD renumbered the rules of the Mediation Code so that they would be consistent with the numbering in the old Code, which was still in effect at the time the Mediation Code became effective. In replacing the old rules with those of the Mediation Code, NASD changed cross-references to proposed rules of the Customer and Industry Codes to applicable rules of the old Code, and removed rule language that was based on the proposed codes.

Under this proposed rule change, NASD is proposing to remove the rules of the Mediation Code from the old Code and re-number them so that the Mediation Code

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<sup>&</sup>lt;sup>3</sup> <u>See</u> Securities Exchange Act Release No. 52705 (Oct. 31, 2005); 70 FR 67525 (Nov. 7, 2005) (File No. SR-NASD-2004-013) (Order Granting Approval to Proposed Rule Change and Amendments Nos. 1 and 2 Thereto, and Notice and Filing and Order Granting Accelerated Approval to Amendment No. 3, to Amend NASD Rules for Mediation Proceedings).

<sup>&</sup>lt;sup>4</sup> The changes were announced in Notice to Members 05-85 (December 2005).

<sup>&</sup>lt;sup>5</sup> <u>See</u> Securities Exchange Act Release No. 55158 (Jan. 24, 2007); 72 FR 4574 (Jan. 31, 2007) (File Nos. SR-NASD-2003-158 and SR-NASD-2004-011) (Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Customer Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto; Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Industry Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto).

<sup>&</sup>lt;sup>6</sup> The changes were announced in Notice to Members 07-07 (February 2007).

becomes a separate procedural code, as proposed and approved by the SEC.<sup>7</sup> The Customer Code will use the Rule 12000 series, the Industry Code will use the Rule 13000 series, and the Mediation Code will use the Rule 14000 series, all of which are also currently unused under the NASD numbering system. NASD also is proposing to change cross-references to applicable rules of the Customer and Industry Codes, and re-insert rule language that had been reserved until the new Codes were approved.

#### (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 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 change is consistent with the provision of the Act noted above because it will provide useful guidance to parties, mediators and staff, and will help standardize the administration of NASD mediations.

## 4. <u>Self-Regulatory Organization's Statement on Burden on Competition</u>

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

Written comments were neither solicited nor received.

#### 6. Extension of Time Period for Commission Action

Not applicable.

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<sup>&</sup>lt;sup>7</sup> <u>Id</u>. at nn.1 & 5.

# 7. <u>Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)</u>

Pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>8</sup> and Rule 19b-4(f)(3) thereunder,<sup>9</sup> NASD has designated this proposal as concerned solely with the administration of the self-regulatory organization, which renders the proposed rule change effective immediately upon filing. The proposed rule change is concerned solely with the administration of NASD in that it re-numbers the rules, updates cross references, and reinserts rule language that had been reserved.

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

Not applicable.

## 9. Exhibits

Completed notice of proposed rule change for publication in the <u>Federal</u>
 Register.

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<sup>&</sup>lt;sup>8</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>&</sup>lt;sup>9</sup> 17 C.F.R. 240.19b-4(f)(3).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION Release No. 34-\_\_\_\_\_; File No. SR-NASD-2007-022

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. to Amend the Code of Mediation Procedure

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that the National Association of Securities Dealers, Inc. ("NASD"), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. ("NASD Dispute Resolution") filed with the Securities and Exchange Commission ("SEC" or "Commission") on March 16, 2007, the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD Dispute Resolution.

NASD has designated the proposed rule change as concerned solely with the administration of the self-regulatory organization under Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(3) thereunder,<sup>4</sup> which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

# I. <u>SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE</u>

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

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

<sup>&</sup>lt;sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>&</sup>lt;sup>4</sup> 17 CFR 240.19b-4(f)(3).

NASD Dispute Resolution is proposing to amend the Code of Mediation Procedure to re-number the rules and update cross references. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

\* \* \* \*

#### NASD CODE OF MEDIATION PROCEDURE

### [10401] 14100. Definitions

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

#### (a) Board

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#### (b) Code

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#### (c) Director

The term "Director" in the Rule [10400] <u>14000</u> Series refers to the Director of Mediation at NASD Dispute Resolution. Unless the Code or any other NASD rule provides otherwise, the term includes NASD staff to whom the Director of Mediation has delegated authority.

### (d) Matter

The term "matter" means a dispute, claim, or controversy.

## (e) NAMC

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

#### (f) NASD

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

#### (g) [Reserved.] NASD Customer Code

<u>The term "NASD Customer Code" means the NASD Code of Arbitration Procedure for Customer Disputes.</u>

#### (h) [Reserved.] NASD Industry Code

The term "NASD Industry Code" means the NASD Code of Arbitration Procedure for Industry Disputes.

#### (i) Submission Agreement

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

### [10402] <u>14101</u>. Applicability of Code

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#### [10403] 14102. National Arbitration and Mediation Committee

- (a) Pursuant to Part V(C)(1)(b) of the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries ("Delegation Plan"), the Board shall appoint a National Arbitration and Mediation Committee ("NAMC").
  - (1) The NAMC shall consist of no fewer than ten and no more than 25 members. At least 50 percent of the NAMC shall be Non-Industry members.
    - (2) The Chairperson of the Board shall name the Chairperson of the NAMC.
- (b) Pursuant to the Delegation Plan, the NAMC shall have the authority to recommend rules, regulations, procedures and amendments relating to arbitration, mediation, and other dispute resolution matters to the Board. All matters recommended by the NAMC to the Board must have been approved by a quorum, which shall consist of a majority of the NAMC, including at least 50 percent of the Non-Industry committee members. If at least 50 percent of the Non-Industry committee members are either (i) present at or (ii) have filed a waiver of attendance for a meeting after receiving an agenda prior to such meeting, the requirement that at least 50 percent of the Non-Industry committee members be present to constitute the quorum shall be waived. The NAMC has such other power and authority as is necessary to carry out the purposes of this Code.
- (c) The NAMC may meet as frequently as necessary, but must meet at least once a year.

#### [10404] 14103. Director of Mediation

- (a) The Board shall appoint a Director of Mediation to administer mediations under the Code. The Director will consult with the NAMC on the administration of mediations, as necessary.
- (b) The Director may delegate his or her duties when appropriate, unless the Code provides otherwise.

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- (b) If all parties agree, any matter that is eligible for arbitration under the <u>NASD</u> <u>Customer Code or NASD Industry Code</u> [NASD Code of Arbitration Procedure], or any part of any such matter, or any dispute related to such matter, including procedural issues, may be submitted for mediation under the Code.
- (c) A matter is submitted to mediation when the Director receives an executed Submission Agreement from each party.
- (d) The Director shall have the sole authority to determine if a matter is eligible to be submitted for mediation.

## [10406] 14105. Effect of Mediation on Arbitration Proceedings

- (a) Unless the parties agree otherwise, the submission of a matter for mediation will not stay or otherwise delay the arbitration of a matter pending at NASD. If all parties agree to stay an arbitration in order to mediate the matter, the arbitration will be stayed, notwithstanding any provision to the contrary in this Code or any other NASD rule.
- (b) If mediation is conducted through NASD, no <u>postponement</u> [adjournment] fees will be charged for staying the arbitration in order to mediate.

## [10407] <u>14106</u>. Mediator Selection

- (a) A mediator may be selected:
  - By the parties from a list supplied by the Director;
  - By the parties from a list or other source of their own choosing; or
  - By the Director if the parties do not select a mediator after submitting a matter to mediation.
- (b) For any mediator assigned or selected from a list provided by NASD, the parties will be provided with information relating to the mediator's employment, education, and professional background, as well as information on the mediator's experience, training, and credentials as a mediator.
- (c) Any mediator selected or assigned to mediate a matter shall comply with the provisions of NASD Customer Code Rule 12408 or NASD Industry Code Rule 13408 [Rule 10312(a), (b), and (c) of the NASD Code of Arbitration Procedure], unless, with respect to a mediator selected from a source other than a list provided by NASD, the parties elect to waive such disclosure.
- (d) No mediator may serve as an arbitrator of any matter pending in NASD arbitration in which he served as a mediator; nor may the mediator represent any party or participant to

the mediation in any subsequent NASD arbitration relating to the subject matter of the mediation.

## [10408] <u>14107</u>. Limitation on Liability

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

#### [10409] <u>14108</u>. Mediation Ground Rules

- (a) The following Ground Rules govern the mediation of a matter. The parties to a mediation may agree to amend any or all of the Ground Rules at any time. The Ground Rules are intended to be standards of conduct for the parties and the mediator.
- (b) Mediation is voluntary and any party may withdraw from mediation at any time prior to the execution of a written settlement agreement by giving written notice of withdrawal to the mediator, the other parties, and the Director.
- (c) The mediator shall act as a neutral, impartial, facilitator of the mediation process and shall not have any authority to determine issues, make decisions or otherwise resolve the matter.
- (d) Following the selection of a mediator, the mediator, all parties and their representatives will meet in person or by conference call for all mediation sessions, as determined by the mediator or by mutual agreement of the parties. The mediator shall facilitate, through joint sessions, caucuses and/or other means, discussions between the parties, with the goal of assisting the parties in reaching their own resolution of the matter. The mediator shall determine the procedure for the conduct of the mediation. The parties and their representatives agree to cooperate with the mediator in ensuring that the mediation is conducted expeditiously, to make all reasonable efforts to be available for mediation sessions, and to be represented at all scheduled mediation sessions either in person or through a person with authority to settle the matter.
- (e) The mediator may meet with and communicate separately with each party or the party's representative. The mediator shall notify all other parties of any such separate meetings or other communications.
- (f) The parties agree to attempt, in good faith, to negotiate a settlement of the matter submitted to mediation. Notwithstanding that a matter is being mediated, the parties may engage in direct settlement discussions and negotiations separate from the mediation process.
  - (g) Mediation is intended to be private and confidential.
  - (1) The parties and the mediator agree not to disclose, transmit, introduce, or otherwise use opinions, suggestions, proposals, offers, or admissions obtained or disclosed during the mediation by any party or the mediator as evidence in any action at law, or other proceeding, including a lawsuit or arbitration, unless authorized in

writing by all other parties to the mediation or compelled by law, except that the fact that a mediation has occurred shall not be considered confidential.

- (2) Notwithstanding the foregoing, the parties agree and acknowledge that the provisions of this paragraph shall not operate to shield from disclosure to NASD or any other regulatory authority, documentary or other information that NASD or other regulatory authority would be entitled to obtain or examine in the exercise of its regulatory responsibilities.
- (3) The mediator will not transmit or otherwise disclose confidential information provided by one party to any other party unless authorized to do so by the party providing the confidential information.

## [10410] <u>14109</u>. Mediation Fees

(a) Filing Fees: Cases Filed Directly in Mediation

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

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

#### (b) Filing Fees: Cases Initially Filed in Arbitration

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

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

## (c) Mediator Fees and Expenses

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

anticipated mediator charges and expenses, as determined by the Director, prior to the first mediation session.

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## II. <u>SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE PURPOSE OF,</u> 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) <u>Self-Regulatory Organization's Statement of the Purpose of, and Statutory</u>
  <u>Basis for, the Proposed Rule Change</u>
- (a) Purpose

In 1998, the SEC launched an initiative to encourage issuers and self-regulatory organizations to use "plain English" in disclosure documents and other materials used by investors. In response, NASD undertook to rewrite the NASD Code of Arbitration Procedure ("old Code") in "plain English." This undertaking became the Code Revision Project (Project).

NASD began to implement the Project in 2003 when it filed with the SEC a proposed rule change to the old Code to reorganize the rules, simplify the language, codify current practices, and implement several substantive changes.<sup>5</sup> The proposal reorganized NASD's old dispute resolution rules (Rules 10000 et seq.) into three separate procedural codes: the NASD Code of Arbitration Procedure for Customer Disputes ("Customer Code"); the NASD

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<sup>&</sup>lt;sup>5</sup> <u>See</u> Securities Exchange Act Release No. 51856 (June 15, 2005), 70 FR 36442 (June 23, 2005) (File No. SR-NASD-2003-158) (Notice of Filing of Proposed Rule Change and Amendments Nos. 1, 2, 3, and 4 Thereto to Amend NASD Code of Arbitration Procedure for Customer Disputes).

Code of Arbitration Procedure for Industry Disputes ("Industry Code"); and the NASD Code of Mediation Procedure ("Mediation Code").<sup>6</sup> The three new Codes would replace the old Code in its entirety.

On October 31, 2005, the SEC approved the Mediation Code.<sup>7</sup> It became effective on January 30, 2006.<sup>8</sup> On January 24, 2007, the SEC approved the Customer Code and Industry Code.<sup>9</sup> The Customer and Industry Codes will become effective on April 16, 2007.<sup>10</sup>

The Mediation Code became effective before the Customer and Industry Codes were approved. NASD implemented the Mediation Code by replacing the old rules governing mediation (Rules 10400 et seq.) in the old Code with the rules of the Mediation Code. To minimize confusion and to assist the users of the dispute resolution forum, NASD renumbered the rules of the Mediation Code so that they would be consistent with the numbering in the old Code, which was still in effect at the time the Mediation Code became effective. In replacing the old rules with those of the Mediation Code, NASD changed cross-references to proposed rules of the Customer and Industry Codes to applicable rules of the

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<sup>&</sup>lt;sup>6</sup> In 2004, NASD filed the Industry and Mediation Codes separately. <u>See</u> Securities Exchange Act Release No. 51857 (June 15, 2005), 70 FR 36430 (June 23, 2005) (File No. SR-NASD-2004-011) (Notice of Filing of Proposed Rule Change and Amendments Nos. 1, 2, 3, and 4 Thereto to Amend NASD Code of Arbitration Procedure for Industry Disputes); and <u>see</u> Securities Exchange Act Release No. 51855 (June 15, 2005), 70 FR 36440 (June 23, 2005) (File No. SR-NASD-2004-013) (Notice of Filing of Proposed Rule Change and Amendments Nos. 1 and 2 Thereto to Amend NASD Arbitration Rules for Mediation Proceedings).

<sup>&</sup>lt;sup>7</sup> <u>See Securities Exchange Act Release No. 52705 (Oct. 31, 2005)</u>; 70 FR 67525 (Nov. 7, 2005) (File No. SR-NASD-2004-013) (Order Granting Approval to Proposed Rule Change and Amendments Nos. 1 and 2 Thereto, and Notice and Filing and Order Granting Accelerated Approval to Amendment No. 3, to Amend NASD Rules for Mediation Proceedings).

<sup>&</sup>lt;sup>8</sup> The changes were announced in Notice to Members 05-85 (December 2005).

<sup>&</sup>lt;sup>9</sup> <u>See</u> Securities Exchange Act Release No. 55158 (Jan. 24, 2007); 72 FR 4574 (Jan. 31, 2007) (File Nos. SR-NASD-2003-158 and SR-NASD-2004-011) (Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Customer Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto; Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Industry Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto).

<sup>&</sup>lt;sup>10</sup> The changes were announced in Notice to Members 07-07 (February 2007).

old Code, and removed rule language that was based on the proposed codes.

Under this proposed rule change, NASD is proposing to remove the rules of the Mediation Code from the old Code and re-number them so that the Mediation Code becomes a separate procedural code, as proposed and approved by the SEC. 11 The Customer Code will use the Rule 12000 series, the Industry Code will use the Rule 13000 series, and the Mediation Code will use the Rule 14000 series, all of which are also currently unused under the NASD numbering system. NASD also is proposing to change cross-references to applicable rules of the Customer and Industry Codes, and re-insert rule language that had been reserved until the new Codes were approved.

## (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 the Association'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 change is consistent with the provision of the Act noted above because it will provide useful guidance to parties, mediators and staff, and will help standardize the administration of NASD mediations.

## (B) <u>Self-Regulatory Organization's Statement on Burden on Competition</u>

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.

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<sup>&</sup>lt;sup>11</sup> Id. at nn.3 & 7.

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

Written comments were neither solicited nor received by NASD.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act and paragraph (f) of Rule 19b-4 thereunder. 12 At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule 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.

#### 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-2007-022 on the subject line.

Paper Comments:

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Send paper comments in triplicate to Nancy M. Morris, Secretary,
 Securities and Exchange Commission, 450 Fifth Street, NW, Washington,
 DC 20549-0609.

All submissions should refer to File Number SR-NASD-2007-022. 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-2007-022 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. <sup>13</sup>

Florence E. Harmon Deputy Secretary

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

by:			
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	(DATE)		