

considering issuance of amendments to Facility Operating License Nos. DPR-39 and DPR-48, issued to Commonwealth Edison Company (the licensee), for operation of Zion Nuclear Power Station, Units 1 and 2, located in Lake County, Illinois.

### Environmental Assessment

#### Identification of the Proposed Action

The proposed action would allow the storage of fuel in the new fuel storage vault with an enrichment up to and including 4.65 weight percent U-235, revise the description of the enrichment of the fuel in the reactor core, and add references to three previously approved documents in the Technical Specifications (TSs).

#### The Need for the Proposed Action

The proposed action is needed since future core designs will incorporate fuel enrichments up to 4.65 weight percent U-235. Use of the higher enrichment fuel will permit increased flexibility in planning fuel cycles, with the potential for longer fuel cycles or higher burnup rates.

#### Environmental Impacts of the Proposed Action

The Commission has completed its evaluation of the proposed revisions to the TSs. The proposed revisions would permit storage of fuel enriched to a nominal 4.65 weight U-235. The safety considerations associated with storing new and spent fuel of a higher enrichment have been evaluated by the NRC staff. The staff has concluded that such changes would not adversely affect plant safety. The proposed changes have no adverse effect on the probability of any accident. No changes are being made in the types or amounts of any radiological effluents that may be released offsite. There is no significant increase in the allowable individual or cumulative occupational radiation exposure.

The environmental impacts of transportation resulting from the use of higher enrichment fuel and extended irradiation were published and discussed in the staff assessment entitled, "NRC Assessment of the Environmental Effects of Transportation Resulting from Extended Fuel Enrichment and Irradiation," dated July 7, 1988, and published in the **Federal Register** (53 FR 30355) on August 11, 1988, as corrected on August 24, 1988 (53 FR 32322) in connection with Shearon Harris Nuclear Power Plant, Unit 1: Environmental Assessment and Finding of No Significant Impact. As indicated therein, the environmental

cost contribution of the proposed increase in the fuel enrichment and irradiation limits are either unchanged or may, in fact, be reduced from those summarized in Table S-4 as set forth in 10 CFR 51.52(c). Accordingly, the Commission concludes that there are no significant radiological environmental impacts associated with the proposed amendment.

With regard to potential nonradiological impacts of reactor operation with the higher enrichment fuel, the proposed changes to the TS involve systems located entirely within the restricted area, as defined in 10 CFR Part 20. They do not affect nonradiological plant effluents and have no other environmental impact. Accordingly, the Commission concludes that there are no significant nonradiological environmental impacts associated with the proposed action.

#### Alternatives to the Proposed Action

Since the Commission has concluded there is no measurable environmental impact associated with the proposed action, any alternatives with equal or greater environmental impact need not be evaluated. As an alternative to the proposed action, the staff considered denial of the proposed action. Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

#### Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Environmental Statement for Zion Nuclear Power Station, Units 1 and 2.

#### Agencies and Persons Consulted

In accordance with its stated policy, on May 31, 1995, the staff consulted with the Illinois State official, Mr. Frank Niziolek; Head, Reactor Safety Section; Division of Engineering; Illinois Department of Nuclear Safety; regarding the environmental impact of the proposed action. The State official had no comments.

#### Finding of No Significant Impact

Based upon the environmental assessment, the Commission concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated December 23, 1994, which is

available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and at the local public document room located at the Waukegan Public Library, 128 N. County Street, Waukegan, Illinois 60085.

Dated at Rockville, Maryland, this 8th day of June 1995.

For the Nuclear Regulatory Commission.

**Robert A. Capra,**

Director, Project Directorate III-2, Division of Reactor Projects III/IV, Office of Nuclear Reactor Regulation.

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## SECURITIES AND EXCHANGE COMMISSION

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc., Relating to Mediation of Disputes

[Release No. 34-35830; File No. SR-NASD-95-25]

June 9, 1995.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on June 6, 1995,<sup>1</sup> the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The NASD is proposing to amend the Code of Arbitration Procedure ("Code") by adding a new Part IV to set forth rules to govern the administration of mediations. The NASD is also proposing to amend Sections 37, 43 and 44 of the Code<sup>2</sup> to add fee and other provisions relating to the administration of

<sup>1</sup> The NASD amended the proposed rule change subsequent to its original filing on May 19, 1995. Amendment No. 1 was a minor technical amendment, the text of which may be examined in the Commission's Public Reference Room. See Letter from Suzanne E. Rothwell, Associate General Counsel, NASD, to Mark P. Barracca, Branch Chief, Over-the-Counter Regulation, Division of Market Regulation, SEC (June 2, 1995).

<sup>2</sup> NASD Manual, Code of Arbitration Procedure, Part III, Secs. 37, 43 and 44. (CCH) ¶¶3737, 3743, 3744.

mediations. Below is the text of the proposed rule change. Proposed new language is in italics.

#### Code of Arbitration Procedure

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#### Record of Proceedings

Sec. 37. (a) A verbatim record by stenographic reporter or tape recording of all arbitration hearings shall be kept. If a party or parties to a dispute elect to have the record transcribed, the cost of such transcription shall be borne by the party or parties making the request unless the arbitrators direct otherwise. The arbitrators may also direct that the record be transcribed. If the record is transcribed at the request of any party, a copy shall be provided to the arbitrators.

(b) A verbatim record of mediation conducted pursuant to Part IV of this Code shall not be kept.

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#### Schedule of Fees for Customer Disputes

Sec. 43.

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(i) Each party to a matter submitted to a mediation administered by the Association where there is no Association arbitration proceeding pending shall pay an administrative fee of \$150.

(j) The parties to a mediation administered by the Association shall 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 the Association their proportional share of the anticipated mediator charges and expenses, as determined by the Director of Mediation, prior to the first mediation session. Mediator charges, except travel and other expenses, are as follows:

(1) Initial Mediation Session: \$600 or four (4) times the mediator's hourly rate agreed to by the parties and the mediator; and

(2) Additional Mediation Sessions: \$150 per hour, or such other hourly rate agreed to by the parties and the mediator, per hour or portion thereof.

#### Schedule of Fees for Industry and Clearing Controversies

Sec. 44.

\* \* \* \* \*

(j) Each party to a matter submitted to a mediation administered by the Association where there is no Association arbitration proceeding pending shall pay an administrative fee of \$250.

(k) The parties to a mediation administered by the Association shall 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 the Association their proportional share of the anticipated mediator charges and expenses, as determined by the Director of Mediation, prior to the first mediation session. Mediator charges, except travel and other expenses, are as follows:

(1) Initial Mediation Session: \$600 or four (4) times the mediator's hourly rate agreed to by the parties and the mediator; and

(2) Additional Mediation Sessions: \$150 per hour, or such other hourly rate agreed to by the parties and the mediator, per hour or portion thereof.

\* \* \* \* \*

Sec. 47 Reserved.<sup>3</sup>

Sec. 48 Reserved.

Sec. 49 Reserved.

#### PART IV—MEDIATION RULES

##### Scope and Authority

Sec. 50. (a) The NASD Mediation Procedures ("Procedures") set forth in this Part shall apply to the mediation of any dispute, claim or controversy ("matter") administered by the Association.

(b) A Director of Mediation shall be designated by the Association to administer mediations under these Procedures. The Director will consult the Association's National Arbitration Committee on the administration of mediations and the Committee shall, as necessary, make recommendations to the Director and recommend to the Board of Governors amendments to the Procedures. The duties and functions of the Director may be delegated as appropriate. For purposes of this Part, the term "Director" refers to the Director of Mediation.

(c) Neither the NASD nor any mediator appointed to mediate a matter pursuant to these Procedures shall have any authority to compel a party to participate in a mediation or to settle a matter.

##### Submission of Eligible Matters

Sec. 51. Any matter eligible for arbitration under this Code, any part thereof, or any issue related to the matter, including procedural issues, may be submitted for mediation under

<sup>3</sup>These new "reserved" sections are being added to provide room for additional new provisions of the Code that should precede the mediation provisions.

these Procedures upon the agreement of all parties. A matter will be deemed submitted when the Director has received an executed Submission Agreement for each party. The Director shall have the sole authority to determine if a matter is eligible to be submitted for mediation.

##### Arbitration Proceedings

Sec. 52. Unless the parties agree otherwise, the submission of a matter for mediation shall not stay or otherwise delay the arbitration of a matter pending under this Code.

##### Mediator Selection

Sec. 53. (a) A mediator may be selected: (1) by the parties from a list supplied by the Director; (2) by the parties from a list or other source of their own choosing; or (3) by the Director if the parties do not act to select a mediator after submitting a matter to mediation.

(b) With respect to any mediator assigned or selected from a list provided by the Association, 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. Any mediator selected or assigned to mediate a matter shall comply with the provisions of Sections 23(a), (b) and (c) of the Code, unless, with respect to a mediator selected from a source other than the Association's list, the parties elect to waive such disclosure.

(c) No mediator shall be permitted to serve as an arbitrator of any matter pending in NASD arbitration in which he served as mediator, nor shall the mediator be permitted to represent any party or participant to the mediation in any subsequent NASD arbitration proceeding relating to the subject matter of the mediation.

##### Limitation on Liability

Sec. 54. The Association, its employees, and any mediator named to mediate a matter under this Part, shall not be liable for any act or omission in connection with a mediation administered pursuant to these Procedures.

##### Mediation Ground Rules

Sec. 55. (a) The following Ground Rules are established to 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 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 on their 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. 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.

Notwithstanding the foregoing, the parties agree and acknowledge that the provisions of this subsection shall not operate to shield from disclosure to the Association or any other regulatory authority, documentary or other

information that the Association or other regulatory authority would be entitled to obtain or examine in the exercise of its regulatory responsibilities.

*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.*

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

In its filing with the Commission, the 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. The 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*

#### Introduction

The NASD is the premier securities industry arbitration forum. The more than 5,500 cases filed with the NASD in calendar year 1994 represented 82 percent of all securities arbitrations filed in all forums combined (including the American Arbitration Association) and 86 percent of all arbitrations filed with self-regulatory organizations. The volume of arbitration cases has been growing dramatically since the U.S. Supreme Court in 1987 recognized the enforceability of predispute arbitration agreements with respect to securities law claims.

Coincidentally with the growth in volume, the NASD has noted that arbitration has become increasingly complex, costly, time-consuming and resembling of court litigation to the point that some of the advantages of arbitration as a low cost, swift, alternative to judicial resolution of disputes are disappearing. The result of this trend has been renewed interest in other forms of alternative dispute resolution that would recapture the low cost and time saving that arbitration once provided. To that end, the NASD has determined that mediation could serve as a valuable alternative to arbitration for all parties. The goal of mediation is to explore and come to a settlement of an outstanding dispute

without resort to adversarial adjudication. Accordingly, the NASD is proposing to adopt a new Part IV to the Code setting forth rules to govern the mediation of disputes administered by the NASD.

#### Description of Proposed Mediation Rules

The NASD published Notice to Members 95-01 ("NTM 95-01") in January 1995 requesting comment on proposed Mediation Rules. The comments received by the NASD are discussed below and a copy of NTM 95-01 is attached to the NASD's filing as Exhibit 2. The proposed Mediation Rules, as revised in response to the comment letters received and as a result of further internal NASD review, have been drafted to preserve the elements of the procedural structure envisioned in the rules published in NTM 95-01, while eliminating those portions that were educational in nature. The proposed Mediation Rules have been structured, by subject, as follows:

1. General Scope and Authority
2. Submission of Eligible Matters
3. Stay or Delay of Arbitration Pending Mediation
4. Mediator Selection
5. Liability Limitation
6. Ground Rules

The Mediation Rules are proposed to be incorporated into the Code as a new Part IV, with provisions matching the structure referred to above, and numbered consecutively with the current provisions of the Code. This structure permits reference in the proposed Mediation Rules to both the subject matter jurisdiction of the Code and the arbitrator disclosure provisions as they apply to mediators.

**Record of Sessions.** The NASD is proposing to amend Section 37 of the Code to add a new paragraph (b) to prohibit the keeping of a verbatim record of any mediation session conducted pursuant to the proposed rules. The NASD believes that a verbatim record is not consistent with the goals or methods of mediation; a free-flowing and confidential exchange of views, opinions, proposals and admissions.

**Fees.** The fees for mediations are set forth as amendments to Sections 43 and 44 of the Code. The NASD is proposing that the administrative fees of the NASD for administering a mediation set forth in proposed Subsections 43(i) and 44(j) will only be charged when there is no Association arbitration pending. Where there is no arbitration pending, under proposed Subsection 43(i) the NASD will charge each party \$150 to administer the mediation of a public

customer matter and, under proposed Subsection 44(j), the NASD will charge each party \$250 to administer the mediation of an industry matter.

The fees will be assessed for each matter submitted to mediation. Pursuant to proposed Section 5, discussed below, a matter is deemed submitted to mediation when the Director has received an executed mediation Submission Agreement from all parties.<sup>4</sup>

In addition, proposed Subsections 43(j) 44(k) provide that the parties shall pay all of the mediator's charges, including travel and other expenses. The NASD proposes to set forth the mediator's charges in the Submission Agreement and they will be apportioned equally among the parties unless they agree otherwise. The NASD also will make an initial estimate the mediator's charges based on the anticipated length of the session or sessions. The parties will be required to deposit their proportional share of such estimated charges with the NASD prior to the first mediation session.

The NASD's standard mediator charges will be \$150 per hour, although the parties may agree to pay different charges for a particular mediator. While the NASD intends to make its best efforts to make mediators available at the specified hourly rate, some qualified mediators may decline to serve unless compensated at a higher rate.

Finally, the NASD intends that the mediator's hourly fee for both joint sessions (except for the first session) and separate sessions will be assessed for each half hour or portion thereof. In addition, the mediator's hourly rate for separate meetings will be apportioned equally among all parties without regard to the actual amount of time each party has spent with the mediator. The NASD believes that all parties benefit equally from the mediator's efforts in meeting with each party even if the mediator spends more time with one than the other.

**General Scope and Authority.** The NASD is proposing to adopt new Section 50 to establish the scope and authority of the rules. Proposed Section 50 provides that the rules apply to mediations administered by the Association and calls for the designation of a Director of Mediation to administer mediations. Section 50 also specifies that the Director of Mediation will consult the National Arbitration Committee ("Committee") on administering the Mediation program

and the Committee, as necessary, may make recommendations concerning the administration of the Mediation Program to the Director and recommend amendments to the rules to the Board. Finally, Section 50 states that neither any mediator nor the NASD shall have any authority to compel a party to submit to mediation or to settle a matter. This last provision is intended to clarify the voluntary nature of mediation.<sup>5</sup>

**Submission of Eligible Matters.** Proposed Section 51 provides that any matter, or part of a matter (such as procedural issues), eligible for arbitration under the NASD's Code may be mediated. Any ambiguities about the eligibility of a matter for mediation will be decided by the Director. Proposed Section 51 also states a matter will be deemed submitted when the Director has received an executed mediation Submission Agreement from each party. The submission of a matter triggers the obligation to pay applicable fees and initiates the NASD's activities in finding a mediator and making arrangements for facilities for the mediation.

The NASD anticipates that indications of interest in mediation will be solicited by the Director, as well as expressed informally by parties. When an indication of interest is expressed, the Director will seek commitments to participate from other parties. Once those commitments are obtained, either orally or in writing, the Director will forward a mediation Submission Agreement to the parties for execution.

**Stay or Delay of Arbitration Pending Mediation.** Proposed Section 52 provides that any arbitration pending at the time of a mediation will not be stayed or delayed unless the parties agree. The NASD believes this provision is important to prevent gamesmanship through the use of mediation as a delaying tactic.

**Mediator Selection.** Proposed Section 53 provides for the appointment of mediators and permits the parties to select a mediator from a list supplied by the Director, or to obtain, on their own, a non-NASD mediator. If the parties do not act to select a mediator, the Director will assign a mediator. The parties will also be provided with information relating to the mediator's employment, education, and professional background, as well as information on the mediator's

comply with the same background disclosure requirements as arbitrators.

Finally, proposed Subsection 53(c) prohibits a mediator from serving as an arbitrator or from representing any party to a mediation in any subsequent arbitration proceeding relating to the subject matter of the mediation. The NASD does not believe that mediators, having served as a neutral in a position of trust and confidence with the parties, should be permitted to serve either as an arbitrator or as an advocate of on party with respect to matters that the has knowledge of due to his involvement with both parties. The NASD also believes that state law, attorney codes of ethics, and mediator codes of conduct<sup>6</sup> provide sufficient protection for parties in judicial forums.

**Liability Limitation.** Proposed Section 54 provides for the limitation of liability of mediators, the Association, and its employees, for any act or omission in connection with a mediation administered by the NASD under the rules.

**Ground Rules.** Proposed Subsection 55(a) states that the Section sets forth standard Ground Rules government mediations and permits the parties to amend any of the Ground Rules at any time. The Subsection also provides that the Ground Rules are intended to be standards of conduct for the parties and for the mediation. The NASD intends that the parties be able to tailor the ground rules governing their mediation to meet their needs.

Proposed Subsection 55(b) states that mediation is voluntary and that parties may withdraw from a mediation at any time prior to the execution of a settlement agreement by giving written notice of withdrawal to the mediator, the other parties, and the Director. This provision is intended to clarify that, while the goal of mediation is to explore and settle outstanding disputes, if possible, the proposed rules are process oriented, not result oriented. The NASD does not intend that any party will be subject to any compulsion or coercion to come to a particular conclusion of a mediation. The process is completely voluntary and any party may withdraw from a mediation at any time and for any reason, or for no reason at all. If at any time a party feels that continuing

<sup>6</sup> The American Bar Association ("ABA") is considering draft mediator standards of conduct. It is anticipated that the ABA will approve the draft standards at its next meeting. Draft Standard III states in pertinent part that "[w]ithout the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process."

<sup>4</sup> The NASD is developing a standard form mediation Submission Agreement containing terms essential to the NASD. A copy of the Submission Agreement will be provided to all parties.

<sup>5</sup> The NASD intends to solicit participation in mediation by approaching parties to arbitration cases to advise them about mediation, explain the program and its merits and explore whether mediation might meet the needs of the parties. The NASD believes an outreach program such as this will increase the utilization of mediation and reduce the number of cases going to hearing.

with a mediation is not in his interests he is free to terminate the mediation.

Proposed Subsection 55(c) establishes that the mediator's role is to act as a neutral, impartial, facilitator, without authority to impose decisions or a settlement on the parties.

Proposed Subsection 55(d) requires that the parties and their representatives meet jointly with the mediator, in person or by conference call as determined by the mediator or by mutual agreement of the parties. The mediator will facilitate through joint sessions, caucuses and/or other means, discussions between the parties on the subject matter of the mediation.

Proposed Subsection 55(d) also provides that the mediator will determine the procedure for the mediation and the parties agree to cooperate with the mediator in conducting the mediation expeditiously, to make reasonable efforts to be available for mediation sessions, and to be represented at all sessions either in person or by someone with authority to settle the matter. This subsection is intended to ensure that common obstacles to expeditious, effective mediation are avoided and it sets forth rules that will discourage dilatory conduct and prevent gamesmanship. Parties failing to adhere to these standards send a strong signal that they are not interested in mediating in good faith.

Proposed Subsection 55(e) permits the mediator to meet with and communicate separately with each party, provided the mediator notifies the other parties. This is intended to permit the mediator to take steps to keep the mediation on track, if necessary, by initiating separate communications. These private caucuses are intended to provide the mediator with an opportunity to explore candidly each party's underlying interests and the strengths and weaknesses of their positions; however, the mediator will not disclose confidential information in violation of the confidentiality provisions. Subsection 55(g), discussed below, bars the mediator from disclosing one party's confidential information to another party without authorization.

Proposed Subsection 55(f) sets forth the goal of mediation—to negotiate a settlement in good faith. The Subsection also permits direct negotiations between the parties outside of the mediation process.

Proposed Subsection 55(g) provides that mediation is intended to be private and confidential. The Subsection obligates the parties and the mediator not to disclose or otherwise communicate anything disclosed during

the mediation in any other proceeding, unless authorized by all other parties to the mediation. The Subsection permits disclosure if compelled by law, which provides for situations where a party is subpoenaed or where there are regulatory requirements, such as the disclosures required in Form U-4 or under Article IV, Section 5 of the Rules of Fair Practice. This Subsection also provides expressly that the fact that a mediation occurred is not confidential.

Proposed Subsection 55(g) also makes clear that the confidentiality provisions will not operate to shield from disclosure documentary or other information that the Association or other regulatory authority would be entitled to obtain or examine in the exercise of its regulatory responsibilities. Thus, a party could not refuse to disclose that information to the NASD or an opposing party in civil litigation under the confidentiality clause by disclosing documentary or other information during the course of a mediation and then claiming that it is confidential.

In addition, the Subsection bars the mediator from disclosing one party's confidential information to another party without authorization, which memorializes a standard practice of mediators.

The NASD is requesting that the proposed rule change be effective within 45 days of SEC approval.

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act<sup>7</sup> in that the proposed rule change will facilitate the dispute resolution process for all participants by providing an alternative to adversarial adjudication of disputes resulting in lower-cost, quicker resolution of disputes.

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

The 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*

The proposed rule change was published for comment by the NASD in Notice to Members 95-01 (January 1995). Five comments were received in response thereto. Of the 5 comment letters received, all generally were in favor of the proposed rule change.

As noted above, the proposed rules as published for comment in Notice to Members 95-01 are substantially different in structure from those being submitted for approval in this proposed rule change. The proposed rule change described in this filing represents modifications that respond to the comments received and to other considerations developed following the publication of Notice to Members 95-01.

The *Securities Industry Association (SIA)* urged the NASD to seek experienced mediators, but said that the amount of detail sought by the Mediation Profile Questionnaire could limit the size of the mediator pool. The SIA also expressed concern about the meaning of paragraph (4)(B)<sup>8</sup> of the Ground Rules which provides that the mediator will decide when to hold "separate meetings with the parties." The SIA said that the typical mediation begins with a joint session at which all parties are given an opportunity to express their positions, after which the parties retire to separate rooms and the mediator shuttles back and forth between them trying to resolve the controversy. The SIA said it is not concerned about paragraph 4(b) unless it is contemplated that a mediator would hold separate sessions on separate days with the involved parties. The SIA believes this would not be productive. The SIA would prefer that paragraph 4(b) state simply "[t]he mediator will decide when to hold meetings with the parties."

The SIA also asks that the proposed rules provide "the mediator shall destroy all notes and other records of the mediation once the matter is concluded whether by settlement or by decision of the parties not to proceed further." The SIA said that destruction of notes and records is a general practice of mediators and should be included in the Ground Rules.

The SIA also expressed concern that the mediator session fees contemplate the parties agreeing to more than one mediator. The SIA believes that the introduction of additional mediators will only prolong the process by introducing potential complexity, confusion and disagreement over the appropriate course of action for the mediators, and recommends that any suggestion of multiple mediators be eliminated.

<sup>8</sup> The citations of the commenters to subsections of the proposed rules correspond to the proposed rules in Notice to Members 95-01. They do not correspond to the proposed rule contained herein because the proposed rules as published for comment by the Association were substantially different in structure.

The SIA also suggests the confidentiality provisions of the proposed rules be amended to require the parties to keep confidential any refusal by any party to submit to mediation. The SIA argues that there can be any number of reasons for a party deciding not to mediate and no inference should be drawn from such a decision. The SIA also asks that a party seeking mediation should agree that the refusal of the other party to mediate will not be introduced as evidence into any arbitral, judicial or other proceeding.

The SIA also asks for further consideration about who is the proper party to initiate mediation and whether mediation can be initiated after the first hearing in an arbitration. Finally, the SIA asks that, in order to prevent breaches of the agreement and forestall future litigation on the same issues, a mechanism be created to reduce the agreement to an arbitration award at the request of a party.

The Association believes that the changes in the proposed rules are responsive to the SIA's concerns. Specifically, with respect to the SIA's suggested language, "[t]he mediator will decide when to hold meetings with the parties," the NASD has determined not to adopt the SIA's proposed language. While the NASD understands the SIA's concern about "separate meetings," the NASD believes nevertheless that such separate meetings may be necessary and productive and that the rules should provide for such meetings. The NASD has, however, modified the proposed rules to eliminate any suggestion that such separate meetings would occur prior to the first joint meeting of the parties. In addition, the NASD has determined to eliminate any references to multiple mediators in response to the concerns raised by the SIA.

Associated Securities Corp. (ASC), an NASD member firm, expressed support for the proposed mediation program. ASC also said that mediation by teleconference should not be allowed because personal contacts are important to the mediation process. ASC also said that the mediators should not make enforcement referrals in order to facilitate frank and open discussion with the mediator, during the course of the mediation sessions.

The Association believes that teleconference sessions by the agreement of the parties may be an effective option that should be available to the parties. With respect to disciplinary referrals, mediators as a matter of course do not make such referrals; however, the NASD does not believe it is necessary to specify such a prohibition.

Robert Burke of the San Francisco law firm of Pettit & Martin commented favorably on the proposed mediation rules, but had two suggestions. First, Mr. Burke believes mediators should disclose their association with the NASD as an NASD arbitrator because the mediator's history as an arbitrator could have an adverse effect on the public customer's willingness to accept the mediator's neutrality. Moreover, the NASD should consider whether to include arbitrators in its mediator pool because good arbitrators do not generally make good mediators. Second, Mr. Burke believes the mediator should not draft settlement agreements as the proposed rules permit because in mediation the settlement is the parties', not the mediator's. Moreover, the mediator could inadvertently or by design fail to include a term that had been part of the parties' understanding, potentially resulting in liability for the mediator and the sponsoring organization.

The Association believes that Mr. Burke's comments with respect to arbitrator selection are addressed in the background information acquisition and disclosure process specified in the proposed rule change. With respect to Mr. Burke's second comment the NASD has eliminated that provision from the proposed rule change.

Joan Protes & Associates suggested that the proposed Mediation Program could be made more accommodating by (1) subsidizing some of the mediator's charges, and (2) designating a mediator to invite the parties and their counsel to mediation.

The NASD believes this commenter's comments are related to the NASD's internal management decisions related to the administration of the program and do not require a response. The issues raised, however, remain under continuing consideration.

Lawyers Mediation Service Corporation (LMSC) commented that the proposed Mediation Program should be administered separately from the arbitration program because the two are different in their functions and in their goals.

The mediation and arbitration programs are being administered separately under the single management umbrella of the Arbitration Department.

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

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

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submission should refer to File No. SR-NASD-95-25 and should be submitted by July 6, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

**Margaret H. McFarland,**  
Deputy Secretary.

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[Release No. 34-35831; File No. SR-NASD-95-13]

### Self-Regulatory Organizations; Order Approving Proposed Rule Change by National Association of Securities Dealers, Inc., Relating to Cold Calling Requirements

June 9, 1995.

On April 10, 1995, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed a proposed rule change with the Securities and Exchange Commission ("SEC" or "Commission") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule

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