grievance procedures currently set forth in the Rule 4000 Series. Finally, other conforming changes are being made to correct existing cross references to the Rule 9700 Series to those of the new Rule 4800 Series.

2. Statutory Basis of Rule Change

The Association believes that the proposed rule change is consistent with Section 15A(b)(4) of the Act [10] in that it assures a fair representation of its members in the selection of its directors and administration of its affairs and provides that one or more directors shall be representatives of issuers and investors and not be associated with a member of the Association, a broker, or a dealer.

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

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

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

Written comments were neither solicited nor received.

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

The proposed rule change has been filed by the Association as a ''non-controversial'' rule change under Rule 19b–4(e)(6).[11] Consequently, the rule change shall become operative 30 days after the date of this filing, or such shorter time as the Commission may designate if the change: (i) Will not significantly affect the protection of investors or the public interest; and (ii) will not impose any significant burden on competition, pursuant to Section 19(b)(3)(A)(iii) of the Act [12] and subparagraph (e)(6) of Rule 19b–4 thereunder.[13] To ensure conformity with the revised Nasdaq By-Laws, however, which are scheduled to become effective at the conclusion of the January 1998 annual meeting of the NASD, the Association requests acceleration of the operative date of the changes contained in this rule filing, so that the revised Rules of the Association and related corporate governance documents will be in force simultaneously.

At any time within 60 days of this filing, the Commission may summarily abrogate this proposal 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.

For the reasons stated, and since such action is in the public interest, does not significantly affect the protection of investors or impose any significant burden on competition, and because the changes in this rule filing conform the Rules of the Association to the by-laws recently approved by the Commission (which will become effective at the conclusion of the NASA's annual meeting), the Commission finds good cause to accelerate the operative date of the changes contained herein, and designate such changes to become operative at the conclusion of the annual meeting of the NASD.

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, N.W., Washington, D.C. 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 submissions should refer to the file number in the caption above and should be submitted by January 27, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–161 Filed 1–5–98; 8:45 am]

BILLING CODE 8010–01–M

[10] 15 U.S.C. 78*o*-3(b)(4).

[11] 17 CFR 240.19b–4(e)(6).

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 17 CFR 240.19b–4(e)(6).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–39487; File No. SR–NASD–97–44]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Eligibility of Claims for Arbitration

December 23, 1997.

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 24, 1997,[1] the National Association of Securities Dealers, Inc. (''NASD'' or ''Association'') filed with the Securities Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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

NASD Regulation is proposing to amend Rules 10304, 10307 and 10324 of the NASD's Code of Arbitration Procedure (''Code'') to establish that all arbitration claims are eligible unless challenged, and to establish a procedure for challenging the eligibility of claims. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

10304. *Time Limit on Eligibility of Claims for Arbitration; Procedures for Determining Eligibility Under This Rule*

[Time Limitation Upon Submission]

This rule describes when a claim must be filed in order to be eligible for arbitration, how and when parties may challenge the eligibility of claims, and the Director's role in determining eligibility.

[No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence

[1] The NASD filed Amendment Nos. 1, 2, 3 and 4 to the proposed rule change on July 15, 1997, July 21, 1997, December 3, 1997, and December 19, 1997, respectively, the substance of which is incorporated into the notice. See letters from to Elliot R. Curzon, Assistant General Counsel, NASD Regulation, to Katherine A. England, Assistant Director, Market Regulation, Commission, dated July 14, 1997 (''Amendment No. 1''), July 18, 1997 (''Amendment No. 2''), and December 18, 1997 (''Amendment No. 4''); and letter from Joan C. Conley, Secretary, NASD Regulation, to Katherine A. England, Assistant Director, Market Regulation, Commission, dated December 3, 1997 (and attachments) (''Amendment No. 3'').

or event giving rise to the act or dispute, claim or controversy. This Rule shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.]

(a) Claims eligible for arbitration and the Director's role in determining the eligibility of claims.

(1) Any filed claim is eligible for arbitration unless the Director decides it is ineligible. The Director may decide a claim is ineligible only if:

(A) a party that is responding to a claim, the responding party, asks the Director to decide that the claim is ineligible; and

(B) the Director determines that the claim is based on an occurrence or event that took place 6 years or more before the claim was filed.

(2) The 6-year eligibility period in paragraph (a)(1)(B) will be extended only for the length of time that a claim is pending in court. (The eligibility period will not be extended during any period in which a responding party fraudulently concealed facts from the claimant.)

(b) Procedures for challenging eligibility and new time periods for answering and delivering documents.

(1) If a responding party wants the Director to decide whether a claim is ineligible:

(A) a responding party must serve a written request on the Director and all the other parties to the arbitration; and

(B) a responding party must serve the written request no later than 30 days after the responding party was served the Statement of Claim. (Rule 10314(c) explains how to serve a document.)

(2) To oppose the written request, a party must serve a written response on the Director and all the parties. This written response must be served no later than 14 days after the party was served the written request.

(3) The Director will try to determine eligibility issues within 30 days of receiving the written request. The Director will serve the decision on all the parties.

(4) The Director's determination is final. No party to the arbitration may seek review of the determination in any forum, in an action to vacate the arbitration award, or in any other proceeding

(5) If a claimant amends a Statement of Claim filed in arbitration, a responding party may challenge the eligibility of any new claim in the amended Statement of Claim.

(6) The parties do not have to file an answer or any other documents until 45 days after the Director serves the decision on eligibility.

(c) Challenges to eligibility when a claimant files a claim or claims in court.

(1) If a court orders a claim to arbitration at the request of the responding party, then the responding party may not challenge the claim's eligibility in arbitration.

(2) The responding party may challenge the eligibility of a claim in arbitration that a claimant initially filed in court when:

(A) the court orders the claim to arbitration and the responding party did not request the order, or

(B) the claimant moves the claim from court to arbitration without a court order.

(d) Determinations of eligibility and statutes of limitation.

(1) All statutes of limitation or any other time limitations that may apply to a claim are extended from the time a Statement of Claim is filed until 45 days after the Director serves a decision on eligibility or the Association no longer has jurisdiction over a claim, whichever is later. The parties agree that they will not assert a statute of limitations defense in court that is inconsistent with this subparagraph.

(2) The Director's determination that a claim is eligible or ineligible does not determine whether a claim was filed later than the time allowed by a statute of limitations. The parties may still assert to the arbitrators or the court that has jurisdiction over a claim any statute of limitations defense that applies to a claim.

(3) A claimant may pursue a claim in court even if a court or the Director determines the claim is ineligible for arbitration.

(e) Consolidation of eligible and ineligible claims. If the Director decides that one or more of the claims is not eligible for arbitration, a customer claimant may:

(1) pursue all of the claims included in the Statement of Claim in court; or

(2) pursue the eligible claims in arbitration and the ineligible claims in court.

(f) Definitions.

(1) ''Claim''—For purposes of this Rule, the term ''claim'' means any dispute or controversy described in a Statement of Claim, including Counter-claims, Cross-claims, and Third-party claims, for which the claimant is seeking any form of relief, damages or other remedy.

(2) ''Occurrence or event''—For purposes of this Rule, the term ''occurrence or event'' means:

(A) the date of the transaction upon which the claim is based; or,

(B) if the claim does not arise from a transaction, the date of the occurrence of the act or omission upon which the claim is based.

* * * * *

10307. *Reserved.* [Tolling of Time Limitation(s) for the Institution of Legal Proceedings and Extension of Time Limitation(s) for Submission to Arbitration]

[(a) Where permitted by applicable law, the time limitations which would otherwise run or accrue for the institution of legal proceedings shall be tolled where a duly executed Submission Agreement is filed by the Claimant(s). The tolling shall continue for such period as the Association shall retain jurisdiction upon the matter submitted.]

[(b) The six (6) year time limitation upon submission to arbitration shall not apply when the parties have submitted the dispute, claim or controversy to a court of competent jurisdiction. The six (6) year time limitation shall not run for such period as the court shall retain jurisdiction upon the matter submitted.]

* * * * *

10324. Interpretation of Provisions of Code and Enforcement of Arbitrator Rulings

[The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties.]

The arbitrators may interpret and apply the provisions of this Code and take appropriate action to obtain compliance with any ruling that they make, except as provided in other provisions of this Code. The interpretations and actions of the arbitrators to obtain compliance shall be final and binding upon the parties.

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 self-regulatory organization 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 self-regulatory organization 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

Purpose

Background

Origins of the Eligiblilyt Rule. A time limitation on matters eligible for arbitration has existed in the Code since it was first adopted in 1968. Originally set at two (2) years, the time limit had been extended to six years by the time the Rule was added to the original Uniform Code of Arbitration developed by the Securities Industry Conference on Arbitration (''SICA'') in 1978. Currently, Rule 10304 of the Code provides, ''No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.''

The original purpose of the rule was to prevent aged claims from being litigated in arbitration. The six-year time limitation was consistent with the SEC's books and records rule, SEC Rule 17a–4, which required certain significant broker/dealer records to be retained for no more than six years, and members may have believed that they would be disadvantaged if forced to arbitrate claims if records were not available. Moreover, the securities industry believed that the inherently equitable nature of arbitration posed a greater risk that arbitrators might not strictly apply legal defenses such as statutes of limitation, thereby permitting a customer (investor) to recover in a case that would have been dismissed had it been brought in court.

Resolving Eligibility Issues. Until about seven or eight years ago, relatively few cases called for the application of the eligibility rule; however, as public investor claims relating to limited partnerships increased in the late 1980s, with many filed more than six years after the public investor's original purchase, member firm respondents employed the eligibility limitation of Rule 10304 to avoid arbitrating those claims.

Member firms's efforts to defeat claims in arbitration on eligibility grounds have had mixed success because arbitrators tend to delay eligibility decisions until the hearing on the merits. Member firms have had greater success when they have taken eligibility issues to the courts in the form of actions to enjoin the arbitration of a claim as ineligible, particularly because courts have not applied the equitable tolling doctrine [2] to eligibility decisions. The success has been augmented by an increasing number of courts that have decided that a predispute arbitration agreement amounts to an election of remedies barring the claim from being heard in court, when it is ineligible for arbitration.[3]

As a result, eligibility issues have become the subject of intense and contentious litigation, both in court and in arbitration, and member firms and customers (investors) often view the resolution of an eligibility dispute as the major strategic issue of a case. If a claim is found to be ineligible for arbitration, it may be either too costly or difficult for the customer (investor) to pursue in court, or it may be more susceptible to a statute of limitations defense in court. The customer (investor) may settle the case for an amount the customer (investor) believes is less than what could have been recovered in arbitration in order to avoid the expense of court litigation or the risk of losing the case. If the case is found to be eligible, the member firm may be more likely to settle because it believes that the equitable nature of arbitration renders one of its most valuable procedural defenses—statutes of limitation—less reliable and increases the risk of an adverse award.

Tactical maneuvering on the eligibility issue also resulted because the courts, the Director of Arbitration (''Director''), and the arbitrators, all have asserted jurisdiction over eligibility issues, or directed the issue to another forum. Parties attempt to gain an advantage by filing a claim or a motion in the forum they believe will produce a favorable ruling. The result is significant confusion about who should decide eligibility issues. Some courts have held that eligibility was for the courts to decide; others have held that the arbitrators could decide the issue.[4] In some cases, the courts have declined to decide the issue if the claim was clearly less than six years old and, instead, deferred to the decision of the Director or the arbitrators.

Until recently, the Director would examine arbitration claims to determine if they were eligible.[5] If the Director rejected a claim as clearly ineligible, the customer (investor) could ask a court to compel arbitration or attempt to litigate the claim in court. If the director determined that the claim was clearly eligible, the member firm could ask the arbitrators to reexamine the issue. If the arbitrators dismissed the claim as ineligible, the customer (investor) could ask a court to compel arbitration or attempt to litigate the claim in court.

Moreover, some courts, arbitrators, and the Director permitted certain claims to be arbitrated even though they appeared to be based on events more than six years old under a theory akin to equitable tolling. Other courts, some arbitrators, and, several years ago, the Director, applied a ''bright line'' transaction date test holding that the date of the transaction was determinative of the eligibility of a claim and that the limit could not be

[2] Equitable tolling based on fraudulent concealment is a legal doctrine that permits a plaintiff to pursue a claim after a time limitation for filing the claim has run out. Under the doctrine, when it appears that a defendant intentionally hid (fraudulently concealed) certain facts that would have alerted the plaintiff to the existence of a legal claim for damages, a court or arbitrator may determine that, in the interests of equity and fairness, the running of a time limitation for the filing of a claim should be tolled (stopped) during the time period when the facts were concealed.

[3] Some recent court rulings have held that if a claim submitted to arbitration under a predispute agreement to arbitrate is ineligible for arbitration, the claim may not be litigated in court because the customer (investor) had elected arbitration as the sole remedy. See *Calabria* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 855 F. Supp. 172 (N.D. Tex. 1994); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Shelapinsky,* No. 93–1553 (E.D. Pa. Mar. 16, 1994); *Piccolo* v. *Faragalli,* 1993 WL 331933 (E.D. Pa. Aug. 24, 1993); and, *Castellano* v. *Prudential-Bache Securities, Inc.,* 1990 WL 87575 (S.D.N.Y. June 19, 1990). Other courts have held there is no election of remedies. See *Smith Barney, Harris Upham & Co.* v. *St. Pierre,* 1994 WL 11600 (N.D. Ill., Jan. 4, 1994); *Prudential Securities* v. *LaPlant,* 829 F. Supp. 1239 (D. Kan. 1993).

[4] The rationale for holding that eligibility is for the courts to decide, and not the arbitrators, is that the arbitrators only have jurisdiction to hear claims the parties have agreed to submit to arbitration and that it is for the courts to determine what the parties have agreed to arbitrate. *See, e.g., Cogswell, Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 78 F.3d 474 (10th Cir. 1996); *Edward D. Jones & Co.* v. *Sorrells,* 957 F.2d 509, 514 (7th Cir. 1992). Other courts have held, however, that the parties may agree to permit the arbitrator to determine if a case is arbitrable. *See PaineWebber Incorporated* v. *Elahi,* 87 F.3d 589 (1st Cir. 1996); *Smith Barney Shearson, Inc.* v. *Boone,* 47 F.3d 750 (5th Cir. 1995).

The Supreme Court's recent decisions in *Mastrobuono* v. *Shearson Lehman Hutton,* 514 U.S. 52, 131 L.Ed.2d 76, 115 S.Ct. 1652 (1996), and *First Options of Chicago, Inc.* v. *Kaplan,* 514 U.S. 938, 131, L.Ed.2d 985, 115 S.Ct. 1920 (1995), among others, favoring arbitration and giving full effect to agreements to arbitrate, suggest that the Supreme Court would resolve the split between the circuits by affirming agreements that give decisionmakers other than the courts (e.g., the Director or the arbitrators) the power to decide eligibility issues.

[5] In October 1996, NASD Regulation filed SR–NASD–96–47 with the SEC setting forth its revised policy that, effective August 1, 1996, the staff of the Office of Dispute Resolution would no longer make preliminary eligibility determinations and, instead, would refer eligibility issues to the arbitrators. The SEC published the proposed rule change for comment in the **Federal Register**. NASD Regulation responded to the comments received by the SEC in a letter from John M. Ramsay to Katherine A. England dated July 1, 1997.

tolled.[6] In the last few years (until August 1996, when NASD Regulation's Office of Dispute Resolution (''Office'') changed the procedure for deciding eligibility issues and sent them to the arbitrators for eligibility determinations) the Office has declined the apply equitable theories tolling as a basis for finding a claim eligible for arbitration and, instead, has required the basis of a claim for relief to be a transaction or an act that occurred within six years of the filing of the claim.

Arbitration Policy Task Force Recommendations. In January 1996, the NASD's Arbitration Policy Task Force (''Task Force'') released its report on Securities Arbitration Reform. The Task Force's report identified eligibility disputes as one of the most important areas for reforming the arbitration process. The Task Force noted that: (1) The eligibility rule has resulted in frequent court litigation; (2) the eligibility rule, as presently written and applied, creates great uncertainty as to who is to decide eligibility and what the triggering event should be; (3) when the bright line transaction date test is not applied, fact intensive inquiry and discovery may be required to determine whether the claim is eligible for arbitration; and (4) the eligibility rule creates the potential for a bifurcated process. In considering its recommendations for resolving the problems with the eligibility rule, the Task Force was confronted with an apparently unbridgeable split of opinion. Customers (investors) want to eliminate the eligibility rule entirely; member firms want to keep the rule and apply it with a bright line test and no equitable tolling.[7]

From the standpoint of some, the rule is viewed as a burdensome, unfair impediment preventing customers (investors) from obtaining a hearing on their claims. The costs and delays involved in resolving eligibility disputes affect the ability of customers (investors) to receive complete recovery on their claims. Under some circumstances, customers (investors) are discouraged or prevented from seeking recovery for their claims because the costs and delays of litigating eligibility claims approach or exceed the value of their claims. Moreover, customers (investors) question the fairness of being forced into arbitration under a predispute agreement that they are required to sign as a condition of opening a securities account[8] and then being forced to litigate the eligibility of their claim. This circumstance appears especially unfair to customers (investors) who find themselves out of arbitration, but also barred from court under the election of remedies doctrine.

One byproduct of eligibility decisions is that if one of several claims filed in arbitration is found to be ineligible, the customer (investor) would be forced to litigate the ineligible claim in court and pursue arbitration of the remaining claims. The cost of litigating claims in two forums may preclude the customer (investor) from pursuing some of the claims. Indeed, the customer (investor) may find that it is uneconomical to pursue any of the claims if some must be litigated in arbitration and others litigated in court.

Some member firms argue that the original reason for the rule still prevails; members should not be forced to arbitrate claims if the records relating to the claim may no longer exist because the SEC's rules do not require them to keep the records. In addition, some argue that with the increasing mobility of associated persons in the securities industry, the individuals responsible for the actions alleged by customers (investors) often are no longer employed by the respondent member firm if the claim is filed many years later, making obtaining witnesses and information in aid of the defense increasingly difficult as time passes. Member firms also argue that arbitrators are not strictly bound to apply statutes of limitation[9] and, therefore, often allow customers (investors) to assert and recover for claims that would be barred if brought in court. Finally, respondents argue that the resulting uncertainty about arbitrator application of statutes of limitation makes analyzing the risks of litigating a claim much more difficult and makes decisions about disposing of records much riskier.

Consideration of Task Force Recommendations by NASD Regulation. NASD Regulation, through its National Arbitration and Mediation Committee, and in consultation with SICA, considered the Task Force's recommendations at length. NASD Regulation initially developed proposed rule changes designed to give effect to the Task Force's recommendations and consulted with SICA, the Public Investors Arbitration Bar Association (''PIABA''), the Securities Industry Association (''SIA''), the staff of the SEC, and others about the efficacy of the proposals.[10]

The Task Force recommended suspending the eligibility rule for three years as a pilot and, ultimately, repealing it. The Task Force also proposed adopting procedures to ensure that statute of limitations issues would be resolved early in a case and directing the arbitrators to resolve statute of limitations issues based on applicable law. Finally, the Task Force recommended prohibiting parties from litigating procedural arbitrability issues in court until after an award was rendered. The recommendations generated significant opposition.

First, customers (investors) objected that if the rule was reinstated after three years, customers (investors) who filed their claims after the rule was reinstated might have their claims dismissed as ineligible while those who filed identical claims before the change would not. Customers (investors) also argued that it was unfair to repeal the eligibility rule only temporarily while permanently adopting a rule capping punitive damages.[11] Member firms argued that repealing the rule either temporarily or permanently would eventually expose them to very old claims and they would be unable to predict or manage the risks of such claims.

[6] Under either standard, if there were a close question or if the facts about the eligibility of a claim were unclear, the Director would refer the decision to the arbitrators.

[7] The Task Force's specific recommendations were to: (1) Suspend the eligibility rule for three years (and repeal the rule if the pilot were successful) and adopt procedures to ensure that statute of limitations issues would be resolved early in a case; (2) suspend and repeal the rule prospectively only so that the eligibility of claims older than six years old at the time the suspension took effect would still be resolved under the old rule; (3) direct the arbitrators to resolve statute of limitations issues based on applicable law and train arbitrators to do so; and (4) prohibit parties from litigating procedural arbitrability issues in court until after an award is rendered.

[8] Not all member firms include predispute arbitration clauses in their new account agreements; however, such clauses are the industry norm.

[9] If the arbitrators err or refuse to apply a statute of limitation in the same manner as would a court, it is extremely difficult for respondents to overturn the decision because the standard of review for an arbitration award is much more limited than the standard of review on appeal from a court decision.

[10] As a member of SICA, NASD Regulation participated in considering several proposals to amend the eligibility rule advanced by other members of SICA. One proposed eligibility rule was adopted by SICA; however, upon further review, NASD Regulation became concerned about a number of unresolved issues and determined not to adopt the SICA rule language. Nevertheless, NASD Regulation has considered the concerns of SICA and its members in developing its proposed rule. While SICA has not adopted NASD Regulation's proposed rule, and some SICA members have indicated they are not in favor of the proposed rule, NASD Regulation believes that the proposed rule adequately addresses the issues raised by SICA and others.

[11] The Task Force recommended adopting a rule permitting punitive damages with a cap, but did not recommend a pilot period for the punitive damages rule.

Second, customers (investors) and member firms believed that adopting a prehearing procedure for resolving statute of limitation issues would add unnecessary burdens and delays, and would aggravate the current trend toward formalization of arbitration proceedings. They also argued that requiring arbitrators to resolve statue of limitations issues on the basis of applicable law would create a contractual limitation on the authority of the arbitrator to decide these issues and make it easier to overturn an arbitration award, because the losing party would have to show only that the arbitrator exceeded the contractual limitation by failing to apply the law rigorously. The usual, more onerous, standard of review that would apply in the absence of a contractual limitation established in the rule would be that the arbitrators so imperfectly exercised their powers by manifestly disregarding the law that a valid award was not rendered.[12]

Finally, some customers (investors) argued that permitting eligibility decisions to be reviewed after an award undermines certainty and finality of arbitration awards. Member firms argued that prohibiting review of eligibility decisions until after an award would cause both sides to expend resources litigating a claim that might ultimately be dismissed. Both customers (investors) and member firms agreed that eligibility decisions should occur early in a case and should be final, but member firms wanted the decisions to be immediately reviewable in court.

As a result of these concerns, NASD Regulation ultimately determined not to adopt the Task Force's recommendations concerning the eligibility rule. NASD Regulation concluded that repealing the rule could create more problems for both customers (investors) and member firms than were solved and that the original purpose for the rule remained valid. Also, the Task Force's recommendations, in the opinion of some, would ultimately work as a greater disadvantage to public investor claimants than to members and associated persons. Consequently, the proposed amendments reestablish the gatekeeping function and eliminate the aspects of the current rule that may be unfair to public investors.

In addition, NASD Regulation believes that the proposed rule addresses the concerns of customers (investors) and enhances the hallmarks of arbitration as an efficient, cost-effective, fair method of resolving disputes. Under the proposed rule, customers (investors) will be assured that their claims will be heard either in court or in arbitration, and that they will not be subjected to repeated, costly, time-consuming, and indeterminate battles over the eligibility of their claim for arbitration. First, by presuming that all filed claims are eligible for arbitration, the proposed rule eliminates the need for customers (investors) to fight their way in to arbitration if that is where they want to have their claims adjudicated. Second, by providing that the Director is the sole and final arbiter of eligibility issues, the parties will know in advance that they will not be engaged in a lengthy, indeterminate, multi-forum fight. Finally, by preventing the potentially costly and involuntary bifurcation of eligible and ineligible claims, the proposed rule will provide customers (investors) with a single forum (either court or arbitration) for the resolution of their disputes. Accordingly, NASD Regulation is proposing to amend the eligibility rule to provide a clear, quick, and final mechanism to resolve eligibility issues, prevent bifurcation of claims, and permit customers (investors) to pursue ineligible claims in court (and in arbitration under some circumstances).

Description of Proposed Rule

The proposed rule, which applies to all claims (public investor-member and intra-industry) filed in arbitration, the provisions of which are described in more detail below, would:

(1) Retain the current six-year eligibility rule but establish that all filed claims are eligible unless successfully challenged; (2) establish a bright line transaction date test for eligibility (i.e., it would preclude the application of the equitable tolling doctrine) and permit separate claims for non-transaction-based occurrences; (3) give investor claimants the option, in the face of a successful eligibility challenge, to consolidate their ineligible and eligible claims in court to avoid bifurcation; and (4) establish that an ineligible claim is not barred from court under the election of remedies doctrine. In the same manner that other provisions of the Code supersede the terms of a predispute arbitration agreement,[13] the proposed changes to Rule 10304 will supersede provisions in any existing or future arbitration agreements between members and others on issues relating to eligibility and statutes of limitations.

The proposed rule has been drafted using the ''plain English'' principles of written communication that the Commission has encouraged. NASD Regulation believes the proposed rule will be easier for all arbitration participants to understand, most notably participants who represent themselves (*pro se* parties). Unlike the NASD's Conduct Rules, which are mainly referred to and applied by member firms, their compliance offices, and their attorneys, the Code of Arbitration Procedure is often used by *pro se* parties who are not attorneys and who by seeking arbitration are usually coming into contact with the dispute resolution process for the first time.[14] In such circumstances, plain English rules are particularly important.

Eligibility Determinations. Paragraph (a)(1) provides that a claim filed with NASD Regulation's Office of Dispute Resolution (''Office'') is eligible for submission to arbitration unless the Director determines that the claim is ineligible. A determination by the Director can occur only if a respondent challenges a claim as ineligible, triggering the Director's action. The Director cannot act in the absence of a challenge. Moreover, in the absence of a challenge, and in contrast to the current rule, the proposed rule does not operate in any manner to preclude the arbitration of a claim. Thus, the rule fundamentally alters the legal effect and procedure surrounding eligibility by changing it from a substantive jurisdictional time limitation on the dispute that could be arbitrated to a presumption that all claims are eligible. The proposed rule establishes that all claims are eligible for arbitration unless the Director decides otherwise and it removes the courts and the arbitrators from any role in determining the eligibility of a claim.[15] Consequently, the proposed rule will eliminate much of the delay and uncertainty that has surrounded the resolution of eligibility issues.

Bright Line Standard for Eligibility Determination. Once a responding party has requested an eligibility determination, the Director, to decide that a claim is ineligible under paragraph (a)(1)(B) of the proposed rule, must find that the claim is based on an occurrence or event that took place more than six years before the claim was filed. The term ''occurrence or event'' is

[12] See Federal Arbitration Act, 9 U.S.C. 10(d).

[13] See Rule 3110(f) of the NASD's Conduct Rules.

[14] NASD Regulation estimates that as many as one-third of all claims filed involve a *pro se* party. See Securities Arbitration Commentator, Vol. VIII, No. 9 (February 1997). The number of *pro se* parties is much higher for smaller claims; more than three-quarters of claims involving $10,000 or less involved *pro se* claimants. *Id.*

[15] NASD Regulation is also proposing to amend Rule 10324 of the Code to clarify that the arbitrators have no power to decide eligibility issues under the proposed amendments to Rule 10304.

defined in paragraph (f)(2) of the proposed rule to mean either the transaction date or, if no transaction is involved, the date of the act or occurrence which is the subject of the claim. This provision and the definition are intended to establish that the six-year limitation in the proposed rule is a ''bright line.''

Further, under paragraph (a)(2), the six-year limitation period cannot be extended or ''tolled'' even if the claimant alleges that the respondent fraudulently concealed the facts that would have alerted the claimant to the existence of a claim. For example, if the customer's claim is for losses from the purchase of a limited partnership from a member in 1987, the claim will be ineligible for arbitration even if the member continued to send account statements to the claimant that showed the investment to be worth more than that current market value. If, however, the customer's claim is for losses suffered from the misrepresentations contained in the account statements sent less than six years before the claim was filed, the claim would be eligible for arbitration.

If the claim is based on an act or occurrence other than a transaction, the six-year period will run from the date of the act or occurrence. This point can be illustrated with the above-described example, assuming the following facts: (1) The claimant asked the member about the value of the limited partnership in 1992; (2) the member misrepresented the value to the claimant; (3) the claimant alleges that the misrepresentation caused the claimant not to sell the security; and (4) the claimant asks for damages for the difference between what the member represented as the actual value of the security at the time and the value at the time the claim is filed. A claim under these facts would be based on the misrepresentation made in 1992, not the original purchase in 1987, and thus would be eligible for arbitration.

While fraudulent concealment will not extend the eligibility period, proposed paragraph (a)(2) provides that if the claimant files a claim in court that is eventually moved to arbitration, either voluntarily or by court order, the six-year period will be tolled for as long as the claim remains in court. For example, if the claimant files a claim in court five years and eleven months after the claim arose and the court ordered the claim to arbitration six months later, the claim will be eligible for arbitration.

Procedure for Challenging Eligibility. Under paragraph (b) of the proposed rule, a respondent (called a ''responding party'' in the proposed rule) who wants to challenge the eligibility of a claim must serve a request on the Director and all the other parties no later than thirty calendar days after receiving the Statement of Claim. A claimant who wants to oppose the respondent's request must serve a response on the Director and all other parties no later than fourteen days after receiving the respondent's request. The Director will attempt to determine the eligibility of the claim within thirty days after receiving the respondent's request.

This requirement is intended to force eligibility issues to be raised, responded to, and decided early in a proceeding. Because of an early eligibility determination, parties will know early in the process whether a claim is eligible and will be able to decide where and how to litigate their claims, pursuant to the options provided by other provisions of the proposed rule.

If a claimant amends a Statement of Claim, under paragraph (b)(5) a respondent may challenge the eligibility of any new claim. This provision is intended to prevent respondents from being foreclosed from challenging a new claim after the time to challenge the initial claim has expired. Under this provision, if a claimant adds a new transaction to the claim, the respondent will have the opportunity to challenge the eligibility of the new claim. For example, if a claimant alleges that the respondent misrepresented certain facts to the claimant related to the sale of security A and purchase of security B five years before the claim was filed, that claim would be eligible. But if the claimant then amended the Statement of Claim to ask for damages relating to the original purchase of security A ten years before the claim was filed, the respondent could challenge the eligibility of that claim insofar as it is related to the purchase. This provision is not intended, however, to prevent or discourage a claimant from including or adding facts to the Statement of Claim that relate to events more than six years before the claim was filed if the facts are relevant to the claim. Because eligibility determinations belong exclusively to the Director under the proposed rule, any decision about what constitutes a new claim will necessarily be a part of that decision and also will belong exclusively to the Director.

Paragraph (b)(6) also provides that the parties need not file an answer or other documents that may be required by the Code until forty-five days after the Director serves an eligibility decision. This provision delays the start of the proceedings until decisions about the eligibility of a claim are made, and permits the parties sufficient time to consider how to proceed according to the various options provided by the proposed rule.

Finality of Director's Decision. Paragraph (b)(4) of the proposed rule provides that the Director's determination of eligibility issues is final and that the parties are prohibited from seeking review of the decision in any forum, in any action to vacate the arbitration award, or in any other proceeding. This provision is intended to establish conclusively that eligibility issues are gatekeeping issues only, internal to the Association's forum, and not a jurisdictional matter that would prevent arbitration of a claim. Providing finality on eligibility decisions early in the process will substantially reduce the expense, time, and uncertainty currently associated with eligibility determinations. Under this provision, parties cannot ask the arbitrators to revisit the Director's eligibility decision; nor can they ask to court to overturn it, either immediately or after the award. Thus, the current practice of seeking an injunction or writ of mandate to prevent or force the arbitration of an eligible or ineligible claim will be prohibited. Likewise, neither customers (investors) nor member firms may ask a court, in an action subsequent to an award, to reconsider the Director's eligibility decision.

NASD Regulation also is considering amending its rules (Rule 10106 and IM–10100 of the Code) to clarify its authority to discipline members and associated persons who attempt to seek review of eligibility decision. Under the plan being considered, if a member or associated person raises an eligibility issue in a motion to vacate an award or in an action to compel or bar an arbitration proceeding (or with the arbitrators, even though such an action is precluded by this rule), such persons may be subject to disciplinary action. While NASD Regulation does not have jurisdiction over non-members, members and associated persons should be able to use the plain language of the rule and any descriptive provisions contained herein to oppose any attempt by non-member parties to litigate eligibility rules.

Bifurcation. In considering how to draft a rule that would retain the six-year eligibility period yet permit parties to litigate ineligible claims in court, many participants in the drafting process became concerned that the eligible and ineligible claims of public investors might be bifurcated between arbitration and court. As noted above, the cost of litigating claims in two forums may preclude customers (investors) from pursuing some or all of

their claims in either forum. Accordingly, the proposed rule will not require customers (investors) to bifurcate their ineligible and eligible claims in different forums. If the Director determines that some of a customer's (investor's) claims are ineligible, paragraph (e) of the proposed rule gives the customer (investor) the option either to pursue the eligible claims in arbitration and the ineligible claims in court, thereby permitting customers (investors) to voluntarily bifurcate the claims,[16] or to consolidate all of the claims in court.

NASD Regulation is also concerned that if a customer (investor) files an action in court, members may attempt to bifurcate claims by selectively compelling only some of the claims to arbitration. In order to prevent such actions, NASD Regulation will be amending Rule 3110(f) to, among other things, require predispute arbitration agreements to include a provision prohibiting members from seeking to compel only some of a customer's court-filed claims.[17]

In addition, NASD Regulation is aware that some members may view the proposed rule change as limiting their ability to defend against a customer's court-filed action. Accordingly, NASD Regulation notes that it will not be a violation of this proposed rule if a member asks a court to dismiss some of a customer's court-filed claims on statute of limitations grounds prior to asking the court to compel arbitration. NASD Regulation believes that permitting members to seek such dismissals is consistent with the goal of judicial economy. There is no reason to force a member to seek to compel arbitration of a claim that could otherwise be dismissed by the court upon the application of the appropriate statute of limitation.

Paragraph (c) of the proposed rule provides that if the member firm asks that court to compel the arbitration of the claims, the member firm will be barred from challenging the eligibility of those claims once they reach arbitration. However, if the customer (investor) moves the claims to arbitration either by voluntarily withdrawing them and refiling in arbitration or by asking the court to order the claims to arbitration, or the court on its own motion orders the claims to arbitration, the member firm may challenge the eligibility of the claims once they reach arbitration.

The intended effect of these provisions is to give the customer (investor) control over whether claims are bifurcated. Member firms will be required to choose whether to challenge the eligibility of a claim in arbitration, recognizing that they may be forced to litigate eligible claims in court as a result of their challenge. Similarly, if a customer (investor) files an action in court first, member firms, in deciding whether to compel arbitration, will have to choose whether they want to litigate all of the claims in court or all of the claims in arbitration. If they choose to compel arbitration, they must seek to compel arbitration of all of the customers' (investors') claims, including claims that may be ineligible, and they will be precluded from challenging the eligibility of the claims once they reach arbitration.

Statutes of Limitation Defenses. Paragraph (d) of the proposed rule tolls any applicable statutes of limitation from the time the claim is filed in arbitration until forty-five days after the Director serves a decision on eligibility. For example, if the statute of limitations on a particular case would have run out the day after a claim was filed in arbitration, the statute will be tolled from the time the claim is filed. If the claim is eligible for arbitration and remains in arbitration, there is no statute of limitations defense because the claim was filed in time. If, however, the Director decides the claim is ineligible, the customer (investor) has forty-five days after the decision is served to refile the claim in court before the statute of limitations begins to run again.

In addition, the proposed rule provides that ''the parties agree that they will not assert a statute of limitations defense that is inconsistent with [the tolling provision].'' While NASD Regulation believes that all of the provisions of the Code are part of the ''agreement to arbitrate'' between the parties, it is especially important to preserve statute of limitation defenses for parties who are subject to the procedures specified in this rule. Therefore, the provision has been phrased as an express agreement between the parties and precludes the parties from asserting the defense in a manner that is inconsistent with the tolling provisions of this rule. NASD Regulation would regard a violation of this provision to be a violation of Rule 2110 of the NASD's Conduct Rules because it would violate and express agreement between the parties and, therefore, would be inconsistent with high standards of commercial honor and just and equitable principles of trade.

Finally, paragraph (d) provides that an eligibility decision does not affect the application of a statute of limitations to a claim. This provision is intended to establish clearly the difference between eligibility and statutes of limitation, a distinction that has occasionally been overlooked by courts, arbitrators, and other participants. Thus, even if a claim is found to be eligible for arbitration after a challenge under the proposed rule (i.e., it was filed less than six years after the transaction), it may have been filed after an applicable statute of limitations have expired (e.g., it was filed more than three years after the transaction and, therefore, too late under the absolute three-year limitation on claims under Section 10(b) of the Securities Exchange Act of 1934). Therefore, the arbitrators could dismiss the claim. Similarly, if a claim is found to be ineligible for arbitration and then is filed in court, it may have been filed in court within the time required by the applicable statute of limitations.

Election of remedies. As noted in the background discussion above, some courts have held under the current rule that, if a claim is ineligible for arbitration, the customer (investor) may not pursue the claim in court. The rationale for these decisions is that, by agreeing to arbitration, customers (investors) have ''elected'' arbitration as their sole remedy for resolving their disputes. NASD Regulation believes that this result may be unfair to public investors particularly because they often are required to arbitrate through predispute agreements in account opening documents. Paragraph (d) of the proposed rule provides that a customer (investor) may pursue a claim in court even if the Director or a court decides the claim is not eligible for arbitration, thereby eliminating the effect of the election of remedies doctrine.

Elimination of Other Tolling Provisions. Finally, NASD Regulation is proposing to repeal Rule 10307 to eliminate the tolling provisions contained therein. The tolling provisions in Rule 10307 are now contained in provisions of the amendments to Rule 10304.

NASD Regulations notes, however, that users of the arbitration forum should be aware that, with the elimination of Rule 10307(a), the filing of an executed Submission Agreement will no longer be sufficient to toll a statute of limitations. Under the proposed amendments to Rule 10304,

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[16] Paragraph (d)(2) does not force a customer (investor) to litigate ineligible claims in court if the customer (investor) determines to arbitrate eligible claims. Rather, the customer (investor) could choose to abandon any ineligible claims.

[17] As noted in part 6 of this rule filing, the amendments to Rule 10304 proposed herein will not take effect until the SEC approves yet-to-be-filed amendments to Rule 3110 (f) of the NASD's Conduct Rules governing the provisions of predispute arbitration agreements.

only the filing of a Statement of Claim will toll a statute of limitations.

Effectiveness of Proposed Rule Change. NASD Regulation plans to make the proposed rule change effective thirty days after SEC approval.[18]

2. Statutory Basis

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act[19] because it will eliminate many of the substantive and procedural issues that have cause eligibility issues to interfere with the fair, efficient, and cost effective resolution of disputes, and will improve the arbitration process for the benefit of public investors, broker/dealer members, and associated person who are the user of the process.

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

The NASD does not believe that the proposed rule change will impose any inappropriate burden on competition.

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

No written comments were either solicited or received.

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

Within 35 days of the 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,[20] the Commission will:

(A) By order approve the 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, N.W., Washington, D.C. 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 at 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 submissions should refer to File No. SR–NASD–97–44 and should be submitted by January 27, 1998.

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

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98–162 Filed 1–5–98; 8:45 am]

BILLING CODE 8010–01–M

[18] NASD Regulation consents to an extension of the time periods specified in Section (19)(b)(2) of the Act until the SEC is prepared to approve NASD Regulation's yet-to-be-filed rule filing proposing to amend Rule 3310(f) to revise the requirements for customer predispute arbitration agreements used by members. NASD Regulation intends to amend the rules governing customer predispute arbitration agreements to give effect to the eligibility rule proposed herein and the punitive damages rule proposed in SR–NASD–97–47. The purpose of the extension is to permit the SEC to act simultaneously on this rule filing, the yet-to-be-filed rule filing proposing to amend Rule 3310(f), and the punitive damages rule proposed in SR–NASD–97–47.

[19] U.S.C. 78*o*–3.

[20] See *supra* note 18.

DEPARTMENT OF TRANSPORTATION

Aviation Proceedings, Agreements filed during the week of December 26, 1997

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. Section 412 and 414. Answers may be filed within 21 days of date of filing.

Docket Number: OST—97—3281.

Date Filed: December 23, 1997.

Parties: Members of the International Air Transport Association.

Subject: PTC23/123 Telex Mail Vote 903, Australia-Europe excursion fares r1–071II r2–071oo. Intended effective date: January 15, 1998.

Docket Number: OST—97—3282.

Date Filed: December 23, 1997.

Parties: Members of the International Air Transport Association.

Subject: PTC COMP 0201 (Report) dated December 19, 1997, PTC COMP Fares 0114 dated December 19, l997, Resolution 015n—US-TC12/123 Add-on Amounts, (US-Europe (except UK), Africa, Middle East, TC3). Intended effective date: April 1, 1998.

Carol Kelley,

Documentary Services.

[FR Doc. 98–163 Filed 1–5–98; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Notice of Application for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ending December 26, 1997

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 *et. seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–97–3275.

Date Filed: December 22, 1997.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: January 20, 1998.

Description: Application of Harlequin Air Corporation, pursuant to 49 U.S.C. 40102 and Subpart Q of the Regulations, for issuance of a Foreign Air Carrier permit to engage in charter foreign air transportation of persons, property and mail between points in Japan and points in the United States.

Docket Number: OST–97–3274.

Date Filed: December 22, 1997.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: January 20, 1998.

Description: Application of Britannia Airways, GmbH pursuant to 49 U.S.C. 41301 and Subpart Q of the Regulations to engage in charter foreign air carrier transportation of persons and their accompanying baggage, and property between a point or points in the Federal Republic of Germany and a point or points in the United States.

Carol Kelley,

Documentary Services.

[FR Doc. 98–164 Filed 1–5–98; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

[CGD08–97–48]

Houston/Galveston Navigation Safety Advisory Committee Meeting

AGENCY: Coast Guard, DOT.

ACTION: Notice of meetings.