SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50971; File No. SR–NASD–2004–180]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc., Regarding Waiver of California Arbitrator Disclosure Standards

January 6, 2005.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 9, 2004, the National Association of Securities Dealers, Inc., (''NASD'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III, below, which NASD has prepared. 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 is proposing to extend the pilot rule in IM–10100(f) of the NASD Code of Arbitration Procedure (''Code''), relating to the California waiver program, until September 30, 2005. NASD is not proposing any textual changes to the By-Laws or Rules of NASD.

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

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

Effective July 1, 2002, the California Judicial Council adopted a set of rules, ''Ethics Standards for Neutral Arbitrators in Contractual Arbitration'' (''California Standards''),[3] which contain extensive disclosure requirements for arbitrators. According to NASD, the rules were designed to address conflicts of interest in private arbitration forums that are not part of a Federal Regulatory System overseen on a uniform, national basis by the SEC. NASD states that the California Standards impose disclosure requirements on arbitrators that conflict with the disclosure rules of NASD and the New York Stock Exchange (''NYSE''). Because NASD could not both administer its arbitration program in accordance with its own rules and comply with the new California Standards at the same time, NASD initially suspended the appointment of arbitrators in cases in California, but offered parties several options for pursuing their cases.[4]

In July 2002, NASD and the NYSE filed a lawsuit in Federal district court seeking a declaratory judgment that the California Standards are inapplicable to arbitration forums sponsored by self-regulatory organizations (''SROs'').[5] On November 12, 2002, the United States District Court for the Northern District of California dismissed the case on Eleventh Amendment grounds. In December 2002, NASD and the NYSE filed a Notice of Appeal to the United States Court of Appeals for the Ninth Circuit. This appeal is currently stayed pending a decision in *Credit Suisse First Boston Corp.* v. *Grunwald*,[6] which is discussed below.

In another case before the United States District Court for the Northern District of California regarding the applicability of the California Standards to NASD arbitrations, Judge Jeremy Fogel denied the plaintiff's motion to vacate an order compelling arbitration.[7] In his April 2003 decision, Judge Fogel concluded that the application of the California Standards to the NYSE and other SROs, such as NASD, is preempted by the Exchange Act and by the Federal Arbitration Act (''FAA''). The *Mayo* decision was not appealed.

The applicability of the California Standards to SRO arbitrations was again addressed by the United States District Court for the Northern District of California in *Grunwald*. The court found that the California Standards could not apply to SRO-appointed arbitrators because such arbitrators did not fall within the definition of ''neutral arbitrators'' that is set forth in the California Code of Civil Procedure. Consequently, the court concluded that the Judicial Council had exceeded its authority in drafting the California Standards and thus declared them void. The *Grunwald* decision has been appealed to the United States Court of Appeals for the Ninth Circuit. Although the appeal has been briefed and argued, the Ninth Circuit has not yet issued a decision.

In *Jevne* v. *The Superior Court of Los Angeles County*,[8] the California Court of Appeal, Second District found that the Judicial Council had not exceeded its authority in drafting the California Standards and that the standards are not preempted by the FAA. The court did find, however, that the California Standards are preempted by the Exchange Act. On March 17, 2004, the California Supreme Court granted review in *Jevne*. Although the case has been fully briefed, oral arguments have not yet been scheduled.

To allow arbitrations to proceed in California while the litigation regarding the applicability of the California Standards to SRO arbitrations is pending, NASD implemented a pilot rule to require all industry parties (member firms and associated persons) to waive application of the California Standards to the case, if all the parties in the case who are customers, associated persons with claims against industry parties, member firms with claims against other member firms, or member firms with claims against associated persons that relate exclusively to promissory notes, have done so.[9] In such cases, the arbitration

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

[2] 17 CFR 240.19b–4.

[3] California Rules of Court, Division VI of the Appendix.

[4] These measures included providing venue changes for arbitration cases, using non-California arbitrators when appropriate, and waiving administrative fees for NASD-sponsored mediations.

[5] *See* Motion for Declaratory Judgment, *NASD Dispute Resolution, Inc. and NYSE, Inc.* v. *Judicial Council of California*, filed in the United States District Court for the Northern District of California, No. C 02 3486 SBA (July 22, 2002), available on the NASD Web site at: *http://www.nasd.com/stellent/groups/med_arb/documents/mediation_arbitration/nasdw_009557.pdf.*

[6] No. C 02–2051 SBA (N.D. Cal. March 31, 2003).

[7] *Mayo* v. *Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097 (N.D. Cal. 2003).

[8] 6 Cal. Rptr. 3d 542, 113 Cal. App. 4th 486 (2d Dist. 2003).

[9] Originally, the pilot rule applied only to claims by customers, or by associated persons asserting a statutory employment discrimination claim against a member, and required a written waiver by the industry respondents. In July 2003, NASD expanded the scope of the pilot rule to include all claims by associated persons against another associated person or a member. At the same time, the rule was amended to provide that when a customer, or an associated person with a claim against a member or another associated person, agrees to waive the application of the California Standards, all respondents that are members or associated persons will be deemed to have waived

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proceeds under the NASD Code of Arbitration Procedure, which already contains extensive disclosure requirements and provisions for challenging arbitrators with potential conflicts of interest.[10]

The pilot rule, which was originally approved for six months on September 26, 2002,[11] has been extended and is now due to expire on March 31, 2005.[12] Because NASD believes all the pending litigation regarding the California Standards is unlikely to be resolved by March 31, 2005, NASD requests that the effectiveness of the pilot rule be extended through September 30, 2005, in order to prevent NASD from having to suspend administration of cases covered by the pilot rule.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,[13] which requires, among other things, that the NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that expediting the appointment of arbitrators under the proposed waiver, at the request of customers, associated persons with claims against industry parties, member firms with claims against other member firms, or member firms with claims against associated persons that relate exclusively to promissory notes, will allow those parties to exercise their contractual rights to proceed in arbitration in California, notwithstanding the conflict between the disputed California Standards and the NASD rules.

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

NASD does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the Act.

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

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, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASD–2004–180 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2004–180. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2004–180 and should be submitted on or before February 4, 2005.

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

Jill M. Peterson,

Assistant Secretary.

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the application of the standards as well. The July 2003 amendment also clarified that the pilot rule applies to terminated members and associated persons. *See* Securities Exchange Act Release No. 48187 (July 16, 2003), 68 FR 43553 (July 23, 2003) (SR–NASD–2003–106). In October 2003, NASD again expanded the scope of the pilot rule to include claims filed by members against other members and to claims filed by members against associated persons that relate exclusively to promissory notes. *See* Securities Exchange Act Release No. 48711 (October 29, 2003), 68 FR 62490 (November 4, 2003) (SR–NASD–2003–153).

[10] NASD states that the NYSE has a similar rule, NYSE Rule 600(g).

[11] *See* Securities Exchange Act Release No. 46562 (September 26, 2002), 67 FR 62085 (October 3, 2002) (SR–NASD–2002–126).

[12] *See* Securities Exchange Act Release No. 50447 (September 24, 2004), 69 FR 58567 (September 30, 2004) (SR–NASD–2004–126).

[13] 15 U.S.C. 78*o*–3(b)(6).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–50982; File No. SR–NYSE–2004–49]

Self-Regulatory Organizations; Notice of Filing of Amendment No. 3 to Proposed Rule Change by the New York Stock Exchange, Inc., Relating to Procedures for Companies That Fail To File Annual Reports in a Timely Manner

January 6, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 21, 2004, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') Amendment No. 3 to the proposed rule change as described in Items I, II, III below, which Items have been prepared by the Exchange.[3] The proposed rule change was published for public comment in the **Federal Register** on

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

[2] 17 CFR 240–19b–4.

[3] The Exchange filed Amendment No. 1 on October 29, 2004, which stated that the proposed rule change would apply to companies that are already late in filing their annual reports as of the date that the Commission approves the proposed rule change. On November 29, 2004, the Exchange filed Amendment No. 2, which replaced and superseded Amendment No. 1. On December 21, 2004, the Exchange withdrew Amendment No. 2.