

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51981; File No. SR-NASD-2005-079]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change to Provide for a 10-Day Notice Requirement Before a Party Issues a Subpoena to a Non-Party for Pre-Hearing Discovery

July 6, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 17, 2005, the National Association of Securities Dealers, Inc. ("NASD") 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 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

NASD is proposing to amend the NASD Code of Arbitration Procedure ("Code") primarily to provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery.

Below is the text of the proposed rule change.<sup>3</sup> Proposed new language is in italics; proposed deletions are in brackets.

\* \* \* \* \*

#### 10322. Subpoenas and Power to Direct Appearances

##### (a) [Subpoenas]

The arbitrators and any counsel of record to the proceeding shall have the power of the subpoena process as provided by law. All parties shall be given a copy of a subpoena upon its issuance. Parties shall produce witnesses and present proofs to the fullest extent possible without resort to the subpoena process. *To the extent possible, parties should produce*

*documents and make witnesses available to each other without the use of subpoenas. Arbitrators and any counsel of record may issue subpoenas as provided by law.*

*(b) No subpoenas seeking discovery shall be issued to or served upon non-parties to an arbitration unless, at least 10 days prior to the issuance or service of the subpoena, the party seeking to issue or serve the subpoena sends notice of intention to serve the subpoena, together with a copy of the subpoena, to all parties to the arbitration.*

*(c) If a subpoena is issued, the issuing party must cause a copy of the request or subpoena to be served on the same day to all parties and the entity receiving the subpoena.*

*(d) In the event a party receiving such a notice objects to the scope or propriety of the subpoena, that party shall, within 10 days of service of the notice, file with the Director, with copies to all other parties, written objections. The party seeking to issue or serve the subpoena may respond thereto. The arbitrator appointed pursuant to this Code shall rule promptly on the issuance and scope of the subpoena.*

*(e) In the event an objection to a subpoena is filed under paragraph (d), the subpoena may only be issued or served prior to the arbitrator's ruling if the party seeking to issue or serve the subpoena advises the subpoenaed party of the existence of the objection at the time the subpoena is served, and instructs the subpoenaed party that it should preserve the subpoenaed documents, but not deliver them until a ruling is made by the arbitrator.*

*(f) Paragraphs (b) and (d) above do not apply to subpoenas addressed to parties or non-parties to appear at a hearing before the arbitrators.*

*(g) The arbitrator(s) shall have the power to quash or limit the scope of any subpoena.*

##### (b) [Power to Direct Appearances and Production of Documents]

*(h) The arbitrator(s) shall be empowered without resort to the subpoena process to direct the appearance of any person employed or associated with any member of the Association and/or the production of any records in the possession or control of such persons or members. Unless the arbitrator(s) directs otherwise, the party requesting the appearance of a person or the production of documents under this Rule shall bear all reasonable costs of such appearance and/or production.*

\* \* \* \* \*

#### 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

The primary purpose of the proposed rule change is to provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery.

Under Rule 10322(a) of the Code of Arbitration Procedure ("Code"), an arbitrator and any counsel of record to the arbitration has the power to issue a subpoena, as provided by law. In the course of preparing their cases, attorneys sometimes issue subpoenas to non-parties requesting the production of documents in advance of an arbitration hearing. For example, an investor's attorney might subpoena account records for other investors at a broker's firm, or a brokerage firm's attorney might subpoena records from the investor's cell phone company. Disputes regarding the propriety or scope of these subpoenas to non-parties occasionally arise, raising the issue of whether the subpoenaed materials should be produced. Currently, the Code does not contain any rules that specifically address the issuance of subpoenas to non-parties or the resolution of disputes involving such subpoenas.

In order to make the pre-hearing discovery process more orderly and efficient, NASD is proposing to revise the Code to provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery.<sup>4</sup> Specifically, the rule will require parties seeking to subpoena discovery-related documents from a non-party to send, at least 10 days prior to the issuance or service of the subpoena, notice of their intention to serve the subpoena, along with a copy of the subpoena, to all parties to the

<sup>4</sup> The subpoena notice and objections provisions of the proposed rule will apply only to pre-hearing discovery and not to subpoenas pertaining to appearances before the panel.

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

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

<sup>3</sup> The rules proposed in this filing will be renumbered as appropriate following Commission approval of the proposed revisions to the NASD Code of Arbitration Procedure for Customer Disputes published for comment on June 23, 2005 (SEC Rel. No. 34-51856, 70 FR 36442); and the NASD Code of Arbitration Procedure for Industry Disputes published for comment on June 23, 2005 (SEC Rel. No. 34-51857, 70 FR 36430).

arbitration. If any party receiving the notice objects to the scope or propriety of the subpoena, that party may, within 10 days of service of the notice, file a written objection with the Director of Arbitration and provide copies of the written objection to all other parties at the same time. Thereafter, the arbitrator responsible for deciding discovery-related motions will rule promptly on the issuance and scope of the subpoena. The arbitrator will have the authority to approve the issuance of a subpoena as well as to quash or limit the scope of any subpoena. In those situations where a panel has not yet been appointed, the rule will allow parties to issue a subpoena only if they advise a subpoenaed party of the existence of the objection at the time the subpoena is served and instruct the subpoenaed party to preserve, but not deliver, the subpoenaed documents until directed to do so by an arbitrator.

Lastly, the proposed rule will clarify the requirements regarding the service of subpoenas. Currently, Rule 10322(a) provides only that all parties are to be given a copy of a subpoena upon its issuance. The proposed rule will require a party that issues a subpoena to serve a copy of the subpoena to all parties and the entity receiving the subpoena on the same day.<sup>5</sup>

## 2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule will make the arbitration pre-hearing discovery process more orderly and efficient, thereby improving the forum for all parties.

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

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*

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. The proposed rule change is based upon, but not identical to, Rule 23(c) of the Uniform Code of Arbitration adopted by the Securities Industry Conference on Arbitration (the "SICA Rule"). The Commission particularly urges commenters to consider the proposed rule change in light of the SICA Rule.

Specifically, the NASD proposal and the SICA Rule differ in whether service or delivery of a subpoena is required to be provided to all parties and the entity receiving the subpoena on the same day. As discussed above, the NASD proposal would require that a subpoena be served on the same day to all parties and the entity receiving the subpoena. Under existing NASD rules, service is accomplished on the date of mailing either by first-class mail or by means of overnight mail service or, in the case of other means of service, on the date of delivery.<sup>6</sup> The SICA Rule, however, requires that upon issuance of a subpoena, the subpoena must be sent in a "manner that is reasonably expected to cause" the subpoena to be delivered to all parties and the entity receiving the subpoena on the same day. What advantages or disadvantages, if any, are associated with the service requirement under NASD proposal versus the delivery requirement under the SICA Rule?

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](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2005-079 on the subject line.

### *Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2005-079. 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, 100 F Street, NE., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to the File Number SR-NASD-2005-079 and should be submitted on or before August 3, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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<sup>5</sup> Rule 10314(c) describes how service may be effected.

<sup>6</sup> NASD Rule 10314(c).

<sup>7</sup> 17 CFR 200.30-3(a)(12).