stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing Board rule under section 19(b)(3)(A)[15] of the Act, and rule 19b–4(f)(1) thereunder,[16] which renders the proposed rule change effective upon receipt of this filing by the Commission. The proposed rule change describes the plan for the Board to provide sample data from the Board's Transaction Reporting System so that the Board can obtain comment on the format of a new Daily Transaction Report and move expeditiously forward with its previously announced plan to make public transaction data more useful and comprehensive. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, D.C. 20549–0609. 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 the filing will also be available for inspection and copying at the Board's principal offices. All submissions should refer to File No. SR–MSRB–99–03 and should be submitted by June 25. 1999.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[17]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–14113 Filed 6–3–99; 8:45 am]

BILLING CODE 8010–01–M

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

[16] 17 U.S.C. 240.19b–4(f)(1).

[17] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41461; File No. SR–NASD–99–08]

Self-Regulatory Organizations; filing of Proposed Rule Change and Amendment No. 1 by the National Association of Securities dealers, Inc. Relating to the Arbitration Process for Claims of Employment Discrimination

May 27, 1999.

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 February 1, 1999, the National Association of Securities Dealers, Inc., (''NASD'') or ''Association''), through its wholly-owned subsidiary, NASD Regulation, Inc. (''NASD Regulation'') 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 Regulation. On May 10, 1999, NASD Regulation amended its proposal.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, 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 10201 and 10202, and to add new Rule 3080 and new Rule Series 10210 of the NASD. The proposed rule change is intended to enhance the dispute resolution process for the handling of employment discrimination disputes, and to expand disclosure to employees concerning the arbitration of all disputes. The text of the proposed rule change follows. Proposed new rule language is in italics; proposed deletions are in brackets.

* * * * *

RULES OF THE ASSOCIATION

* * * * *

3000. RESPONSIBILITIES RELATING TO ASSOCIATED PERSONS, EMPLOYEES, AND OTHERS' EMPLOYEES

* * * * *

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

[2] 17 CFR 240.19b–4.

[3] See Letter from Alden S. Adkins, Senior Vice President and General Counsel, NASD Regulation, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated May 10, 1999 (''Amendment No. 1''). Amendment No. 1 made substantive changes to the proposed rule language, including the provisions for arbitrator qualifications and coordination of claims filed in court and arbitration.

3080. Disclosure to Associated Persons When Signing Form U–4

A member shall provide an associated person with the following written statement whenever the associated person is asked to sign a new or amended Form U–4.

The Form U–4 contains a predispute arbitration clause. It is in item 5 on page 4 of the Form U–4. You should read that clause now. Before signing the Form U–4, you should understand the following:

(1) You are agreeing to arbitrate any dispute, claim or controversy that may arise between you and your firm, or a customer, or any other person, that is required to be arbitrated under the rules of the self-regulatory organizations with which you are registering. This means you are giving up the right to sue a member, customer, or another associated person in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.

(2) A claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute is not required to be arbitrated under NASD rules. Such a claim may be arbitrated at the NASD only if the parties have agreed to arbitrate it, either before or after the dispute arose. The rules of other arbitration forums may be different.

(3) Arbitration awards are generally final and binding; a party's ability to have a court reverse or modify an arbitration award is very limited.

(4) The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.

(5) The arbitrators do not have to explain the reason(s) for their award.

(6) The panel of arbitrators may include arbitrators who were or are affiliated with the securities industry, or public arbitrators, as provided by the rules of the arbitration forum in which a claim is filed.

(7) The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible for arbitration may be brought in court.

* * * * *

1000. CODE OF ARBITRATION PROCEDURE

* * * * *

10200. INDUSTRY AND CLEARING CONTROVERSIES

10210. Required Submission

(a) Except as provided in paragraph (b) *or Rule 10216,* a dispute, claim, or

controversy eligible for submission under the Rule 10100 Series between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) with such member, shall be arbitrated under this Code, at the instance of:

(1) a member against another member;

(2) a member against a person associated with a member or a person associated with a member against a member; and

(3) a person associated with a member against a person associated with a member.

* * * * *

10202. Composition of Panels

(a) In disputes subject to arbitration that arise out of the employment or termination of employment of an associated person, and that relate exclusively to disputes involving employment contracts, promissory notes or receipt of commission, the panel of arbitrators shall be appointed as provided by paragraph (b)(1) or (2) or Rule 10203, whichever is applicable. In all other disputes arising out of the employment or termination of employment of an associated person, the panel of arbitrators shall be appointed as provided by rule *10212,* 10302 or [Rule] 10308, whichever is applicable.

10210. Statutory Employment Discrimination Claims

The Rule 10210 Series shall apply only to disputes that include a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute. The Rule 10210 Series shall supersede any inconsistent Rules contained in this Code.

10211. Special Arbitrator Qualifications for Employment Discrimination Disputes (a) Minimum Qualifications for All Arbitrators

Only arbitrators classified as public arbitrators as provided in Rule 10308 shall be selected to consider disputes involving a claim of employment discrimination, including a sexual harassment claim, in violation of a statute.

(b) Single Arbitrators or Chairs of Three-Person Panels

(1) Arbitrators who are selected to serve as single arbitrators or as chairs of three-person panels should have the following additional qualifications:

(A) law degree (Juris Doctor or equivalent);

(B) membership in the Bar of any jurisdiction;

(C) substantial familiarity with employment law; and

(D) ten or more years of legal experience, of which at least five years must be in either:

(i) law practice;

(ii) law school teaching;

(iii) government enforcement of equal employment opportunity statutes;

(iv) experience as a judge, arbitrator, or mediator, or

(v) experience as an equal employment opportunity officer or in-house counsel of a corporation.

(2) In addition, a chair or single arbitrator with the above experience may not have represented primarily the views of employers or of employees within the last five years. For purposes of this Rule, the term ''primarily'' shall be interpreted to mean 50% or more of the arbitrator's business or professional activities within the last five years.

(c) Waiver of Special Qualifications

If all parties agree, after a dispute arises, they may waive any of the qualifications set forth in paragraph (a) or (b) above.

10212. Composition of panels

For disputes involving a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute:

(a) Each panel shall consist of either a single public arbitrator or three public arbitrators qualified under Rule 10211, unless the parties agree to a different panel composition.

(b) A single arbitrator shall be appointed to hear claims for $100,00 or less.

(c) A panel of three arbitrators shall be appointed to hear claims for more than $100,000, unless the parties agree to have their case determined by a single arbitrator.

10213. Discovery

(a) Necessary pre-hearing depositions consistent with the expedited nature of arbitration shall be available.

(b) The provisions of Rule 10321 shall apply to proceedings under this Rule 10210 Series.

10214. Awards

The arbitrator(s) shall be empowered to award any relief that would be available in court under the law. The arbitrator(s) shall issue an award setting forth a summary of the issues, including the type(s) of dispute(s), the damages or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

10215. Attorneys' Fees

The arbitrator(s) shall have the authority to provide for reasonable attorneys' fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law.

10216. Coordination of Claims Filed in Court and in Arbitration

(a) Option To Combine Related Claims in Court

(1)(A) If a current or former associated person of a member files a statutory discrimination claim in court against a member or its associated persons, and asserts related claims in arbitration at the Association against some or all of the same parties, a respondent who is named in both proceedings shall have the option to move to compel the claimant to bring the related arbitration claims in the same court proceeding In which the statutory discrimination claim is pending, to the full extent to which the court will accept jurisdiction over the related claims.

(B) The respondent shall notify the claimant in writing, before the time to answer Rule 10314 has expired, that it is exercising this option and shall file a copy of such notification with the Director. If the respondent files an answer without having exercised this option, it shall have waived its right to move to compel the claimant to assert related claims in court, except as provided in paragraph (b).

(2)(A) If a member or current or former associated person of a member (''party'') has a pending claim in arbitration against a current or former associated person of a member and the current or former associated person thereafter asserts a related statutory employment discrimination claim in court against the party, the party shall have the option to assert its pending arbitration claims and any counterclaims in court.

(B) The party shall notify the current or former associated person in writing, before filing an answer to the complaint in court, that it is exercising this option and shall file a copy of such notification with the Director. If the party files an answer in court without having exercised this option, it shall have waived its right to assert the pending arbitration claim in court.

(C) The party may not exercise this option after the first hearing has begun on the arbitration claim.

(b) Option Extended When Claim Is Amended

(1) If the claimant files an amended Statement of Claim adding new claims not asserted in the original Statement of Claim, a respondent named in the amended Statement of Claim shall have the right to move to compel the claimant to assert all related claims in the same court proceeding in which the statutory discrimination claim is pending, to the full extent that the court will accept jurisdiction over the related claims, even if those related claims were asserted in the original Statement of Claim.

(2) The respondent shall notify the claimant in writing, before the time to answer the amended Statement of Claim under Rule 10314 has expired, that it is exercising this option and shall file a copy of such notification with the Director. If the respondent files an answer to the amended Statement of Claim without having exercised this option, it shall have waived its right to move to compel the claimant to assert related claims in court.

(c) Requirement to Combine All Related Claims

If a party elects to require a current or former associated person to assert all related claims in court, the party shall assert in the same court proceeding all related claims that it has against the associated person to the full extent to which the court will accept jurisdiction over the related claims.

(d) Right of Respondent to Remain in Arbitration

(1) If there are multiple respondents and a respondent has exercised an option under paragraph (a) or (b), but another respondent wishes to have the claims against it remain in arbitration, then any remaining party may apply for a stay of the arbitration proceeding.

(2) The arbitration shall be stayed unless the arbitration panel determines that the stay will result in substantial prejudice to one or more of the parties. If a panel has not been appointed, the Director shall appoint a single arbitrator to consider the application for a stay. Such single arbitrator shall be selected using the Neutral List Selection System (as defined in Rule 10308) and is not required to have the special employment arbitrator qualifications described in Rule 10211.

(e) Pre-Filing Certification

(1) Prior to or concurrently with filing a Statement of Claim, a claimant may file with the Director a certification that it had communicated unsuccessfully with the respondent concerning the consolidation of all claims in court prior to filing a Statement of Claim, in an effort to save the expense of arbitration fees. A copy of such certification shall be sent to the respondent at the same time and in the same manner as the filing with the Director.

(2) If, after a certification has been filed, all the respondents later exercise the option to consolidate all claims in court, the Director will return the claimant's filing fee and any hearing session deposits for hearings that have not been held, but will retain the member surcharge and any accrued member process fees. If there are any remaining respondents, the filing fee and any hearing deposits will be adjusted to correspond to the claims against the remaining respondents.

(f) Motions to Compel Arbitration

If a member or a current or former associated person of a member files in court a claim against a member or a current or former associated person of a member that includes matters that are subject to mandatory arbitration, either by the rules of the Association or by private agreement, the defending party may move to compel arbitration of the claims that are subject to mandatory arbitration.

(g) Definitions

For purposes of this Rule:

(1) The term ''related claim'' shall mean any claim that arises out of the employment or termination of employment of an associated person.

(2) The term ''statutory discrimination claim'' means a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statutes.

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 Regulation 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 Regulation 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 proposed rule change is intended to enhance the dispute resolution process for the handling of employment discrimination disputes, and to expand disclosure to employees concerning the arbitration of all disputes.

Background. In August 1997, NASD Regulation and the NASD Boards decided to remove from the NASD Code of Arbitration Procedure the requirement for registered persons to arbitrate claims of statutory employment discrimination. That rule change was approved by the Commission and became effective January 1, 1999.[4] In conjunction with this rule change, the Boards recommended certain enhancements to the arbitration process for discrimination claims. To carry out the Boards' mandate, NASD Regulation staff assembled a working group, including attorneys representing employees, general counsels of member firms, and arbitrators with expertise in employment matters to advise on issues relating to the arbitration of employment discrimination claims. This working group met numerous times during 1997 and 1998 to assist the staff in preparing recommendations to the Board.

In addition to several issues that were presented to them by NASD Regulation staff, the working group considered recommendations contained in a document known as ''A Due Process Protocol for Mediation and Arbitration of Statutory Disputes arising out of the Employment Relationship'' (''the Protocol''). The Protocol was created in 1995 by a task force made up of individuals from diverse organizations involved in labor and employment law to examine questions of due process arising out of the use of mediation and

[4] *See* Securities Exchange Act Release No. 40109 (June 22, 1998), 63 FR 35299 (June 29, 1998). The NASD Code of Arbitration Procedure applies not only to NASD members and their associated persons, but also to members and associated persons of the Municipal Securities rulemaking Board (''MSRB'') (for claims filed after Jan. 1, 1998), the Philadelphia Stock Exchange (''Phlx'') (for claims filed after Oct. 1, 1998), and the American Stock Exchange (''Amex'') (for claims filed following the closing of the merger), pursuant to agreements under which members of those self-regulatory organizations for whom the NASD administers the arbitration process will be treated as ''members'' of the NASD for purposes of the NASD Code of Arbitration Procedure. *See* Securities Exchange Act Release Nos. 39378 (December 1, 1997), 62 FR 64417 (December 5, 1997) (MSRB); 40517 (October 1, 1998), 63 FR 54177 (October 8, 1998) (Phlx); and 40622 (October 30, 1998), 63 FR 59819 (November 5, 1998) (Amex).

arbitration for resolving employment disputes. The Protocol has been adopted by several dispute resolution forums, and the Boards recommended that due process procedures similar to those in the Protocol be considered for use in the dispute resolution process at the NASD for claims of employment discrimination. The working group and the staff considered the provisions of the Protocol, and made recommendations to the Board as to how they could be applied to the arbitration process in the NASD forum. Those recommendations were considered and adopted by the Boards in October 1998. In this rule filing, NASD Regulation proposes adoption of a new Rule 10210 Series which will contain special rules applicable to the arbitration of statutory employment discrimination claims, and proposes related changes to other NASD rules. These rule changes deal with the qualifications of arbitrators hearing claims of employment discrimination; the number of arbitrators to hear such claims; special rules for discovery, awards, and attorneys' fees; coordination of claims filed in court and arbitration; and disclosure to associated persons of the effects of the arbitration clause found in the Forum U–4. These proposed changes are described in detail below.

Description of Proposed Amendments. The proposed Rule 10210 Series contains certain special rules applicable to statutory employment discrimination claims. These rules supplement and, in some instances, supersede the provisions of the Code that currently apply to the arbitration of employment disputes. The proposed special rules do not attempt to set forth all procedures applicable to the arbitration of statutory employment discrimination claims, but only those procedures that relate specifically to such claims and may be different from procedures that apply to other intra-industry claims.

Qualifications for Neutrals Who Hear Employment Discrimination Cases. With regard to membership on the roster of arbitrators qualified to hear claims of employment discrimination, the Protocol provides as follows:

> Mediators and arbitrators selected for such cases should have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment. The roster of available mediators and arbitrators should be established on a non-discriminatory basis, diverse by gender, ethnicity, background, experience, etc. to satisfy the parties that their interest and objectives will be respected and fully considered.
>
> Our recommendation is for selection of impartial arbitrators and mediators. We recognize the right of employers and employees to jointly select as mediator and/or arbitrators one in whom both parties have requisite trust, even though not possessing the qualifications here recommended, as most promising to bring finality and to withstand judicial scrutiny. The existing cadre of labor and employment mediators and arbitrators, some lawyers, some not, although skilled in conducting hearings and familiar with the employment milieu is unlikely, without special training, to consistently possess knowledge of the statutory environment in which these disputes arise and of the characteristics of the non-union workplace.

NASD Regulation currently has on its arbitration roster many arbitrators who have indicated that they have experience or training in employment law. In addition, NASD Regulation currently offers employment law training to arbitrators; such training is conducted by attorneys experienced in the field of employment law. In accordance with the Protocol provisions, however, NASD Regulation proposes the use of a more specialized roster of available arbitrators for intra-industry cases in which statutory discrimination is alleged. In its discretion, and depending in part on the number of statutory employment discrimination claims filed in its forum, NASD Regulation may choose to create its own specialized employment roster or may work with other dispute resolution providers to utilize their rosters of qualified employment arbitrators.

Proposed Rule 10211(a) provides that only arbitrators classified as public (non-industry) arbitrators will be selected to consider disputes involving a claim of employment discrimination, including a sexual harassment claim, in violation of a statute. Proposed Rule 10211(a) incorporates by reference the definition of ''public arbitrator'' in the newly revised list selection rule, Rule 10308, which applies both to customer disputes and to intra-industry disputes except where superseded by more specific industry arbitration rules. The definition of ''public arbitrator'' in Rule 10308 excludes not only securities industry employees and their immediate family members, but also attorneys, accountants, and other professionals who have devoted 20% or more of their professional work in the last two years to clients who are engaged in the securities business (as described in Rule 10308). Use of the same definition of public arbitrators throughout the Code provides for more efficient administration of the list selection system.

For chairpersons and single arbitrators, NASD Regulation proposes additional qualifications in proposed Rule 10211(b). These qualifications include a law degree, membership in the Bar of any jurisdiction, substantial familiarity with employment law, and ten or more years of legal experience that included at least five years of one of the following: law practice; law school teaching; government enforcement of equal employment opportunity (EEO) statutes; experience as a judge, arbitrator, or mediator; or experience as an EEO officer or in-house counsel of a corporation. In addition, the chair or single arbitrator may not have represented primarily the views of employees or employers within the past five years. For this purpose, ''primarily'' is defined to mean 50% or more of the arbitrator's business or professional activities within the last five years. NASD Regulation believes that it is important to the credibility of the forum for the single arbitrator or chair not only to be neutral, but to avoid even the appearance of bias toward either employees or employers.

Rule 10211(c) provides that parties may agree, after a dispute arises, to waive any of the special qualifications contained in either paragraph (a) or paragraph (b). Such a waiver is not valid if it is contained in a predispute arbitration agreement.

Composition of Panels. The current arbitration panel composition for statutory discrimination claims and certain other employment claims is identical to the panel used for customer disputes and consists of either one public (non-industry) arbitrator for single arbitrator cases, or two public arbitrators and one non-public (industry) arbitrator for three arbitrator cases. An all-industry panel is used solely for employment disputes that relate exclusively to claims involving employment contracts, promissory notes or receipt of commissions.

As described above, NASD Regulation proposes to change this practice so that, for cases involving claims of employment discrimination, whether or not other issues are also involved, all arbitrators must be classified as public. Therefore, proposed Rule 10212(a) provides for a special panel composition of all public arbitrators to hear claims of statutory employment discrimination. Rule 10212 provides, however, that parties may agree to a different panel composition in a particular case.

Proposed Rule 10212(b) provides a higher threshold for single arbitrator cases than is found elsewhere in the

Code: a single arbitrator will hear claims of $100,000 or less. This higher threshold reduces the hearing costs for the parties and results in more efficient allocation of qualified employment arbitrators. Proposed Rule 10212(c) provides that the claims for more than $100,000 will be assigned to a three-person panel unless the parties agree to have their case determined by a single arbitrator. NASD Regulation also proposes a conforming amendment to Rule 10202, the general intra-industry panel composition rule, to include a reference to the above special panel composition rule.

Discovery. The Protocol provides as follows with respect to discovery:

> One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims. The employees' representative should also have reasonable pre-hearing and hearing access to all such information and documentation.
>
> Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available.

NASD Regulation has determined to adopt the Protocol provision on discovery. Although the Protocol focuses on the employee's access to information, there also could be situations in which the employee has documents that the employer requires to prepare its case, such as records of the employee's outside business activities or prior employment. Therefore, NASD Regulation believes the term ''employees'' in the quoted provision should be interpreted to include all parties to the employment dispute. In any event, the NASD's current rule on pre-hearing procedures, including discovery, Rule 10321, already meets the Protocol standard regarding access to information and is not proposed to be amended at this time. Rule 10321 is cross-referenced in proposed Rule 10213(b) to make clear that its provisions apply to employment discrimination disputes.

On the issue of depositions in employment discrimination cases, NASD Regulation proposes that the Protocol should be the standard for depositions. NASD Regulation proposes that, in considering the need for depositions, arbitrators should consider the relevancy of the information sought from the persons to be deposed and the issues of time and expense. Such considerations are already provided for in Rule 10321, paragraphs (d) and (e), which set forth procedures for deciding unresolved issues either at the pre-hearing conference or by appointment of a selected arbitrator. NASD Regulation has incorporated the proposed discovery provision relating to depositions in proposed Rule 10313.

Attorney's Fees. The Protocol provides as follows:

> The amount and method of payment for representation should be determined between the claimant and the representative. We recommend, however, a number of existing systems which provide employer reimbursement of at least a portion of the employee's attorney fees, especially for lower paid employees. The arbitrator should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or in the interests of justice.

Although the Code of Arbitration Procedure is silent with respect to attorneys' fees, such fees may be awarded under current practice. Normally, parties will brief the arbitrators on applicable law providing for the award of attorneys' fees in their cases. In view of provisions in the federal civil rights laws that specifically provide for the award of attorneys' fee, NASD Regulation proposes that the Protocol provision be adopted as amended below (additions in italics; deletions in brackets):

> The arbitrator should have the authority to provide for *reasonable attorneys'* fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law [or in the interests of justice].

Proposed Rule 10215 incorporates the amended provision. It provides that the arbitrator has authority to provide for reasonable attorney's fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law. This accords with Title VII of the Civil Rights Act of 1964, which authorizes a court, in its discretion, to allow the prevailing party ''a reasonable attorney's fee'' as part of the costs.[5] NASD Regulation believes that the language of proposed rule 10215 is more precise if the Protocol phrase ''or in the interests of justice'' is omitted, as that phrase may mislead parties into thinking that no statutory basis is necessary for the award of attorneys fees.[6] Rather, the intent of proposed rule 10215 is to allow the award of attorney's fees if applicable law permits such an award.

Awards. The Protocol provides as follows with regard to awards and the authority of the arbitrator:

> The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating agency, including the authority to determine the time and place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary matters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute.
>
> The arbitrator should be empowered to award whatever relief would be available in court under the law. The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

NASD Regulation proposes that the Protocol language be adopted with one language change described below. The Code already provides arbitrators with authority similar to the Protocol provisions, although it does not specifically require a statement regarding the disposition of any statutory claims. In order to add the requirement for a statement regarding the disposition of any statutory claims, and to have all related provisions in the same Rule Series, NASD Regulation has drafted proposed Rule 10214. Proposed Rule 10214 provides that arbitrators will be empowered to award any relief that would be available in court under the law, and sets forth the information that must be contained in the arbitrator's award. Such information includes a summary of the issues, including the types of disputes, the damages or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claims.

NASD Regulation has not used the Protocol's phase ''opinion and award'' in proposed Rule 10214, but instead has used only the term ''award,'' which is consistent with terminology used elsewhere in the Code. This avoids confusion that might result from use of the term ''opinion,'' which could mislead parties into expecting a judicial type of decision, rather than the customary type of arbitration award that contains the specific elements listed in the proposed rule, but not a detailed

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[5] 42 U.S.C. 2000e–5(k) (1998).

[6] A guide for arbitrators drafted by the Securities Industry Conference on Arbitration (SICA) provides as follows: ''Generally, parties to an arbitration are responsible for their personal costs associated with bringing or defending an arbitration action. Exceptions to the rule do exist. Parties should be prepared to argue the statutory or contractual basis that permits an award of attorneys' fees. The arbitrators should consider referring to the authority relied upon if attorneys' fees are awarded.'' *The Arbitrator's Manual* (October 1996). SICA is a group composed of representatives of the self-regulatory organizations that provide arbitration forums; public investors; and the securities industry.

explanation. Under current NASD Regulation practice, however, parties may request that the arbitrators provide reasons for their decision, and the arbitrators have discretion to grant or deny the request.[7]

Other Protocol Provisions. NASD Regulation believes that the other applicable provisions of the Protocol are already addressed sufficiently in existing Rules within the Code of Arbitration Procedure. For example, NASD Regulation already gives parties the right to representation by counsel and refers claimants to state and local bar associations for legal referrals in several major cities; parties receive information on arbitration awards issued by arbitrators who may hear their cases; arbitrators are required to disclose possible conflicts of interest; arbitrators have the authority to make necessary rulings and to allocate fees among the parties; and recent rule changes approved by the Commission [8] provide a list selection method for both customer and intra-industry arbitration proceedings that meets the Protocol standard.

Coordination of Claims Filed in Court and in Arbitration. Several individuals who commented on the recent rule change to allow statutory discrimination claims to be filed in court predicted that the change could lead to splitting or bifurcation of cases: the discrimination claims would proceed in court, while other employment claims that are subject to mandatory arbitration would proceed in arbitration. As the Commission noted in its approval order for that rule change, some commenters argued that such bifurcation could result in the separation of claims that are often joined together and based on the same alleged facts.[9] Some commenters believed bifurcation of statutory and common law claims could create a financial burden on employees and members, delay the resolution of claims, and cause scheduling and discovery disputes.[10] Therefore, NASD Regulation proposes adoption of a new rule on coordination of claims that may be filed in court and those that are normally required to be arbitrated under NASD rules.

Proposed Rule 10216 would provide that, if the parties agree to resolve all related matters in court, then the matter need not be submitted to arbitration. Moreover, if a discrimination claim is filed in court and related claims subject to mandatory arbitration are filed in arbitration, a respondent in the arbitration would have the option to move to combine all claims in court. As described more fully below, the rule provides several other opportunities for a party to move to compel that a claim be consolidated with other claims in court. Any claims not accepted by the court under any of these methods, however, would continue to be arbitrable.

The proposed rule would include a pre-filing procedure in which the claimant may certify to the Director of Arbitration that he or she communicated with the respondent about the possibility of filing all claims in court initially, in order to save the expense of arbitration fees and attorneys' fees to draft arbitration claim papers. If the respondent does not agree to consolidate all claims in court, and an arbitration claim is then filed, proposed Rule 10216 provides several methods for coordinating claims filed in court and in arbitration.

Paragraph (a)(1)(A) deals with the situation in which an associated person files a statutory discrimination claim in court and files related claims in arbitration against some or all of the same parties. In that case, any respondent who is named in both proceedings may move to compel the associated person to bring the related arbitration claims in the same court proceeding, to the full extent to which the court will accept jurisdiction over those claims. As noted above, any claims not accepted by the court would remain in arbitration.

Paragraph (a)(1)(B) requires the respondent that wishes to exercise this option to notify the claimant in writing, before the time to answer under Rule 10314 has expired, that it is exercising this option and to file a copy of such notification with the Director of Arbitration, or be deemed to have waived its right to exercise the option, except as provided in paragraph (b), described below. This notice is intended to motivate parties to discuss their options and consider consolidating all claims in one forum before further expenses are incurred by either party.

Paragraph (a)(2)(A) provides that if a party has a pending claim in arbitration against an associated person who thereafter asserts as related statutory employment discrimination claim in court against the party, that party has the option to assert all arbitration claims and counterclaims in court. This is intended to cover the situation in which an arbitration claim was filed before the statutory discrimination claim was filed in court. For purposes of paragraph (a)(2), the term ''party'' means a member or a current or former associated person of a member. Paragraph (a)(2)(B) provides notice and time requirements for the exercise of the option similar to those in paragraph (a)(1)(B), described above. Paragraph (a)(2)(C) provides that a party may not exercise this option after the first hearing has begun on the arbitration claim. This is intended to avoid disruption to the arbitration proceeding when it is farther along in the process.

Paragraph (b) of proposed Rule 10216 provides that the time for consolidating claims in court is extended if the claimant files an amended statement of claim adding new claims not asserted in the original statement of claim. In that case, a respondent has an opportunity to move to compel the claimant to assert all related claims in the same court proceeding, even if those claims were asserted in the original statement of claim. As above, the respondent wishing to exercise this option must notify the claimant in writing before filing an answer to the amended statement of claim or be deemed to have waived the right to do so, and must file a copy of such notification with the Director.

Paragraph (c) of proposed Rule 10216 provides that if a party elects to require a current or former associated person to assert all related claims in court, the party also must asserts in the same court proceeding all related claims the party has against the associated person, to the full extent to which the court will accept jurisdiction over the related claims.

Paragraph (d) of proposed Rule 10216 provides that a respondent named in both court and arbitration proceedings may choose to remain in arbitration, even if another respondent has exercised its option to consolidate the proceedings against it in court. Any remaining party may seek a stay of the arbitration proceeding, and the proceeding will be stayed unless the arbitration panel determines that the stay will result in substantial prejudice

[7] A booklet prepared by SICA and provided to all claimants explains this industry-wide practice as follows: ''Arbitrators are not required to write opinions or provide reasons for the award. A party, however, may request an opinion. This request should be made no later than the hearing date.'' *Arbitration Procedures* (October 1996) (also available via the Internet under the title, *Arbitration Procedures for Investors*, on the Arbitration page at *www.nasdr.com*). In a 1989 Order approving arbitration rule changes by several self-regulatory organizations, the Commission decided not to require written opinions in awards, but express the view that arbitrators could voluntarily prepare written opinions. *See* Securities Exchange Act Rel. No. 26805 (May 10, 1989), 54 FR 21144 (May 16, 1989).

[8] *See* Securities Exchange Act Rel. Nos. 40555 (October 14, 1998), 63 FR 56670 (October 22, 1998) and 40556 (October 14, 1998), 63 FR 56957 (October 23, 1998).

[9] *See* Securities Exchange Act Rel. Nos. 40109 (June 22, 1998), 63 FR 35299 (June 29, 1998).

[10] *Id.*

to one or more of the parties. The presumption in favor of a stay of the arbitration proceeding is designed to avoid the situation in which parties must proceed in two forums at the same time. Nevertheless, a party may object to the stay and have the matter considered by an arbitrator.

If no panel has been appointed yet, the Director will appoint a single arbitrator to consider the application for a stay, using the Neutral List Selection System to select the arbitrator. That arbitrator is not required to have the special employment arbitrator qualifications described in Rule 10211, since there would be no statutory employment discrimination claims in arbitration at this point; rather, the provisions of Rule 10202 would determine whether the single arbitrator should be an industry arbitrator or a public arbitrator. This means that if the claims that are the subject of the arbitration proceeding ''relate exclusively to disputes involving employment contracts, promissory notes or receipt of commissions,'' as provided in the first sentence of Rule 10202(a), then the single arbitrator would be an industry arbitrator. In ''all other disputes arising out of the employment or termination of employment of an associated person,'' as provided in the second sentence of rule 10202(a), a public arbitrator would be appointed. The single public arbitrator may later appear on a list of arbitrators to be chosen for any hearing on the merits in the same arbitration.

Paragraph (e) of proposed rule 10216 provides a procedure for certifying that the claimant has communicated unsuccessfully with the respondent(s) concerning the consolidation of all claims in court prior to filing a Statement of Claim, in an effort to save the expense of arbitration fees, rather than filing the statutory discrimination claims in court and the other claims in arbitration. If such a certification has been filed, and all the respondents later exercise the option to consolidate all claims in court, the Director will return the claimant's filing fee and any hearing session deposits for hearings that have not been held, but will retain the member surcharge and any accrued member process fees to cover the cost of docketing and otherwise processing the claim. If there are remaining respondents, however, the filing fee and any hearing deposits will be adjusted to correspond to the claims against the remaining respondents.

Paragraph (f) of proposed rule 10216 clarifies that, if an associated person files a claim in court that includes matters that are subject to mandatory arbitration, either by the rules of the NASD or by private agreement, the defending party may move to compel arbitration of the claims that are subject to mandatory arbitration. This is a statement of current practice and is intended to apply where the defending party has not exercised an option under other provisions of proposed Rule 10216 to combine all claims in court.

Paragraph (g) of proposed rule 10216 provides that, for purposes of Rule 10216, the term ''related claim'' means any claim that arises out of the employment or termination of employment of an associated person and the term ''statutory discrimination claim'' means a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute.

In conjunction with the proposed bifurcation rule, a change is proposed to Rule 10201 to add a reference to proposed Rule 10216. This exception is necessary because, under Rule 10216, some claims that might otherwise be required to be arbitrated may be brought in court, at the respondent's option.

Disclosure Issues. NASD Regulation proposes adoption of a model disclosure statement that would be given to persons who are signing the Form U–4 to apply for registration. This disclosure statement would explain the nature and effect of the arbitration clause contained in the Form U–4. It would not address any private arbitration agreement that the applicant might enter into with the member firm. Rather, the firm would be responsible for either making proper disclosure to its employees about its private arbitration agreement, or risking an adverse decision in later litigation concerning any inadequacy in the disclosure.

Proposed Rule 3080, entitled ''Disclosure to Associated Persons When Signing a Form U–4,'' was modeled on the disclosure given to customs when signing predispute arbitration agreements with member firms, as contained in current Rule 3110(f) and proposed amendments thereto contained in File No. SR–NASD–98–74. Because the proposed rule relates to associated persons, it has been placed in the portion of the Rules that deal with the responsibilities of members relating to associated persons, employees and others' employees. The introductory language of the proposed rule requires members to provide each associated person, whenever the associated person is asked to sign a new or amended Form U–4, with certain specified disclosure language. This means that the disclosure may be given by the same member to the same associated person on more than one occasion during that person's employment, if the associated person has reason to re-sign the Form U–4. The specified disclosure language explains that the Form U–4 contains a predispute arbitration clause, and indicates in which Item of the Form U–4 the clause is located.[11] The disclosure language then advises the associated person to read the predispute arbitration clause.

Subparagraph (1) of proposed Rule 3080 paraphrases the arbitration clause in the Form U–4 and then provides disclosure that the associated person is giving up the right to sue in court, except as provided by the rules of the arbitration forum in which a claim may be filed. Subparagraph (2) incorporates the language of Rule 1021 regarding an exception to the arbitration requirement for claims of statutory employment discrimination. Subparagraph (2) also indicates that the rules of other arbitration forums may be different. Subparagraphs (3) through (7) track the language of the proposed amendments to Rule 3110(f)(1), which sets forth similar disclosures to customers. Those subparagraphs inform the associated person that arbitration awards are generally final and binding, that discovery is generally more limited in arbitration than in court, that arbitrators do not have to explain the reasons for their awards, that the panel of arbitrators may include either public or industry (non-public) arbitrators,[12] and that the rules of some arbitration forums may impose time limits for bringing a claim in arbitration.

2. Statutory Basis

The Association believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which require that the rules of an association 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. The Association believes that the proposed rule change will protect the public interest by improving the arbitration process for claims of statutory employment discrimination, and result in increased satisfaction with that process by both associated persons and members.

[11] The member will be responsible for updating this item number on new disclosure statements if it changes in later versions of the Form U–4.

[12] The language of subparagraph (6) differs slightly from that of proposed Rule 3110(f)(1)(E) because, following adoption of the present proposed rule change, the panel composition for statutory employment discrimination claims will differ from the panel composition for customer claims.

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

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

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participation, 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 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 NASD consents, 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, including whether the proposal is consistent with the Act. In particular, the Commission solicits comments on the following issues:

Proposed Rule 10216 provides procedures for administering disputes that involve both statutory employment discrimination claims that are filed in court and other claims that are filed at the NASD Regulation's arbitration forum. Cases affected by proposed Rule 10216 would generally involve firms that have not entered into agreements with their employees to arbitrate statutory employment discrimination claims.

(1) The proposed rule permits respondents to choose when to bifurcate claims in these disputes. Does this strike a fair balance?

(2) Is this aspect of the proposal (permitting respondents to choose when to bifurcate claims) necessary to encourage firms to give their employees the option of bringing statutory employment discrimination claims in court? Without this provision, would firms be more likely to require employees to sign predispute arbitration clauses governing these claims?

(3) Does the proposal place an unreasonable burden on individual claimants because they are unable to determine the forum in which they will assert claims related to their stautory employment discrimination claims, or does the ability to bring their dominant, statutory employment discrimination claims in court provide for the appropriate balance?

(4) Does the presumption in favor of a stay of proceedings for those parties who remain in arbitration while other claims are being litigated unduly infringe on the parties bargain to arbitrate?

The Commission welcomes suggestions as to how objectionable procedures could be changed without imposing undue litigation costs in either party to a dispute.

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609. 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–99–08 and should be submitted by June 25, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–14210 Filed 6–3–99; 8:45 am]

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[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41459; File No. SR–NYSE–99–17]

Self-Regulatory Organizations; Notice of Filing and Order Granting Partial Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc., Relating to Original Listing Standards

May 27, 1999.

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 April 22, 1999, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change relating to the exchange's original listing standards. The Exchange submitted Amendment No. 1 to its proposal on May 19, 1999.[3] The proposed rule change, as amended, is described in Items I, II, and III below, which Items have been prepared by the exchange. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons and to grant partial accelerated approval to the portion of the proposal instituting a Pilot relating to the listing eligibility criteria for companies satisfying the Capitalization Standard. The Pilot will expire on September 3, 1999, or at such earlier time as the Commission grants the Exchange's request for permanent approval of the program.

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

[2] 17 CFR 240.19b–4.

[3] In amendment No. 1, the Exchange (i) requested that the Commission approve on an accelerated basis a 90-day pilot program (''Pilot'') for the portion of the proposal adding a new original listing standard applicable to both domestic and non-U.S. companies with a $1 billion market capitalization and $250 million in revenues in the most recent fiscal year (''Capitalization Standard''), (ii) clarified that companies satisfying the Capitalization Standard are subject to the Exchange's other original listing criteria (other than the financial criteria), (iii) revised the text of the proposed rule language to show changes against the current *Listed Company Manual* (''Manual'') rather than the language proposed for adoption in the pending filing, (iv) incorporated procedures for reconciliation with U.S. GAAP in the third year in the Exchange's proposed rule language and (v) removed the cash flow standard from the text of the proposed rule language. *See* Letter from James Buck, Senior Vice President and Secretary, NYSE, to Richard Strasser, Assistant Director, Division of Market Regulation (''Division''), Commission, dated May 18, 1999 (''Amendment No. 1'').