the Philadelphia Stock Exchange, Inc. (''Phlx'') (the CHX and the Phlx shall be referred to herein collectively as the ''Exchanges'').

The reasons cited in the application for withdrawing the Securities from listing and registration on the Exchanges include the following:

The Securities of the Company have been listed for trading on the CHX, the Phlx and the New York Stock Exchange, Inc. (''NYSE''). The Board of Directors of the Company has authorized the withdrawal of the Securities from the CHX and the Phlx in order to eliminate the costs associated with such listings. Moreover, the Company does not see any particular advantage in having its Securities trade on multiple exchanges.

The Company has complied with the Exchanges' rules by filing with each certified copies of the resolutions adopted by the Company's Board of Directors authorizing the withdrawal of its Securities from listing on the Exchanges and by setting forth in detail to the each Exchange the reasons for the proposed withdrawal and the facts in support thereof.

The CHX and the Phlx have each informed the Company that they have not objections to the Company's withdrawal of its Securities from listing on the respective Exchanges.

The Company's application relates solely to the withdrawal of its Securities from listing on the CHX and the Phlx and shall have no effect upon the continued listing of the Securities on the NYSE. By reason of Section 12(b) of the Act and the rules and regulations of the Commission thereunder, the Company shall continue to be obligated to file reports with the Commission and with the NYSE under Section 13 of the Act.

Any interested person may, on or before November 18, 1999, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609, facts bearing upon whether the application has been made in accordance with the rules of the Exchange and what terms, it any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

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

Jonathan G. Katz,

Secretary.

[FR Doc. 99–28755 Filed 11–2–99; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–42061; File No. SR–NASD–99–08]

Self-Regulatory Organizations; Order Approving a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Arbitration Process for Claims of Employment Discrimination

October 27, 1999.

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''), a proposed rule change pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder.[2] Under its proposal, NASD Regulation has created rules for the resolution of statutory employment discrimination claims. The proposed rule change and Amendment No. 1[3] to the proposed were published for comment in the **Federal Register** on June 4, 1999.[4] The Commission received four comment letters on the proposal.[5] This order approves the proposed rule change, as amended.

I. Description of the Proposed

NASD Regulation proposes to amend NASD Rules 10201 and 10202, and to add new Rule 3080 and new Rule 10210 Series. The proposed rule change is intended to enhance the dispute resolution process for the handling of employment discrimination claims, and to expand disclosure to employees concerning the arbitration of all disputes.

A. Background

In August 1997, the Board of NASD Regulation and the Board of the NASD (''NASD Boards'') submitted a proposal that removed from the NASD Code of Arbitration Procedure provisions requiring registered persons to arbitrate claims of statutory employment discrimination. That rule change was approved by the Commission, and became effective January 1, 1999.[6] In conjunction with this rule change, the NASD Boards recommended certain enhancements to the voluntary arbitration process for employment 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.

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 has been adopted by several dispute resolution forums, and the NASD Boards recommended that due process procedures similar to those in the Protocol be considered by the working group for use in the dispute resolution process at the NASD for claims of employment discrimination.

B. Description of Proposed Amendments.

The Proposed Rule 10210 Series contains special rules applicable to statutory employment discrimination claims. These rules supplement and, in some instances, supersede the provisions of the NASD Code that currently apply to the arbitration of employment disputes.

(1) Qualifications for Arbitrators Who Hear Employment Discrimination Cases

In accordance with the Protocol provisions, NASD Regulation proposes

[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 (''Division''), 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.

[4] Securities Exchange Act Release No. 41461 (May 27, 1999), 64 FR 30081 (File No. SR–NASD–99–08.

[5] *See* Letters to Jonathan G. Katz, Secretary, Commission, from: Jeffery A. Norris, President, Equal Employment Advisory Council (''EEAC Letter''), date June 24, 1999; Stephen G. Sneeringer, Chairman of the Arbitration Committee, Securities Industry Association (''SIA Letter''), dated June 30, 1999; and Cliff Palefsky, National Employment Lawyers Association (''NELA Letter''), dated July 7, 1999, and letter from George A. Schieren, Senior Vice President and General Counsel, Merrill Lynch, Pierce, Fenner & Smith Inc. (''Merrill Lynch Letter''), to Margaret H. McFarland, Deputy Secretary, Commission, dated June 30, 1999.

[6] *See* Securities Exchange Act Release No. 40109 (June 22, 1998), 63 FR 35299 (June 29, 1998).

the use of a specialized roster of available arbitrators for intra-industry cases in which statutory discrimination is alleged. Proposed Rule 10211(a) provides that 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 list selection rule, Rule 10308. 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 preceding two years to clients who are engaged in the securities business. NASD Regulation believes that the use of the same definition of public arbitrators throughout the NASD Code provides for more efficient administration of the list selection system.

For chairpersons and single arbitrators, NASD Regulation proposes additional qualifications in Rule 10211(b)(1) that should assist NASD Regulation to identify specially qualified and impartial arbitrators to resolve these disputes. In addition, under Rule 10211(b)(2), a chairperson or single arbitrator may not have represented primarily the views of employees or employers within the past five years. For this purpose, NASD Regulation has defined ''primarily'' to mean 50% or more of the arbitrator's business or professional activities within the preceding five years. NASD Regulation states that it is important to the credibility to the forum for the single arbitrator or chairperson 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 paragraphs (a) or (b) of proposed Rule 10211. Such a waiver is not valid if it is contained in a predispute arbitration agreement.

(2) Composition of Panels

NASD Regulation proposes that for each involving claims of employment discrimination, regardless of whether other issues are also involved, all arbitrators must be qualified as public arbitrators under Rule 10211.[7] In addition, proposed Rule 10212(b) provides a higher dollar threshold for single arbitrator cases than is found elsewhere in the Code: a single arbitrator will hear claims of $100,000 or less. NASD Regulation states that 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 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.

(3) Discovery

NASD Regulation proposes that the provision on depositions in the Protocol should be the standard under its own rules. NASD Regulation proposes that, in considering the need for depositions, arbitrator(s) should consider the relevancy of the information sought from the persons to be deposed, and the issues of time and expenses. These 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. The proposed discovery provision relating to depositions is in proposed Rule 10213.

(4) Attorneys' Fees

Proposed Rule 10215 provides that the arbitrator(s) shall have the authority to award reasonable attorneys' fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law. NASD Regulation notes that 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.[8] NASD Regulation states that the intent of proposed Rule 1021 is to allow the award of attorneys' fees if applicable law permits such an award.

(5) Awards

Proposed Rule 10214 provides that arbitrator(s) will be empowered to award any relief that would be available in court under applicable law, and sets forth the information that must be contained in the arbitrators' award. This information includes a summary of the issues, 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 phrase ''opinion and award'' in Proposed Rule 10214, but instead has used the term ''award,'' which is also used elsewhere in the NASD Code. This avoids confusion that might result from use of the term ''opinion,'' which could mislead parties into expecting a judicial type of decision, including a detailed explanation, rather than the customary type of arbitration award that contains the specific elements listed in the proposed rule. Consistent with current NASD Regulations practice, however, parties may request that the arbitrator(s) provide reasons for their decision, and the arbitrator(s) have discretion to grant or deny the request.

(6) Coordination of Claims Filed in Court and in Arbitration

Several commenters on the 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 arbitrable employment claims would proceed in arbitration.[9] Some commenters believed bifurcation of statutory and common law claims could impose a financial burden on employees and members, delay the resolution of claims, and cause scheduling and discovery disputes.[10]

NASD Regulation proposes a new rule to address coordination of claims. Proposed Rule 10216 provides 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.

If the respondent does not agree to consolidate all claims in court, and an arbitration claims is then filed, proposed Rule 10216 provides several methods for coordinating claims filed in court and in arbitration. Paragraph (a)(1)(A) of proposed Rule 10216 addresses the situation in which an

[7] Arbitrators must qualify under the relevant portion of Rule 10211: paragraph (a) for the second and third arbitrators on a three-arbitrator panel, and paragraph (b) for the chairperson or single arbitrator. *See* Letter from Jean I. Feeney, Assistant General Counsel, NASD Regulation, to Richard C. Strasser, Assistant Director, Division, Commission, dated August 20, 1999 (''NASD Regulation Letter'').

[8] 42 U.S.C. 2000e–5(k) (1998).

[9] *See* Securities Exchange Act Rel. No. 40109 (June 22, 1998), 63 FR 35299 (June 29, 1998).

[10] *Id.*

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 situation, 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) of proposed Rule 10216 requires a respondent that wishes to exercise this option to notify the claimant in writing that it is exercising this option. This notice is intended to motivate parties to discuss their options and consider consolidating all claims in one forum before either party incurs further expenses.

Paragraph (a)(2)(A) of proposed Rule 10216 provides that if a party has a pending claim in arbitration against an associated person who thereafter assets a 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 arbitration claims is filed before the statutory discrimination claim is filed in court. Paragraph (a)(2)(C) of proposed Rule 10216 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 of 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 situation, a respondent has an opportunity to move to compel the claimant to assert all related claims in the same court proceeding, even if those related claims were asserted in the original statement of claim.

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 assert 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 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, a single arbitrator will be appointed 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. Instead, the single arbitrator would be appointed under the provisions of Rule 10202. Under that rule, the single arbitrator is either an industry arbitrator or a public arbitrator, depending on the claims involved.A 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 (f) of proposed Rule 10216 clarifies that, if an associated person files a claim in court that includes matters that are subject to 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.

(7) Disclosure Issues

NASD Regulation also proposes a model disclosure statement that would be given to persons who 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 an applicant might enter into with a member firm. Rather, firms would be responsible for either making proper disclosure to their employees about their private arbitration agreement, or risk 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 customers when signing predispute arbitration agreements with member firms, as required by Rule 3110(f) and proposed amendments to that rule contained in File No. SR–NASD–98–74. 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 specified disclosure language. 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]

Subparagraph (1) of proposed Rule 3080 paraphrases the arbitration clause in the Form U–4 and discloses that an 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 be filed. Subparagraph (2) incorporates the language of Rule 10201 regarding an exception to the arbitration requirement for claims of statutory employment discrimination, and indicates that the rules of other arbitration forums may be different. Subparagraph (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 associated persons that arbitration awards are generally final and binding, that discovery is generally more limited in arbitration than in court, that arbitrator(s) 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 rules of some arbitration forums may impose time limits for bringing a claim in arbitration.

II. Summary of Comments

The Commission received four comment letters on the proposed rule change.[13] Three commenters generally supported the proposed rule change, believing that it will help ensure the efficient resolution of statutory discrimination claims in a manner fair to all parties.[14] The remaining

[11] The member will be responsible for updating the item number of 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.

[13] *See supra* note 3.

[14] *See* Letters from EEAC, Merrill Lynch, and NELA. However, NELA stated that the Protocol

Continued

commenter believed the proposal was an unnecessary departure from an arbitration system that has worked well in the past.[15]

A. The Commission's Solicitation of Comments

The Commission specifically solicited comment on the following aspects of proposed Rule 10216: (1) Whether the proposed rule strikes a fair balance in permitting respondents to choose when to bifurcate claims; (2) whether the provision permitting respondents to choose when to bifurcate is necessary to give employers an incentive to allow employees to bring statutory claims in court; (3) whether the bifurcation provisions unreasonably burden individual claimants; and (4) whether the presumptive stay unduly infringes upon the parties' bargain to arbitrate.[16]

Two commenters responded to the Commission's questions.[17] Both commenters stated that the proposal strikes a fair balance in permitting respondents to chose when to bifurcate claims. One of these commenters noted that the provision preserves the effectiveness of the NASD's general arbitration rule for employers and employees, while the other comment focused on the costs of litigation and on its view that claimants already have procedural advantages in bringing their case. Both commenters also stated that without the choice of when to bifurcate, employers would be more likely to require their employees to sign pre-dispute arguments mandating arbitration of all claims.[18] In response to the third question, the commenters stated their views that allowing respondents to coordinate related claims in court does not place an unreasonable burden on claimants because the proposed rule furthers the goals of providing fair and efficient arbitration of statutory employment disputes.[19] Finally, both commenters argued that the presumptive stay does not unduly infringe on the parties bargain to arbitrate, and that parties should not be burdened with simultaneously litigating claims in two different forums.[20]

B. Qualifications of Arbitrators and Composition of Arbitration Panels

One commenter contends that the proposed requirements for qualification of single arbitrators and panel chairs will severely limit the pool of available arbitrators.[21] That commenter recommends that section 10211(b)(2) be deleted. Another commenter argues that the use of ''public arbitrators,'' only as defined in Rule 10308, discriminates against attorneys who primarily represent employers in employment discrimination cases.[22] With respect to the composition of the panel, one commenter suggests that only single arbitrators who have no affiliation with securities industry employers be used in order to improve the fairness, reduce the cost, and increase the efficiency of the arbitration process.[23]

C. Discovery

The Commission received three comments on the discovery provisions contained in proposed Rule 10213.[24] Two commenters believe that the proposed rule would be adequate,[25] although one of those commenters suggested that: (1) The rule contains a presumption of one deposition per side, with arbitrator(s) retaining the authority to order additional depositions of an indispensable witness who is unavailable to attend a hearing; and (2) the rule contain a specific procedure requiring panel approval of the particular deposition the parties intend to take.[26]

The remaining commenter argues that the proposed rule should set more specific limitations and guidance as to how and when depositions should be used.[27] This commenter recommends the adoption of language concerning depositions in SR–NASD–99–07,[28] which discourages the use of depositions and generally advises arbitrator(s) to permit depositions under limited circumstances.[29]

D. Attorneys' Fees

One commenter believes that the proposal correctly limits awards of attorneys' fees to cases in which there is a statutory basis for such an award.[30] One commenter, however, thinks that language of proposed Rule 10215 wrongly suggests that an award of attorneys' fees is required in employment discrimination cases.[31] That commenter recommended modifying the proposal by deleting proposed Rule 10215, and adding the phrase ''including reasonable attorneys' fees where appropriate'' to proposed Rule 10214 to clarify the arbitrator's authority.[32]

E. Miscellaneous Provisions

Finally, one commenter suggests the adoption of the Protocol's requirement that arbitrator(s) are bound by applicable statutes, and that arbitrator(s) should issue a written opinion.[33]

III. Discussion

The Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)[34] of the Act, in general, and furthers the objectives of section 15A(b)(6)[35] in particular, in that it is designed to promote just and equitable principles of trade, and to protect investors and the public interest.[36] The Commission believes that the proposed rule change will protect the public interest by improving the arbitration process for those individuals who arbitrate claims of statutory employment discrimination. The public interest will be further protected by the expanded disclosure contained in the Form U–4 concerning the arbitration of all disputes.

In June of 1998, the Commission approved the NASD's proposal to remove the requirement to arbitrate statutory claims of employment discrimination.[37] The Commission stated in its order approving the NASD's rule change that ''[i]t is reasonable for the NASD to determine that in this unique area, it will not, as a self-regulatory organization, require arbitration.'' [38] That rule change does not affect the obligations of NASD member firms and associated persons under NASD rules to arbitrate other employment-related claims, as well as any business-related claims involving investors or other persons.

Moreover, statutory employment discrimination claims will continue to be resolved in the NASD's forum under private employment agreements between the parties or through post-dispute submissions. The current rule

should be adopted without modification. *See* NELA Letter.

[15] *See* SIA Letter.

[16] *See* notice of the proposed rule change.

[17] *See* Letters from EEAC and Merrill Lynch.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *See* EEAC Letter.

[22] *See* SIA Letter.

[23] *See* NELA Letter.

[24] *See* letters from EEAC, Merrill Lynch, and the SIA.

[25] *See* Letters from EEAC and Merrill Lynch.

[26] *See* Merrill Lynch Letter.

[27] *See* SIA Letter.

[28] Securities Exchange Act Release No. 41833 (September 2, 1999), 64 FR 49256 (September 10, 1999) (order approving proposed rule change relating to the creation of a Discovery Guide for use in NASD arbitrations).

[29] *Id.*

[30] *See* EEAC Letter.

[31] *See* SIA Letter.

[32] *Id.*

[33] *See* NELA Letter.

[34] 15 U.S.C. 78o–3(b).

[35] 15 U.S.C. 78o–3(b)(6).

[36] In approving this rule, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[37] *See supra* note 6.

[38] *Id.*

proposal strengthens the NASD's procedures for administering statutory employment discrimination claims by amending appropriate provisions, including those governing the composition of arbitration panels, discovery, and awards. The proposal also introduces predictable methods for determining how disputes involving both statutory employment discrimination claims filed in court and arbitrable claims will be resolved. In addition, it also provides for clear disclosure to employees about arbitration.

The rules were drafted by the NASD over a two-year period with the contributions of organizations who represent interests of both employers and employees within the securities industry, as well as arbitrators who practice in this area. The proposal includes many of the provisions of the Protocol, and equitably accommodates competing concerns.

The comments on the qualifications for arbitrators in the proposal point out the sharp differences of opinion the NASD worked to bridge in its proposal. One commenter objected to the exclusion of industry arbitrators from the panels, another objected to the additional requirements for those who serve as single arbitrators or panel chairpersons because of the resulting exclusion of certain employment experts from serving in those roles,[39] while yet another commenter objected that the proposal permits the use of arbitrators with too much affiliation with the industry.

Further, a commenter stated that the additional qualifications required for single arbitrators and panel chairs will severely limit the pool of available arbitrators. In response, NASD Regulation stated that it will have enough qualified arbitrators on its roster.[40] The Commission believes that the NASD's proposal resolves these differing views in a fair manner, and should enable the NASD to identify qualified and impartial arbitrators to resolve these disputes.

Another commenter contends that only single arbitrators, rather than a panel, should be used for discrimination cases to reduce the cost and increase the efficiency of the process. The Commission notes, however, that proposed Rule 10212(b) already provides a higher dollar threshold for single arbitrator cases than is found elsewhere the NASD Code. The Commission believes that this threshold should help reduce the hearing costs for the parties in smaller cases.

With respect to discovery provisions of the proposed rule, two commenters urged a more restrictive use of depositions.[41] However, the Commission supports NASD Regulation's adoption of the Protocol's view that ''necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available'' in employment discrimination cases. The Commission notes that arbitrators are as capable of resolving disputes concerning depositions as they are for difficult factual and legal issues. Under the proposal, arbitrators must consider the relevance of the information sought, the expeditious nature of arbitration, and the expense of discovery, prior to permitting the use of depositions.

One commenter argues that arbitrators should issue a written opinion detailing their reasoning for the award. However, the Commission has previously stated that arbitrators are not required to write opinions, although they may voluntarily prepare them.[42]

Another commenter contends that the provisions for attorneys' fees in the proposed rule suggests that an award of attorneys' fees is mandatory. NASD Regulation has stated, however, that the intent of proposed Rule 10215 is to allow the award of attorney's fees only if applicable law permits such an award. There is no difference between the NASD's proposed Rule 10215 and the commenter's suggestion, noted above, that Rule 10214 be amended to include the attorneys' fees reference. As the NASD noted, attorneys' fees may be awarded under current practice under the Code of Arbitration Procedure that is used for all of its cases. The NASD has proposed, and the Commission is today approving, the specific provision governing attorneys fees in cognizance of the special attention to them under the civil rights laws, and in the discussions of the arbitration of these claims that the NASD has sponsored. We also note that awards of attorney's fees by arbitrators remain available to all parties in other cases administered under the Code of Arbitration Procedure, if applicable law permits such an award.

The Commissions did not receive any negative comments with respect to the bifurcation provisions contained in proposed Rule 10216. These provisions appear to strike a fair balance in administering statutory discrimination and other employment disputes.

Finally, the Commission observes that the NASD's proposal includes opportunities for the parties to talk with one another, when determining where to file a claim (including fee savings and reimbursements for employees) and in putting together a mutually acceptable arbitration panel. Providing opportunities for the parties to talk with one another early in the process allows parties to resolve their disputes earlier, and with less cost.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change (SR–NASD–99–08) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[43]

Margaret H. McFarland,

Deputy Secretary.

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BILLING CODE 8010–01–M

[39] The Commission notes that the additional requirements for chairpersons and single arbitrators do not prevent individuals from serving as one of the other two arbitrators on a three person panel, provided that they qualify as public arbitrators. The Commission further notes that the commenter's concerns about the exclusion of industry arbitrators is addressed, in part, by the NASD's determination to exclude plaintiffs' attorneys from serving as panel chairpersons or single arbitrators (Rule 10211(b)(2)), and the Commission will not interfere with that balancing determination. Moreover, the proposal also allows the parties, after their dispute has arisen, to waive any of the qualifications under the rule and to agree on the use of other arbitrators.

[40] In 1998, 107 claims of employment discrimination were filed with NASD Regulation and, as of August 10, 1999, 40 claims of discrimination have been filed. Approximately 58% of the more than 6,700 arbitrators on the NASD Regulation roster are classified as public arbitrators, and at least 40 arbitrators have already been identified as meeting the additional standards of proposed Rule 10211(b). Due to the fact that many cases are settled or withdrawn before a hearing commences, the NASD believes that there will be enough qualified employment arbitrators. *See* NASD Regulation Letter, *supra* note 7.

[41] As previously noted, one commenter urged the adoption of the language found in the new Discovery Guide for use in NASD arbitrations. The Commission notes, however, that the Discovery Guide only contains suggested guidance on the use of depositions. The policies and procedures set forth in Discovery Guide are discretionary and may be changed by the arbitrators so long as they are consistent with the rules of the forum. *See supra* note 28.

[42] *See* Securities Exchange Act Release No. 26805 (May 10, 1989), 54 FR 21144 (May 16, 1989).

[43] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Privacy Act of 1974; System of Records Notices

AGENCY: Small Business Administration.

ACTION: Notice of new system of record.

SUMMARY: The Small Business Administration is adding a new system of records to the Agency's Privacy Act System of Records. The new system collects information for the Women's Business Center, Small Business