

Phlx Memo No. 203-07

RC No: NASD- 2005-79

MEMORANDUM

To: Members and Member Organizations

From: Legal Department

Date: January 26, 2007

Re: NASD Code of Arbitration
SR-NASD-2005-79 Order Approving Proposed Rule Change and
Amendment Nos. 1,2, and 3 Thereto and Notice of Filing and Order
Granting Accelerated Approval to Amendment No. 4 to Revise Rule
10322 Pertaining to Subpoenas and the Power to Direct Appearances

Pursuant to Phlx Rule 950, Section 44, the Exchange has outsourced its arbitration and mediation program to NASD Dispute Resolution. The purpose of this memo is to update you as to proposed amendments to the NASD Code of Arbitration Procedure.

On June 17, 2005, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or the "Commission"), a proposed rule change to revise Rule 10322 of the NASD Code of Arbitration Procedure (the "Code"), which pertains to subpoenas and the power to direct appearances. On July 13, 2005, the Commission published for comment the proposed rule change in the Federal Register. The Commission received twelve comments on the proposal. On March 29, 2006, May 12, 2006, and July 7, 2006, NASD submitted Amendment Nos. 1, 2, and 3, respectively, to the proposed rule change. The Commission published the proposed rule change, as amended, for comment in the Federal Register on July 18, 2006. The Commission received twenty-six comment letters on the proposal, as amended. On November 30, 2006, NASD submitted Amendment No. 4 to the proposed rule change. This notice and order solicits comments from interested persons on Amendment No. 4 and approves the proposal, as amended, on an accelerated basis.

In the initial rule filing, NASD proposed to revise Rule 10322 of the Code to provide for a 10-day notice requirement before a party issues a subpoena to a non-party for pre-hearing discovery. In addition, NASD proposed clarifying the requirements regarding the service of subpoenas by specifying that a party that issues a subpoena must serve a copy of the subpoena to all parties and the entity receiving the subpoena on the same day.

In Amendment No. 1, NASD proposed to allow only arbitrators to issue subpoenas for both parties and non-parties, whether for discovery or for appearance at a hearing. In Amendment No. 2, NASD clarified the process for issuing a subpoena to both parties and non-parties. In Amendment No. 3, NASD clarified that, in most cases, a public arbitrator will rule on all motions requesting a subpoena.

In Amendment No. 4, NASD responded to comments on Amendment Nos. 1, 2, and 3 and amended the proposed rule change to authorize the arbitration panel to determine the amount of costs incurred as a result of subpoenaed documents and by whom such costs should be borne. NASD also amended the proposed rule change to provide that the party requesting the subpoena may respond to objections within 10 calendar days of receipt of the objections. In addition, NASD clarified that certain references to days are references to calendar days.

The text of the amended rule is set forth below. If you have any questions regarding this approved rule change, or would like a complete copy of this proposed filing, or further questions regarding the NASD Dispute Resolution Process, please click on the NASD Dispute Resolution website at www.nasdadr.com. If you need additional help, please contact Scott Donnini at (215) 496-5358.

Proposed new language is underlined; proposed deletions are in brackets.

10322. Subpoenas and Power to Direct Appearances

(a) **[Subpoenas]**

To the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas. [The] [a] Arbitrators [and any counsel of record to the proceeding] shall have the [power of the subpoena process as provided by law. All parties shall be given a copy of a subpoena upon its issuance. Parties shall produce witnesses and present proofs to the fullest extent possible without resort to the subpoena process.] authority to issue subpoenas for the production of documents or the appearance of witnesses.

(b) A party may make a written motion requesting that an arbitrator issue a subpoena to a party or a non-party. The motion must include a draft subpoena and must be filed with the Director, with an additional copy for the arbitrator. The requesting party must serve the motion and draft subpoena on each other party, at the same time and in the same manner as on the Director. The requesting party may not serve the motion or draft subpoena on a non-party.

(c) If a party receiving a motion and draft subpoena objects to the scope or propriety of the subpoena, that party shall, within 10 calendar days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance

and scope of the subpoena.

(d) If the arbitrator issues a subpoena, the party that requested the subpoena must serve the subpoena at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the subpoena.

(e) Any party that receives documents in response to a subpoena served on a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request.

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

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

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