

**Phlx Memo No. 1144-07**

**RC No: NASD- 2006-109**

**MEMORANDUM**

To: Members and Member Organizations

From: Legal Department

Date: May 14, 2007

Re: NASD Code of Arbitration  
SR-NASD-2006-109 Notice of Filing of Proposed Rule Change and  
Amendment Nos. 1 and 2 Thereto Relating to Representation of Parties in  
Arbitration and Mediation

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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.

National Association of Securities Dealers, Inc. ("NASD"), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. ("NASD Dispute Resolution") filed with the Securities and Exchange Commission ("SEC" or "Commission") on September 14, 2006, and amended on November 9, 2006 (Amendment No. 1) and February 23, 2007 (Amendment No. 2), the proposed rule change as described below.

NASD Dispute Resolution believes a rule is needed to clarify the issue of representation of parties in dispute resolution. NASD Rule 10316 states that all parties shall have the right to representation by counsel at any stage of the proceedings. The rule provides no guidance on the kind of representatives who are permitted to practice in the NASD dispute resolution forum, or on the qualifications those representatives must have to participate in the forum. Moreover, Rule 10316 does not address a growing trend in American jurisprudence, the multi-jurisdictional practice of law.

The multi-jurisdictional practice of law occurs when attorneys, licensed in one United States (U.S.) jurisdiction, practice law in a jurisdiction in which they are not licensed. In the area of dispute resolution, for example, it is common for an attorney licensed to practice law in one state to represent a client in a dispute resolution proceeding in another state in which the attorney is not licensed. Although this practice is permitted in many jurisdictions, it may be a violation of certain other states' unauthorized practice of law provisions. Until recent years, most states had taken no action against this practice. However, two state courts have found that out-of-state attorneys must meet

certain conditions in order to participate in a dispute resolution proceeding in their jurisdictions. In light of these developments, the American Bar Association (ABA) amended its Model Rule of Professional Conduct 5.5 (ABA Model Rule 5.5) to promote the multi-jurisdictional practice of law.

Accordingly, NASD proposes to codify its current practice of permitting the multi-jurisdictional practice of law in NASD's dispute resolution forum to the extent permitted under applicable state law. NASD also proposes to codify its current practice which allows non-attorney representatives to represent parties in arbitration or mediation.

NASD Dispute Resolution is proposing to amend the Code of Arbitration Procedure for Customer Disputes ("Customer Code"), the Code of Arbitration Procedure for Industry Disputes ("Industry Code"), and the NASD Code of Arbitration Procedure ("Code") to address representation of parties in arbitration and mediation. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

## **Customer Code**

### 12208. Representation of Parties

#### *(a) Representation by a Party*

*Parties may represent themselves in an arbitration held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.*

#### *(b) Representation by an Attorney*

*At any stage of an arbitration proceeding held in a United States hearing location, [All] all parties shall have the right to be represented by [counsel during any stage of an arbitration] an attorney at law in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.*

#### *(c) Representation by Others*

*Parties may be represented in an arbitration by a person who is not an attorney, unless:*

*. state law prohibits such representation, or*

*. the person is currently suspended or barred from the securities industry in any capacity, or*

*. the person is currently suspended from the practice of law or disbarred.*

*(d) Qualifications of Representative*

*Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.*

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**Industry Code**

13208. Representation of Parties

*(a) Representation by a Party*

*Parties may represent themselves in an arbitration held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.*

*(b) Representation by an Attorney*

*At any stage of an arbitration proceeding held in a United States hearing location, [All] all parties shall have the right to be represented by [counsel during any stage of an arbitration] an attorney at law in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.*

*(c) Representation by Others*

*Parties may be represented in an arbitration by a person who is not an attorney, unless:*

*. state law prohibits such representation, or*

*. the person is currently suspended or barred from the securities industry in any capacity, or*

*. the person is currently suspended from the practice of law or disbarred.*

*(d) Qualifications of Representative*

*Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not*

*be stayed or otherwise delayed pending resolution of such issues.*

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## **Code of Arbitration Procedure**

### *10407. Representation of Parties*

#### *(a) Representation by Party*

*Parties may represent themselves in mediation held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.*

#### *(b) Representation by an Attorney*

*At any stage of a mediation proceeding held in a United States hearing location, all parties shall have the right to be represented by an attorney at law in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.*

#### *(c) Representation by Others*

*Parties may be represented in mediation by a person who is not an attorney, unless:*

*. state law prohibits such representation, or*

*. the person is currently suspended or barred from the securities industry in any capacity, or*

*. the person is currently suspended from the practice of law or disbarred.*

#### *(d) Qualifications of Representatives*

*Issues regarding the qualifications of a person to represent a party in mediation are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the mediation proceeding shall not be delayed pending resolution of such issues.*

### [10407] *10408. Mediator Selection*

(a)-(d) No change.

### [10408] *10409. Limitation on Liability*

No change.

[10409] *10410*. Mediation Ground Rules

(a)-(g) No change.

[10410] *10411*. Mediation Fees

(a)-(c) No change.

The text of the proposed rule change is available on NASD's Web site (<http://www.nasd.com>), at NASD's principal office, and at the Commission's Public Reference Room.

If you have any questions regarding this proposed 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](http://www.nasdadr.com). If you need additional help, please contact Scott Donnini at (215) 496-5358.