(b) Mediation is voluntary and any party may withdraw from mediation at any time prior to the execution of a written settlement agreement by giving notice of withdrawal to the mediator, the other parties, and the Director.

(c) The mediator shall act as a neutral, impartial, facilitator of the mediation process and shall not have any authority to determine issues, make decisions or

otherwise resolve the matter.

- (d) Following the selection of a mediator, the mediator, all parties and their representatives will meet in person or by conference call for all mediation sessions, as determined by the mediator or by mutual agreement of the parties. The mediator shall facilitate, through joint sessions, caucuses and/or other means, discussions between the parties, with the goal of assisting the parties in reaching their own resolution of the matter. The mediator shall determine the procedure for the conduct of the mediation. The parties and their representatives agree to cooperate with the mediator in ensuring that the mediation is conducted expeditiously, to make all reasonable efforts to be available for mediation sessions, and to be represented at all scheduled mediation sessions either in person or through a person with authority to settle the matter.
- (e) The mediator may meet with and communicate separately with each party on their representative. The mediator shall notify all other parities of any such separate meetings or other communications.

(f) The parties agree to attempt, in good faith, to negotiate a settlement of the matter submitted to mediation. Notwithstanding that a matter is being mediated, the parties may engage in direct settlement discussions and negotiation spearate from the

mediation process.

(g) Mediation is intended to be private and confidential. The parties and the mediator agree not to disclose, transmit, introduce, or otherwise use opinions, suggestions, proposals, offers, or admissions obtained or disclosed during the mediation by any party or the mediator as evidence in any action at law, or other proceeding, including a lawsuit or arbitration, unless authorized in writing by all other parties to the mediation or compelled by law, except that the fact that a mediation has occurred shall not be considered confidential.

Notwithstanding the foregoing, the parties agree and acknowledge that the provisions of this subsection shall not operate to shield from disclosure to the Association or any other regulatory authority, documentary or other

information that the Association or other regulatory authority would be entitled to obtain or examine in the exercise of its regulatory responsibilities.

The mediator will not transmit or otherwise disclose confidential information provided by one party to any other party unless authorized to do so by the party providing the confidential information.

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

## Introduction

The NASD is the premier securities industry arbitration forum. The more than 5,500 cases filed with the NASD in calendar year 1994 represented 82 percent of all securities arbitrations filed in all forums combined (including the American Arbitration Association) and 86 percent of all arbitrations filed with self-regulatory organizations. The volume of arbitration cases has been growing dramatically since the U.S. Supreme Court in 1987 recognized the enforceability of predispute arbitration agreements with respect to securities law claims.

Coincidentally with the growth in volume, the NASD has noted that arbitration has become increasingly complex, costly, time-consuming and resembling of court litigation to the point that some of the advantages of arbitration as a low cost, swift, alternative to judicial resolution of disputes are disappearing. The result of this trend has been renewed interest in other forms of alternative dispute resolution that would recapture the low cost and time saving that arbitration once provided. To that end, the NASD has determined that mediation could serve as a valuable alternative to arbitration for all parties. The goal of mediation is to explore and come to a settlement of an outstanding dispute

without resort to adversarial adjudication. Accordingly, the NASD is proposing to adopt a new Part IV to the Code setting forth rules to govern the mediation of disputes administered by the NASD.

Description of Proposed Mediation Rules

The NASD published Notice to Members 95-01 ("NTM 95-01") in January 1995 requesting comment on proposed Mediation Rules. The comments received by the NASD are discussed below and a copy of NTM 95-01 is attached to the NASD's filing as Exhibit 2. The proposed Mediation Rules, as revised in response to the comment letters received and as a result of further internal NASD review, have been drafted to preserve the elements of the procedural structure envisioned in the rules published in NTM 95-01, while eliminating those portions that were educational in nature. The proposed Mediation Rules have been structured, by subject, as follows:

- 1. General Scope and Authority
- 2. Submission of Eligible Matters
- 3. Stay or Delay of Arbitration Pending Mediation
- 4. Mediator Selection
- 5. Liability Limitation
- 6. Ground Rules

The Mediation Rules are proposed to be incorporated into the Code as a new Part IV, with provisions matching the structure referred to above, and numbered consecutively with the current provisions of the Code. This structure permits reference in the proposed Mediation Rules to both the subject matter jurisdiction of the Code and the arbitrator disclosure provisions as they apply to mediators.

Record of Sessions. The NASD is proposing to amend Section 37 of the Code to add a new paragraph (b) to prohibit the keeping of a verbatim record of any mediation session conducted pursuant to the proposed rules. The NASD believes that a verbatim record is not consistent with the goals or methods of mediation; a free-flowing and confidential exchange of views, opinions, proposals and admissions.

Fees. The fees for mediations are set forth as amendments to Sections 43 and 44 of the Code. The NASD is proposing that the administrative fees of the NASD for administering a mediation set forth in proposed Subsections 43(i) and 44(j) will only be charged when there is no Association arbitration pending. Where there is no arbitration pending, under proposed Subsection 43(i) the NASD will charge each party \$150 to administer the mediation of a public