

customer matter and, under proposed Subsection 44(j), the NASD will charge each party \$250 to administer the mediation of an industry matter.

The fees will be assessed for each matter submitted to mediation. Pursuant to proposed Section 5, discussed below, a matter is deemed submitted to mediation when the Director has received an executed mediation Submission Agreement from all parties.⁴

In addition, proposed Subsections 43(j) 44(k) provide that the parties shall pay all of the mediator's charges, including travel and other expenses. The NASD proposes to set forth the mediator's charges in the Submission Agreement and they will be apportioned equally among the parties unless they agree otherwise. The NASD also will make an initial estimate the mediator's charges based on the anticipated length of the session or sessions. The parties will be required to deposit their proportional share of such estimated charges with the NASD prior to the first mediation session.

The NASD's standard mediator charges will be \$150 per hour, although the parties may agree to pay different charges for a particular mediator. While the NASD intends to make its best efforts to make mediators available at the specified hourly rate, some qualified mediators may decline to serve unless compensated at a higher rate.

Finally, the NASD intends that the mediator's hourly fee for both joint sessions (except for the first session) and separate sessions will be assessed for each half hour or portion thereof. In addition, the mediator's hourly rate for separate meetings will be apportioned equally among all parties without regard to the actual amount of time each party has spent with the mediator. The NASD believes that all parties benefit equally from the mediator's efforts in meeting with each party even if the mediator spends more time with one than the other.

General Scope and Authority. The NASD is proposing to adopt new Section 50 to establish the scope and authority of the rules. Proposed Section 50 provides that the rules apply to mediations administered by the Association and calls for the designation of a Director of Mediation to administer mediations. Section 50 also specifies that the Director of Mediation will consult the National Arbitration Committee ("Committee") on administering the Mediation program

and the Committee, as necessary, may make recommendations concerning the administration of the Mediation Program to the Director and recommend amendments to the rules to the Board. Finally, Section 50 states that neither any mediator nor the NASD shall have any authority to compel a party to submit to mediation or to settle a matter. This last provision is intended to clarify the voluntary nature of mediation.⁵

Submission of Eligible Matters. Proposed Section 51 provides that any matter, or part of a matter (such as procedural issues), eligible for arbitration under the NASD's Code may be mediated. Any ambiguities about the eligibility of a matter for mediation will be decided by the Director. Proposed Section 51 also states a matter will be deemed submitted when the Director has received an executed mediation Submission Agreement from each party. The submission of a matter triggers the obligation to pay applicable fees and initiates the NASD's activities in finding a mediator and making arrangements for facilities for the mediation.

The NASD anticipates that indications of interest in mediation will be solicited by the Director, as well as expressed informally by parties. When an indication of interest is expressed, the Director will seek commitments to participate from other parties. Once those commitments are obtained, either orally or in writing, the Director will forward a mediation Submission Agreement to the parties for execution.

Stay or Delay of Arbitration Pending Mediation. Proposed Section 52 provides that any arbitration pending at the time of a mediation will not be stayed or delayed unless the parties agree. The NASD believes this provision is important to prevent gamesmanship through the use of mediation as a delaying tactic.

Mediator Selection. Proposed Section 53 provides for the appointment of mediators and permits the parties to select a mediator from a list supplied by the Director, or to obtain, on their own, a non-NASD mediator. If the parties do not act to select a mediator, the Director will assign a mediator. The parties will also be provided with information relating to the mediator's employment, education, and professional background, as well as information on the mediator's

comply with the same background disclosure requirements as arbitrators.

Finally, proposed Subsection 53(c) prohibits a mediator from serving as an arbitrator or from representing any party to a mediation in any subsequent arbitration proceeding relating to the subject matter of the mediation. The NASD does not believe that mediators, having served as a neutral in a position of trust and confidence with the parties, should be permitted to serve either as an arbitrator or as an advocate of on party with respect to matters that the has knowledge of due to his involvement with both parties. The NASD also believes that state law, attorney codes of ethics, and mediator codes of conduct⁶ provide sufficient protection for parties in judicial forums.

Liability Limitation. Proposed Section 54 provides for the limitation of liability of mediators, the Association, and its employees, for any act or omission in connection with a mediation administered by the NASD under the rules.

Ground Rules. Proposed Subsection 55(a) states that the Section sets forth standard Ground Rules government mediations and permits the parties to amend any of the Ground Rules at any time. The Subsection also provides that the Ground Rules are intended to be standards of conduct for the parties and for the mediation. The NASD intends that the parties be able to tailor the ground rules governing their mediation to meet their needs.

Proposed Subsection 55(b) states that mediation is voluntary and that parties may withdraw from a mediation at any time prior to the execution of a settlement agreement by giving written notice of withdrawal to the mediator, the other parties, and the Director. This provision is intended to clarify that, while the goal of mediation is to explore and settle outstanding disputes, if possible, the proposed rules are process oriented, not result oriented. The NASD does not intend that any party will be subject to any compulsion or coercion to come to a particular conclusion of a mediation. The process is completely voluntary and any party may withdraw from a mediation at any time and for any reason, or for no reason at all. If at any time a party feels that continuing

⁴ The NASD is developing a standard form mediation Submission Agreement containing terms essential to the NASD. A copy of the Submission Agreement will be provided to all parties.

⁵ The NASD intends to solicit participation in mediation by approaching parties to arbitration cases to advise them about mediation, explain the program and its merits and explore whether mediation might meet the needs of the parties. The NASD believes an outreach program such as this will increase the utilization of mediation and reduce the number of cases going to hearing.

⁶ The American Bar Association ("ABA") is considering draft mediator standards of conduct. It is anticipated that the ABA will approve the draft standards at its next meeting. Draft Standard III states in pertinent part that "[w]ithout the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in a related matter, or in an unrelated matter under circumstances which would raise legitimate questions about the integrity of the mediation process."