

with a mediation is not in his interests he is free to terminate the mediation.

Proposed Subsection 55(c) establishes that the mediator's role is to act as a neutral, impartial, facilitator, without authority to impose decisions or a settlement on the parties.

Proposed Subsection 55(d) requires that the parties and their representatives meet jointly with the mediator, in person or by conference call as determined by the mediator or by mutual agreement of the parties. The mediator will facilitate through joint sessions, caucuses and/or other means, discussions between the parties on the subject matter of the mediation.

Proposed Subsection 55(d) also provides that the mediator will determine the procedure for the mediation and the parties agree to cooperate with the mediator in conducting the mediation expeditiously, to make reasonable efforts to be available for mediation sessions, and to be represented at all sessions either in person or by someone with authority to settle the matter. This subsection is intended to ensure that common obstacles to expeditious, effective mediation are avoided and it sets forth rules that will discourage dilatory conduct and prevent gamesmanship. Parties failing to adhere to these standards send a strong signal that they are not interested in mediating in good faith.

Proposed Subsection 55(e) permits the mediator to meet with and communicate separately with each party, provided the mediator notifies the other parties. This is intended to permit the mediator to take steps to keep the mediation on track, if necessary, by initiating separate communications. These private caucuses are intended to provide the mediator with an opportunity to explore candidly each party's underlying interests and the strengths and weaknesses of their positions; however, the mediator will not disclose confidential information in violation of the confidentiality provisions. Subsection 55(g), discussed below, bars the mediator from disclosing one party's confidential information to another party without authorization.

Proposed Subsection 55(f) sets forth the goal of mediation—to negotiate a settlement in good faith. The Subsection also permits direct negotiations between the parties outside of the mediation process.

Proposed Subsection 55(g) provides that mediation is intended to be private and confidential. The Subsection obligates the parties and the mediator not to disclose or otherwise communicate anything disclosed during

the mediation in any other proceeding, unless authorized by all other parties to the mediation. The Subsection permits disclosure if compelled by law, which provides for situations where a party is subpoenaed or where there are regulatory requirements, such as the disclosures required in Form U-4 or under Article IV, Section 5 of the Rules of Fair Practice. This Subsection also provides expressly that the fact that a mediation occurred is not confidential.

Proposed Subsection 55(g) also makes clear that the confidentiality provisions will not operate to shield from disclosure 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. Thus, a party could not refuse to disclose that information to the NASD or an opposing party in civil litigation under the confidentiality clause by disclosing documentary or other information during the course of a mediation and then claiming that it is confidential.

In addition, the Subsection bars the mediator from disclosing one party's confidential information to another party without authorization, which memorializes a standard practice of mediators.

The NASD is requesting that the proposed rule change be effective within 45 days of SEC approval.

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act⁷ in that the proposed rule change will facilitate the dispute resolution process for all participants by providing an alternative to adversarial adjudication of disputes resulting in lower-cost, quicker resolution of disputes.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The proposed rule change was published for comment by the NASD in Notice to Members 95-01 (January 1995). Five comments were received in response thereto. Of the 5 comment letters received, all generally were in favor of the proposed rule change.

⁷ 15 U.S.C. § 78o-3.

As noted above, the proposed rules as published for comment in Notice to Members 95-01 are substantially different in structure from those being submitted for approval in this proposed rule change. The proposed rule change described in this filing represents modifications that respond to the comments received and to other considerations developed following the publication of Notice to Members 95-01.

The *Securities Industry Association (SIA)* urged the NASD to seek experienced mediators, but said that the amount of detail sought by the Mediation Profile Questionnaire could limit the size of the mediator pool. The SIA also expressed concern about the meaning of paragraph (4)(B)⁸ of the Ground Rules which provides that the mediator will decide when to hold "separate meetings with the parties." The SIA said that the typical mediation begins with a joint session at which all parties are given an opportunity to express their positions, after which the parties retire to separate rooms and the mediator shuttles back and forth between them trying to resolve the controversy. The SIA said it is not concerned about paragraph 4(b) unless it is contemplated that a mediator would hold separate sessions on separate days with the involved parties. The SIA believes this would not be productive. The SIA would prefer that paragraph 4(b) state simply "[t]he mediator will decide when to hold meetings with the parties."

The SIA also asks that the proposed rules provide "the mediator shall destroy all notes and other records of the mediation once the matter is concluded whether by settlement or by decision of the parties not to proceed further." The SIA said that destruction of notes and records is a general practice of mediators and should be included in the Ground Rules.

The SIA also expressed concern that the mediator session fees contemplate the parties agreeing to more than one mediator. The SIA believes that the introduction of additional mediators will only prolong the process by introducing potential complexity, confusion and disagreement over the appropriate course of action for the mediators, and recommends that any suggestion of multiple mediators be eliminated.

⁸ The citations of the commenters to subsections of the proposed rules correspond to the proposed rules in Notice to Members 95-01. They do not correspond to the proposed rule contained herein because the proposed rules as published for comment by the Association were substantially different in structure.