

The SIA also suggests the confidentiality provisions of the proposed rules be amended to require the parties to keep confidential any refusal by any party to submit to mediation. The SIA argues that there can be any number of reasons for a party deciding not to mediate and no inference should be drawn from such a decision. The SIA also asks that a party seeking mediation should agree that the refusal of the other party to mediate will not be introduced as evidence into any arbitral, judicial or other proceeding.

The SIA also asks for further consideration about who is the proper party to initiate mediation and whether mediation can be initiated after the first hearing in an arbitration. Finally, the SIA asks that, in order to prevent breaches of the agreement and forestall future litigation on the same issues, a mechanism be created to reduce the agreement to an arbitration award at the request of a party.

The Association believes that the changes in the proposed rules are responsive to the SIA's concerns. Specifically, with respect to the SIA's suggested language, "[t]he mediator will decide when to hold meetings with the parties," the NASD has determined not to adopt the SIA's proposed language. While the NASD understands the SIA's concern about "separate meetings," the NASD believes nevertheless that such separate meetings may be necessary and productive and that the rules should provide for such meetings. The NASD has, however, modified the proposed rules to eliminate any suggestion that such separate meetings would occur prior to the first joint meeting of the parties. In addition, the NASD has determined to eliminate any references to multiple mediators in response to the concerns raised by the SIA.

Associated Securities Corp. (ASC), an NASD member firm, expressed support for the proposed mediation program. ASC also said that mediation by teleconference should not be allowed because personal contacts are important to the mediation process. ASC also said that the mediators should not make enforcement referrals in order to facilitate frank and open discussion with the mediator, during the course of the mediation sessions.

The Association believes that teleconference sessions by the agreement of the parties may be an effective option that should be available to the parties. With respect to disciplinary referrals, mediators as a matter of course do not make such referrals; however, the NASD does not believe it is necessary to specify such a prohibition.

Robert Burke of the San Francisco law firm of Pettit & Martin commented favorably on the proposed mediation rules, but had two suggestions. First, Mr. Burke believes mediators should disclose their association with the NASD as an NASD arbitrator because the mediator's history as an arbitrator could have an adverse effect on the public customer's willingness to accept the mediator's neutrality. Moreover, the NASD should consider whether to include arbitrators in its mediator pool because good arbitrators do not generally make good mediators. Second, Mr. Burke believes the mediator should not draft settlement agreements as the proposed rules permit because in mediation the settlement is the parties', not the mediator's. Moreover, the mediator could inadvertently or by design fail to include a term that had been part of the parties' understanding, potentially resulting in liability for the mediator and the sponsoring organization.

The Association believes that Mr. Burke's comments with respect to arbitrator selection are addressed in the background information acquisition and disclosure process specified in the proposed rule change. With respect to Mr. Burke's second comment the NASD has eliminated that provision from the proposed rule change.

Joan Protesse & Associates suggested that the proposed Mediation Program could be made more accommodating by (1) subsidizing some of the mediator's charges, and (2) designating a mediator to invite the parties and their counsel to mediation.

The NASD believes this commenter's comments are related to the NASD's internal management decisions related to the administration of the program and do not require a response. The issues raised, however, remain under continuing consideration.

Lawyers Mediation Service Corporation (LMSC) commented that the proposed Mediation Program should be administered separately from the arbitration program because the two are different in their functions and in their goals.

The mediation and arbitration programs are being administered separately under the single management umbrella of the Arbitration Department.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such

longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submission should refer to File No. SR-NASD-95-25 and should be submitted by July 6, 1995.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Margaret H. McFarland,
Deputy Secretary.

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Self-Regulatory Organizations; Order Approving Proposed Rule Change by National Association of Securities Dealers, Inc., Relating to Cold Calling Requirements

June 9, 1995.

On April 10, 1995, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed a proposed rule change with the Securities and Exchange Commission ("SEC" or "Commission") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule

¹ 15 U.S.C. 78s(b)(1).