

will be unable to present sufficient opposition to expungement attempts at the court confirmation level. NASD responded in Amendment No. 2 by stating that these comments were without merit or supporting evidence. NASD noted that it is committed to enforcing the proposed rule, as amended, and that it has an obligation as a self-regulatory organization to fulfill all of its regulatory obligations. Furthermore, NASD stressed that it will be subject to Commission oversight in its administration of the proposed rule. As a further means to ensure that the court is made aware of the investor protection and regulatory implications of an expungement, NASD noted that states will be able to intervene if they have concerns regarding whether investor protection or regulatory issues have been fairly considered by the NASD.<sup>30</sup>

The NASD also discussed on the effective date of the proposed rule in Amendment No. 2. NASD stated that, following Commission approval of proposed Rule 2130, it will announce the approval of the Rule in a NtM, which also will announce the effective date of Rule 2130. According to NASD, the NtM will announce that the requirements of Rule 2130 will apply to all arbitrations or civil lawsuits filed on or after the effective date. NASD noted that all requests to expunge customer dispute information from the CRD system arising from arbitrations or civil lawsuits filed before the effective date of the rule, including any settlements arising therefrom, will continue to be subject to the terms of the moratorium in effect as of January 19, 1999.

### III. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change, as amended, the comments, and the NASD's response thereto, and finds that the proposed rule change, as amended, is consistent with the Act and the rules and regulations promulgated thereunder applicable to a national securities association,<sup>31</sup> and, in particular, with

the requirements of section 15A<sup>32</sup> of the Act. Specifically, the Commission finds that approval of the proposed rule change is consistent with section 15A(b)(6)<sup>33</sup> of the Act because it is designed to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission finds that the proposed rule change, as amended, is reasonably designed to accomplish these ends by allowing fact finders and the NASD to consider all competing interests before directing or granting expungement of customer dispute information from the CRD.

Moreover, the Commission, pursuant to section 19(b)(2)<sup>34</sup> of the Act, finds good cause for approving Amendment No. 2 prior to the 30th day after the date of publication of notice thereof in the **Federal Register**. As discussed below, the Commission believes that the NASD has responded to the concerns raised by the commenters and has struck a fair and reasonable balance between the burden that the proposed rule change will impose upon member firms and associated persons and the benefit that the proposed rule change will bestow upon investors, generally. To the extent that the NASD's Amendment No. 2 has not specifically addressed any arguments raised, the Commission is not persuaded by these arguments. The Commission believes that the proposal is a clear improvement over the current system for the expungement of information from the CRD system and believes that it should be put into place as soon as practicable to ensure that investors and regulators have access to more accurate information through the CRD system.

With respect to Argument Nos. 1–9, 11, 13, and 18 discussed above, the Commission believes that the NASD has sufficiently responded in Amendment No. 2. Specifically, with respect to Argument Nos. 1 and 8, the Commission believes that the NASD has sufficiently justified its application of the standards in question to the NASD's waiver or non-waiver of involvement at the court confirmation level. Argument Nos. 1 and 8 assert that the standards should be applied to arbitrators through the Code of Arbitration Procedure and to NASD members seeking expungement, respectively. The Commission agrees with the NASD that standards will be most effectively applied at the waiver juncture. In no other instance in the

NASD's Code of Arbitration Procedure are arbitrators bound by substantive restrictions on how they decide an arbitration case. Moreover, as the NASD notes in Amendment No. 2, arbitrators will be aware of the standards that will be utilized with respect to the NASD's waiver of involvement, and, thus, arbitrators will indirectly consider them. NASD notes in Amendment No. 2 that the standards should not be applied to members directly, because federal and state courts are more than able to make the proper decisions with respect to arbitration award confirmation. The Commission agrees with this analysis, and also believes that the potential involvement of the NASD at the court confirmation level will provide greater safeguards than simple application of the rule to members.

With respect to Argument No. 2, concerning the "buying of clean records," the Commission is satisfied that the NASD's requirement that an "affirmative" determination be made by an arbitrator will provide sufficient regulatory protection. In the initial proposed rule filing, the NASD's proposal simply required that a finding be made by an arbitrator that matched one of the proposed standards. In response to this, commenters expressed the concern that members and associated persons would be able to negotiate for the inclusion of a finding in the arbitration settlement that matched one of the requisite standards. By requiring an "affirmative determination" on the part of the arbitrator that one of the standards was met, the NASD asserted that this concern and the ability of members and associated persons to "buy clean records" will be greatly reduced. The Commission agrees with the NASD's analysis in this regard.

Argument Nos. 3–6 and 10 all relate to the potential problems that could be caused by the NASD's use of the word "defamation" in one of the three standards for waiver. In response to these arguments, the NASD proposed replacing the phrase "information contained in the CRD system is defamatory in nature" with "claim, allegation, or information is false." The Commission believes that this change sufficiently addresses Argument Nos. 3–6 and is satisfied that the new proposed language should achieve the NASD's goal in this respect (*i.e.*, ensuring that the CRD system contains accurate information).

Argument Nos. 7 and 11 are concerned with the proposed rule leading to a formal dispositive motions practice at the arbitration level. The Commission believes that the NASD has

<sup>30</sup> NASD represented to the Commission that it is in the process of establishing a notice procedure, whereby the state(s) in which a member or associated person is registered would be notified when that member or associated person seeks a waiver of NASD involvement in the court confirmation level. To the extent that the state(s) wishes to intervene, it could so petition the court. Telephone conference between Shirley H. Weiss, Associate General Counsel, Office of General Counsel, NASD, and Christopher B. Stone, Special Counsel, Division of Market Regulation, Commission (October 17, 2003).

<sup>31</sup> 15 U.S.C. 78f(b). In approving this proposal, the Commission has considered the proposed rule's

impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>32</sup> 15 U.S.C. 78o–3.

<sup>33</sup> 15 U.S.C. 78o–3(b)(6).

<sup>34</sup> 15 U.S.C. 78s(b)(2).