

proposal strengthens the NASD's procedures for administering statutory employment discrimination claims by amending appropriate provisions, including those governing the composition of arbitration panels, discovery, and awards. The proposal also introduces predictable methods for determining how disputes involving both statutory employment discrimination claims filed in court and arbitrable claims will be resolved. In addition, it also provides for clear disclosure to employees about arbitration.

The rules were drafted by the NASD over a two-year period with the contributions of organizations who represent interests of both employers and employees within the securities industry, as well as arbitrators who practice in this area. The proposal includes many of the provisions of the Protocol, and equitably accommodates competing concerns.

The comments on the qualifications for arbitrators in the proposal point out the sharp differences of opinion the NASD worked to bridge in its proposal. One commenter objected to the exclusion of industry arbitrators from the panels, another objected to the additional requirements for those who serve as single arbitrators or panel chairpersons because of the resulting exclusion of certain employment experts from serving in those roles,<sup>39</sup> while yet another commenter objected that the proposal permits the use of arbitrators with too much affiliation with the industry.

Further, a commenter stated that the additional qualifications required for single arbitrators and panel chairs will severely limit the pool of available arbitrators. In response, NASD Regulation stated that it will have enough qualified arbitrators on its roster.<sup>40</sup> The Commission believes that

the NASD's proposal resolves these differing views in a fair manner, and should enable the NASD to identify qualified and impartial arbitrators to resolve these disputes.

Another commenter contends that only single arbitrators, rather than a panel, should be used for discrimination cases to reduce the cost and increase the efficiency of the process. The Commission notes, however, that proposed Rule 10212(b) already provides a higher dollar threshold for single arbitrator cases than is found elsewhere in the NASD Code. The Commission believes that this threshold should help reduce the hearing costs for the parties in smaller cases.

With respect to discovery provisions of the proposed rule, two commenters urged a more restrictive use of depositions.<sup>41</sup> However, the Commission supports NASD Regulation's adoption of the Protocol's view that "necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available" in employment discrimination cases. The Commission notes that arbitrators are as capable of resolving disputes concerning depositions as they are for difficult factual and legal issues. Under the proposal, arbitrators must consider the relevance of the information sought, the expeditious nature of arbitration, and the expense of discovery, prior to permitting the use of depositions.

One commenter argues that arbitrators should issue a written opinion detailing their reasoning for the award. However, the Commission has previously stated that arbitrators are not required to write opinions, although they may voluntarily prepare them.<sup>42</sup>

Another commenter contends that the provisions for attorneys' fees in the proposed rule suggests that an award of attorneys' fees is mandatory. NASD Regulation has stated, however, that the intent of proposed Rule 10215 is to allow the award of attorney's fees only if applicable law permits such an award. There is no difference between the

NASD's proposed Rule 10215 and the commenter's suggestion, noted above, that Rule 10214 be amended to include the attorneys' fees reference. As the NASD noted, attorneys' fees may be awarded under current practice under the Code of Arbitration Procedure that is used for all of its cases. The NASD has proposed, and the Commission is today approving, the specific provision governing attorneys fees in cognizance of the special attention to them under the civil rights laws, and in the discussions of the arbitration of these claims that the NASD has sponsored. We also note that awards of attorney's fees by arbitrators remain available to all parties in other cases administered under the Code of Arbitration Procedure, if applicable law permits such an award.

The Commissions did not receive any negative comments with respect to the bifurcation provisions contained in proposed Rule 10216. These provisions appear to strike a fair balance in administering statutory discrimination and other employment disputes.

Finally, the Commission observes that the NASD's proposal includes opportunities for the parties to talk with one another, when determining where to file a claim (including fee savings and reimbursements for employees) and in putting together a mutually acceptable arbitration panel. Providing opportunities for the parties to talk with one another early in the process allows parties to resolve their disputes earlier, and with less cost.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act, that the proposed rule change (SR-NASD-99-08) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>43</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

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<sup>39</sup> The Commission notes that the additional requirements for chairpersons and single arbitrators do not prevent individuals from serving as one of the other two arbitrators on a three person panel, provided that they qualify as public arbitrators. The Commission further notes that the commenter's concerns about the exclusion of industry arbitrators is addressed, in part, by the NASD's determination to exclude plaintiffs' attorneys from serving as panel chairpersons or single arbitrators (Rule 10211(b)(2)), and the Commission will not interfere with that balancing determination. Moreover, the proposal also allows the parties, after their dispute has arisen, to waive any of the qualifications under the rule and to agree on the use of other arbitrators.

<sup>40</sup> In 1998, 107 claims of employment discrimination were filed with NASD Regulation and, as of August 10, 1999, 40 claims of discrimination have been filed. Approximately 58% of the more than 6,700 arbitrators on the NASD Regulation roster are classified as public arbitrators, and at least 40 arbitrators have already been identified as meeting the additional standards of

proposed Rule 10211(b). Due to the fact that many cases are settled or withdrawn before a hearing commences, the NASD believes that there will be enough qualified employment arbitrators. See NASD Regulation Letter, *supra* note 7.

<sup>41</sup> As previously noted, one commenter urged the adoption of the language found in the new Discovery Guide for use in NASD arbitrations. The Commission notes, however, that the Discovery Guide only contains suggested guidance on the use of depositions. The policies and procedures set forth in Discovery Guide are discretionary and may be changed by the arbitrators so long as they are consistent with the rules of the forum. See *supra* note 28.

<sup>42</sup> See Securities Exchange Act Release No. 26805 (May 10, 1989), 54 FR 21144 (May 16, 1989).

<sup>43</sup> 17 CFR 200.30-3(a)(12).

## SMALL BUSINESS ADMINISTRATION

### Privacy Act of 1974; System of Records Notices

**AGENCY:** Small Business Administration.  
**ACTION:** Notice of new system of record.

**SUMMARY:** The Small Business Administration is adding a new system of records to the Agency's Privacy Act System of Records. The new system collects information for the Women's Business Center, Small Business

Development Center, Business Information Center, One Stop Capital Shop, Veteran's Assistance, Tribal Business Information Center, and Welfare to Work Programs.

**DATES:** Submit comments on or before December 3, 1999.

**ADDRESSES:** Address comments to Monika Edwards Harrison, Associate Administrator for Business Initiatives, Small Business Administration, 409 3rd Street, SW., Suite 6100, Washington, DC 20416.

**FOR FURTHER INFORMATION CONTACT:** Monika Edwards Harrison, Associate Administrator for Business Initiatives, (202) 205-6665.

#### **SBA 170**

##### **SYSTEM NAME:**

Entrepreneurial Development—Management Information System (EDMIS), U.S. Small Business Administration (SBA).

##### **SYSTEM LOCATION:**

SBA Headquarters.

##### **CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Individuals using SBA's business counseling and assistance services.

##### **CATEGORIES OF RECORDS IN THE SYSTEM:**

Individual and business information on SBA clients.

##### **AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

Pub. L. 85-536; 15 U.S.C. 631 (Small Business Act), sec. 7(j)(1), (Business Counseling); 15 U.S.C. 648 sec. 21 (Small Business Development Centers); 15 U.S.C. 656 sec. 29 (Women's Business Centers); Pub. L. 106-50 (Veterans' Entrepreneurship and Small Business Development Act of 1999); 44 U.S.C. 3101 (Records Management by Federal Agencies); and Pub. L. 103-62 (Results Act).

##### **ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:**

These records may be used, disclosed, or referred:

(a) To the Agency service provider (resource partner) who initially collected the individual's information.

(b) To a Congressional office from an individual's record when the office is inquiring on the individual's behalf. The Member's access rights are no greater than the individual's.

(c) To the Federal, state, local or foreign agency or organization which investigates, prosecutes, or enforces violations, statutes, rules, regulations, or orders issued when an agency identifies a violation or potential violation of law,

arising by general or program statute, or by regulation, rule, or order.

(d) To Agency volunteers, interns, and contractors for use in their official duties.

(e) To the Department of Justice (DOJ) when:

(1) The agency, or any component thereof; or

(2) Any employee of the agency in his or her official capacity; or

(3) Any employee of the agency in his or her individual capacity where the DOJ has agreed to represent the employee; or

(4) The United States Government, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the DOJ is deemed by the agency to be relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to the DOJ is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

(f) To disclose them in a proceeding before a court or adjudicative body before which the Agency is authorized to appear, when:

(1) The agency, or any component thereof; or

(2) Any employee of the agency in his or her official capacity; or

(3) Any employee of the agency in his or her individual capacity where the agency has agreed to represent the employee; or

(4) The United States Government, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the agency determines that use of such records is relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to a court or other adjudicative body is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

##### **POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING AND DISPOSING OF RECORDS:**

##### **STORAGE:**

Electronic form in secured database on a dedicated server.

##### **RETRIEVABILITY:**

By SBA Customer Number and cross-referenced by individual or business name.

##### **SAFEGUARDS:**

Access and use over the Internet with a restricted numerical password. Access and use is limited to Federal officials with a need-to-know and to designated resource partners. SBA resource partners will have access only to those individual records that were collected by that particular resource partner. Generally, designated program managers in Headquarters and the district director in the field will have access to individual records only as needed for program management.

##### **RETENTION AND DISPOSAL:**

In accordance with SBA SOP 00 41 2, Item #65:06, these records are retained a minimum of 3 years and generally destroyed 3 years after last update.

##### **SYSTEM MANAGER(S) AND ADDRESS:**

Associate Deputy Administrator of Entrepreneurial Development and designee in Headquarters.

##### **NOTIFICATION PROCEDURE:**

An individual may submit a record inquiry either in person or in writing to the Systems Manager or Privacy Act Officer for Headquarters records. Individuals inquiring about this system must follow the SBA Privacy Act Regulations at 13 CFR part 102 subpart B.

##### **RECORDS ACCESS PROCEDURES:**

Systems Manager or Privacy Act Officer will determine procedures. Individuals inquiring about this system must follow the SBA Privacy Act Regulations at 13 CFR part 102 subpart B.

##### **CONTESTING RECORD PROCEDURES:**

Notify the official listed above and state reason(s) for contesting and the proposed amendment sought, as indicated in 13 CFR part 102 subpart B.

##### **RECORD SOURCE CATEGORIES:**

Individuals and businesses to whom the record belongs.

Dated: October 29, 1999.

**Mona Koppel Mitnick,**  
Senior Privacy Act Official.

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