SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52658; File No. SR-NASD-2005-046)

October 24, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.: Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 thereto Amending the Arbitration Fees Applicable to Certain Statutory Employment Discrimination Claims

I. Introduction

On April 8, 2005, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change relating to arbitration fees applicable to certain statutory employment discrimination claims. On April 25, 2005, NASD filed Amendment No. 1 ("Amendment No. 1") to the proposed rule change.[1] On June 23, 2005, NASD filed Amendment No. 2 ("Amendment No. 2") to the proposed rule change.[2] The proposed rule change was published for comment in the Federal Register on June 30, 2005.[3] The Commission received three comments on the proposal, as amended.[4] For the reasons discussed below, the Commission is approving the proposed rule change.

II. Description of the Proposed Rule Change

A. Description of the Proposal

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1 Amendment No. 1 replaces the original rule filing in its entirety.

2 See Amendment No. 2. Amendment No. 2 clarified certain aspects of the rule text.

3 Securities Exchange Act Release No. 51921 (June 24, 2005), 70 FR 37887 (June 30, 2005) (the "Notice").

4 See letter to Jonathan Katz, dated July 21, 2005, by Richard P. Ryder, President, Securities Arbitration Commentator, Inc. ("Ryder Letter"); letter to Jonathan Katz, dated July 21, 2005, by Steven B. Caruso, P.C., Maddox Hargett & Caruso ("Caruso Letter"); letter to Jonathan Katz, dated July 26, 2005, by Rosemary J. Shockman, President, Public Investors Arbitration Bar Association ("Shockman Letter").

The purpose of the proposed rule change is to limit the arbitration filing fees applicable to certain statutory employment discrimination claims. The Rule 10210 Series contains special rules applicable to the arbitration of employment discrimination claims. The rules, which set forth the procedures that relate specifically to statutory employment discrimination claims, supplement and, in some instances, supersede the provisions of the Code of Arbitration Procedure (Code) that apply to the arbitration of other employment disputes. The Rule 10210 Series, however, does not provide a separate fee schedule for statutory employment discrimination claims. Instead, associated persons who bring statutory employment discrimination claims pay according to the schedule of fees (which are based on the dollar value of the claim) set forth in Rule 10332.

During the 1990s, federal appeals courts were split on whether employers could require mandatory arbitration of statutory employment discrimination claims and then require the employee to pay all or part of the arbitrators' fees.[5] The United States Supreme Court

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[5] Previously, the United Stated Supreme Court had determined that mandatory arbitration of employment discrimination claims was permissible so long as the prospective litigant could effectively vindicate his or her statutory cause of action in the arbitral forum, thereby allowing the statute to continue to serve both its remedial and deterrent function. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)). Specifically, the courts disagreed as to whether requiring claimants in statutory employment discrimination claims to pay arbitral forum fees and expenses would prevent them from effectively vindicating their claims. The United States Court of Appeals for the District of Columbia Circuit, found that an employee could not be required to agree to arbitrate statutory claims if the agreement required the employee to pay all or even part of the arbitrator's fees and expenses. Cole v. Burns International Security Services, et al., 105 F.3d 1465 (D.C. Cir 1997) ("Cole v. Burns"). The court noted that "it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court." Id. at 1484. On the other hand, the United States Court of Appeals for the Fifth Circuit found that although the allocation of arbitration costs may not be used to prevent effective

considered the issue of fees in connection with the arbitration of federal statutory claims in 2000.[6] The Supreme Court found that the existence of large arbitration costs could preclude a person from effectively vindicating his or her federal statutory rights in arbitration. Therefore, the Supreme Court established a case-by-case approach whereby a person can invalidate an arbitration agreement by showing that the arbitration would be prohibitively expensive. Since the respondent never presented any evidence regarding her likely arbitration costs, the Supreme Court did not specify how "detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence."[7]

In light of the case law, and in order to ensure that associated persons who have statutory employment discrimination claims are able to effectively vindicate such claims, the proposed rule change revised the arbitration fees applicable to certain statutory employment discrimination claims.[8] Specifically, the proposed rule change provided that a current or former associated person who brings a statutory employment discrimination claim that is subject to a predispute arbitration agreement will pay no more than a $200 filing fee (which is non-refundable) at the

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vindication of federal statutory claims, this does not mean that the assessment of any arbitral forum fees against an employee bringing such claims is prohibited. Williams v. Cigna Financial Advisors Inc., 197 F.3d 752, 763-64 (5th Cir. 1999) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)).

6 Green Tree Finance Corp. of Alabama v. Randolph, 531 U.S. 79 (2000) ("Green Tree").

7 Id. at 92.

8 The new rule will apply only to disputes that are subject to a predispute arbitration agreement. The regular fee schedule set forth in Rule 10332 will apply to claims that are not subject to such an agreement. Thus, if a member does not require its employees to arbitrate employment disputes, but the employee chooses to file a statutory employment discrimination claim in arbitration, the employee will be subject to the regular fee schedule. See Rule 10201(b) (statutory employment discrimination claims that are not subject to a predispute arbitration agreement may be arbitrated only if all the parties agree to do so).

time that the associated person asserts such a claim.[9] The member that is a party to a statutory employment discrimination arbitration proceeding will pay the remainder of the filing fee, if any, as well as all forum fees. While the filing and forum fees will not be subject to allocation by the arbitrator(s), the panel will have the ability, as it does currently under the Code, to allocate various costs associated with arbitration, including the adjournment of hearings (Rule 10319); the production of documents (Rules 10321 and 10322); the appearance of witnesses (Rule 10322); and the recording of proceedings (Rule 10326). In addition, arbitrators will still have the ability to allocate attorneys' fees, in accordance with applicable law, as currently provided for in Rule 10215.

NASD believes that the proposed rule will allow those associated persons who agree to arbitrate statutory employment discrimination claims as a condition of employment to pursue their rights in arbitration, because their filing fee will be limited to a maximum of $200 which is comparable to the cost of filing a civil claim in state or federal court.[10] At the same time, the proposed rule will not result in any additional delays or uncertainty in the arbitral process as it provides for a straightforward sliding-scale fee with a cap rather than a case-by-case analysis of

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[9] As previously mentioned, associated persons who have statutory employment discrimination claims currently pay the filing fees and hearing session deposits provided in Rule 10332 at the time that they file a claim. These charges, which are based on the amount of the claim, range from $25 to $600 for filing fees and from $25 to $1,200 for hearing session deposits. Under the proposed rule, the filing fee will continue to be based on the amount of the claim as set forth in Rule 10332, but will be capped at $200. Thus, an associated person who files a claim requesting damages of $4,000 would pay a $50 filing fee, while the filing fee for a $4 million claim would be $200.

[10] In October 2004, NASD surveyed the state and federal court filing fees for civil cases in the five states where it believes the largest number of NASD arbitrations are filed (California, Florida, Illinois, New York, and Texas). NASD found that, in these jurisdictions, the state court filing fees ranged from $160 to $305 and the federal court filing fee was $150.

such things as the claimant's ability to pay for arbitration and the cost differential between arbitration fees and court filing fees.

B. Comment Summary

The proposal was published for comment in the Federal Register on June 30, 2005.[11] We received three comments on the proposal.[12] Two commenters believed that the treatment accorded to employees with statutory discrimination claims should be extended to customer claims.[13] One of these commenters stated that as there are significantly more customers than there are associated persons, the NASD should expand the fee relief to customer claims, and stated that the NASD had not justified its determination to treat associated persons more favorably than customers.[14] One commenter expressed concern that arbitration fees are higher than fees in court proceedings, discouraging arbitration claims, and stated that arbitration should be equally accessible to customers as to employees.[15] This commenter did not believe that the NASD had sufficiently justified its decision to provide fee relief for statutory employment discrimination claims but not customer claims, and believed that fee relief for customer claims was necessary for vindication of customers' rights. The commenter cited the fee-relief rules of other arbitration associations in support of the argument that such fee relief was appropriate.

One commenter was concerned that charging the broker-dealer "virtually all" the fees for a statutory discrimination claim would create distortions in the process, lengthening and encouraging dissatisfaction with the process and providing incentives to bring a weak

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[11] See note 3, supra.

[12] See note 4, supra.

[13] See Caruso Letter, Shockman Letter.

[14] See Caruso Letter.

discrimination claim.[16] This commenter believed that assessing attorneys' fees for frivolous claims would not have any deterrent effect, and also believed that weak discrimination claims would be dismissed and the dismissal would be inappropriately blamed on arbitrator bias. Citing LaPrade v. Kidder Peabody ("LaPrade"),[17] the commenter expressed disagreement with the NASD's decision to shift the greater part of the forum fees to the employer, and criticized the NASD's reliance on and interpretation of Cole v. Burns and Green Tree. The commenter stated that the rationale for fee-shifting in these court cases could not be limited to fee-shifting in statutory employment discrimination claims, and expressed concern that the proposed rule change would accelerate demand for fee-shifting across all arbitrations. The commenter believed that an occasional waiver rather than a blanket exemption would be preferable.

NASD responded to the commenters by observing that the proposed rule change was intended to be very limited in scope, only addressing situations in which an employee must enter into a predispute arbitration agreement for statutory employment discrimination claims, specifically the issue addressed in Cole v. Burns. NASD stated that such claims form a very small percentage of the total number of claims filed with NASD. NASD also stated that it neither intended nor believes that there is a compelling reason for the proposed fee changes to be applied to all statutory securities claims brought by customers. Furthermore, NASD stated that it does not believe that the arbitration process will be impaired by the change because arbitrators will be able to identify and dispose of frivolous or marginal claims, as well as allocate costs and

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15 See Shockman Letter.

16 See Ryder Letter.

17 246 F.3d 702 (DC Cir., 2001)(holding that Cole v. Burns does not preclude an arbitrator from assessing certain fees against a claimant).

attorneys' fees. Lastly, NASD stated that it believes that waivers, rather than uniform fee-shifting, will introduce significant delays and uncertainty to the arbitration process.

In connection with one commenter's[18] objection to the fee-shifts, NASD noted that NASD is the only forum for statutory employment discrimination claims based on presdispute arbitration agreements. In this context, NASD stated that it believes that it is "fair and reasonable for members, who require their employees to enter into predispute arbitration agreements, to pay additional filing and forum fees for this service."

III. Discussion and Findings

The Commission finds the proposed rule change is consistent with the Act, and in particular with Sections 15A(b)(5)[19] of the Act, which requires that the NASD's rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that the NASD operates or controls. The Commission believes that the proposed rule change is consistent with the provisions of the Act noted above because it will permit employees subject to predispute arbitration agreements to vindicate statutory employment discrimination claims without significant financial barriers to adjudication.

We do not believe that NASD is required, in connection with this proposal, which addresses a limited number of statutory employment discrimination claims, to expand the fee relief in the proposal to fees for statutory securities claims brought by customers. The NASD's proposal deals with an extremely limited set of claims brought in its arbitration forums. The

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18 See Ryder Letter.

19 15 U.S.C. 78o-3(b)(5).

NASD states that in each of the last five years, statutory employment discrimination claims accounted for less than one percent of all claims filed with NASD. In connection with providing a forum for arbitration of such claims, the NASD has determined to provide fee relief consistent with Cole v. Burns, which was concerned with the accessibility of the adjudicatory system to a claimant subject to a predispute arbitration agreement in a statutory employment discrimination claim. We note that Cole v. Burns provides justification for the fee relief, and would not require expansion of fee relief into other statutory securities claims. In this context, we agree with NASD's rationale for limiting the proposed fee reduction to statutory employment discrimination claims based on predispute agreements.

With regard to the proposed rule change's determination to shift certain fees to employers, we note particularly that NASD provides the only forum for employers in which such claims can be adjudicated, and that very few of the claims adjudicated by NASD's arbitration system involve statutory employment discrimination claims. LaPrade, the case cited by the commenter for the proposition that Cole v. Burns does not bar the assessment of all forum fees against the claimant, does not preclude NASD from determining that it will assess certain fees against an employer in this extremely limited number of cases. Further, given the extremely limited number of these cases adjudicated by the NASD, automatic fee-shifting for employment discrimination claims based on predispute agreements should not pose a significant hardship to employers. We agree with the NASD's position that requiring a waiver analysis of every case involving statutory employment discrimination claims would most likely introduce significant delays, complexity and uncertainty to the arbitration process.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act[20] that the proposed rule change (SR-NASD-2005-046) be, and hereby is, approved.[21]

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[22]

Jonathan G. Katz
Secretary

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[20] 15 U.S.C. 78s(b)(2).

[21] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[22] 17 CFR 200.30-3(a)(12).