

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-54857; File No. SR-NASD-2006-101)

December 1, 2006

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto to Provide for the Payment of a \$200 Honorarium per Case for Each Arbitrator who Considers Contested Motions for the Issuance of Subpoenas

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 23, 2006, the National Association of Securities Dealers, Inc. (“NASD”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. On November 13, 2006, NASD filed Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to provide for the payment of a \$200 honorarium per case for each arbitrator who considers contested motions for the issuance of subpoenas. Below is the text of the proposed rule change.⁴ Proposed new language is underlined.

* * * * *

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, NASD clarified provisions to the proposed rule change.

⁴ If the Commission approves the pending revisions to the NASD Code of Arbitration Procedure for Customer Disputes, the rules proposed in this filing will be renumbered as appropriate; see Securities Exchange Act Release No. 51856 (June 15, 2005) (SR-NASD-2003-158), 70 FR 36442 (June 23, 2005); and the NASD Code of Arbitration Procedure for Industry Disputes; see Securities Exchange Act Release No. 51857 (June 15, 2005) (SR-NASD-2004-011), 70 FR 36430 (June 23, 2005).

IM-10104. Arbitrators' Honorarium

(a) – (e) No change

(f) Payment for Deciding Contested Subpoena Requests Without a Hearing Session

(1) The honorarium for deciding one or more contested motions requesting the issuance of a subpoena without a hearing session shall be \$200. The honorarium shall be paid on a per case basis to each arbitrator who decides the contested motion(s). The parties shall not be assessed more than \$600 in fees under this paragraph in any arbitration proceeding. The honorarium shall not be paid for cases administered under Rules 10203 or 10302.

(2) For purposes of paragraph (f)(1), a contested motion requesting the issuance of a subpoena shall include a motion requesting the issuance of a subpoena, the draft subpoena, a written objection from the party opposing the issuance of the subpoena, and any other documents supporting a party's position.

(3) The panel will allocate the cost of the honorarium under paragraph (f)(1) to the parties pursuant to Rules 10205(c) and 10332(c).

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to provide for the payment of a \$200 honorarium per case for each arbitrator who considers contested motions for the issuance of subpoenas. Last year, NASD amended IM-10104 of the NASD Code of Arbitration Procedure (“Code”), to provide arbitrators with an honorarium of \$200 to decide discovery-related motions without a hearing session.⁵ The revised rule, however, does not address whether a contested motion concerning a subpoena constitutes a discovery-related motion. As a result, NASD has received questions regarding the appropriate payment, if any, for arbitrators who decide subpoena issues. These questions have focused on whether, under the rule, arbitrators should be paid to decide contested motions requesting the issuance of a subpoena.

The issue of whether arbitrators should receive an honorarium for deciding contested subpoena motions will become even more significant if the Commission approves amendments to Rule 10322 as proposed by NASD.⁶ The proposed changes to Rule 10322 would permit only arbitrators to issue subpoenas in arbitration disputes.⁷ If the proposed changes to Rule 10322 are approved by the Commission, attorneys would no longer have the authority to issue subpoenas. NASD anticipates that this would result in a significant increase in the number of subpoena requests considered by arbitrators.

⁵ See Securities Exchange Act Release No. 51931 (June 28, 2005) (File No. SR-NASD-2005-052), 70 FR 38989 (July 6, 2005).

⁶ See Securities Exchange Act Release No. 54134 (July 12, 2006) (File No. SR-NASD-2005-079), 71 FR 40762 (July 18, 2006).

⁷ Currently, Rule 10322 allows arbitrators and any counsel of record to the proceedings to issue subpoenas as provided by law.

NASD recognizes that arbitrators may spend a considerable amount of time and effort deciding contested subpoena motions and believes that arbitrators should be compensated for this work. Therefore, NASD proposes to provide a \$200 honorarium to each arbitrator who decides contested motions for subpoenas.⁸ NASD anticipates that if its proposed changes to Rule 10322 are approved, under most circumstances, the chairperson will be the only arbitrator considering subpoena requests based on the documents supplied by the parties. If the entire panel decides a contested motion, each arbitrator who participates in the subpoena ruling will receive an honorarium of \$200. The \$200 honorarium paid to an arbitrator would provide payment for all contested subpoena motions in a case (i.e., the honorarium would be paid on a per case basis, regardless of the number of contested subpoena motions considered by an arbitrator or panel during the case).⁹ Furthermore, the maximum amount that would be paid by the parties, collectively, for any one case would be \$600, irrespective of any changes to the composition of the panel.¹⁰ NASD believes that structuring the honorarium in this manner will limit the arbitration costs for parties while at the same time compensating arbitrators for the time that they spend considering contested subpoena requests.

⁸ For purposes of this rule, a contested motion is defined as a motion to issue a subpoena, the draft subpoena, a written objection from the party opposing the issuance of the subpoena, and any other documents supporting a party's position. Arbitrators will not be entitled to receive the honorarium if a motion for a subpoena is uncontested.

⁹ This differs from other discovery-related motions, for which an arbitrator receives an honorarium for each motion considered. See IM-10104(e). If the panel has received the honorarium for considering a contested subpoena request and subsequently receives a number of new contested subpoena requests, however, the chairperson may call a prehearing conference to hear and decide these matters, for which the participating arbitrator(s) would receive the normal prehearing honorarium. See IM-10104(a) and (b).

¹⁰ In situations where more than three different arbitrators consider contested subpoena requests, NASD will pay the additional honorarium. For example, if all three members of a panel have decided a contested subpoena request and the chairperson is thereafter replaced by another arbitrator, NASD would pay the \$200 honorarium to the replacement chairperson for deciding any later contested subpoena requests, because the parties already would have incurred \$600 in costs relating to the requests. Likewise, if there have been three different chairpersons in the same proceeding, each of whom has considered a contested subpoena request, NASD would pay the \$200 honorarium should a fourth chairperson consider a contested subpoena request. NASD does not anticipate that either of these situations will occur frequently.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Sections 15A(b)(5)¹¹ and 15A(b)(6)¹² of the Act, which require, among other things, that 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, and that NASD's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change is consistent with the provisions of the Act noted above because the panel will allocate the honorarium for deciding a discovery-related motion equitably among the parties. Moreover, NASD believes the proposed rule change will encourage arbitrators to decide contested subpoena requests without scheduling a prehearing conference, thereby expediting the arbitration process for parties.

B. Self-Regulatory Organization's Statement on Burden on Competition

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.

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

Written comments were neither solicited nor received.

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

¹¹ 15 U.S.C. 78o-3(b)(5).

¹² 15 U.S.C. 78o-3(b)(6).

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, including whether the proposed rule change, as amended, is consistent with the Act.

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2006-101 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASD-2006-101. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>).

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 also will be available for inspection and copying at the principal office of NASD.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2006-101 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹³

Florence E. Harmon
Deputy Secretary

¹³ 17 CFR 200.30-3(a)(12).