

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55108; File No. SR-NASD-2006-101)

January 16, 2007

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving 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

I. Introduction

On August 23, 2006, the National Association of Securities Dealers, Inc. (“NASD”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend IM-10104 of the NASD Code of Arbitration Procedure (“Code”) to provide for the payment of a \$200 honorarium per case for each arbitrator who considers contested motions for the issuance of subpoenas. On November 13, 2006, NASD filed Amendment No. 1 to the proposed rule change.³ The proposed rule change, as amended, was published for comment in the Federal Register on December 8, 2006.⁴ The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

II. Description

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. NASD previously amended IM-10104, to provide arbitrators with an honorarium of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

⁴ See Exchange Act Release No. 54857 (Dec. 1, 2006), 71 FR 71213 (Dec. 8, 2006).

\$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 has become even more significant with the Commission's recent approval of amendments to NASD Rule 10322 which, among other changes, permit only arbitrators to issue subpoenas in NASD arbitrations.⁶

In proposing the current rule change, NASD recognized that arbitrators may spend a considerable amount of time and effort deciding contested subpoena motions⁷ and stated it believes that arbitrators should be compensated for this work. NASD anticipated that if its proposed changes to Rule 10322 were approved, under most circumstances, the chairperson would be the only arbitrator considering subpoena requests based on the documents supplied by the parties. If the entire panel decided a contested motion, each arbitrator who participates in the subpoena ruling would 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

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

⁶ See Exchange Act Release No. 55038 (Jan. 3, 2007) (File No. SR-NASD-2005-079). Previously, Rule 10322 allowed arbitrators and any counsel of record to the proceedings to issue subpoenas as provided by law.

⁷ 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

motions considered by an arbitrator or panel during the case).⁸ 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.⁹ 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.

III. Discussion and Findings

The Commission finds that the proposed rule change is consistent with the provisions of Sections 15A(b)(5)¹⁰ and 15A(b)(6)¹¹ of the Exchange 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. The Commission believes that the proposed rule change is consistent with the provisions of the Exchange Act noted above because the rule change provides that the panel will have the ability to allocate the honorarium for deciding a

supporting a party's position. Arbitrators will not be entitled to receive the honorarium if a motion for a subpoena is uncontested.

⁸ 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).

⁹ 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.

¹⁰ 15 U.S.C. 78o-3(b)(5).

¹¹ 15 U.S.C. 78o-3(b)(6).

discovery-related motion equitably among the parties.¹² Moreover, the Commission 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.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act¹³ that the proposed rule change (SR-NASD-2006-101), as amended, be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Florence E. Harmon
Deputy Secretary

¹² In approving this proposed rule change, as amended, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ 17 CFR 200.30-3(a)(12).