

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-51082; File No. SR-NASD-2004-042)**

**January 26, 2005**

**Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Foreign Hearing Locations**

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 9, 2004, National Association of Securities Dealers, Inc. (“NASD”), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. (“Dispute Resolution”), filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Dispute Resolution. NASD amended the proposal on September 29, 2004,<sup>3</sup> and November 23, 2004.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE**

NASD is proposing to amend NASD Rule 10315 to permit arbitrations to occur in a foreign hearing location and to amend IM—10104 to allow the Director of Arbitration to authorize a higher or additional honorarium for the use of a foreign hearing location. Below

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Letter from Mignon McLemore, Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated September 29, 2004 (“Amendment No. 1”). Amendment No. 1 amended the proposed rule language, among other things, to clarify that the Director of Arbitration may authorize a higher or additional honorarium only for the use of a foreign hearing location.

<sup>4</sup> Form 19b-4 dated November 23, 2004 (“Amendment No. 2”). Amendment No. 2 amended the proposed rule language, among other things, to add qualifications for foreign arbitrators to NASD Rule 10315(b)(1).

is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

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**IM-10104. Arbitrators' Honorarium**

All persons selected to serve as arbitrators pursuant to the Association's Code of Arbitration Procedure shall be paid an honorarium for each hearing session (including a prehearing conference) in which they participate.

The honorarium shall be \$200 for each hearing session and \$75 per day additional honorarium to the chairperson of the panel. The honorarium for a case not requiring a hearing shall be \$125.

The honorarium for travel to a canceled hearing session shall be \$50. If a hearing session other than a prehearing conference is adjourned pursuant to Rule 10319(d), each arbitrator shall receive an additional honorarium of \$100.

The Director may authorize a higher or additional honorarium for the use of a foreign hearing location.

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**10315. [Designation of Time and Place] Determination of Hearing Location**

(a) Designation of Time and Place of Hearing

The Director shall determine the time and place of the first meeting of the arbitration panel and the parties, whether the first meeting is a pre-hearing conference or a hearing, and shall give notice of the time and place at least 15 business days prior to the date fixed for the first meeting by personal service, registered or certified mail to each of the parties unless the

parties shall, by their mutual consent, waive the notice provisions under this Rule. The arbitrators shall determine the time and place for all subsequent meetings, whether the meetings are pre-hearing conferences, hearings, or any other type of meetings, and shall give notice as the arbitrators may determine. Attendance at a meeting waives notice thereof.

(b) Foreign Hearing Location

(1) If the Director and all parties agree, parties may have their hearing in a foreign hearing location and conducted by foreign arbitrators, provided that the foreign arbitrators have:

(A) met NASD background qualifications for arbitrators;

(B) received training on NASD arbitration rules and procedures; and

(C) satisfied at least the same training and testing requirements as those arbitrators who serve in U. S. locations of NASD.

(2) The parties shall pay an additional surcharge for each day of hearings held in a foreign hearing location. The amount of the surcharge shall be determined by the Director and must be agreed to by the parties before the foreign hearing location may be used. This surcharge shall be specified in the agreement to use a foreign hearing location and shall be apportioned equally among the parties, unless they agree otherwise. The foreign arbitrators shall have the authority to apportion this surcharge as provided in Rules 10205 and 10332.

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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

(a) **Purpose**

Background

Dispute Resolution maintains a roster of qualified neutrals (*i.e.*, arbitrators and mediators) in 51 cities in the United States and Puerto Rico. In accordance with NASD Rule 10315, the Director of Arbitration sets the hearing location for NASD arbitration cases. For cases involving public customers, the Director generally designates the hearing location that is closest to the public customer's residence at the time of the events in dispute. However, for claimants who reside outside of the United States, the Director sets the hearing in the NASD hearing location that is most logical for the case. Generally, in instances where the claimant resides outside the United States, the Director will consider a number of factors in determining a hearing location, including the preferences of the parties, the location of counsel or witnesses, and the availability of transportation routes to cities in the United States.

NASD's Proposal

To accommodate parties to arbitrations abroad, NASD is proposing to amend NASD Rule 10315 to permit arbitrations to occur in a foreign hearing location. NASD is also proposing to amend IM—10104 to allow the Director to authorize a higher or additional honorarium for the use of a foreign hearing location. Under the proposal, the foreign hearing

location process will be voluntary.<sup>5</sup> Parties seeking arbitration will still file with NASD the claim information, submission agreements, and other related documents currently required by NASD rules. Once Dispute Resolution has determined that an arbitration case can be handled using a foreign hearing location, Dispute Resolution will inform claimants residing in the United Kingdom or other European countries about the availability and the additional costs of the appropriate foreign hearing location. If the claimant wishes to use a foreign hearing location, Dispute Resolution will seek the agreement of the respondents.

Under the proposal, all foreign arbitrators selected by NASD to conduct arbitrations in foreign hearing locations must satisfy certain requirements. First, they must meet NASD background qualifications for arbitrators.<sup>6</sup> Second, they must receive training on NASD arbitration rules and procedures.<sup>7</sup> Finally, they must satisfy at least the same training and testing requirements as those arbitrators who serve in U. S. locations of NASD.<sup>8</sup>

The first foreign hearing location for NASD arbitrations will be in London. Dispute Resolution has formed a relationship with the Chartered Institute of Arbitrators (“CIArb”), which is based in London and maintains a worldwide roster of neutrals, specializing in, among other areas, providing dispute resolution services for banking, finance, business, commercial, and international issues. NASD believes that a partnership between CIArb and NASD will provide NASD’s international constituents with access to a local roster of

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<sup>5</sup> NASD Rule 10315(b)(1).

<sup>6</sup> NASD Rule 10315(b)(1)(A).

<sup>7</sup> NASD Rule 10315(b)(1)(B).

<sup>8</sup> NASD Rule 10315(b)(1)(C).

experienced neutrals<sup>9</sup> as well as the convenience and cost efficiency of conducting hearing sessions within a reasonable distance from their place of business or residence.

Furthermore, under the proposal, as a condition of using a foreign hearing location, the parties must agree to accept the special Foreign Hearing Location Surcharge to cover the additional daily cost for the foreign arbitrators' service in that location.<sup>10</sup> While this surcharge will initially be apportioned equally among the parties, unless they agree otherwise, the foreign arbitrators will have the authority to apportion the surcharge as provided for in NASD Rules 10205 and 10332.<sup>11</sup>

Finally, the NASD Dispute Resolution Business Development staff, with the cooperation of the administrative staff of the groups providing the foreign arbitrators, will administer all cases designated for hearing in a foreign location.<sup>12</sup> The Code, with the addition of the Foreign Hearing Location Surcharge, will govern all case administration.

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<sup>9</sup> CIArb's neutrals are required to complete a rigorous training program and to pass testing and interview requirements before being qualified for appointment to cases. The CIArb's training requirements exceed any standards currently employed by a United States forum. CIArb's neutrals must meet NASD's background qualification requirements. NASD, upon approval of its National Arbitration and Mediation Committee, agreed to accept the CIArb training and testing requirements for arbitrators as a substitute for NASD training and testing. In addition, NASD conducted training for CIArb neutrals on NASD arbitration rules and procedures.

<sup>10</sup> NASD Rule 10315(b)(2). CIArb neutrals have agreed to serve in NASD cases at daily rates that are lower than their normal charges. However, those reduced rates are still significantly higher than the arbitrator honorarium rates paid by NASD. To cover the additional cost of the foreign neutral fee, NASD will assess the daily Foreign Hearing Location Surcharge for parties agreeing to use the London hearing location. This surcharge will be used solely to pay additional honorarium to the foreign neutrals rather than to cover any other NASD expenses. The amount of the surcharge may vary depending on factors such as the daily rates for neutrals in a foreign hearing location and the currency exchange rates.

<sup>11</sup> NASD Rule 10315(b)(2). NASD Rule 10205 (Schedule of Fees for Industry and Clearing Controversies) and NASD Rule 10332 (Schedule of Fees for Customer Disputes) provide that arbitrators, in their awards, shall determine who shall pay forum fees.

<sup>12</sup> NASD will add information about CIArb neutrals to the Neutral List Selection System so that the background disclosures provided to parties and the arbitrator selection process will be the same as in other hearing locations.

## Conclusion

The proposed rule change will provide those parties residing in foreign locations with the option of holding their arbitration hearings closer to home, using local arbitrators, and saving the expenses of traveling to the U.S. to resolve their disputes. The voluntary aspect of the proposed rule change will allow these parties to decide in each matter whether a foreign hearing location or U.S. hearing location is preferable. NASD believes that the expenses saved by the parties will offset the Foreign Hearing Location Surcharge.

### **(b) Statutory Basis**

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that the Association'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 because it will expand access to its arbitration forum internationally while maintaining the same protections that apply to the process in the United States.

### **(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, as amended.

### **(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 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 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2004-042.

##### Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-042. 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 Section, 450 Fifth Street, NW, Washington, DC 20549.

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 No. SR-NASD-2004-042 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.<sup>13</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>13</sup> 17 CFR 200.30-3(a)(12).