

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- 51693; File No. SR-NASD-2005-052)

May 12, 2005

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendments No. 1 and No. 2 Thereto Relating to Honorarium for Arbitrators Deciding Discovery-related Motions

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 the National Association of Securities Dealers, Inc. (“NASD”), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. (“NASD Dispute Resolution”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) on April 14, 2005, on April 29, 2005 (Amendment No. 1) and on May 6, 2005 (Amendment No. 2), the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. 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 Dispute Resolution is proposing to amend Interpretive Material (IM) 10104 of the NASD Code of Arbitration Procedure (“Code”) to provide payment to arbitrators for deciding discovery-related motions without a hearing.³ Below is the text of the proposed rule change.⁴ Proposed new language is in italics; proposed deletions are in brackets.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ On March 15, 2005, NASD filed a proposed rule change to provide written explanations in arbitration awards upon the request of customers, or of associated persons in industry controversies. This proposal amends IM-10104. See SR-NASD-2005-032.

⁴ This IM will be renumbered as appropriate following Commission approval of the pending revisions to the NASD Code of Arbitration Procedure for Customer Disputes filed on October 15, 2003, and amended on January 3, 2005, January 19, 2005, and April 8, 2005 (SR-NASD-2003-158); and the NASD Code of Arbitration Procedure for Industry Disputes filed on January 16, 2004, and amended on February 26, 2004, January 3, 2005, and April 8, 2005 (SR-NASD-2004-011).

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IM-10104. Arbitrators' Honorarium

(a) 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.

(b) 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.

(c) 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.

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

(e) Payment for Deciding Discovery-Related Motions Without a Hearing Session

(1) NASD will pay each arbitrator an honorarium of \$200 to decide a discovery-related motion without a hearing session. This paragraph does not apply to cases administered under Rules 10203 and 10302.

(2) For purposes of paragraph (e)(1), a discovery-related motion and any replies or other correspondence relating to the motion shall be considered to be a single motion.

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

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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

1. Purpose

In 2002, NASD Dispute Resolution conducted arbitrator focus groups across the country. One of the consistently raised concerns was the amount of time and effort invested by chairpersons in reviewing and deciding various discovery motions, especially in situations in which the motions are decided without a hearing (*i.e.*, on the papers). Also, Dispute Resolution staff has found that the current lack of compensation for deciding such motions has made it more difficult to recruit current arbitrators to become chairpersons. Currently, arbitrators are not compensated for deciding discovery motions on the papers. Arbitrators are compensated, however, when they conduct pre-hearing conferences to hear argument from parties regarding discovery motions.

NASD is, therefore, proposing to adopt a rule to compensate arbitrators in the amount of \$200 (the same amount that is paid for an arbitrator to participate in a pre-hearing conference regarding discovery) to decide discovery motions on the papers. The new rule language states that NASD will pay arbitrators an honorarium of \$200 to decide a discovery-related motion without a hearing session. For purposes of this rule, a discovery-related motion and any replies or other correspondence relating to the motion will be considered to be a single motion. If more than one arbitrator considers a discovery-related motion, each arbitrator will receive \$200. The

panel will allocate the cost of the honoraria as part of the eventual arbitration award. The rule will not apply to simplified cases administered under Rules 10203 and 10302.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Sections 15A(b)(5)⁵ and 15A(b)(6)⁶ of the Act, which require, among other things, 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, and that NASD rules must 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 accomplishes these goals by encouraging arbitrators to decide discovery-related motions on the papers without the need for a pre-hearing conference, thereby expediting the pace of arbitrations, which should reduce the time between the filing of an arbitration claim and the rendering of an award. Moreover, the panel would allocate the honorarium for deciding a discovery-related motion equitably among the parties.

⁵ 15 U.S.C. 78o-3(b)(5).

⁶ 15 U.S.C. 78o-3(b)(6).

(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. Please include File Number SR-NASD-2005-052 on the subject line.

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-2005-052. 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 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 the File Number SR-NASD-2005-052 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.⁷

Margaret H. McFarland
Deputy Secretary

⁷ 17 CFR 200.30-3(a)(12).