

**SECURITIES AND EXCHANGE COMMISSION**  
**(Release No. 34-51921; File No. SR-NASD-2005-046)**

**June 24, 2005**

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 8, 2005, the National Association of Securities Dealers, Inc. (“NASD”) 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 NASD. On April 25, 2005, NASD filed Amendment No. 1 (“Amendment No. 1”) to the proposed rule change.<sup>3</sup> On June 23, 2005, NASD filed Amendment No. 2 (“Amendment No. 2”) to the proposed rule change.<sup>4</sup> 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 amend the NASD Code of Arbitration Procedure (“Code”) to amend the arbitration fees applicable to certain statutory employment discrimination claims.

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

<sup>4</sup> See Amendment No. 2. Amendment No. 2 clarified certain aspects of the rule text.

Below is the text of the proposed rule change.<sup>5</sup> Proposed new language is in italics.

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**10217. Fees**

(a) For any claim of statutory employment discrimination submitted to arbitration that is subject to a predispute arbitration agreement, a party who is a current or former associated person shall pay a non-refundable filing fee according to the schedule of fees set forth in Rule 10332, provided that:

(1) In no event shall such a person pay more than \$200 for a filing fee;

(2) A member that is a party to such an arbitration proceeding under this rule shall pay the remainder of all applicable arbitration fees set forth in Rule 10332; and

(3) No party shall be required to remit a hearing session deposit.

(b) The arbitration fees described in paragraph (a)(2) are not subject to allocation in the award. The panel, however, may assess to a party who is a current or former associated person those costs incurred under Rules 10319, 10321, 10322, and 10326.

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<sup>5</sup> The rule change proposed in this filing will be renumbered as appropriate following Commission approval of the pending revisions to the NASD Code of Arbitration Procedure for Customer Disputes, see Securities Exchange Act Release No. 51856 (June 15, 2005), 70 FR 36442 (June 23, 2005) (SR-NASD-2003-158); and the NASD Code of Arbitration Procedure for Industry Disputes, see Securities Exchange Act

## **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 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. Rather, Rule 10205, the Schedule of Fees for Industry and Clearing Controversies, provides in paragraph (a) that, "A party who is an associated person shall pay a non-refundable filing fee and shall pay a hearing session deposit in the amounts specified for customer claimants in Rule 10332." Consequently, 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.<sup>6</sup> 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. Certain courts, such as 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.<sup>7</sup> 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."<sup>8</sup> 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 vindication of federal statutory claims, this does not mean that the

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<sup>6</sup> Previously, the United States 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)).

<sup>7</sup> Cole v. Burns International Security Services, et al., 105 F.3d 1465 (D.C. Cir 1997).

<sup>8</sup> Id. at 1484.

assessment of any arbitral forum fees against an employee bringing such claims is prohibited.<sup>9</sup>

The United States Supreme Court considered the issue of fees in connection with the arbitration of federal statutory claims in 2000.<sup>10</sup> 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.”<sup>11</sup>

In order to ensure that associated persons who have statutory employment discrimination claims are able to effectively vindicate such claims, NASD is proposing to revise the arbitration fees applicable to certain statutory employment discrimination claims.<sup>12</sup> Specifically, a current or former associated person who brings a statutory employment

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<sup>9</sup> Williams v. Cigna Financial Advisors Inc., 197 F.3d 752, 763-64 (5<sup>th</sup> Cir. 1999) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)).

<sup>10</sup> Green Tree Finance Corp. of Alabama v. Randolph, 531 U.S. 79 (2000).

<sup>11</sup> Id. at 92.

<sup>12</sup> 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).

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 time that the associated person asserts such a claim.<sup>13</sup> 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.<sup>14</sup> At the

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<sup>13</sup> 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.

<sup>14</sup> 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

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

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of provisions of Section 15A of the Act,<sup>15</sup> in general and with Section 15A(b)(6) of the Act,<sup>16</sup> in particular, which requires, among other things, that NASD's 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 will serve the public interest in that it will ensure that filing and hearing session fees do not prevent associated persons from vindicating their statutory employment discrimination claims in arbitration.

**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**

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jurisdictions, the state court filing fees ranged from \$160 to \$305 and the federal court filing fee was \$150.

<sup>15</sup> 15 U.S.C. 78o-3.

<sup>16</sup> 15 U.S.C. 78o-3(b)(6).

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, 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2005-046 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-9303.



All submissions should refer to File Number SR-NASD-2005-046. 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 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 the File Number SR-NASD-2005-046 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>17</sup>

J. Lynn Taylor  
Assistant Secretary

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