

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51931; File No. SR-NASD-2005-052)

June 28, 2005

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

I. INTRODUCTION

On April 14, 2005, 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”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change relating to an honorarium for arbitrators deciding discovery-related motions. On April 29, 2005, NASD Dispute Resolution submitted Amendment No. 1 to the proposed rule change. On May 6, 2005, NASD Dispute Resolution submitted Amendment No. 2. The proposed rule change, as amended, was published for comment in the Federal Register on May 19, 2005.³ The Commission received one comment on the proposal. For the reasons discussed below, the Commission is approving the proposed rule change, as amended.

II. DESCRIPTION OF THE PROPOSED RULE CHANGE

A. Description of the Proposal

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 51693 (May 12, 2005), 70 FR 28972 (May 19, 2005) (the “Notice”).

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 arguments from parties regarding discovery motions.

NASD, therefore, proposed 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.

B. Comment Summary

The proposal was published for comment in the Federal Register on May 19, 2005.⁴ We received one comment letter on the proposal which suggested that compensation to arbitrators should be based on units of time required to decide discovery motion on the papers and also proposed several alternatives for improving the arbitration process.⁵ In response to the Greenberg Letter, the NASD states that “NASD concluded that variable fee structures based on such factors as the number or complexity of motions or the time spent by an arbitrator in deciding a discovery-related motion on the papers could result in unlimited costs for the

⁴ See Notice, *supra* note 3.

⁵ See letter from Les Greenberg, Law Offices of Les Greenberg, to Jonathan G. Katz, Secretary, Securities and Exchange Commission, received May 31, 2005 (“Greenberg Letter”).

parties.”⁶ The NASD therefore concluded that “a set fee would be the most efficient way to compensate arbitrators for the additional work in deciding discovery-related motions, while keeping costs to the parties at reasonable and predictable levels.”⁷ The NASD indicated that the remaining items in the Greenberg Letter were beyond the scope of the proposed rule change.⁸

III. DISCUSSION AND FINDINGS

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the provisions of Sections 15A(b)(5)⁹ and 15A(b)(6)¹⁰ 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. The Commission believes that the proposed rule change, as amended, accomplishes these goals by encouraging arbitrators to decide discovery-related motions on the papers without the need for a pre-hearing conference (while keeping costs to the parties at reasonable and predictable levels), thereby expediting the pace of arbitrations, which should reduce the time between the filing of an arbitration claim and the rendering of an award.

⁶ See letter from Mignon McLemore, Associate Chief Counsel, NASD, to Lourdes Gonzalez, Assistant Chief Counsel, Division of Market Regulation, Commission, dated June 24, 2005.

⁷ Id.

⁸ Id.

⁹ 15 U.S.C. 78o-3(b)(5).

¹⁰ 15 U.S.C. 78o-3(b)(6).

IV. CONCLUSIONS

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act¹¹ that the proposed rule change, as amended (SR-NASD-2005-052), be, and hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland
Deputy Secretary

¹¹ 15 U.S.C. 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).