

April 1, 2004

Katherine A. England
Assistant Director
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-1001

**Re: File No. SR-NASD-2003-164 – Amendment No. 2 to the Three-Day
Adjournment Rule**

Dear Ms. England:

Pursuant to conversations with Division of Market Regulation staff, NASD is filing this letter as Amendment No. 2 (“Amendment”) to the above-numbered rule filing. NASD is enclosing a 3-1/2" disk containing the amended Exhibit 1 (“Exhibit”) in Microsoft Word 7.0 to facilitate production of the Federal Register release.

This Amendment clarifies several issues concerning the proposed changes to Rule 10319(d). First, NASD proposes to add rule language to emphasize the fact that only one payment of \$100 will be made to each arbitrator, regardless of the number of parties requesting the adjournment. Second, NASD proposes to add rule language to limit the arbitrators’ discretion in waiving this adjournment fee to an extraordinary circumstance only. Further, the proposed rule language will require that arbitrators receive verification of such circumstance prior to determining whether to waive the fee. Third, NASD proposes to add rule language to provide that arbitrators can allocate this fee against a non-requesting party or parties, if arbitrators determine that the non-requesting party or parties caused or contributed to the need for the adjournment.

Therefore, the following changes should be made to Rule 10319(d) on page 4 of the rule filing, and page 15 of the Exhibit (new language is underlined; deletions are bracketed):

10319. Adjournments

(a) The arbitrator(s) may, in their discretion, adjourn any hearing(s) either upon their own initiative or upon the request of any party to the arbitration.

(b) If an adjournment requested by a party is granted after arbitrators have been appointed, the party requesting the adjournment shall pay a fee equal to the initial deposit of hearing session fees for the first adjournment and twice the initial deposit of hearing session fees, not to exceed \$1,500, for a second or subsequent adjournment requested by that party. The arbitrators may waive these fees in their discretion. If more than one party requests the adjournment, the arbitrators shall allocate the fees among the requesting parties.

(c) Upon receiving a third request consented to by all parties for an adjournment, the arbitrator(s) may dismiss the arbitration without prejudice to the Claimant filing a new arbitration.

(d) If an adjournment request is made by one or more parties and granted within three business days before a scheduled hearing session, the party or parties making the request shall pay an additional fee of \$100 per arbitrator. If more than one party requests the adjournment, the arbitrators shall allocate the \$100 per arbitrator fee among the requesting parties. The arbitrators may allocate all or a portion of the \$100 per arbitrator fee to the non-requesting party or parties, if the arbitrators determine that the non-requesting party or parties caused or contributed to the need for the adjournment. In the event that a request results in the adjournment of consecutively scheduled hearing sessions, the additional fee will be assessed only for the first of the consecutively scheduled hearing sessions. In the event that an extraordinary circumstance prevents a party or parties from making a timely adjournment request, [The] arbitrators may [waive or allocate] use [this fee in] their discretion to waive the fee, provided verification of such circumstance is received.

Also, NASD has changed the text of the rule filing and Exhibit, where applicable, to reflect changes made by this Amendment. The following changes should be made to the fourth sentence of the first full paragraph on page 9 of the rule filing, and to the fourth sentence of the third paragraph, beginning on page 19 and continuing on page 20 of the Exhibit (new language is underlined; deletions are bracketed):

[The proposed rule change clarifies that arbitrators have the discretion to waive or allocate the fee under Rule 10319(d), just as they do under Rule 10319(b).]

Finally, this Amendment clarifies that a waiver of the fee, pursuant to Rule 10319(d), will not affect the payment of the honorarium, described in IM-10104. The following changes should be made to the last sentence of the second full paragraph beginning on page 9 and continuing on page 10 of the rule filing, and to the last sentence of the second full paragraph on page 20 of the Exhibit (new language is underlined; deletions are bracketed):

In these cases, arbitrators will have the discretion to waive the fee, provided they receive [adequate proof] verification of such circumstances.¹ (Footnote added.)

¹ A waiver of the fee, pursuant to Rule 10319(d), will not affect the payment of the honorarium, described in IM-10104.

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If you have any questions, I can be reached at (202) 728-8151 or by email at Mignon.McLemore@NASD.com.

Very truly yours,

Mignon McLemore

Counsel

NASD Dispute Resolution, Inc.

Enclosures

REVISED EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34

; File No. SR-NASD-2003-164)

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Adjournment of a Hearing within Three Business Days of the First Scheduled Hearing Session

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 on _____, 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”) 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 NASD IM-10104, Rule 10306, and Rule 10319 of the NASD Code of Arbitration Procedure (“Code”) of the National Association of Securities Dealers, Inc. (“NASD” or “Association”), to impose a fee on parties of \$100 and to compensate arbitrators in the event a hearing is adjourned within three business days before a scheduled hearing session. Below is the text of the proposed rule change. 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.

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[, \$50 for travel to a canceled hearing,] 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.

10306. Settlements

(a) Parties to an arbitration may agree to settle their dispute at any time.

(b) If the parties agree to settle their dispute, they will remain responsible for payment of fees incurred, including fees for previously scheduled hearing sessions and fees incurred as a result of adjournments, pursuant to Rule 10319.

[(b)] (c) The terms of a settlement agreement do not need to be disclosed to the Association. However, [the parties will remain responsible for payment of fees incurred, including fees for previously scheduled hearing sessions. If] if the parties fail to agree on the allocation of outstanding fees, the fees shall be divided equally among all parties.

10319. Adjournments

(a) The arbitrator(s) may, in their discretion, adjourn any hearing(s) either upon their own initiative or upon the request of any party to the arbitration.

(b) If an adjournment requested by a party is granted after arbitrators have been appointed, the party requesting the adjournment shall pay a fee equal to the initial deposit of hearing session fees for the first adjournment and twice the initial deposit of hearing session fees, not to exceed \$1,500, for a second or subsequent adjournment requested by that party. The arbitrators may waive these fees in their discretion. If more than one party requests the adjournment, the arbitrators shall allocate the fees among the requesting parties.

(c) Upon receiving a third request consented to by all parties for an adjournment, the arbitrator(s) may dismiss the arbitration without prejudice to the Claimant filing a new arbitration.

(d) If an adjournment request is made by one or more parties and granted within three business days before a scheduled hearing session, the party or parties making the request shall pay an additional fee of \$100 per arbitrator. If more than one party requests the adjournment, the arbitrators shall allocate the \$100 per arbitrator fee among the requesting parties. The arbitrators may allocate all or portion of the \$100 per arbitrator fee to the non-requesting party or parties, if the arbitrators determine that the non-requesting party or parties caused or contributed to the need for the adjournment. In the event that a request results in the adjournment of consecutively scheduled hearing sessions, the additional fee will be assessed only for the first of the consecutively scheduled hearing sessions. In the event that an extraordinary circumstance prevents a party or parties from making a timely adjournment request, arbitrators may use their discretion to waive the fee, provided verification of such circumstance is received.

* * *

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**

NASD Dispute Resolution proposes to amend NASD IM-10104, Rule 10306, and Rule 10319 of the Code to impose a fee of \$100 per arbitrator on parties and to compensate arbitrators in the event a hearing is adjourned within three business days before a scheduled hearing session.

Background

The NASD Code has several provisions dealing with postponements and cancellations of hearings (both situations are included in the term “adjournments”). Rule 10319(b) requires parties to pay fees for first and subsequent adjournments; Rules 10332(f) and 10205(f) provide for the forfeiture of the initial hearing deposit for matters that are settled or withdrawn within eight business days of the first scheduled hearing session (other than a prehearing conference); and Rules 10332(g) and 10205(g) provide that matters that are settled or withdrawn after the commencement of the first hearing session (which may include a prehearing conference) are subject to assessment of forum fees for hearings held or scheduled within eight business days after NASD receives notice of the settlement or withdrawal.

Over the past 13 years, NASD has taken several steps to address the delays caused by adjournments. In 1990, NASD proposed³ and the SEC approved⁴ an amendment to the Code to increase the adjournment fee and establish a timeframe by which an arbitration case could be settled or withdrawn without parties' forfeiting their hearing session deposit. In one provision, NASD proposed to increase the adjournment fee from \$100 to an amount equal to the initial hearing session deposit, because it found that "adjournments [were] the single most significant cause of delays in resolving disputes and result[ed] in the lengthening of the overall processing time for arbitration cases."⁵ In another provision, NASD proposed that if a case were settled or withdrawn within eight business days of the first scheduled hearing session, NASD would retain the initial hearing session deposit.⁶ NASD expected these changes to "reduce delays by discouraging frivolous requests for adjournments in the arbitration process and to encourage more efficient use of this process by parties to arbitration proceedings."⁷ In 2001, in an effort to ensure that the adjournment fees would operate as a deterrent to repeated adjournment requests, NASD amended Rule 10319(b) to increase the cap for second or subsequent adjournments from \$1,000 to \$1,500.⁸

These Code provisions have not had the expected impact on curbing adjournment requests, particularly those requested at the last minute. NASD has found that parties often seek to adjourn scheduled hearing sessions on short notice for various reasons, which may include

³ See Securities Exchange Act Rel. No. 27900 (April 12, 1990), 55 FR 15048 (April 20, 1990) (File No. 90-3).

⁴ See Securities Exchange Act Rel. No. 28086 (June 1, 1990), 55 FR 23493 (June 8, 1990) (File No. 90-3).

⁵ See Rel. No. 28086 at 23494.

⁶ See Rel. No. 27900 at 15052.

⁷ See Rel. No. 28086 at 23494.

⁸ See Securities Exchange Act Rel. No. 44573 (July 18, 2001), 66 FR 38773 (July 25, 2001) (File No. 2001-21).

scheduling conflicts of parties or their counsel, ongoing settlement discussions, or unrelated matters.

The issue of last minute hearing cancellations was raised as a concern by arbitrators at each of the regional arbitrator focus groups held by NASD Dispute Resolution in 2001 and 2002. Arbitration hearing dates are scheduled often months in advance and arbitrators, once assigned to hear a case, must reserve those dates. Thus, if a party requests that a hearing be adjourned at the last minute, the arbitrators lose not only the time that they spent preparing for the hearing and the honoraria from the adjourned hearing (or series of hearings), but also other income they could have earned on the reserved dates. Therefore, NASD Dispute Resolution believes that the proposed rule change is necessary to provide arbitrators with some compensation in the event that a scheduled hearing is adjourned at the last minute and to encourage parties, when appropriate, to settle their disputes earlier to avoid additional fees.

The Proposed Rule Change and its Application

The proposed rule change would amend Rule 10319 to require that an additional \$100 fee per arbitrator be paid by one or more parties if their request for an adjournment is made and granted within three business days before a scheduled hearing session or before the first of a number of consecutively scheduled hearing sessions.⁹ If one hearing session had been scheduled, the arbitrators would assess this fee for adjourning that hearing session. If a number of consecutively scheduled hearing sessions were scheduled, the fee would be assessed only for adjourning the first hearing in that group of consecutively scheduled hearing sessions, not for all hearing sessions in that group. The Rule will not apply to the adjournment of a prehearing

⁹ Conforming changes are being made to IM-10104 and Rule 10306.

conference. Further, for purposes of determining whether the timing of an adjournment would trigger a fee assessment, holidays recognized by NASD will not be counted as business days.

The following example illustrates how the Rule will work. An arbitrator schedules five consecutive hearing sessions to begin on a Tuesday, following a Monday holiday. If a party's adjournment request is made and granted no later than the preceding Tuesday, the party would not be assessed the \$100 per-arbitrator fee, because the request was made and granted more than three business days before the first scheduled day of the hearing session.¹⁰ If, however, a party's request is made and granted on the preceding Wednesday or later in that week, then the party would be assessed the \$100 per-arbitrator fee for the adjournment of the first day in a group of consecutively scheduled hearing sessions, which, in the example, is the following Tuesday.¹¹ The party would not be assessed a \$100 per-arbitrator fee for the subsequently scheduled hearing sessions that have now been canceled.

Generally, when NASD Dispute Resolution receives a party's adjournment request, a decision on the request is usually made in a short timeframe (i.e., from a few hours to a few days). Staff of NASD Dispute Resolution makes every effort to process adjournment requests expeditiously, but the requesting party should allow for delays over which the staff has no control. If a requesting party asks for an adjournment within the three days before a scheduled hearing session and the arbitrators cannot be reached, the request will not be granted and the hearing will proceed as scheduled, unless extraordinary circumstances exist, as explained below.

The proposed rule change would allow arbitrators to assess the \$100 per-arbitrator fee against the requesting party, after the request is granted. There may be instances, however, in which the arbitrators determine that a non-requesting party has caused or contributed to the need

¹⁰ The party could be subject to other fees and costs as a result of adjourning the hearing, however. See Rules 10319(b) and 10332(f).

¹¹ Id.

for the adjournment. In these instances, the requesting party can ask for a reallocation of the fees to the non-requesting party or a sharing of the fees. The arbitrators can review the circumstances and, in their discretion, allocate all or a portion of the fee to the non-requesting party. In instances where more than one party requests an adjournment, arbitrators must allocate the fees among those parties.¹²

The proposed rule change also will apply to final settlements reached by the parties. If staff is notified of a final settlement within three business days before a scheduled hearing session, and the hearing must be canceled, this will be considered to be an adjournment request that is “made and granted” for purposes of proposed Rule 10319(d), and the allocation of the \$100 per-arbitrator fee will be handled pursuant to Rule 10306.¹³

If an adjournment is requested and granted within three business days before a scheduled hearing session, NASD Dispute Resolution believes that arbitrators should assess the \$100 per-arbitrator fee in all cases, regardless of the reason for the request. For example, this fee should be assessed even if arbitrators determine to waive the fees established under Rule 10319(b). NASD Dispute Resolution believes that by applying this standard, arbitrators will not be inundated with requests to waive the fee. NASD Dispute Resolution recognizes, however, that there are some extraordinary circumstances that could prevent a party from making an adjournment request in time to avoid the additional fee assessment (e.g., a serious accident or a sudden severe illness). In these cases, arbitrators will have the discretion to waive the fee, provided they receive verification of such circumstances.¹⁴

¹² See Rule 10319(b).

¹³ Rule 10306 is being amended to include a specific reference to fees for adjournments under Rule 10319; however, the provisions of the Rule addressing fee allocation remain unchanged.

¹⁴ A waiver of the fee, pursuant to Rule 10319(d), will not affect the payment of the honorarium, described in IM-10104.

The NASD will announce the effective date of the proposed rule change in a Notice to Members to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the Notice to Members announcing Commission approval.

(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 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 will help NASD Dispute Resolution maintain a deep pool of qualified arbitrators by assuring them of some compensation in the event a scheduled hearing is adjourned at the last minute. NASD believes maintaining depth and quality of arbitrators protects investors and the public interest by providing a more efficient forum for investors to address grievances.

(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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. 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 Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by [insert date 21 days from the date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Jonathan G. Katz
Secretary