

Notice to Members

MAY 2003

SUGGESTED ROUTING

Legal & Compliance
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KEY TOPICS

Arbitration
Associated Persons
California Disclosure Standards
Members

SEC Approves Extension to IM-10100 Pilot

Waiver Program for Parties in California Arbitration Proceedings has Been Extended to September 30, 2003; New Waiver Agreement Form **Effective March 31, 2003**

Executive Summary

The Securities and Exchange Commission (SEC or Commission) has approved an extension to a pilot program in IM-10100 of the NASD Code of Arbitration Procedure (Code) governing Failure to Act Under Provisions of Code of Arbitration Procedure.¹ The pilot program provides that members and associated persons involved in NASD arbitration proceedings in the State of California are required to waive application of California Ethics Standards for Neutral Arbitrators in Contractual Arbitration (the "California Standards") to their arbitration proceedings upon the request of investors or, in industry cases, upon the request of associated persons with claims of statutory employment discrimination, for a pilot period ending September 30, 2003 (or until pending litigation has resolved the question of whether or not the California Standards apply to NASD arbitration). The waiver agreement form has been revised as of March 31, 2003.

The pilot program will apply to the appointment of arbitrators from September 30, 2002, to September 30, 2003, to serve in California arbitrations.

The revised waiver agreement is included as Attachment A. The revised waiver agreement is only for use in arbitration cases in which none of the parties previously had signed the prior waiver form.

Questions/Further Information

Questions regarding this *Notice* may be directed to Jean I. Feeney, Vice President and Chief Counsel, NASD Dispute Resolution, at (202) 728-6959, or via e-mail, jean.feeney@nasd.com.

Discussion

Notice to Members 02-68 described the steps that NASD has taken to address concerns raised by the California Standards, which NASD believes to be in conflict with the Code of Arbitration Procedure. On July 1, 2002, NASD temporarily postponed appointing arbitrators in arbitration proceedings scheduled to take place in California. Additional information on the history of this issue, and the measures NASD has taken to provide alternatives for parties, can be found in NASD's rule proposals, SR-NASD-2002-126² and SR-NASD-2003-64,³ and related SEC releases.

Effective September 30, 2002, NASD implemented a pilot amendment to IM-10100, "Failure to Act Under Provisions of Code of Arbitration Procedure," for cases that are affected by the new California Standards. The amendment requires industry parties to waive the California Standards in all cases in which all the parties in the case who are investors (referred to as "customers" in the Code) or associated persons with claims of statutory employment discrimination agree to waive application of the California Standards. Under such a waiver, the case would proceed in California under the existing NASD Code, which already contains extensive disclosure requirements and provisions for challenging arbitrators with potential conflicts of interest.

Since litigation is still pending to resolve the question of whether or not the California Standards apply to NASD arbitration, NASD has extended the pilot until September 30, 2003. The waiver form was revised effective March 31, 2003, but only for use in arbitration cases in which none of the parties had yet signed the prior waiver form. This change will not affect any parties that already have signed the prior NASD waiver agreement, or any cases in which some of the parties have signed the prior NASD waiver agreement. If any party in an ongoing case has signed the prior NASD waiver agreement, then all other parties will use the same agreement.

Effective Date

The extension and the revised waiver form are effective on March 31, 2003.

Endnotes

- 1 Exchange Act Release No. 47631 (April 3, 2003) (File No. SR-NASD-2003-64), 68 Fed. Reg. 17713 (April 10, 2003).
- 2 This rule filing may be found on the NASD Web Site at www.nasdadr.com/app_orders_index.asp#02-126.
- 3 This rule filing may be found on the NASD Web Site at www.nasdadr.com/app_orders_index.asp#03-64.

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Waiver Agreement

The undersigned parties hereby agree that this arbitration shall be governed by the NASD Code of Arbitration Procedure and the Federal Arbitration Act. In particular, the parties agree that the provisions of the NASD Code of Arbitration Procedure, specifically including its arbitrator disclosure requirements, arbitrator selection procedures, and arbitrator disqualification provisions, and not any provisions of the California Ethics Standards for Neutral Arbitrators in Contractual Arbitration in California ("California Standards"), will apply in this arbitration. The California Standards shall have no application whatsoever to any aspect of this arbitration, including without limitation any proceedings to obtain judicial review or judicial enforcement of any arbitration award that may be entered in this arbitration.

The parties accept the disclosures required under the NASD Code of Arbitration Procedure as fully sufficient for purposes of this case, notwithstanding the fact that such disclosures may be less extensive than those required by the California Standards in cases to which those Standards apply. The parties further accept that the NASD Code of Arbitration Procedure's disqualification procedures vest the ultimate authority in the Director of Arbitration to determine whether to disqualify an arbitrator, whereas the California Standards purport to eliminate the Director of Arbitration's discretion in determining whether to disqualify arbitrators. In recognition of these, and other, variances between the NASD Code of Arbitration Procedure and the California Standards, the parties hereby expressly waive any and all rights, obligations, and/or benefits that might be conferred on them by the California Standards in this arbitration, expressly agree that they will not seek to enforce any rights or claim any remedies under or pursuant to the California Standards in any court, proceeding or forum in any matter relating to this arbitration, and expressly and irrevocably release any claim or claims that they may have based on the California Standards in connection with this arbitration or any proceedings relating thereto.

In addition, and without limiting in any way the scope of the waiver and release set forth in the foregoing paragraph, the parties specifically agree not to assert, in any forum, that non-compliance with the California Standards is a basis for challenging the validity of any arbitrator or of any arbitration award, whether asserted during the arbitration proceeding or after an arbitration award has been issued. The parties also specifically agree not to seek any relief against NASD Dispute Resolution or NASD, or any arbitrator, for any failure to comply with the Standards.

The parties understand and acknowledge that this waiver and release applies to and includes all unknown or unsuspected consequences or results arising from or relating to the parties' waiver of any and all rights under the California Standards in connection with this arbitration. The parties represent and warrant that they have read the contents of California Civil Code section 1542, which provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected this settlement with the debtor."

**THE PARTIES EXPRESSLY WAIVE ANY AND ALL RIGHTS AND
BENEFITS UNDER CALIFORNIA CIVIL CODE SECTION 1542.**

NASD Arbitration No. _____

The parties hereby agree that this agreement may be signed in counterparts.

Date:

Date:

Claimant(s):

Respondent(s): (Print here)

Claimant
(print name and sign above)

Counsel for Respondent

Claimant
(print name and sign above)

Counsel for Respondent

Claimant
(print name and sign above)

Counsel for Respondent

Counsel for Claimant
