

# Notice to Members

JANUARY 2003

## SUGGESTED ROUTING

Finance  
Legal and Compliance  
Senior Management

## Member Surcharge in Arbitration

NASD to Refund Arbitration Member Surcharge Under Certain Circumstances

## KEY TOPICS

Arbitration

### Executive Summary

For arbitration claims filed on or after January 13, 2003, NASD will refund the member surcharge paid by each member firm named as a party (or where its present or former associated person has been named as a party) in an arbitration filed by a customer in which the arbitration panel: (1) denies all of the customer's claims; and (2) allocates all of the forum fees against the customer. In cases with more than one customer claimant, NASD will **NOT** refund the surcharge unless the arbitration panel denies all of the customers' claims and allocates all of the forum fees against one or more of the customer claimants.

### Questions/Further Information

Questions regarding this *Notice* may be directed to Laura Gansler, Counsel, NASD Dispute Resolution, at (202) 728-8275, or [laura.gansler@nasd.com](mailto:laura.gansler@nasd.com).

### Discussion

Rule 10332(c) of the NASD Code of Arbitration Procedure requires that arbitrators, in their awards, shall determine the amount chargeable to the parties as forum fees and shall determine who shall pay such forum fees. Often these fees are divided among the parties, but the arbitrators may, in their discretion, allocate all forum fees against the claimant or the respondent.

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Rule 10333(a) of the Code requires that each member that is named as a party in an arbitration, or that employed an associated person who is named as a party at the time of the events that gave rise to the dispute, must pay a surcharge. The surcharge, which is based on the amount asserted by the claimant to be in dispute, is not allocable among the parties. In addition, prior to the rule change described in this *Notice*, the surcharge was non-refundable. Therefore, member firms were required to pay the surcharge, which is typically higher than filing fees or forum fees, even when the arbitrators denied a customer's claim and allocated all forum fees against the customer.

To mitigate the impact of arbitration fees on member firms in such cases, NASD has amended Rule 10333(a) to provide that it will refund the member surcharge paid by each member firm named as a party (or where its present or former associated person has been named as a party) in an arbitration filed by a customer in which the arbitration panel: (1) denies all of the customer's claims; and (2) allocates all of the forum fees against the customer. In cases with more than one customer claimant, NASD will not refund the surcharge unless the arbitration panel denies all of the customers' claims and allocates all of the forum fees against one or more of the customer claimants.

In addition, from time to time, a refund of the member surcharge may be warranted in extraordinary circumstances that do not meet the criteria described above. For example, occasionally a customer mistakenly names a member firm as a respondent, and later withdraws the claim as to that particular member firm. To give NASD more flexibility in addressing such cases, NASD has also

amended Rule 10333(a) to provide that the Director of Dispute Resolution, in his or her discretion, may cancel or refund member surcharges in extraordinary circumstances when he or she determines that retention of the surcharge by NASD would be inappropriate.

This rule change applies only to member surcharges under Rule 10333(a) and does not affect any other fee or surcharge required under the Code. The rule change will apply to all claims filed on or after January 13, 2003.

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## ATTACHMENT A

New language is underlined; deleted language is in brackets.

### Code of Arbitration Procedure

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#### 10333. Member Surcharge and Process Fees

(a) Member Surcharge

(1) Each member that is named as a party to an arbitration proceeding, whether in a Claim, Counterclaim, Cross-Claim or Third-Party Claim, shall be assessed a [non-refundable] surcharge pursuant to the schedule below when the Director of Arbitration perfects service of the claim naming the member on any party to the proceeding.

(2) For each associated person who is named, the surcharge shall be assessed against the member or members that employed the associated person at the time of the events which gave rise to the dispute, claim or controversy. No member shall be assessed more than a single surcharge in any arbitration proceeding.

(3) The surcharge shall not be chargeable to any other party under Rules 10332(c) and 10205(c) of the Code. The Director will refund the surcharge paid by a member in an arbitration filed by a customer if the arbitration panel: (A) denies all of a customer's claims against the member or associated person; and (B) allocates all forum fees assessed pursuant to Rule 10332(c) against the customer. The Director may also refund or cancel the member surcharge in extraordinary circumstances.

(Remainder of rule unchanged.)