

INFORMATIONAL

Single Arbitrator Pilot Program

SEC Approves New
Voluntary Single
Arbitrator Pilot Program
For A Two-Year Period;
**Effective Date:
May 15, 2000**

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- Legal & Compliance
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KEY TOPICS

- Arbitration
- Direct Communication with Single Arbitrator
- Neutral List Selection System
- Reduced Hearing Session Fees
- Single Arbitration Pilot

Executive Summary

On February 15, 2000,¹ the Securities and Exchange Commission approved the proposal of NASD Regulation, Inc. (NASD RegulationSM) to add a new rule to the National Association of Securities Dealers, Inc. (NASD[®]) Code of Arbitration Procedure (Code). The new rule—Rule 10336—will be entitled “Single Arbitrator Pilot Program” and will be effective for a two-year period. The Pilot Program is voluntary and will allow parties with claims of \$50,000.01 to \$200,000 to select a single arbitrator to hear their cases, rather than the panel of three arbitrators they would otherwise select. The Pilot Program will also allow the parties to communicate directly with the single arbitrator under certain conditions. Rule 10336, which will become effective on May 15, 2000, will result in lower arbitration fees to the parties and will enhance the dispute resolution process by affording quicker resolution of arbitration claims by participants.

Included with this *Notice* is Attachment A, the text of the amendments that will become effective on May 15, 2000.

Questions/Further Information

Questions regarding this *Notice* may be directed to Jean I. Feeney, Special Advisor, Office of Dispute Resolution, NASD Regulation, at (202) 728-6959, or via e-mail at: jean.feeney@nasd.com.

Background

In developing a proposal to provide parties in a public customer case with the alternative of a single arbitrator at a reduced cost, NASD Regulation sought feedback from the Public Investors Arbitration Bar

Association, the Securities Industry Association, and the Small Firm Advisory Board of the NASD to determine if investors and the industry would support such a program. After evaluating the feedback provided, NASD Regulation decided to offer, on a trial basis, an optional modification of current Neutral List Selection System (NLSS) procedures. NLSS is a computerized program developed in November 1998 to generate lists of proposed arbitrators (neutrals) for selection by the parties under Rule 10308 of the Code.

Description Of The Single Arbitrator Pilot Program

The Single Arbitrator Pilot Program is designed to allow parties in a public customer case with claims of \$50,000.01 to \$200,000, inclusive of interest, attorneys’ fees, and other costs, to agree to select a single arbitrator to hear their cases, rather than a panel of three arbitrators as would normally be the procedure under the Code. The Pilot Program will exclude any case seeking punitive damages unless all of the parties in such a case request a single arbitrator. All types of claims by all parties, including counterclaims, third-party claims, and cross-claims, will be counted in the \$200,000 claim limitation. Forum fees provided for in Rule 10332(c) of the Code will not be counted in the \$200,000 limitation.

The Pilot Program provides that the parties will participate in the selection of the single arbitrator. After the parties receive notice that a panel of three arbitrators has been selected, the parties will have 15 days to determine whether they want to choose one of the three selected arbitrators to serve as the single arbitrator under the Pilot Program. The 15-day period

corresponds with the 15-day period that parties have to select a chairperson of the panel under Rule 10308(c)(5) of the Code. Thus, if the parties decide not to proceed in the Pilot Program, they can proceed under regular NLSS selection procedures without delay.

The Pilot Program also allows the parties to communicate directly with the arbitrators under certain conditions, a unique feature not found elsewhere in the Code.

Frequently Asked Questions Relating To The Single Arbitrator Pilot Program

To help explain the details of the Single Arbitrator Pilot Program to investors, members, and associated persons, NASD Regulation staff designed the following comprehensive list of questions and answers:

Q. What is the Single Arbitrator Pilot Program (Pilot Program) designed to do?

A. The Pilot Program is designed to allow parties with claims of \$50,000.01 to \$200,000, inclusive of interest, attorneys' fees, and other costs, to agree to select a single arbitrator to hear their cases, rather than a panel of three arbitrators as would normally be the case under the Code. This will result in lower arbitration fees and quicker resolution of arbitration claims. The Pilot Program also allows the parties to communicate directly with the arbitrators under certain conditions, as described below.

Q. Is the Pilot Program mandatory or voluntary?

A. The Pilot Program is voluntary. All parties must agree to the use of the Pilot Program.

Q. What types of claims are eligible for the Pilot Program?

A. Claims arising between a customer and an associated person or a member are eligible for the Pilot Program. The Pilot Program will be limited to cases involving aggregate claims between \$50,000.01 and \$200,000. Cases involving claims of \$50,000 or less normally have only one arbitrator under the Code.

Q. Are there any types of claims not eligible for the Pilot Program?

A. The Pilot Program is not available for the resolution of employment disputes or other intra-industry disputes.

Q. Are claims that include a request for punitive damages eligible for the Pilot Program?

A. No. The Pilot Program will exclude any case seeking punitive damages unless all of the parties in such a case request a single arbitrator. If the parties agree to include requests for punitive damages, the \$200,000 limitation will still apply unless the parties agree to a higher amount.

Q. Will interest, attorneys' fees, and other costs be included within the Pilot Program's \$200,000 claim limitation?

A. Yes.

Q. Will filing fees, hearing session fees, member surcharges, and member process fees be included within the Pilot Program's \$200,000 claim limitation?

A. No.

Q. Will all types of claims by all parties, including any counter-claims, third-party claims, and cross-claims be counted towards the \$200,000 limitation?

A. Yes.

Q. When do the parties decide on whether to use the Pilot Program?

A. The parties will participate in the usual arbitrator selection method provided under the Code, known as the Neutral List Selection System. After the parties receive notice that a panel of three arbitrators has been selected, Rule 10308(c)(5) of the Code provides that they have 15 days in which to select a chairperson. If it appears that the case fits the criteria for the Pilot Program, the parties can determine pursuant to Rule 10336(b)(1) whether they want to choose one of their three selected arbitrators to serve as the single arbitrator in the Pilot Program.

Q. May the parties choose any of the three arbitrators as the single arbitrator?

A. Yes. The parties may choose any of the three arbitrators, including the non-public arbitrator, to serve as the single arbitrator.

Q. How many days do the parties have to agree on a single arbitrator?

A. Rule 10336(b)(2) provides that the parties will have 15 days from the date the Director sends notice of the names of the arbitrators to agree on a single arbitrator. This 15-day period will run concurrently with the time period to select a chairperson under Rule 10308(c)(5).

Q. What if the parties do not agree on a single arbitrator?

A. If the parties do not agree on a single arbitrator, Rule 10336(b)(3) provides that the case will proceed under the usual procedures of Rule 10308. This means the case will be heard by a panel of three arbitrators, with the parties being given a chance to select the chair from among these arbitrators.

Q. May parties communicate orally with the arbitrator outside the presence of other parties?

A. No. The parties may not communicate orally with the arbitrator unless all parties participate.

Q. May the parties communicate directly in writing with the single arbitrator?

A. Yes. The Pilot Program will allow parties to agree to communicate directly with the arbitrator without Office of Dispute Resolution (ODR) staff involvement. Rule 10336(c)(1) provides that parties will be permitted to send written materials, including information (discovery) requests and motions, directly to the selected arbitrator. This is different from the procedures normally used under the Code, and is a special feature of the Pilot Program. Copies of such materials must be sent simultaneously and in the same manner to all parties and to the ODR staff member assigned to the case.

Q. Are the parties required to send proof of service of written materials?

A. Yes. Parties must send to the ODR staff member assigned to the case, the arbitrator and all

parties proof of service of written materials, indicating the time, date, and manner of service upon the arbitrator and all parties.

Q. Do you require a particular format for proof of service?

A. No. Parties may use the same type of Certificate of Service used in state or federal courts or another format that includes the necessary information, including the address to which the materials were sent. As is true under Rule 5(b) of the Federal Rules of Civil Procedure, service by mail is complete upon mailing.

Q. May parties serve the materials on the arbitrator by facsimile (fax) or other electronic means?

A. Yes. If the arbitrator and all parties agree, written materials may be served by fax or other electronic means. Such agreement might be given at the point of entry into the Pilot Program or at any time thereafter by providing an electronic mail (e-mail) address or a fax number. Once such agreement is reached, it will be presumed to continue unless the arbitrator and parties are notified otherwise. If the arbitrator or any party does not have access to an electronic means of communication, then such means may not be used.

Q. May parties initiate conference calls with the arbitrator?

A. Yes. Rule 10336(c)(2) provides that, if the arbitrator agrees, parties may initiate conference calls with the arbitrator, provided that all parties are on the line before the arbitrator joins the call.

Q. May the arbitrator initiate conference calls with the parties?

A. Yes. Rule 10336(c)(3) provides that the arbitrator may initiate conference calls with the parties, provided all parties are on the line before the conference begins.

Q. Will filing fees, member surcharges, and member process fees change under the Pilot Program?

A. No.

Q. Are any fees reduced in the Pilot Program?

- A. Yes. Hearing session fees have been reduced in the Pilot Program to reflect lower arbitrator honoraria (payments) and other cost savings:
- For claims of \$50,000.01 to \$100,000, hearing session fees under the Pilot Program will be \$550 per session or \$1,100 for a two-session day.
 - For claims of \$100,000.01 to \$200,000, hearing session fees under the Pilot Program will be \$750 per session or \$1,500 for a two-session day.

Q. What are the savings?

A. For claims of \$50,000.01 to \$100,000, the Pilot Program fee structure represents a reduction of \$200 per session for the parties as compared with normal case procedures (or a \$400 reduction for a two-session day).

For claims of \$100,000.01 to \$200,000, the new fee structure represents a reduction of \$375 per session for the parties as compared with normal case

procedures (or a \$750 reduction for a two-session day).

Q. What if, after agreeing to the Single Arbitrator Pilot Program, a party learns of information that leads the party to believe there are additional claims or higher claims than originally made, which would raise the total amount in controversy over the \$200,000 maximum for the Pilot Program?

A. Because the Pilot Program is designed to add flexibility to the Code, parties and arbitrators faced with these facts could, for example, agree to continue with a single arbitrator who would be empowered to award more than \$200,000, or determine whether two other arbitrators already ranked in the initial list selection process might still be available, allowing the case to continue without serious interruption as a three-arbitrator case (fees would be adjusted to the normal three-arbitrator schedule).

The single arbitrator has discretion to determine whether to allow a party to file a new or amended pleading, except when a party is responding to a new or amended pleading. See Rule 10328(b). Accordingly, if a party seeks to amend a pleading to raise the total amount in controversy over the \$200,000 maximum, the party must first receive the arbitrator's consent.

Q. What if the parties do not agree to amend the claim and continue with either a single arbitrator or a three-arbitrator panel?

A. A party may move to dismiss the claim without prejudice and, if the arbitrator grants the motion, the claim can then be re-filed as a regular, three-person case.

Parties considering the option to re-file the revised claim as a regular, three-arbitrator case should understand that filing a new case would involve the payment of the initial filing fees and hearing session deposit for the new case. They should also consider any applicable eligibility or statute of limitations defenses the new filing date might raise.

Q. What is the procedure for seeking a dismissal without prejudice?

A. Rule 10305(a) provides that arbitrators may dismiss a proceeding at the request of a party or on the arbitrator's own initiative. Another party to the case may object to the dismissal. The single arbitrator has the discretion to determine whether or not to grant a request for dismissal. Rule 10305(c) provides that arbitrators shall dismiss a proceeding at the joint request of all the parties.

Q. What happens if the request to dismiss without prejudice is denied?

A. If the request to dismiss is denied, then the case will proceed with the single arbitrator, who cannot award more than the \$200,000 jurisdictional limit (unless the parties have agreed otherwise).

Q. What happens if the request to dismiss without prejudice is granted?

A. When a case is dismissed, hearing session deposits will be returned for any hearings that were not held. Filing fees, member surcharges, and process fees are non-refundable. If any hearing sessions were held, the arbitrator will determine the allocation of forum fees.

Q. Where can I get more information on the Pilot Program?

A. Speak with the staff in any ODR office, or visit the Arbitration/Mediation Web pages on the NASD Regulation Web Site at www.nasdr.com.

Endnote

¹Exchange Act Release No. 42226 (February 15, 2000) (File No. SR-NASD-99-54), 65 Federal Register 8753 (February 22, 2000).

ATTACHMENT A

Text Of Amendments

(All rule language is new.)

Rules Of The Association

10000. Code Of Arbitration Procedure

10336. Single Arbitrator Pilot Program

This Rule allows parties with claims of \$50,000.01 to \$200,000 to select a single arbitrator to hear their cases, rather than the panel of three arbitrators they would otherwise select. This Pilot Program is voluntary, and includes provisions that allow the parties to communicate directly with the arbitrators under certain conditions. The Pilot Program should result in lower arbitration fees and quicker resolution of arbitration claims for participants.

(a) Claims Eligible for Single Arbitrator Pilot Program

(1) Claims arising between a customer and an associated person or a member for amounts from \$50,000.01 to \$200,000, including damages, interest, costs, and attorneys' fees, will be eligible to be heard by a single arbitrator pursuant to this Rule ("Pilot Program"), except as provided in paragraph (a)(2) or (b)(3) below.

(2) Claims that include a request for punitive damages will not be eligible for the Pilot Program unless all parties agree.

(b) Arbitrator Selection Procedure

(1) After parties receive notice that a panel of three arbitrators has been selected for their case, as provided in Rule 10308, the parties may agree to have one of the arbitrators serve as the single arbitrator who will hear their case.

(2) The parties shall have 15 days from the date the Director sends notice of the names of the arbitrators to agree on a single arbitrator. This 15-day period will run concurrently with the time period to select a chairperson under Rule 10308(c)(5).

(3) If the parties do not agree to have one of the arbitrators serve as the single arbitrator, then the claim will not be eligible for the Pilot Program and will proceed instead under the usual procedures of Rule 10308.

(c) Communications with Arbitrators

(1) Parties may send written materials, including information requests and motions, directly to the single arbitrator, provided that copies of such materials are sent simultaneously and in the same manner to all parties and to the Director. Parties shall send the Director, arbitrator, and all parties proof of service of such written materials, indicating the time, date, and manner of service upon the arbitrator and all parties. Service by mail is complete upon mailing. If the arbitrator and all parties agree, written materials may be served electronically.

(2) If the arbitrator agrees, parties may initiate conference calls with the arbitrator, provided that all parties are on the line before the arbitrator joins the call. At the discretion of the arbitrator, such conference calls may be tape recorded.

(3) The arbitrator may initiate conference calls with the parties, provided all parties are on the line before the conference begins. At the discretion of the arbitrator, such conference calls may be tape recorded.

(4) Parties may not communicate orally with the arbitrator unless all parties are present.

(d) Fees

(1) Filing fees, member surcharges, and process fees for the Pilot Program will be the same as in Rules 10332 and 10333.

(2) Hearing session deposits for the Pilot Program are as follows:

(A) Hearing session deposits for claims of \$50,000.01 to \$100,000 will be \$550 per session.

(B) Hearing session deposits for claims of \$100,000.01 to \$200,000 will be \$750 per session.

(C) The forum fee for a telephone pre-hearing conference call with the arbitrator will be \$450.

(e) Awards

The single arbitrator may not award the parties more than a total of

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\$200,000, including damages, interest, costs, and attorneys' fees, unless all parties agree that the arbitrator may award a larger amount. In addition, the arbitrator shall allocate forum fees to the parties as provided in Rule 10332(c).

(f) Applicability of Code

Except as provided in this Rule, the remaining provisions of the Code will apply to the Pilot Program.

(g) Temporary Effectiveness

This Rule shall remain in effect until May 15, 2002.

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