

Notice to Members

JULY 2004

SUGGESTED ROUTING

Legal and Compliance

KEY TOPICS

Arbitration
Arbitrators
Dispute Resolution

GUIDANCE

Arbitration Hearing Adjournments

SEC Approves Amendments to IM-10104 and Rules 10306 and 10319 Regarding “Last Minute” Adjournments of Arbitration Hearings; **Effective Date: August 16, 2004**

Executive Summary

The Securities and Exchange Commission (SEC) has approved amendments to IM-10104 and Rules 10306 and 10319 of the NASD Code of Arbitration Procedure (Code) to impose a fee and provide an arbitrators’ honorarium when hearings are postponed, canceled, or settled on short notice.¹

The text of the amendments is set forth in Attachment A. The amendments will be effective on August 16, 2004, and will apply to any adjournment request or notification of final settlement received by NASD on or after August 16, 2004.

Questions/Further Information

Questions regarding this *Notice* may be directed to Mignon McLemore, Counsel, NASD Dispute Resolution, at (202) 728-8151 or mignon.mclemore@nasd.com.

Discussion

NASD has amended IM-10104 and Rules 10306 and 10319 of the Code to charge parties a fee of \$100 per arbitrator and to compensate arbitrators by that amount in the event that a hearing is adjourned within three business days before a scheduled hearing session.

Background

Over the past 13 years, NASD has taken several steps to address the delays caused by adjournments, including both postponements and cancellations of hearings. In 1990, NASD increased the adjournment fee and established a timeframe within which an arbitration case could be settled or withdrawn without parties' forfeiting their hearing session deposit. In 2001, NASD increased the cap for second or subsequent adjournments from \$1,000 to \$1,500 in an attempt to make these adjournment fees operate as a deterrent to repeated adjournment requests. These changes have helped reduce delays in the arbitration process, but they have not had the expected impact on curbing last-minute adjournment requests.

NASD has found that parties often seek to adjourn scheduled hearing sessions at the last minute for various reasons, which may include scheduling conflicts of parties or their counsel, ongoing settlement discussions, or other personal matters unrelated to the arbitration process. Regardless of the reasons for the requests, last-minute adjournments result in inconvenience and lost income to the arbitrators. NASD has, therefore, amended several Code provisions to discourage these types of requests and encourage the parties, when appropriate, to begin settlement discussions as soon as reasonably possible.

Last-Minute Adjournments

Rule 10319 authorizes arbitrators to adjourn hearings under certain circumstances, and establishes fees the parties could incur, depending on the timing of the adjournment request. This rule has been amended to address last-minute adjournment requests and establish an honorarium for arbitrators in the event that such a request is granted. Specifically, Rule 10319 has been amended to add subparagraph (d), which requires that an additional \$100 fee per arbitrator be paid if a request for an adjournment is made and granted within three business days before a scheduled hearing session or before the first in a number of consecutively scheduled hearing sessions.²

The following example illustrates how the rule will work. An arbitrator schedules five consecutive hearing sessions to begin on a Monday. 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.³ 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, or, in the example, Monday.⁴ The party would not be assessed a \$100 per-arbitrator fee for each of the four remaining scheduled hearing sessions that also have been canceled.

In all last-minute adjournment cases, arbitrators will be instructed to assess the \$100 per-arbitrator fee, regardless of the reason for the request. The only exception will be in cases where extraordinary circumstances exist. NASD Dispute Resolution recognizes 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.

Arbitrators' Honorarium

The Interpretative Material concerning Arbitrators' Honorarium (IM-10104) has been amended to reference the \$100 per-arbitrator fee if a hearing session is adjourned pursuant to Rule 10319(d). Generally, arbitrators will 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 caused or contributed to the need 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.

Settlements

Rule 10306 has been amended to clarify that, if parties to an arbitration settle their dispute, they will be responsible for any fees incurred, including fees incurred as a result of a last-minute adjournment. Thus, if the parties notify staff of a final settlement within three business days before a scheduled hearing session, and the hearing session must be canceled, this notification will be treated as an adjournment request that is "made and granted" for purposes of Rule 10319(d), and will result in the assessment of the \$100 per-arbitrator fee.

Effective Date

The amendments described in this *Notice* are effective on August 16, 2004, and will apply to any adjournment request or notification of final settlement received by NASD on or after August 16, 2004.

Endnotes

- 1 Exchange Act Release No. 49716 (May 17, 2004) (File No. SR-NASD-2003-164), 69 *Federal Register* 29342 (May 21, 2004).
- 2 For purposes of this rule, a scheduled hearing session refers to a hearing on the merits, and not to a prehearing conference or a hearing on request for permanent injunctive relief under Rule 10335(b).
- 3 The party could be subject to other fees and costs as a result of adjourning the hearing in this timeframe, however. See Rules 10319(b) and 10332(f).
- 4 *Id.* The analysis would be the same if, in the example, Monday was a holiday (or other day on which NASD was closed) and the hearing sessions were scheduled to begin on the Tuesday after the holiday.

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ATTACHMENT A

New language is underlined; deletions in brackets.

Code of Arbitration Procedure

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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.

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