

Notice to Members

AUGUST 2005

SUGGESTED ROUTING

Legal and Compliance

KEY TOPICS

Discovery-Related Motions

Dispute Resolution

GUIDANCE

Discovery-Related Motions

SEC Approves Amendments to IM-10104 to Provide Payment to Arbitrators for Deciding Discovery-Related Motions; **Effective Date: September 26, 2005**

Executive Summary

The Securities and Exchange Commission (SEC) has approved an amendment to Interpretive Material (IM) 10104 of the NASD Code of Arbitration Procedure (Code) to provide payment to arbitrators for deciding discovery-related motions without a hearing session.¹

The text of the amendment is set forth in Attachment A. The amendment will become effective on **September 26, 2005**, and will apply to any arbitrator order issued on or after September 26, 2005, that decides a discovery-related motion.

Questions/Further Information

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

Background and Discussion

When parties have a dispute over the pre-hearing production of information or documents ("discovery"), an arbitrator may choose to hold a hearing to hear arguments from the parties.² The arbitrator conducts such hearings as pre-hearing telephone conferences, for which the arbitrator receives an honorarium of \$200. Arbitrators currently are not, however, compensated for deciding discovery-related motions without a hearing ("on the papers"). In arbitrator focus groups conducted across the country, one of the consistently raised concerns was the amount of time and effort invested by arbitrators, particularly chairpersons, in reviewing and deciding various discovery motions. NASD considered these concerns and determined that the arbitrators performed a substantial amount of uncompensated work in resolving discovery-related motions.

In light of these findings, NASD has amended IM-10104 of the Code to provide payment to arbitrators for deciding discovery-related motions without a hearing session. NASD believes this amendment will motivate a greater number of arbitrators to accept assignments as chairpersons, thus expanding the pool of qualified arbitrators willing to serve in this role. Moreover, NASD believes the amendment will encourage arbitrators to decide discovery-related motions on the papers without scheduling a pre-hearing conference, thereby expediting the pace of arbitrations.

Under amended IM-10104, an arbitrator will be paid \$200 to decide a discovery-related motion without a hearing session. This is the same amount an arbitrator receives to participate in a pre-hearing conference regarding discovery. For purposes of amended IM-10104, a discovery-related motion and any replies or other correspondence relating to the motion will be considered to be a single motion.³ If more than one arbitrator considers a discovery-related motion, each arbitrator will receive \$200. The panel will allocate the cost of the honoraria as part of the allocation of fees in the eventual arbitration award. The rule will not apply to simplified cases administered under Rules 10203 and 10302.

Effective Date Provisions

The amendment described in this *Notice* will become effective on **September 26, 2005**. The amendment will apply to any arbitrator order issued on or after September 26, 2005, that decides a discovery-related motion.

Endnotes

- 1 Exchange Act Release No. 51931 (June 28, 2005) (File No. SR-NASD-2005-052), 70 Federal Register 38989 (July 6, 2005).
- 2 Rule 10321(d) provides that the Director of Arbitration may appoint a person to preside at a pre-hearing conference to deal with the exchange of information, the exchange or production of documents, identification of witnesses, and other pre-hearing matters. Normally, the single arbitrator or the chair of a three-arbitration panel will be appointed to preside.
- 3 A motion for sanctions for failure to comply with discovery will be considered a "discovery-related" motion.

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ATTACHMENT A

New language is underlined; deletions are in brackets.

Code of Arbitration Procedure

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IM-10104. Arbitrators' Honorarium

(a) 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.

(b) The honorarium shall be \$200 for each hearing session and \$75 per day additional honorarium to the chairperson of the panel. The honorarium for a case not requiring a hearing shall be \$125.

(c) 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.

(d) The Director may authorize a higher or additional honorarium for the use of a foreign hearing location.

(e) Payment for Deciding Discovery-Related Motions Without a Hearing Session

(1) NASD will pay each arbitrator an honorarium of \$200 to decide a discovery-related motion without a hearing session. This paragraph does not apply to cases administered under Rules 10203 and 10302.

(2) For purposes of paragraph (e)(1), a discovery-related motion and any replies or other correspondence relating to the motion shall be considered to be a single motion.

(3) The panel will allocate the cost of the honoraria under paragraph (e)(1) to the parties pursuant to Rules 10205(c) and 10332(c).

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