

Notice to Members

DECEMBER 2005

SUGGESTED ROUTING

Legal and Compliance

INFORMATIONAL

Statutory Employment Discrimination Arbitration Fees

SEC Approves Amendments to Arbitration Fees
Applicable to Certain Statutory Employment
Discrimination Claims; **Effective Date: January 17, 2006**

KEY TOPICS

Arbitration Fees

Executive Summary

On October 24, 2005, the Securities and Exchange Commission (SEC) approved an amendment to the fee schedule for certain statutory employment discrimination claims.¹ Under the new fee schedule, a current or former associated person who brings a statutory employment discrimination claim that is subject to a predispute arbitration agreement will pay no more than a \$200 filing fee at the time that the claim is filed. The member that is a party to such a statutory employment discrimination arbitration proceeding will pay the remainder of the filing fee, if any, as well as all forum fees.

The text of the amendment is set forth in Attachment A.

The amendment will become effective on January 17, 2006, and will apply to all claims filed on or after that date.

Questions/Further Information

Questions regarding this *Notice* may be directed to John D. Nachmann, Counsel, NASD Dispute Resolution, at (202) 728-8273 or john.nachmann@nasd.com.

Background and Discussion

The Rule 10210 Series of the NASD Code of Arbitration Procedure (Code) contains special procedural rules applicable to the arbitration of employment discrimination claims. The Rule 10210 Series, however, does not provide a separate fee schedule for employment discrimination claims. Rather, Rule 10205, which details the schedule of fees for industry and clearing controversies, provides that an associated person shall pay the non-refundable filing fee and hearing session deposit in the amount specified for customer claimants in Rule 10332. Consequently, associated persons who bring statutory employment discrimination claims pay the schedule of fees set forth in Rule 10332, which are based on the dollar value of the claim.

Beginning in the 1990s, state and federal courts considered whether employers could require mandatory arbitration of statutory employment discrimination claims and then require the employee to pay all or part of the arbitrators' fees. Specifically, the courts disagreed as to whether requiring claimants with federal statutory claims to pay arbitral forum fees and expenses would prevent them from effectively vindicating their claims.

In order to ensure that those associated persons who are required by their employers to arbitrate statutory employment discrimination claims do not face financial barriers to effectively vindicating such claims, NASD has revised its arbitration fee schedule. Specifically, a current or former associated person who brings a statutory employment discrimination claim that is subject to a predispute arbitration agreement² will pay no more than a \$200 filing fee (which is non-refundable) at the time that the associated person files such a claim.³ The member that is a party to a statutory employment discrimination arbitration proceeding will pay the remainder of the filing fee, if any, as well as all forum fees. The \$200 fee is meant to be comparable to what an employee would pay to file a similar claim in court.

While the filing and forum fees will not be subject to allocation by the arbitrator(s), the panel will have the ability, as it does currently under the Code, to allocate among the parties the various costs associated with arbitration, including costs for the adjournment of hearings (Rule 10319); the production of documents (Rules 10321 and 10322); the appearance of witnesses (Rule 10322); and the recording of proceedings (Rule 10326). In addition, arbitrators will still have the ability to allocate attorneys' fees, in accordance with applicable law, as currently provided for in Rule 10215.

Endnotes

- 1 Securities Exchange Act Release No. 52658 (October 24, 2005), 70 FR 62362 (October 31, 2005) (File No. SR-NASD-2005-046).
- 2 The new rule applies only to disputes that are subject to a predispute arbitration agreement. As provided in Rule 10201(b), a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute is not required to be arbitrated merely because an associated person signed the Form U4. Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose. The regular fee schedule set forth in Rule 10332 continues to apply to claims that are not subject to a predispute arbitration agreement. Thus, if a member firm does not require its employees to arbitrate employment disputes, but the employee chooses to file a statutory employment discrimination claim in arbitration (and the firm agrees to arbitrate), the employee will be subject to the regular fee schedule.
- 3 As previously mentioned, associated persons who have statutory employment discrimination claims currently pay the filing fees and hearing session deposits provided in Rule 10332 at the time that they file a claim. These charges, which are based on the amount of the claim, range from \$25 to \$600 for filing fees and from \$25 to \$1,200 for hearing session deposits. Under the new fee schedule, the filing fee will continue to be based on the amount of the claim as set forth in Rule 10332, but will be capped at \$200. Thus, for example, an associated person who files a statutory employment discrimination claim requesting damages of \$4,000 will pay a \$50 filing fee, while the filing fee for an associated person with a \$4 million claim will be \$200. Hearing session deposits will no longer be required under the new fee schedule.

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ATTACHMENT A

New text is underlined.

10210. Statutory Employment Discrimination Claims

The Rule 10210 Series shall apply only to disputes that include a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute. The Rule 10210 Series shall supersede any inconsistent Rules contained in this Code.

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10217. Fees

(a) For any claim of statutory employment discrimination submitted to arbitration that is subject to a predispute arbitration agreement, a party who is a current or former associated person shall pay a non-refundable filing fee according to the schedule of fees set forth in Rule 10332, provided that:

(1) In no event shall such a person pay more than \$200 for a filing fee;

(2) A member that is a party to such an arbitration proceeding under this rule shall pay the remainder of all applicable arbitration fees set forth in Rule 10332; and

(3) No party shall be required to remit a hearing session deposit.

(b) The arbitration fees described in paragraph (a)(2) are not subject to allocation in the award. The panel, however, may assess to a party who is a current or former associated person those costs incurred under Rules 10319, 10321, 10322, and 10326.