

September 29, 2004

Katherine A. England  
Assistant Director  
Division of Market Regulation  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549-1001

**Re: File No. SR-NASD-2004-042 – Proposed Foreign Hearing Location Rule,  
Amendment No. 1**

Dear Ms. England:

Pursuant to conversations with Division of Market Regulation staff, NASD is filing this letter as Amendment No. 1 (“Amendment”) to the above-numbered rule filing. NASD is enclosing a 3-1/2" disk containing the amended Exhibit 1 (“Exhibit”) in Microsoft Word 7.0 to facilitate production of the Federal Register release.

First, this Amendment makes several changes to the proposed rule language. Interpretive Material 10104 (“IM-10104”) is updated to reflect new rule language that was approved recently by the Securities and Exchange Commission (“SEC”), after the current proposed rule change was filed.<sup>1</sup> Thus, paragraphs two and three have been modified to incorporate the approved language. Also, IM-10104 is amended to clarify that the higher or additional honorarium applies only to the use of a foreign hearing location.

The following changes should be made to IM-10104 on page 3 of the rule filing and on page 11 of the Exhibit (new language is underlined; deletions are bracketed):

**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.

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<sup>1</sup> See Securities Exchange Act Rel. No. 49716 (May 17, 2004), 69 FR 29342 (May 21, 2004)(File No. SR-NASD-2003-164).

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.

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.

The Director may authorize a higher or additional honorarium [in special circumstances, such as] for the use of a foreign hearing location.

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Second, this Amendment places the proposed rule language that provides parties with the option to use a foreign hearing location in Rule 10315 of the NASD Code of Arbitration Procedure (“Code”). The proposed rule language will be added as subparagraph (b) to Rule 10315. Also, NASD proposes to amend Rule 10315(b)(2) to refer to the arbitrators’ authority to determine which party should bear the costs of an arbitration proceeding. Thus, a reference to Rule 10332 is added to the proposed rule language and inconsistent language is removed.

The following changes should be made to the proposed new rule language, labeled as 103xx, on the top of page 4 of the rule filing and in the middle of page 11 of the Exhibit (new language is underlined; deletions are bracketed):

**10315. [Designation of Time and Place] Determination of Hearing Location**

**(a) Designation of Time and Place of Hearing**

The Director shall determine the time and place of the first meeting of the arbitration panel and the parties, whether the first meeting is a pre-hearing conference or a hearing, and shall give notice of the time and place at least 15 business days prior to the date fixed for the first meeting by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this Rule. The arbitrators shall determine the time and place for all subsequent meetings, whether the meetings are pre-hearing conferences, hearings, or any other type of meetings, and shall give notice as the arbitrators may determine. Attendance at a meeting waives notice thereof.

**(b) [103xx.] Foreign Hearing Location [Surcharge]**

[(a)] (1) If the Director and all parties agree, parties may have their hearing in a foreign hearing location.

[(b)] (2) The parties shall pay an additional surcharge for each day of hearings held in a foreign hearing location. The amount of the surcharge will be determined by the Director and must be agreed to by the parties before the foreign hearing location may be

used. This surcharge shall be specified in the agreement to use a foreign hearing location and shall be apportioned equally among the parties, except as provided in Rule 10332 [unless they agree otherwise].

\* \* \*

Third, the Market Regulation staff suggested that NASD clarify that the foreign neutrals, who will be deciding NASD cases in a foreign hearing location, will be as well qualified as the arbitrators who decide cases for NASD in its United States forums.

Thus, the following changes should be made to the 2<sup>nd</sup> full paragraph under the Statement of Purpose of the rule filing, beginning on page 5, and to the 2<sup>nd</sup> full paragraph under the Statement of Purpose of the Exhibit, beginning on page 12 of the Exhibit (new language is underlined; deletions are bracketed):

The first foreign hearing location for NASD arbitrations will be in London. Dispute Resolution has formed a relationship with the Chartered Institute of Arbitrators (“CIArb”), a well-respected organization capable of assisting Dispute Resolution in providing dispute resolution services for international cases. The CIArb, established in 1915, is based in London and maintains a worldwide roster of neutrals. The CIArb specializes in, among other areas, providing dispute resolution services for banking, finance, business, commercial, and international issues. CIArb’s neutrals are required to complete a rigorous training program and to pass testing and interview requirements before being qualified for appointment to cases. The CIArb’s training requirements exceed any standards currently employed by a United States (“U.S.”) forum. CIArb’s neutrals must meet NASD’s background qualification requirements. NASD, upon approval of its National Arbitration and Mediation Committee, agreed to accept the CIArb training and testing requirements for arbitrators as a substitute for NASD training and testing. In addition, NASD conducted training for CIArb neutrals on NASD arbitration rules and procedures. Therefore, NASD believes that a partnership between CIArb and NASD will provide NASD’s international constituents with access to a local roster of experienced neutrals as well as the convenience and cost efficiency of conducting hearing sessions within a reasonable distance from their place of business or residence.

\* \* \*

Fourth, the Market Regulation staff suggested that NASD clarify that there is an increased cost associated with using a foreign hearing location, and that this surcharge will be used solely to pay the additional honorarium to the foreign neutrals, not any other NASD expenses. NASD is also clarifying that those claimants residing in the United Kingdom or other European countries would be notified of the appropriate foreign hearing location.

Thus, the following changes should be made to the last sentence of the first full paragraph on page 6 of the rule filing and to the last sentence of the first full paragraph on page 13 of the Exhibit (new language is underlined; deletions are bracketed):

Once Dispute Resolution has determined that an arbitration case can be handled using a foreign hearing location, Dispute Resolution would inform claimants residing in the United Kingdom (“U.K.”)[,] or other European countries [other location outside the Americas], about the availability and the additional costs of the appropriate foreign hearing location.

Also, the following changes should be made to the fifth sentence of the second full paragraph beginning on page 6 of the rule filing, and to the fifth sentence of the second full paragraph beginning on page 13 of the Exhibit (new language is underlined; deletions are bracketed):

To cover the additional cost of the foreign neutral fee, NASD will assess the daily Foreign Hearing Location Surcharge for parties agreeing to use the London hearing location. This surcharge will be used solely to pay additional honorarium to the foreign neutrals, and not to cover any other NASD expenses.<sup>2</sup> (Remainder of paragraph unchanged.)

\* \* \*

Last, NASD proposes to amend language in the Conclusion of the rule filing and Exhibit, in an effort to be consistent with other changes made with this Amendment.

Thus, the following changes should be made to the first sentence of the Conclusion on page 7 of the rule filing and page 14 of the Exhibit (new language is underlined; deletions are bracketed):

The proposed rule change will provide those parties residing in [the U.K., Europe, or other countries outside the Americas,] foreign locations with the option of holding their arbitration hearings closer to home, using local arbitrators, and saving the expenses of traveling to the U.S. to resolve their disputes.

If you have any questions, I can be reached at (202) 728-8151 or by email at Mignon.McLemore@NASD.com.

Very truly yours,

Mignon McLemore

Enclosures

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<sup>2</sup> The amount of the surcharge may vary depending on factors such as the daily rates for neutrals in a foreign hearing location and the currency exchange rates.

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. SR-NASD-2004-042)

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Foreign Hearing Locations

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on \_\_\_\_\_, National Association of Securities Dealers, Inc. (“NASD”), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. (“Dispute Resolution”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) and amended on September 29, 2004,<sup>3</sup> the proposed rule change as described in Items I, II, and III below, which Items have been prepared by Dispute Resolution. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE TERMS OF SUBSTANCE OF THE PROPOSED RULE CHANGE

NASD is proposing to adopt a new rule in the NASD Code of Arbitration Procedure (“Code”) regarding foreign hearing locations and to amend IM-10104 to allow payment of additional or increased honoraria to arbitrators who hear cases in foreign locations. Below is the text of the proposed rule change and of the proposed rule. Proposed new language is in italics; proposed deletions are in brackets.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Amendment No. 1 to SR-NASD-2004-042 amends the proposed rule language to, among other things, clarify that the higher honorarium applies only to the use of a foreign hearing location.

**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 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.

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

\* \* \*

**10315. [Designation of Time and Place] Determination of Hearing Location**

(a) Designation of Time and Place of Hearing

The Director shall determine the time and place of the first meeting of the arbitration panel and the parties, whether the first meeting is a pre-hearing conference or a hearing, and shall give notice of the time and place at least 15 business days prior to the date fixed for the first meeting by personal service, registered or certified mail to each of the parties unless the parties shall, by their mutual consent, waive the notice provisions under this Rule. The arbitrators shall determine the time and place for all subsequent meetings, whether the meetings are pre-hearing conferences, hearings, or any other type of meetings, and shall give notice as the arbitrators may determine. Attendance at a meeting waives notice thereof.

(b) Foreign Hearing Location

(1) If the Director and all parties agree, parties may have their hearing in a foreign hearing location.

(2) The parties shall pay an additional surcharge for each day of hearings held in a foreign hearing location. The amount of the surcharge will be determined by the Director and must be agreed to by the parties before the foreign hearing location may be used. This surcharge shall be specified in the agreement to use a foreign hearing location and shall be apportioned equally among the parties, except as provided in Rule 10332.

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II SELF-REGULATORY ORGANIZATION'S STATEMENT OF THE PURPOSE OF, AND STATUTORY BASIS FOR, THE PROPOSED RULE CHANGE

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) **Purpose**

Background

Dispute Resolution maintains a roster of qualified neutrals (i.e., arbitrators and mediators) in 51 cities in the United States and Puerto Rico. In accordance with the Code, the Director of Arbitration sets the hearing location for NASD arbitration cases. For cases involving public customers, the Director generally designates the hearing location that is closest to the public customer's residence at the time of the events in dispute. However, for claimants who reside

outside of the United States, NASD sets the hearing in the NASD hearing location that is most logical for the case. Generally, consideration is given to a number of factors, including the preferences of the parties, the location of counsel or witnesses, and the availability of transportation routes to cities in the United States.

The first foreign hearing location for NASD arbitrations will be in London. Dispute Resolution has formed a relationship with the Chartered Institute of Arbitrators (“CIArb”), a well-respected organization capable of assisting Dispute Resolution in providing dispute resolution services for international cases. The CIArb, established in 1915, is based in London and maintains a worldwide roster of neutrals. The CIArb specializes in, among other areas, providing dispute resolution services for banking, finance, business, commercial, and international issues. CIArb’s neutrals are required to complete a rigorous training program and to pass testing and interview requirements before being qualified for appointment to cases. The CIArb’s training requirements exceed any standards currently employed by a United States (“U.S.”) forum. CIArb’s neutrals must meet NASD’s background qualification requirements. NASD, upon approval of its National Arbitration and Mediation Committee, agreed to accept the CIArb training and testing requirements for arbitrators as a substitute for NASD training and testing. In addition, NASD conducted training for CIArb neutrals on NASD arbitration rules and procedures. Therefore, NASD believes that a partnership between CIArb and NASD will provide NASD’s international constituents with access to a local roster of experienced neutrals as well as the convenience and cost efficiency of conducting hearing sessions within a reasonable distance from their place of business or residence.

## **Procedures for Foreign Hearing Location Cases**

The foreign hearing location process will be voluntary. Parties seeking arbitration would still file with NASD the claim information, submission agreements, and other related documents currently required by NASD rules. Once Dispute Resolution has determined that an arbitration case can be handled using a foreign hearing location, Dispute Resolution would inform claimants residing in the United Kingdom (“U.K.”) or other European countries, about the availability and the additional costs of the appropriate foreign hearing location.

If the claimant wishes to use a foreign hearing location, Dispute Resolution will seek the agreement of the respondents. As a condition of using a foreign hearing location, the parties must agree to accept the special Foreign Hearing Location Surcharge to cover the additional daily cost for the neutrals’ service in that location. CIArb neutrals have agreed to serve in NASD cases at daily rates that are lower than their normal charges. However, those reduced rates are still significantly higher than the arbitrator honorarium rates paid by NASD. To cover the additional cost of the foreign neutral fee, NASD will assess the daily Foreign Hearing Location Surcharge for parties agreeing to use the London hearing location. This surcharge will be used solely to pay additional honorarium to the foreign neutrals, and not to cover any other NASD expenses.<sup>4</sup> Further, NASD anticipates establishing similar arrangements in other foreign locations, and believes this proposed rule change would provide the flexibility to expand its dispute resolution services to those locations in the future.

The NASD Dispute Resolution Business Development staff, with the cooperation of CIArb’s administrative staff, will administer all cases designated by mutual consent for hearing in a foreign location. NASD will add information about CIArb neutrals to the Neutral List Selection System so that the background disclosures provided to parties and the arbitrator

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<sup>4</sup> The amount of the surcharge may vary depending on factors such as the daily rates for neutrals in a foreign hearing location and the currency exchange rates.

selection process will be the same as in other hearing locations. The Code, with the addition of the Foreign Hearing Location Surcharge, will govern all case administration.

## **Conclusion**

The proposed rule change will provide those parties residing in foreign locations with the option of holding their arbitration hearings closer to home, using local arbitrators, and saving the expenses of traveling to the U.S. to resolve their disputes. NASD believes that the expenses saved by the parties will offset the Foreign Hearing Location Surcharge. The voluntary aspect of the proposed rule change, however, will allow these parties to decide in each matter whether a foreign hearing location or U.S. hearing location is preferable.

### **(b) Statutory Basis**

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that the Association's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes that the proposed rule change will expand access to its arbitration forum internationally and ultimately, will result in more transparency in the global securities markets.

### **(B) Self-Regulatory Organization's Statement on Burden on Competition**

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

### **(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others**

Written comments were neither solicited nor received.

## **III. DATE OF EFFECTIVENESS OF THE PROPOSED RULE CHANGE AND TIMING FOR COMMISSION ACTION**

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- A. by order approve such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. SOLICITATION OF COMMENTS

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to the file number in the caption above and should be submitted by [insert date 21 days from the date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority,  
17 CFR 200.30-3(a)(12).

Jonathan G. Katz  
Secretary