

Proposed Rule Change by National Association of Securities Dealers
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial <input checked="" type="checkbox"/>	Amendment <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) <input checked="" type="checkbox"/>	Section 19(b)(3)(A) <input type="checkbox"/>	Section 19(b)(3)(B) <input type="checkbox"/>
			Rule		
			<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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Description
Provide a brief description of the proposed rule change (limit 250 characters).

Proposed rule change to amend the arbitration fees applicable to certain statutory employment discrimination claims.

Contact Information
Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name	<input type="text" value="John"/>	Last Name	<input type="text" value="Nachmann"/>
Title	<input type="text" value="Counsel"/>		
E-mail	<input type="text" value="john.nachmann@nasd.com"/>		
Telephone	<input type="text" value="(202) 728-8273"/>	Fax	<input type="text" value="(301) 527-4754"/>

Signature
Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date	<input type="text" value="04/08/2005"/>
By	<input type="text" value="Jean I. Feeney"/>
	(Name)
	<input type="text" value="Vice President and Chief Counsel
NASD Dispute Resolution"/>
	(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information

Add Remove View

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”), the National Association of Securities Dealers, Inc. (“NASD” or “Association”), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. (“NASD Dispute Resolution”), is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to amend the arbitration fees applicable to certain statutory employment discrimination claims.

Below is the text of the proposed rule change.¹ Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

10217. Fees

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 of no more than \$200 at the time that party asserts a claim. 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. These fees 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.

* * * * *

¹ The rule change proposed in this filing will be renumbered as appropriate following Commission approval of the pending revisions to the NASD Code of Arbitration Procedure for Customer Disputes filed on October 15, 2003, and amended on January 3, 2005, and January 19, 2005 (SR-NASD-2003-158); and the NASD Code of Arbitration Procedure for Industry Disputes filed on January 16, 2004, and amended on February 26, 2004, and January 3, 2005 (SR-NASD-2004-011).

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

(a) The proposed rule change was approved by the Board of Directors of NASD Dispute Resolution at its meeting on January 26, 2005, which authorized the filing of the rule change with the SEC. Counsel for The Nasdaq Stock Market and NASD Regulatory Policy and Oversight have been provided an opportunity to consult with respect to the proposed rule change, pursuant to the Plan of Allocation and Delegation of Functions by the NASD to its Subsidiaries. The NASD Board of Governors had an opportunity to review the proposed rule change at its meeting on January 27, 2005. No other action by the NASD is necessary for the filing of the proposed rule change. Section 1(a)(ii) of Article VII of the NASD By-Laws permits the NASD Board of Governors to adopt amendments to NASD Rules without recourse to the membership for approval.

NASD will announce the effective date of the proposed rule change in a Notice to Members to be published no later than 60 days following Commission approval. The effective date will be no later than 30 days following publication of the Notice to Members announcing Commission approval. Once approved, the new rule will apply to claims filed on or after the effective date.

(b) Questions regarding this rule filing may be directed to John D. Nachmann, Counsel, NASD Dispute Resolution, at (202) 728-8273.

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

The purpose of the proposed rule change is to amend the arbitration fees

applicable to certain statutory employment discrimination claims.

The Rule 10210 Series contains special rules applicable to the arbitration of employment discrimination claims. The rules, which set forth the procedures that relate specifically to statutory employment discrimination claims, supplement and, in some instances, supersede the provisions of the Code of Arbitration Procedure (Code) that apply to the arbitration of employment disputes. The Rule 10210 Series, however, does not provide a separate fee schedule for statutory employment discrimination claims. Rather, Rule 10205, the Schedule of Fees for Industry and Clearing Controversies, provides in paragraph (a) that, “A party who is an associated person shall pay a non-refundable filing fee and shall pay a hearing session deposit in the amounts 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.

During the 1990s, federal appeals courts were split on 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.² Specifically, the courts disagreed as to whether requiring claimants in statutory employment discrimination claims to pay arbitral forum fees and expenses would prevent them from effectively vindicating their claims. Certain courts, such as the United States Court of Appeals for the District of Columbia Circuit, found that an employee could not be required to agree to

² Previously, the United States Supreme Court had determined that mandatory arbitration of employment discrimination claims was permissible so long as the prospective litigant could effectively vindicate his or her statutory cause of action in the arbitral forum, thereby allowing the statute to continue to serve both its remedial and deterrent function. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985)).

arbitrate statutory claims if the agreement required the employee to pay all or even part of the arbitrator's fees and expenses.³ The court noted that "it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court."⁴ On the other hand, the United States Court of Appeals for the Fifth Circuit found that although the allocation of arbitration costs may not be used to prevent effective vindication of federal statutory claims, this does not mean that the assessment of any arbitral forum fees against an employee bringing such claims is prohibited.⁵

The United States Supreme Court considered the issue of arbitration fees in connection with the mandatory arbitration of statutory employment discrimination claims in 2000.⁶ The Supreme Court found that the existence of large arbitration costs could preclude a person from effectively vindicating his or her federal statutory rights in arbitration. Therefore, the Supreme Court established a case-by-case approach whereby a person can invalidate an arbitration agreement by showing that the arbitration would be prohibitively expensive. Since the respondent never presented any evidence regarding her likely arbitration costs, the Supreme Court did not specify how "detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward

³ Cole v. Burns International Security Services, et al., 105 F.3d 1465 (D.C. Cir 1997).

⁴ Id. at 1484.

⁵ Williams v. Cigna Financial Advisors Inc., 197 F.3d 752 (5th Cir. 1999) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)).

⁶ Green Tree Finance Corp. of Alabama v. Randolph, 531 U.S. 79 (2000).

with contrary evidence.”⁷

In order to ensure that associated persons who have statutory employment discrimination claims are able to effectively vindicate such claims, NASD is proposing to revise the arbitration fees applicable to certain statutory employment discrimination claims. Specifically, 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 associated person asserts such a claim.⁸ 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 hearing session fees. While the filing and hearing session fees will not be subject to allocation by the arbitrator(s), the panel will have the ability to allocate various costs associated with arbitration, including 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 as currently provided for in Rule 10215.

NASD believes that the proposed rule will allow those associated persons who agree to arbitrate statutory employment discrimination claims as a condition of employment to pursue their rights in arbitration, because their filing fee will be limited to

⁷ Id. at 92.

⁸ The new rule will apply only to disputes that are subject to a predispute arbitration agreement. The regular fee schedule set forth in Rule 10332 will apply to claims that are not subject to such an agreement. Thus, if a member does not require its employees to arbitrate employment disputes, but the employee chooses to file a statutory employment discrimination claim in arbitration, the employee will be subject to the regular fee schedule. See Rule 10201(b) (statutory employment discrimination claims that are not subject to a predispute arbitration agreement may be arbitrated only if all the parties agree to do so).

\$200, which is comparable to the cost of filing a civil claim in state or federal court.⁹ At the same time, the proposed rule will not result in any additional delays or uncertainty in the arbitral process as it provides for a flat fee rather than a case-by-case analysis of such things as the claimant's ability to pay for arbitration and the cost differential between arbitration fees and court filing fees.

(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 NASD'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 will ensure that filing and hearing session fees do not prevent associated persons from vindicating their statutory employment discrimination claims in arbitration.

4. 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.

5. 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.

6. Extension of Time Period for Commission Action

NASD does not consent at this time to an extension of the time period for

⁹ In October 2004, NASD surveyed the state and federal court filing fees for civil cases in the five states where it believes the largest number of NASD arbitrations are filed (California, Florida, Illinois, New York, and Texas). NASD found that, in these jurisdictions, the state court filing fees ranged from \$160 to \$305 and the federal court filing fee was \$150.

Commission action specified in Section 19(b)(2) of the Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

1. Completed notice of proposed rule change for publication in the Federal Register.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- ; File No. SR-NASD-2005-046)

SELF-REGULATORY ORGANIZATIONS

Proposed Rule Change by National Association of Securities Dealers, Inc. to Amend the Arbitration Fees Applicable to Certain Statutory Employment Discrimination Claims

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on , the National Association of Securities Dealers, Inc. (“NASD”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. 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 amend the NASD Code of Arbitration Procedure (“Code”) to amend the arbitration fees applicable to certain statutory employment discrimination claims.

Below is the text of the proposed rule change.³ Proposed new language is underlined; proposed deletions are in brackets.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The rule change proposed in this filing will be renumbered as appropriate following Commission approval of the pending revisions to the NASD Code of Arbitration Procedure for Customer Disputes filed on October 15, 2003, and amended on January 3, 2005, and January 19, 2005 (SR-NASD-2003-158); and the NASD Code of Arbitration Procedure for Industry Disputes filed on January 16, 2004, and amended on February 26, 2004, and January 3, 2005 (SR-NASD-2004-011).

* * * * *

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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

1. Purpose

The purpose of the proposed rule change is to amend the arbitration fees applicable to certain statutory employment discrimination claims.

The Rule 10210 Series contains special rules applicable to the arbitration of employment discrimination claims. The rules, which set forth the procedures that relate specifically to statutory employment discrimination claims, supplement and, in some instances, supersede the provisions of the Code of Arbitration Procedure (Code) that apply to the arbitration of employment disputes. The Rule 10210 Series, however, does not provide a separate fee schedule for statutory employment discrimination claims. Rather, Rule 10205, the Schedule of Fees for Industry and Clearing Controversies, provides in paragraph (a) that, “A party who is an associated person shall pay a non-refundable filing fee and shall pay a hearing session deposit in the amounts 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.

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expenses.⁵ The court noted that “it would undermine Congress’s intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.”⁶ On the other hand, the United States Court of Appeals for the Fifth Circuit found that although the allocation of arbitration costs may not be used to prevent effective vindication of federal statutory claims, this does not mean that the assessment of any arbitral forum fees against an employee bringing such claims is prohibited.⁷

The United States Supreme Court considered the issue of arbitration fees in connection with the mandatory arbitration of statutory employment discrimination claims in 2000.⁸ The Supreme Court found that the existence of large arbitration costs could preclude a person from effectively vindicating his or her federal statutory rights in arbitration. Therefore, the Supreme Court established a case-by-case approach whereby a person can invalidate an arbitration agreement by showing that the arbitration would be prohibitively expensive. Since the respondent never presented any evidence regarding her likely arbitration costs, the Supreme Court did not specify how “detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence.”⁹

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⁸ Green Tree Finance Corp. of Alabama v. Randolph, 531 U.S. 79 (2000).

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In order to ensure that associated persons who have statutory employment discrimination claims are able to effectively vindicate such claims, NASD is proposing to revise the arbitration fees applicable to certain statutory employment discrimination claims. Specifically, 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 associated person asserts such a claim.¹⁰ 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 hearing session fees. While the filing and hearing session fees will not be subject to allocation by the arbitrator(s), the panel will have the ability to allocate various costs associated with arbitration, including 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 as currently provided for in Rule 10215.

NASD believes that the proposed rule will allow those associated persons who agree to arbitrate statutory employment discrimination claims as a condition of employment to pursue their rights in arbitration, because their filing fee will be limited to \$200, which is comparable to the cost of filing a civil claim in state or federal court.¹¹ At the same time, the

¹⁰ The new rule will apply only to disputes that are subject to a predispute arbitration agreement. The regular fee schedule set forth in Rule 10332 will apply to claims that are not subject to such an agreement. Thus, if a member does not require its employees to arbitrate employment disputes, but the employee chooses to file a statutory employment discrimination claim in arbitration, the employee will be subject to the regular fee schedule. See Rule 10201(b) (statutory employment discrimination claims that are not subject to a predispute arbitration agreement may be arbitrated only if all the parties agree to do so).

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proposed rule will not result in any additional delays or uncertainty in the arbitral process as it provides for a flat fee rather than a case-by-case analysis of such things as the claimant's ability to pay for arbitration and the cost differential between arbitration fees and court filing fees.

2. 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 NASD'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 will ensure that filing and hearing session fees do not prevent associated persons from vindicating their statutory employment discrimination claims in arbitration.

(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, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASD-2005-046 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2005-046. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). 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 at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to the File Number SR-NASD-2005-046 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland
Deputy Secretary

Action as set forth or recommended herein
APPROVED pursuant to authority delegated by
the Commission under Public Law 87-592.

For the Division of Market Regulation

by: _____

(DATE)

¹² 17 CFR 200.30-3(a)(12).