

INFORMATIONAL

Member Surcharges And Process Fees In Arbitrations

SEC Approves Increases To Member Surcharges And Process Fees In NASD Arbitration Proceedings, And Other Amendments To Fee-Related Provisions Of The NASD Code of Arbitration Procedure

SUGGESTED ROUTING

The Suggested Routing function is meant to aid the reader of this document. Each NASD member firm should consider the appropriate distribution in the context of its own organizational structure.

- Executive Representatives
- Legal & Compliance
- Senior Management

KEY TOPICS

- Arbitration Fees
- Code of Arbitration Procedure

Executive Summary

The Securities and Exchange Commission (SEC or Commission) has approved increases to the member surcharges and process fees paid by member firms in National Association of Securities Dealers, Inc. (NASD®) arbitration proceedings. For claims filed on or after November 19, 2001, member surcharges and hearing process fees will increase by an aggregate of 10 percent. In addition, the incremental prehearing process fee payments currently paid by member firms will be combined into a single payment of \$750, an overall increase of \$150, which will be payable at the time arbitrator lists are sent to the parties pursuant to Rule 10308(c)(5) of the NASD Code of Arbitration Procedure (Code).¹ These increases will be used to fund NASD Dispute Resolution's share of the cost of developing and implementing a new computer system, which will greatly enhance the administration of cases in the forum, and to cover inflationary cost increases.

In addition, the SEC has approved several other amendments to provisions of the Code relating to the assessment and payment of fees in NASD arbitration proceedings that will also go into effect on November 19, 2001.²

Specifically:

- Rule 10306 of the Code has been amended to provide that any forum fees unpaid at the time of settlement will be divided equally among the parties when settling parties fail to allocate the fees in their settlement agreements;
- Rule 10319 of the Code has been amended to provide that payment of the adjournment fee is required only if an

adjournment is granted, rather than when a request for adjournment is made, and to raise the current cap on adjournment fees from \$1,000 to \$1,500; and

- Rule 10328 of the Code has been amended to clarify that when a claim is amended to increase the amount in dispute, NASD Dispute Resolution will recalculate filing fees, hearing session deposits, process fees, and surcharges based on the new, increased claim.

The text of the amendments described in this *Notice* is included as Attachment A.

Questions/Further Information

Questions regarding this *Notice* may be directed to Laura Leedy Gansler, Counsel, NASD Dispute Resolution, Inc., at (202) 728-8275.

Discussion

Increases In Member Surcharge And Prehearing And Hearing Process Fees

Member Surcharge Increase

Rule 10333 of the Code requires that each member that is a party to an arbitration proceeding, or that employed an associated person who is a party to an arbitration proceeding at the time of the events that gave rise to the dispute, pay a non-refundable member surcharge. The amount of the surcharge varies depending on the amount in dispute. For all claims filed on or after November 19, 2001, member surcharges, which were last raised in 1997, will increase by an aggregate of 10 percent. Actual increases in each case will vary depending on the

amount in dispute. The highest per-case increase will be \$350.

Prehearing Process Fees

Rule 10333 also provides that, in cases in which the amount in controversy exceeds \$25,000, each member that is a party, or that employed an associated person named as a party at the time of the events that gave rise to the arbitration proceeding, must pay a prehearing process fee. Until now, the prehearing process fee was divided into three segments, which accrued as follows: \$50 at the time of the service of claim; \$150 when the first answer to the claim was received or due, and discovery and motions proceedings begin; and \$400 when the parties were first notified of the names of any of the arbitrators selected to hear the matter, or given the names of arbitrators to select.

For all claims filed on or after November 19, 2001, these three prehearing process fee payments will be combined into a single payment of \$750, due at the time the parties receive the arbitrator lists.

Hearing Process Fee Increase

Rule 10333 also requires that each member that is a party to an arbitration proceeding, or that employed an associated person who is a party to an arbitration proceeding at the time of the events that gave rise to the dispute, pay a hearing process fee, which accrues when the parties are notified of the date and location of the first hearing session. The amount of the hearing process fee varies depending on the amount of damages requested. For all claims filed on or after November 19, 2001, hearing process fees will go up an aggregate of 10 percent.

Actual increases in each case will range from zero to 14 percent, depending on the amount in dispute. The highest per-case increase will be \$500.

Other Changes To Rule 10333

Rule 10333 also has been reorganized to make it simpler to use, and to conform the rest of the rule to the consolidation of the prehearing process fee payments. The rule has been broken into two sections: Member Surcharges, and Prehearing and Hearing Process Fees. In addition, language in Rule 10333(d) relating to the disposition of accrued but unpaid member fees has been deleted. This language is no longer necessary in light of the amendment to Rule 10306 of the Code described in this *Notice*, which clarifies that, in the event of a settlement, parties remain responsible for all fees incurred under the Code.

Other Amendments To The Fee Provisions

Settlement Default For The Allocation Of Forum Fees

Rule 10306 of the Code provides that parties to arbitrations may settle their dispute at any time. The terms of any settlement agreement need not be disclosed to NASD Dispute Resolution. However, settling parties remain responsible for payment of outstanding fees incurred under the Code. NASD Dispute Resolution encourages parties to agree on how any outstanding fees shall be divided among the parties as part of the settlement agreement. Unfortunately, this often does not happen. When the parties fail to allocate fees in settlements, the staff must present this issue to the arbitrator(s) for resolution. This is a time-consuming process that is an unnecessary burden to the

arbitrator(s), and can result in surprises to the parties. To eliminate any ambiguity in this area, Rule 10306 has been amended to provide that if settling parties fail to agree on the allocation of outstanding fees, the fees will be divided equally among all parties by default. This rule change will apply to all settlements entered into on or after November 19, 2001.

Adjournment Fees

Rule 10319 of the Code previously required parties requesting adjournment of an arbitration hearing to deposit a fee at the time the adjournment is requested. If the adjournment was not granted, the deposit was returned; if it was granted, the arbitrators could return the deposit in their discretion. Rule 10319 has been amended to minimize the burden this rule placed on parties, arbitrators, and staff by providing that payment of the adjournment fee is required only if an adjournment is granted, rather than when a request for adjournment is made. This will eliminate the need for parties to deposit funds that may be returned to them, as well as the need for the staff to track the deposits and issue refunds if necessary. It will also help to expedite the resolution of adjournment requests. The rule also has been amended to increase the current \$1,000 cap on adjournment fees to \$1,500. This rule change will apply to all adjournment requests made on or after November 19, 2001.

Recalculating Fees When Amount In Dispute Is Amended

Rule 10328 of the Code, governing amendments to pleadings, has been amended to clarify that when a claim is amended to increase the amount in dispute, NASD Dispute Resolution will recalculate filing

fees, hearing session deposits, process fees, and surcharges based on the new, increased claim. This will eliminate confusion regarding the effect on such fees when the amount of dispute is increased. This rule change will apply to all amended pleadings filed on or after November 19, 2001.

Effective Date

The amendments to Rule 10333 will apply to all claims filed on or after November 19, 2001. The amendments to Rule 10306 will apply to all settlements entered into on or after November 19, 2001. The amendments to Rule 10319 will apply to all adjournment requests made on or after November 19, 2001. The amendments to Rule 10328 will apply to all amended pleadings filed on or after November 19, 2001.

Endnotes

- 1 Exchange Act Release No. 44897 (October 2, 2001) (File No. SR-NASD-2001-62), 66 *Federal Register* 51711 (October 10, 2001).
- 2 Exchange Act Release No. 44573 (July 18, 2001) (File No. SR-NASD-2001-21), 66 *Federal Register* 38773 (July 25, 2001).

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ATTACHMENT A

New language is underlined; deletions are in brackets.

10000. Code of Arbitration Procedure

* * *

10306. Settlements

[All settlements upon any matter shall be at the election of the parties.]

(a) Parties to an arbitration may agree to settle their dispute at any time.

(b) The terms of a settlement agreement do not need to be disclosed to NASD Dispute Resolution. However, the parties will remain responsible for payment of fees incurred under the Code. 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) [Unless waived by the Director of Arbitration upon a showing of financial need,] If an adjournment requested by a party is granted after arbitrators have been appointed, the [a] party requesting the adjournment [after arbitrators have been appointed shall deposit with the request for an adjournment,] must 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 [\$1,000] for a second or subsequent adjournment requested by that party. [If the adjournment is granted, the arbitrator(s) may direct the return of the adjournment fee.] The arbitrators may waive these fees in their discretion. If more than one party requests the adjournment, the fees shall be allocated among the requesting parties by the arbitrators.

(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.

* * *

10328. Amendments

(a) After the filing of any pleadings, if a party desires to file a new or different pleading, such change must be made in writing and filed with the Director of Arbitration with sufficient additional copies for each arbitrator. The party filing a new or different pleading shall serve on all other parties, a copy of the new or different pleading in accordance with the provisions set forth in Rule 10314(b). The other parties may, within ten (10) business days from the receipt of service, file a response with all other parties and the Director of Arbitration in accordance with Rule 10314(b).

NASD Notice to Members 01-70

(b) If a new or amended pleading increases the amount in dispute, all filing fees, hearing session deposits, surcharges, and process fees required under Rules 10332 and 10333 will be recalculated based on the amended amount in dispute.

(c) After a panel has been appointed, no new or different pleading may be filed except for a responsive pleading as provided for in (a) above or with the panel's consent.

* * *

10333. Member Surcharge and Process Fees

(a) Member Surcharge

(1) Each member that is named as a party to an arbitration proceeding, whether in a Claim, Counterclaim, Cross-Claim or Third-Party Claim, shall be assessed a non-refundable surcharge pursuant to the schedule below when the Director of Arbitration perfects service of the claim naming the member on any party to the proceeding.

(2) For each associated person who is named, the surcharge shall be assessed against the member or members that employed the associated person at the time of the events which gave rise to the dispute, claim or controversy. No member shall be assessed more than a single surcharge in any arbitration proceeding.

(3) The surcharge shall not be chargeable to any other party under Rules 10332(c) and 10205(c) of the Code.

Member Surcharge Schedule

Amount in Dispute	Surcharge
\$.01 - \$2,500	\$150
\$2,500.01 - \$5,000	\$200
\$5,000.01 - \$10,000	[\$300] <u>\$325</u>
\$10,000.01 - \$25,000	[\$400] <u>\$425</u>
\$25,000.01 - \$30,000	\$600
\$30,000.01 - \$50,000	[\$800] <u>\$875</u>
\$50,000.01 - \$100,000	[\$1,000] <u>\$1,100</u>
\$100,000.01 - \$500,000	[\$1,500] <u>\$1,700</u>
\$500,000.01 - \$1,000,000	[\$2,000] <u>\$2,250</u>
\$1,000,000.01 - \$5,000,000	[\$2,500] <u>\$2,800</u>
\$5,000,000.01 - \$10,000,000	[\$3,000] <u>\$3,350</u>
Over 10,000,000	[\$3,600] <u>\$3,750</u>

NASD Notice to Members 01-70

([b]4) Unchanged.

([c]5) If the dispute, claim, or controversy does not involve, disclose, or specify a money claim, the non-refundable surcharge shall be [~~\$1,200~~] \$1,500 or such greater or lesser amount as the Director of Arbitration or the panel of arbitrators may require, but shall not exceed the maximum amount specified in the schedule.

([d]b) Prehearing and Hearing Process Fees

(1) Each member that is a party to an arbitration proceeding in which more than \$25,000 is in dispute will pay:

(A) [a non-refundable process fee as set forth in the schedule below for each stage of the proceeding] a non-refundable prehearing process fee of \$750, due at the time the parties are sent arbitrator lists in accordance with Rule 10308(b)(5); and

(B) a non-refundable hearing process fee, due when the parties are notified of the date and location of the first hearing session, as set forth in the schedule below.

(2) [The prehearing and hearing process fees shall not be chargeable to any other party under Rules 10332(c) and 10205(c) of the Code.] If an associated person of a member is a party, the member that employed the associated person at the time of the events which gave rise to the dispute, claim or controversy will be charged the process fees[.], even if the member is not a party. No member shall be assessed more than one prehearing and one hearing process fee in any arbitration proceeding.

(3) The prehearing and hearing process fees shall not be chargeable to any other party under Rules 10332(c) and 10205(c) of the Code.

[The prehearing process fee will accrue according to the schedule set forth below, but will not become due until (1) the parties are notified of the prehearing conference, or (2) if no prehearing conference is scheduled, the parties are notified of the date and location of the first hearing session. The hearing fee will accrue and be due and payable when the parties are notified of the date and location of the first hearing session. All accrued but unpaid fees will be due and payable at the conclusion of the member's or associated person's involvement in the proceeding. No member will pay more than one prehearing and hearing process fee for any case. The process fees will stop accruing when either the member enters into a settlement of the dispute or the member is dismissed from the proceeding or, if the member is paying a process fee as a result of an associated person being named as a party, when the associated person enters into a settlement or is dismissed from the proceeding, whichever is later.]

NASD Notice to Members 01-70

[Prehearing Process Fee Schedule

(proceedings where more than \$25,000 is in dispute)

Service of Claim (accrues when the claim has been submitted and is ready to be served on the respondents)	\$50
Case Preparation (accrues when the first answer to the claim is received or due and discovery or motions proceedings commence)	\$150
Prehearing Activities (accrues when the parties are first notified of the names of any arbitrators selected to hear the matter or are given the names of arbitrators to select)	\$400
	Total \$600]

Hearing Process Fee Schedule

[(accrues and becomes due and payable when the parties are notified of the date and location of the first hearing session)]

Damages Requested	Hearing Process Fee
\$1 - \$25,000	\$ 0
\$25,000.01 - \$50,000	\$1,000
\$50,000.01 - \$100,000	[\$1,500] <u>\$1,700</u>
\$100,000.01 - \$500,000	[\$2,500] <u>\$2,750</u>
\$500,000.01 - \$1,000,000	[\$3,500] <u>\$4,000</u>
\$1,000,000.01 - \$5,000,000	[\$4,500] <u>\$5,000</u>
More than \$5,000,000	[\$5,000] <u>\$5,500</u>
Unspecified	[\$2,000] <u>\$2,200</u>