Subject: Rule Change Notice – Changes to NASD Arbitration Rules

Pursuant to ISE Rule 1800, which in part states that the NASD’s Code of Arbitration shall govern ISE arbitrations, this Regulatory Information Circular informs Members of a proposed rule change to the NASD Code of Arbitration published by the Securities and Exchange Commission, attached.

In the June 30, 2005 Federal Register, the Commission published notice of filing of a proposed rule change (SR-NASD-2005-046) by NASD to amend arbitration fees applicable to certain statutory employment discrimination claims.

(Securities Exchange Act Release No. 34-51921 (June 24, 2005))
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, as amended, or

B. institute proceedings to determine whether the proposed rule change, as amended, 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, as amended, 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–2003–168 on the subject line.

Paper Comments
- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9309.

All submissions should refer to File Number SR–NASD–2003–168. 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 in the Commission’s Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the 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 File Number SR–NASD–2003–168 and should be submitted on or before July 21, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.10
J. Lynn Taylor,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto Amending the Arbitration Fees Applicable to Certain Statutory Employment Discrimination Claims

June 24, 2005.

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 April 8, 2005, 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. On April 25, 2005, NASD filed Amendment No. 1 ("Amendment No. 1") to the proposed rule change.3 On June 23, 2005, NASD filed Amendment No. 2 ("Amendment No. 2") to the proposed rule change.4 The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, 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.

4 Amendment No. 1 replaces the original rule filling its entirety.
5 See Amendment No. 2. Amendment No. 2 clarified certain aspects of the rule text.

Below is the text of the proposed rule change.5 Proposed new language is in italics.

* * * * * * * 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.

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 limit the arbitration filing fees applicable to certain statutory employment discrimination claims.

The Rule 10210 Series contains special rules applicable to the

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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 other 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 according to the schedule of fees (which are based on the dollar value of the claim) set forth in Rule 10332. During the 1990s, federal appeals courts began to hold that 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 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 arbitrate statutory claims if the agreement required the employee to pay all or even part of the arbitrator's fees and expenses. 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." 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. The United States Supreme Court considered the issue of fees in connection with the arbitration of federal statutory claims in 2000. 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." 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 (which is non-refundable) at the time that the associated person asserts such a claim. The member that would pay a $50 filing fee, while the filing fee for a $4 million claim would be $200.

NASD believes that the proposed rule change is consistent with the provisions of Section 15A of the Act, in general and with Section 15A(b)(6) of the Act, in particular, 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 serve the public interest in that it 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

NASDAQ 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, as amended, 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–NASDAQ–2005–046 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–9303.

All submissions should refer to File Number SR–NASDAQ–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 Commission’s Public Reference Room. Copies of such filing also 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–NASDAQ–2005–046 and should be submitted on or before July 21, 2005.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. 17 J. Lynn Taylor, Assistant Secretary.

[FR Doc. E5–3430 Filed 6–29–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations; National Stock Exchange; Notice of Filing of Proposed Rule Change, and Amendments No. 1 and 2 Thereto, Relating to the Ongoing Qualification of the Members of NSX’s Board of Directors

June 23, 2005.

Pursuant to Section 19(b)(1) of 1934 (“Act”) 1 and Rule 19b–4 thereunder, notice is hereby given that on May 13, 2005, the National Stock ExchangeSM (the “Exchange” or “NSX”)SM filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in items I, II, and III below, which items have been prepared by NSX. On June 10, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.3 On June 21, 2005, the Exchange filed Amendment No. 2 to the proposed rule change.4 The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Article V, Section 3 of its By-Laws which pertains to the ongoing qualification of the members of its Board of Directors (“Board”). Below is the amended text of the proposed rule change. Proposed new language is in italics.5

CODE OF REGULATIONS (BY-LAWS) OF NATIONAL STOCK EXCHANGE

ARTICLE V

Exchange Organization and Administration

Section 3. Vacancies

(a) Any intramural vacancy may occur on the Board caused by death, resignation or otherwise shall be filled by the Directors then in office by a person having the same qualifications, as set forth in Section 1 of Article V of these By-Laws, as those of the Director whose seat is vacant. The person selected to fill such vacancy shall serve the remaining term of office.

(b) In the event any Director fails to maintain the qualifications of his designated category, as set forth in Section 1 of Article V of these By-Laws, of which failure the Board shall be the sole judge, the Director shall, upon determination of the Board that the Director is no longer qualified, cease to be a Director, his office shall become vacant and (effective upon the expiration of the grace period for requalification set forth in Subsection (1) below), the vacancy may be filled by the Board with a person who qualifies for the category in which the vacancy exists.

(1) A Director who fails to maintain the applicable qualifications will be allowed the later of (i) 45 days from the date when the Board determines the Director is no longer qualified or (ii)

4 In Amendment No. 2, the Exchange revised the proposed rule text, as well as the proposed rule change’s statutory basis section.