

Phlx Memo No. 184-07

RC No:-NASD- 2006-101

MEMORANDUM

To: Members and Member Organizations
From: Legal Department
Date: January 25, 2007
Re: NASD Code of Arbitration

SR-NASD-2006-101-Order Approving Proposed Rule Change and Amendment No. 1 Thereto To Provide for the Payment of a \$ 200 Honorarium Per Case for Each Arbitrator Who Considers Contested Motions for the Issuance of Subpoenas

Pursuant to Phlx Rule 950, Section 44, the Exchange has outsourced its arbitration and mediation program to NASD Dispute Resolution. The purpose of this memo is to update you as to proposed amendments to the NASD Code of Arbitration Procedure.

On August 23, 2006, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change to amend IM-10104 of the NASD Code of Arbitration Procedure ("Code") to provide for the payment of a \$ 200 honorarium per case for each arbitrator who considers contested motions for the issuance of subpoenas. On November 13, 2006, NASD filed Amendment No. 1 ("Amendment No. 1") to the proposed rule change.

The purpose of the proposed rule change is to provide for the payment of a \$ 200 honorarium per case for each arbitrator who considers contested motions for the issuance of subpoenas. NASD previously amended IM-10104, to provide arbitrators with an honorarium of \$ 200 to decide discovery-related motions without a hearing session. The revised rule, however, does not address whether a contested motion concerning a subpoena constitutes a discovery-related motion. As a result, NASD has received questions regarding the appropriate payment, if any, for arbitrators who decide subpoena issues. These questions have focused on whether, under the rule, arbitrators should be paid to decide contested motions requesting the issuance of a subpoena.

The issue of whether arbitrators should receive an honorarium for deciding contested subpoena motions has become even more significant with the Commission's recent approval of amendments to NASD Rule 10322 which, among other changes, permit only arbitrators to issue subpoenas in NASD arbitrations.

In proposing the current rule change, NASD recognized that arbitrators may spend a considerable amount of time and effort deciding contested subpoena motions and stated it believes that arbitrators should be compensated for this work. NASD anticipated that if its proposed changes to Rule 10322 were approved, under most circumstances, the chairperson would be the only arbitrator considering subpoena requests based on the documents supplied by the parties. If the entire panel decided a contested motion, each arbitrator who participates in the subpoena ruling would receive an honorarium of \$ 200. The \$ 200 honorarium paid to an arbitrator would provide payment for all contested subpoena motions in a case (*i.e.*, the honorarium would be paid on a per case basis, regardless of the number of contested subpoena motions considered by an arbitrator or panel during the case). Furthermore, the maximum amount that would be paid by the parties, collectively, for any one case would be \$ 600, irrespective of any changes to the composition of the panel. NASD believes that structuring the honorarium in this manner will limit the arbitration costs for parties while at the same time compensating arbitrators for the time that they spend considering contested subpoena requests.

The text of the amended rule is set forth below. If you have any questions regarding this approved rule change, or would like a complete copy of this proposed filing, or further questions regarding the NASD Dispute Resolution Process, please click on the NASD Dispute Resolution website at www.nasdadr.com. If you need additional help, please contact Scott Donnini at (215) 496-5358.

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

IM-10104. Arbitrators' Honorarium

(a)-(e) No change

(f) *Payment for Deciding Contested Subpoena Requests Without a Hearing Session*

(1) The honorarium for deciding one or more contested motions requesting the issuance of a subpoena without a hearing session shall be \$ 200. The honorarium shall be paid on a per case basis to each arbitrator who decides the contested motion(s). The parties shall not be assessed more than \$ 600 in fees under this paragraph in any arbitration proceeding. The honorarium shall not be paid for cases administered under Rules 10203 or 10302.

(2) For purposes of paragraph (f)(1), a contested motion requesting the issuance of a subpoena shall include a motion requesting the issuance of a subpoena, the draft subpoena, a written objection from

the party opposing the issuance of the subpoena, and any other documents supporting a party's position.

(3) The panel will allocate the cost of the honorarium under paragraph (f)(1) to the parties pursuant to Rules 10205(c) and 10332(c).