

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. *The Director will refund the surcharge paid by a member in an arbitration filed by a customer if the arbitration panel: (A) denies all of the customer's claims against the member or associated person; and (B) allocates all forum fees assessed pursuant to Rule 10332(c) against the customer. The Director may also refund or cancel the member surcharge in extraordinary circumstances.*

(Remainder of rule unchanged.)

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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. 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

Rule 10332(c) of the Code requires that the arbitrators, in their awards, shall determine the amount chargeable to the parties as forum fees and shall determine who shall pay such forum fees. Generally such fees are divided among the parties, but the arbitrators may, in their discretion, allocate all forum fees against the claimant or the respondent.

Rule 10333(a) of the Code requires that each member that is named as a party in an arbitration, or that employed an associated person who is named as a party at the time of the events that gave rise to the dispute, must pay a surcharge. The amount of the surcharge is based on the amount asserted by the claimant to be in dispute. The member surcharge is non-refundable and, unlike forum fees, may not be allocated among the other parties, regardless of the outcome of the arbitration. As a result, member firms must pay the surcharge,

which is typically higher than filing fees or forum fees, even when the arbitrators deny a customer's claim and allocate all forum fees against the customer.

To mitigate the impact of arbitration fees on member firms in such cases, NASD is amending rule 10333(a) to provide that it will refund the member surcharge paid by each member firm named as a party (or where its employee/former employee has been named as a party) in an arbitration filed by a customer in which the arbitration panel: (1) Denies all of the customer's claims; and (2) allocates all of the forum fees against the customer. In cases with more than one customer claimant, NASD will not refund the surcharge unless the arbitration panel denies all of the customers' claims and allocates all of the forum fees against one or more of the customer claimants.

In addition, from time to time, the NASD states that a refund of the member surcharge may be warranted in extraordinary circumstances that do not meet the criteria described above. As an example, the NASD states that occasionally a customer mistakenly names a member firm as a respondent, and later withdraws the claim as to that particular member firm. The Code as currently written would prohibit any refund or cancellation of the surcharge in such a case. To give NASD more flexibility in addressing such cases, NASD is further amending rule 10333(a) to provide that the Director of Dispute Resolution, in his or her discretion, may cancel or refund member surcharges in extraordinary circumstances when he or she determines that retention of the surcharge would be inappropriate.<sup>3</sup>

This rule change applies only to member surcharges under rule 10333(a) and does not affect any other fee required under the Code. The rule change will apply to all claims filed on or after January 13, 2003.

#### 2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,<sup>4</sup> 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

<sup>3</sup> NASD has represented to Commission staff that they will monitor the effect of the refund of the member surcharge on NASD Dispute Resolution's operating budget. Also, if NASD raises customer arbitration fees in the future, NASD will reinstate this member surcharge. Telephone conversation between Laura Gansler, Counsel, NASD Dispute Resolution, and Florence Harmon, Senior Special Counsel, Division of Market Regulation, Commission, January 10, 2003.

<sup>4</sup> 15 U.S.C. 78o-3(b)(6).

general, to protect investors and the public interest. NASD believes that the rule change will enhance the fairness of the NASD arbitration forum for member firms, particularly small member firms.

### B. Self-Regulatory Organization's Statement on Burden on Competition

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

### 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

The proposed rule change has been filed by NASD as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization. Consequently, it has become effective pursuant to section 19(b)(3)(A) of the Act<sup>5</sup> and paragraph (f)(2) of rule 19b-4 thereunder.<sup>6</sup> At any time within 60 days of this filing, the Commission may summarily abrogate this proposal if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>6</sup> 17 CFR 240.19b-4(f)(6).