

PACE INVESTOR RIGHTS PROJECT

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May 4, 2007

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: File Number SR-NASD-2006-109

Dear Ms. Morris:

The Pace Investor Rights Project (PIRP) at Pace University School of Law welcomes the opportunity to comment on NASD's proposal to amend Rules 12208 of the NASD Customer Code, 13208 of the NASD Industry Code and 10407 of the NASD Code of Arbitration Procedure to address attorney representation in arbitration and mediation. PIRP's mission is to advocate on behalf of investor justice, particularly with regard to the rights of small investors.

PIRP previously commented on NASD's proposal to amend Rule 10316 and adopt Rule 10408 of the NASD Code of Arbitration Procedure. After numerous commentators pointed out the ambiguous language of those proposed rules, NASD withdrew those proposals and devised the current proposals to address the concerns raised in the comments.

PIRP continues to support the substituted rule proposals because they codify NASD Dispute Resolution's current practice to allow an attorney admitted to (and not suspended from) the bar of any state to represent parties in arbitrations and mediations in its forum without regard to jurisdictional boundaries. We do not believe that the practice of NASD arbitration or mediation differs from state to state and thus does not require the expertise of an attorney admitted to practice in the particular state of the hearing location.¹ By codifying current practice, subject to state bar limitations, NASD clarifies

¹ Indeed, some states, including New York, do not consider representation of a party in arbitration to be the practice of law. *See, e.g., Siegel v. Bidas Sociedad Anonima Petroleia Industrial Y Comercial*, 1991 WL

for parties that there are no forum limits on party representation in the forum. In addition, the amendment of rule 10316 should make it clear to courts that the fact that a party was represented in arbitration by an attorney not admitted to practice in the forum state is not a basis for vacating an arbitration award.²

In our previous comment letter, we supported the rule proposal because it expanded the pool of attorneys available to represent parties in the forum, and increased the possibility that investors with small claims could obtain legal representation. Small investors are generally unable to obtain favorable results in arbitration without legal representation.³ Moreover, it is difficult for small investors to obtain counsel because either they cannot afford attorney's fees, or attorneys are unwilling to take claims that are too small and economically unfeasible for the attorney to handle.⁴ Many of the losses suffered by small investors are highly detrimental to their financial condition, as often these losses make up a large part of their savings.

Furthermore, the new proposal addresses our concern that NASD incorrectly characterized its previous proposal as not addressing the issue of representation by non-attorneys in arbitration and mediation cases.⁵ By clarifying its position on the practice of non-attorney representatives in the forum, NASD has removed unnecessary restrictions on customer representation and provided a third option of allowing customers to seek representation from someone other than themselves or non-suspended attorneys. Small investors plainly benefit from the enhanced access to justice.

Thank you for providing us with the opportunity to comment on these proposed

167979, *5 (S.D.N.Y. Aug. 19, 1991); *Williamson v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982).

² See *Sirotzky v. New York Stock Exchange*, 347 F.3d 985 (7th Cir. 2003) (stating that losing party had no grounds to vacate award where the other party was represented by an out-of-state lawyer, since it was for the arbitrators, not the courts, to decide whether this was proper).

³ See Barbara Black, *Establishing A Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL ED. 35, 36 (2000) (explaining reasons why “[s]mall investors’ perceptions that they would fare better with legal representation appear to be accurate”); see also GEN. ACCT. OFF., REP. NO. GGD-92-74, SECURITIES ARBITRATION: HOW INVESTORS FARE 40-41 (1992) (reporting that investors who receive an award were more likely to receive a higher percentage of their damages claimed when they were represented, especially investors with claims under \$20,000).

⁴ To some extent, law school securities arbitration clinics fill that void, as they provide free or low-cost legal representation to small investors in arbitration or mediation against brokerage firms and their associated persons. To our knowledge, twelve law school clinics in the United States offer representation to small investors in connection with securities arbitration and/or mediation claims. Currently, nine of those clinics are in New York State, one is in Pennsylvania, one is in Illinois, and one is in California. See Securities and Exchange Commission, “Arbitration/Mediation Clinics in California, Illinois, New York, and Pennsylvania,” available at <http://www.sec.gov/answers/arbclin.htm> (last modified Apr. 6, 2005). We are aware of at least two other law schools that plan to open clinics next year. This rule proposal would allow these clinics to proceed with representation of clients in out-of-state hearing locations without fear of reprisal from the forum or respondent(s), subject of course to applicable student practice orders, state bar rules and institutional limitations.

⁵ See 72 Fed. Reg. 18703, 18705.

rule changes. Please do not hesitate to contact us if you have any questions regarding these comments.

Sincerely yours,

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