



NASAA

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VIA EMAIL: rule-comments@sec.gov

Nancy M. Morris, Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, D.C. 20549-9303

**RE: SR-NASDDR-2003-158: Proposed Rule change to Revised Rule 12504 of the NASD Code of Arbitration Procedure which Pertains to Dispositive Motion Rule**

Dear Ms. Morris:

The North American Securities Administrators Association, Inc. (NASAA) submits these comments on proposed Rule 12504 (the "Rule") of the NASD Code of Arbitration Procedure (the "Code"). The Rule relates to the issuance of summary dismissal motion in arbitration proceedings.

It is NASAA's understanding that one of the reasons for the Rule is that the current Code provides no guidance with regards to motions to dismiss. It is also our understanding that these motions are being filed more frequently and those decisions in this matter lack uniformity. The proposed Rule is an attempt to correct this problem.

As always, NASAA commends NASD Dispute Resolution (NASDDR) in its attempts to correct abuses in the arbitration process. We agree with NASDDR that the lack of uniformity can lead to investor harm. However, we retain serious reservations as to whether summary dismissal motions should ever be issued in an arbitration forum. It is telling that the current Code authorizes virtually no motion practice. The virtue of the arbitration process is that it acts more as a court of equity than a court of law. The arbitration forum therefore is premised on providing a fair, just, and equitable hearing. Highly formalized procedures and legal formalities, which preclude the case from being heard, compromise the integrity of the process.

It is NASAA's position that a claimant, especially a pro-se claimant, should not be denied their day in court simply because he/she filed a facially deficient claim. Moreover, Rule 10314 only requires that "The Statement of Claim shall specify the relevant facts and the remedies sought." Since the Code does not impose any legal pleading requirements, it is unfair to dismiss claims based upon a failure to plead properly. To do so, is to deny that claimant any chance to a hearing on the merits of the case. This is especially true given courts are not likely to engage in judicial review of summary dismissal given the appeal standard of manifest disregard for the law.

Rule 10305 of the Code and NYSE Arbitration Rule 604 provide for only limited circumstances in which a claim may be dismissed without a hearing: 1) to dismiss the proceeding and refer the parties to their judicial remedies without prejudice to the claim; 2) to dismiss with prejudice as a sanction for willful and intentional disregard of an order; and 3) to dismiss at the joint request of all parties. The recent increase in the number of summary dismissals seems to be contrary to the rules limited circumstances to dismiss without full evidentiary hearing. Moreover, the introduction of legal courtroom maneuvers into arbitration calls into question the often-repeated assertion that binding arbitration is more beneficial to investors. If a claimant's suit can be tossed out by a legal technicality it's difficult to imagine why a court system with its right to appeal would not be more advantageous to investors. More importantly, public perception would be created that the arbitration process delivers none of its advertised goals: it is not fair, it favors the securities industry, and it is complex and specialized. For these reasons, NASAA recommends that summary dismissal motions not be codified into the Code.

However if the Rule is to be adopted, NASAA agrees that the correct standard for issuing a summary dismissal motion is "extraordinary circumstances." However, NASAA has grave concerns with NASDDR's most recent explanatory language setting out examples of certain legal defenses, which would meet the standard of "extraordinary circumstances" under the Rule. These examples, accord and satisfaction, arbitration and award, settlement and release, running of the statute of repose, all raise issues that entail complex questions of law. These are not issues to be decided without an opportunity for discovery or testimony. It is NASAA's position that this explanatory guidance sets the wrong standard leaving the Rule ripe for abuse and harmful to investors. If guidance is to be given as to the proper standard for issuing summary dismissal motions, it should be that claims should only be dismissed if they are truly frivolous and totally lacking merit.

Thank you for your consideration of NASAA's views on the Rule. If you have any questions regarding these comments contained in this letter, please do not hesitate to contact Bryan Lantagne, Director of the Massachusetts Securities Division and Chair of the Broker-Dealer Arbitration Project Group (bryan.lantagne@sec.state.ma.us).

Sincerely,

A handwritten signature in black ink, appearing to read "Bryan Lantagne", is written over a thin red horizontal line.

Bryan Lantagne  
Director, Massachusetts Securities Division  
Chair, NASAA Broker-Dealer Arbitration Project Group