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Nancy M. Morris, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

RE: Comments on SR-NASD-2006-088
Proposed Rule Change Relating to Motions to Decide Claims Before a Hearing on the Merits

Dear Madam Secretary:

I am writing to express my comments to the NASD's proposed new Rules 12504 and 13504 of the NASD Code of Arbitration Procedure. By way of background, I was an attorney-advisor at the Commission, Division of Corporation Finance, in '86, '87 and '88. I have served as an Arbitrator with the NASD since 1989. I earned a Master of Laws (LL.M.) in Securities Regulation from Georgetown University Law Center in 1987. I have represented investors in securities arbitrations and litigation for over sixteen (16) years, and I represent stockbrokers and investment adviser representatives in NASD, NYSE, SEC and state securities regulatory investigations and administrative proceedings. With the exception of my three years stint at the Commission, I have been a litigation and trial lawyer in private practice since 1982.

Rules 12504 and 13504 empower the Arbitrators to decide claims before a hearing on the merits in "extraordinary circumstances." The problem with the Rules, as crafted, is that "extraordinary circumstances" is not defined. In practice in the future, the Arbitrators will apply their subjective and arbitrary judgments as to what constitutes "extraordinary circumstances." There will be a divergence of decisions around the country with no uniform standards whatsoever. The Rules, as crafted, will spawn time-consuming, expensive and burdensome litigation and appeals from adverse decisions by the Arbitrators over whether "extraordinary circumstances" existed and whether parties had evidence to overcome the Arbitrators' judgment of a claim without a hearing on the merits.

The NASD proposed to insert narrative language in the Dispositive Motions section of the rule, which engendered "substantial controversy" in the form of 105 comment letters. The fact that the NASD was unable to obtain a consensus among its constituents as to what constitutes "extraordinary circumstances" foreshadows the heavy litigation that will ensue for years to come over the meaning of "extraordinary circumstances." The proposed language will increase investors' costs of Arbitration as they are forced to defend against motions under the rules.

Rules 12504 and 13504, as crafted, leave open the likelihood that Arbitrators, who have formed a premature opinion about a case before discovery has been completed and the facts are fully fledged out, will shorten the Arbitration process by deciding that "extraordinary circumstances" exist to decide a claim without a hearing. Having sat as an Arbitrator on NASD panels for over decade, it is amazing to see how frequently Arbitrators form a strong opinion about a case from the initial set of pleadings and have little patience to spend time hearing evidence.

Rule 12504 is designed to conclude Arbitrations before a public customer has had his or her "day in court." The Rule will *never* be used to make an award in favor of a public customer against a broker-dealer without a hearing on the merits. It is a one-way Rule.

Rule 12504 also overlooks the need many customers have to obtain discovery from the securities industry before they can adequately respond to a motion to dismiss. The Rule should be modified to provide that Arbitrators cannot decide a claim before a hearing until all documents have been produced by the parties.

In promissory note cases brought by broker-dealers against their former registered representatives, broker-dealers will almost always file a motion under Rule 13504 to decide the claims before a hearing on the merits. These motions, if and when granted, will cut-off defenses that the broker-dealer breached its contract with the registered representative or that the broker-dealer was unjustly enriched, i.e., equitable defenses will be lost. There will be one-sided awards in favor of broker-dealers against their registered representatives. The Rule will *never* be used to make an award in favor of a registered representative against a broker-dealer without a hearing on the merits.

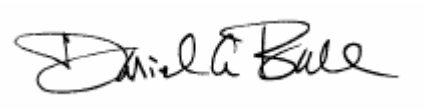
If "extraordinary circumstances" is narrowly defined in the Rules, and is limited to a few circumstances, there may be some fairness in adopting the Rules. For example, an Arbitration Panel should be allowed to decide whether the defense of "accord and satisfaction" or "release" require hearings. But Arbitration Panels should not be allowed

to decide motions to dismiss on grounds of statutes of limitations or repose without a hearing on the merits because in virtually all cases factual determinations as to whether the limitations periods were tolled must be made on the basis of direct or cross-examination.

Rules 12504 and 13504, as crafted, create opportunity for abuse. Motions to dismiss are likely to become routine as broker-dealers take their chances and use this one opportunity to have a case dismissed without a hearing. The Rules also can be strategically used by a party to flesh out documents, legal strategy and affidavits from the opposing party in advance of a hearing.

For these various reasons, Rules 12504 and 13504 should be modified before they are adopted.

Sincerely yours,



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