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September 29, 2006

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

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

Dear Ms. Morris:

The Arbitration and Litigation Committee of the Securities Industry Association ("SIA")[1] appreciates the opportunity to comment on the above-captioned proposed rule change by the National Association of Securities Dealers ("NASD"). The proposed rule change is similar to one contained in a series of proposed rule changes to the NASD's Code of Arbitration Procedure filed with the Securities and Exchange Commission ("SEC" or "Commission") in 2005. Both that proposal and the present one would, *inter alia*, provide that motions to decide a claim before a hearing should only be granted "in extraordinary circumstances." We understand that the NASD has elected to refile the provisions on motions to dismiss separately. The only substantive difference between the originally proposed provision on motions to dismiss and this one is that this version deletes a narrative discussion that would have offered guidance on what "extraordinary circumstances" means.

[1] The Securities Industry Association brings together the shared interests of more than 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. SIA's members (including investment banks, broker-dealers and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. More information on SIA is available at www.sia.com. SIA and the Bond Market Association ("TBMA") plan to merge to form the Securities Industry and Financial Markets Association, effective November 1, 2006.

The Committee noted in a comment letter on the original proposal[2] that it had significant concerns with that proposal. Those concerns still apply. Specifically, we continue to believe that the Code should neither discourage nor encourage dispositive motions. As stated in our earlier letter

> "[t]here are many situations in which dispositive motions are appropriate yet the circumstances may not be 'extraordinary.' Examples include stale claims that are barred by the statute of limitations; claims asserted against parties who had no involvement in the dispute; and cases in which the facts are not in dispute. In addition, claimants sometimes include clearing firms as respondents based solely on their role as clearing firms, despite compelling authority that clearing firms generally have no liability for the conduct of introducing firms. [citation omitted]. The 'extraordinary circumstances' language, combined with the Code's discouragement of dispositive motions, could be interpreted by panels to deny relief in cases where dismissal prior to the hearing on the merits is appropriate and the denial of relief unfairly imposes the unwarranted cost of discovery and a hearing on the merits on respondents."[3]

The deletion of the narrative guidance on the meaning of the term "extraordinary circumstances" is likely to sow even more confusion and uncertainty on arbitration panels as to when they can consider a dispositive motion. The result will be that many complaints that lack any legal or factual support, and which might otherwise have been resolved on a dispositive motion, will proceed through a full-blown discovery and hearing process, toward a resolution that was foreseeable to the panel at the outset. The direct and indirect costs of this will be additional delay and expense, not just for the parties to the case that could have been decided on a motion, but all users of the arbitration system who depend on the availability of arbitrators to hear their cases in an expeditious and efficient manner.

The Committee supports the provision in the proposed rule permitting panels to award sanctions for any bad-faith dispositive motion, and we believe that this should be ample safeguard against any concern about spurious dispositive motions. Beyond that, a statement that any dispositive motion is to be "discouraged and may only be granted in

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[2] http://www.sia.com/2005_comment_letters/7154.pdf.

[3] *Id.* at p. 9.

extraordinary circumstances" invites the accelerated assertion of vexatious and meritless claims that could clog the NASD dispute resolution system. The lack of guidance for the term "extraordinary circumstances" only makes a bad proposal worse.

Thank you for giving the Committee the opportunity to comment on this revised amendment to the Code of Arbitration Procedure. If you have any questions about this letter please contact the undersigned, or the Committee's staff adviser, Amal Aly, at 212-608-1500 or aaly@sia.com.

Sincerely,

Edward G. Turan
Chair, SIA Arbitration and Litigation Committee

Cc:
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