Comments of Eliot Goldstein, Esq.
On SR-NASD-2006-088

October 4, 2006

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

Re: SR-NASD-2006-088

Dear Ms. Morris:

I am writing to comment on the proposed new rule relating to motions to dismiss in NASD arbitrations (SR-NASD-2006-088).

My perspective is of one who has worked as a securities and financial services attorney in the Washington, D.C. area for more than 25 years. I have served as Senior Enforcement Counsel for the SEC, as Assistant Director of Enforcement for a federal bank regulatory agency, and, in private practice, as a court-appointed Receiver selected by the SEC to serve on its behalf in major securities fraud cases.

Although the majority of my practice in recent years has involved representing public investors in securities arbitrations, I have also had substantial experience on the industry side, including representing brokerage and investment advisory firms, individual brokers and investment advisors, and serving as General Counsel for one of the world's largest financial services firms.

The stated mission of the SEC is "to protect investors." In my opinion, if the SEC does not seize this opportunity to put an end to abusive motion to dismiss practice in SRO arbitrations, it will be ignoring its mission and sorely letting down the investing public.

The problem with the proposed language stating that motions to dismiss are discouraged except in "extraordinary circumstances" is obvious to any experienced litigator. This vague phrase will enable Respondents' counsel to fashion arguments in nearly every arbitration that there are "extraordinary circumstances" of one kind or another that need to be addressed by the panel prior to hearing. The unintended effect of this rule, which purports to severely *limit* the use of such motions to the most rare of circumstances, will be to *increase* the use of such motions. Even worse, because the words "extraordinary circumstances" are subject to differing interpretations by arbitrators, the rule as written will undoubtedly lead not only to expensive and time-consuming litigation over its meaning but also to wildly inconsistent decisions.

No matter how false or frivolous the contentions in a respondent's motion to dismiss may be, if the Claimant is forced to respond, the impact will be severe. These motions are invariably lengthy, often with dozens of exhibits or legal cases attached. Even if Claimant responds, the burden does not end there. The briefing process will also inevitably entail the lengthy process of both sides then filing reply briefs and then sur-reply briefs.

For most investors, the costs are devastating; for some, they are an insurmountable obstacle that shuts them out of the process entirely. This horror is amplified exponentially where, as is often the case, there are multiple respondents in the same arbitration filing multiple motions to dismiss – each asserting a different laundry list of alleged "extraordinary circumstances." Aside from the increased costs to the claimant in dealing with the briefing for these motions -- typically tens of thousands of dollars -- the briefing process also results in months of needless and unfair delay that works to the advantage of the respondents.

This is completely antithetical to the whole concept of arbitration, which is supposed to be, unlike a court proceeding, a simple, inexpensive, and more informal forum that allows the aggrieved investor to be heard. In testimony before Congress on March 17, 2005, the President of NASD Dispute Resolution, Linda Feinberg, stated:

> "Unlike in court cases, claimants in arbitration are not held to technical pleading requirements.....Unlike in court cases, the hearings themselves are not intimidating technical proceedings bound strictly by the rules of evidence, but are designed to be flexible and allow the arbitrators to reach the most equitable and just conclusions. The more streamlined process of arbitration, as compared with many procedural and financial obstacles that must be overcome by a plaintiff in a court case, means that nearly every case brought in arbitration other than those that are settled goes to a full merits hearing.

Needless to say, the proposed new NASD rule will foster a process that is inconsistent with these laudatory goals and will open the door to abusive and unfair motions practice as a routine defense litigation tactic.

The NYSE has taken a different approach to this issue. The NYSE arbitration rules have no provision for motions to dismiss. In testimony before Congress on March 17, 2005, the Director of NYSE Arbitration, Karen Kupersmith, stated about its arbitration process:

> "There is no requirement for a formal submission of pleadings. similar to that required in court. Instead, an investor may file a statement of claim in simple letter format that explains what happened and what the investor seeks to recover.

The Director has also stated publicly that investors in NYSE arbitrations should have an opportunity to have their claims heard and that arbitrators therefore should not dismiss cases prior to a full-blown evidentiary hearing.

Important to bear in mind is that, unlike court proceedings, claimants in SRO securities arbitration have no right to appeal. They have often have lost all or a large portion of their net worth or life's savings and the arbitration process is their one and only opportunity to seek redress. They should not have to fight a gauntlet of expensive and abusive motion practice in order to have an evidentiary hearing on the merits of their claims.

The investing public relies on the SEC's promise that it will seek to fulfill its stated mission to *protect* them. If the SEC endorses the proposed rule as currently written, it will in my opinion strike a severe blow *against* the investing public.

The proposed NASD Rule should be changed to remove the reference to motions to dismiss entirely. The Rules should simply provide that Claimants in NASD arbitrations are entitled to an evidentiary hearing on the merits, except in such cases in which the Claimant has erroneously named the wrong party as Respondent or cases in which there has been a previous written settlement, release, or accord and satisfaction between or among the parties.

Thank you for your consideration. If you have any questions or require any additional information, please feel free to contact me.

Respectfully yours,

Eliot Goldstein

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