TIMOTHY A. CANNING
ATTORNEY AT LAW

STEWART SCHOOL BUILDING
1125 16TH STREET, SUITE 204
ARCATA, CALIFORNIA 95521

MAILING ADDRESS
P.O. BOX 4201
ARCATA, CALIFORNIA 95518

TELEPHONE: (707) 822-1620
FACSIMILE: (707) 760-3523
E-MAIL: tc@tclaws.com
Website: www.tclaws.com

May 4, 2007

Via email only

Nancy Morris, Secretary
Securities and Exchange Commission
100 F Street, NE.
Washington, DC 20549–9303.

Re: SR-NASD-2006-109
SEC Release 34-55604

Dear Secretary Morris:

I am an attorney licensed to practice law in California and Wisconsin. Since 1994, the vast majority of my practice has been and continues to be representing investors in arbitrations pending at the NASD, the (former) Pacific Exchange and (soon to be former) New York Stock Exchange, as well as in related litigation. I also represent individual brokers in claims against brokerage firms, and in regulatory matters. In many of my cases, my clients are also represented by a non-attorney advocate.

The NASD's proposed rule change, SR-NASD-2006-109, should not be approved in its current form, for the following reasons. (The following comments apply to the proposal for the public customer code, the industry code, and the mediation code.)

(1) The Rule Is Inconsistent With The Statement Of Purpose

The wording of the proposed rule is inconsistent with the NASD's Statement of Purpose for the proposed rule change. The plain language of the proposed rule states that arbitration participants have the right to be represented by any attorney as long as that attorney is licensed anywhere in the U.S. Yet, the NASD states that, "The proposed rule change is not intended to preempt state law; …" 72 Fed. Reg. 18706. So, if state law prohibits an arbitration participant from being

represented by attorney licensed in another state, then the rule is incorrect – the participant cannot be represented by any licensed attorney.

According to the NASD's stated rationale – and contrary to the plain language of the rule -- this proposed rule will have no effect on whether an attorney can represent a party in arbitration in any particular state. If only state law will govern the issue of who can represent parties in NASD arbitration, then why is the NASD bothering to propose this rule change? At best, the rule is unnecessary; at worst, it will leave the door open to considerable interpretative difficulties and litigation collateral to arbitration (as discussed below).

(2) The Proposal Favors The Securities Industry

The proposal unfairly favors industry participants at the expense of public customers. The language in the last sentence of subparagraph (a) of the proposed rule gives brokerage firms the right to be represented by a non-attorney without restriction, as long as that non-attorney is "a member of a partnership" or "a bona fide officer of a corporation, trust or association" being represented.

The effect of this rule is to permit brokerage firms to be represented by a non-attorney advocate. But there is no corresponding right for a public customer or an individual broker. It would be rare indeed to find a public customer non-attorney advocate who is a member or bone fide officer of a claimant partnership, corporation or trust, whereas it is not uncommon for a brokerage firm (partnership or corporation) to have such an individual to represent it.

Under subparagraph(c), whether claimants and individual brokers have a right to representation by a non-attorney is left to a state-by-state determination.

If the industry is entitled to representation by a non-attorney advocate, the public customer should also be so entitled. As drafted, this rule gives industry firm respondents favored treatment and an unfair advantage in, among other things, obtaining experienced advocates, and hence is not designed to protect investors and the public interest, contrary to the requirements of 15 U.S.C. §78o-3(b)(6).

(3) Preemption Effect/Contradiction

The SEC and the NASD have stated publicly and in sworn testimony that the NASD arbitration program **cannot function** under 50 different sets of procedural rules (a position taken in support of its argument that NASD rules preempt contrary state law). See Amicus Brief by the SEC and Decl. of G. Friedman, filed

in NASD v. Judicial Council, U.S. District Court, Northern District of California case no. C 02 3486. The California Supreme Court and the U.S. Court of Appeals for the Ninth Circuit accepted that argument, in ruling that California state law regarding arbitrator disclosures was preempted by SEC-approved NASD rules. See *Jevne v Superior Court (JB Oxford)* (2005) 35 Cal.4th 935, and *Credit Suisse First Boston Corporation* (9th Cir. 2005) 400 F.3d 1119.

Indeed, in holding that SEC-approved NASD arbitration rules preempt contrary state law, the Ninth Circuit Court of Appeals relied on the SEC's assertion that:

> permitting each state to regulate NASD arbitration procedures would create a patchwork of laws that would interfere with Congress's chosen approach of delegating nationwide, cooperative regulatory authority to the Commission and the NASD.

Credit Suisse First Boston, supra, 400 F.3d at 1135.

Yet, this proposed rule change will do exactly what the SEC and the NASD said would cripple NASD's arbitration program: It would create a patchwork of 50 different sets of rules as to who can represent whom in NASD arbitration.

This confusion will be compounded by uncertainty over which state's law will apply in a particular dispute, which often is difficult to determine at the outset of an arbitration proceeding. In public customer cases, the NASD attempts to set the venue at a location closest to where the public customer resided at the time the dispute arose. So, for example, a public customer residing in Truckee, California will have her dispute with a New York broker heard in another state – Reno, Nevada. Will her California representative be permitted to represent her at the hearing in Nevada? Will the New York firm file suit in New York to enjoin the California representative?

Further, should the venue of the arbitration hearing change (which the Code authorizes arbitrators to do), then whether or not a particular representative can continue representing a party may also change, depending on where the hearing is moved to.

The section on non-attorneys is especially confusing insofar as it relates to changing state law. The NASD claims that the rule is not intended to change state law. If that's true, then what is the consequence of this rule proposal in a state that permits non-attorney representation in arbitration (such as California)? Does that mean that the NASD's proposed restriction on non-attorneys does not apply in

California, since the NASD says it is not designed to change state law? In other words, can a non-attorney who has been suspended or barred from the industry still represent parties in arbitration, since California law permits it?

If the answer to that question is "no", i.e., a non-attorney who has been suspended or barred from the industry **cannot** represent parties in arbitration in California, then the proposal does exactly what the NASD said it will not do: it changes state law.

If the answer to that question is "yes", i.e., a non-attorney who has been suspended or barred from the industry **can** represent parties in arbitration in California, then the proposal cannot accomplish what the NASD said it will accomplish – i.e., protect investors.

If the NASD wants to make a statement about who can represent whom in its forum, then it should do so only with the express intention of its rule having a preemptive effect over contrary state law.

(4) New Retroactive Penalty

Perhaps a more serious problem with the proposal is that it adds a new penalty for those who have already had their alleged misconduct adjudicated and sanctions imposed. At a minimum, the rule should be modified so that it applies only to those who were barred or suspended from the securities industry after the effective date of the rule.

There are non-attorney advocates who have been successfully representing public customers in NASD arbitration for years, even though they were barred or suspended from the securities industry. In fact, those advocates may be the most effective representatives for public customers, because of their "inside knowledge" of how the securities industry works.

Retroactively adding a new penalty to the penalty that was previously imposed by the NASD or SEC five, ten or fifteen years ago is unfair to those advocates and their clients, and will likely result in the rule being unenforceable or vacated. See, e.g., 28 U.S.C. § 2462 (setting a five-year period in which to bring an action to enforce a civil penalty); and see Kresock *v. Bankers Trust Co.*, (7th Cir. 1994) 21 F.3d 176 ("it would be unfair to hold the plaintiff accountable for rules that were not in effect at the time the relevant conduct took place"); and *Harwell v. Growth Programs, Inc.* (5th Cir. 1971) 451 F.2d 240 ("A reasonable rule for prospective conduct could well be unreasonable when applied retrospectively").

(5) Collateral Litigation

Finally, as mentioned above, the proposal as written is an invitation for any party who would like to delay an arbitration hearing to run to court for temporary injunctive relief on the grounds that the opposing party's representative is somehow "unqualified". Even if that party is ultimately unsuccessful in court, it will have succeeded in exacerbating delay and escalating costs in arbitration.

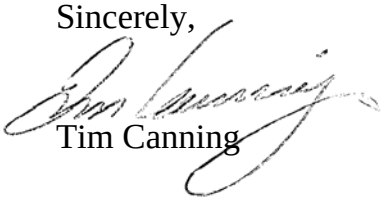
Conclusion

In sum, this proposal is, at best, unnecessary, and favors industry respondents at the expense of public customers. As written, the proposal will likely increase the amount of collateral litigation arising out of arbitration.

For the foregoing reasons, the rule proposed by NASD Dispute Resolution is not designed to protect investors and the public interest, contrary to the requirements of 15 U.S.C. §78o-3(b)(6), and therefore should not be approved.

Thank you for your consideration of this comment.

Sincerely,



Tim Canning