Linda D. Fienberg
President, Dispute Resolution
Executive Vice President and Chief Hearing Officer, Regulatory Policy and Oversight

May 29, 2007

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

Re: File No. SR-NASD-2007-023 – Supplemental Response to Comments

Dear Ms. Morris:

This letter responds to comments about the arbitration forum received by the Securities and Exchange Commission ("SEC" or "Commission") to the above-referenced filing, a proposed rule change to amend the By-Laws of NASD ("By-Laws" or "NASD By-Laws"). The proposed rule change would implement governance and related changes to accommodate the planned consolidation of the member firm regulatory operations of NASD and NYSE Regulation, Inc. ("NYSE Regulation") into NASD, operating under a new name ("New SRO"). The proposed rule change was published for comment in the Federal Register on March 26, 2007.[1]

In a separate letter, NASD responded to comments on the By-Laws changes and other aspects of the consolidation contained in the above filing.[2] Some commenters also expressed concerns regarding the proposed consolidation of the NYSE Regulation and NASD arbitration forums.[3] In response, NASD refers to a January 26, 2007 letter from Linda D. Fienberg, President, NASD Dispute Resolution, which refutes such

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1 Securities Exchange Act Release No. 55495 (March 20, 2007), 72 FR 14149 (March 26, 2007).

2 Letter from Patrice M. Gliniecki, NASD, to Nancy Morris, Commission (May 29, 2007).

3 Letters from Public Members of Securities Industry Conference on Arbitration (SICA) (January 12, 2007); Les Greenberg, Esq. (April 8 and 11, 2007), Kathryn L. Lundgren (April 16, 2007); Steven B. Caruso, President, Public Investors Arbitration Bar Association (April 16, 2007); and William F. Galvin, Secretary of the Commonwealth, Massachusetts Securities Division, Commonwealth of Massachusetts (April 18, 2007).

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contentions.[4] This letter supplements the January 26 letter by addressing three issues raised by the comments.

Composition of Arbitration Panels

One commenter urged the Commission to take the opportunity of the consolidation to address the composition of arbitration panels in the New SRO forum (even though the arbitration rules are not contained in the By-Laws amendments before the Commission).[5] In particular, the commenter states that the New SRO forum should remove from arbitration panels in cases involving customer claims the industry arbitrator and any public arbitrators who maintain "significant ties" to the industry. Under both NASD and NYSE Regulation current rules, customer arbitrations are decided either by a single public arbitrator or by a panel of three arbitrators, two of whom are public. Both organizations have taken significant steps to ensure that public arbitrators do not have ties to the industry. Both organizations also are currently working together to harmonize their definitions of public and non-public arbitrators, which already are substantially similar, and any resulting proposed rule changes would be submitted to the SEC for its approval following a public comment period, as at present.[6]

Costs to Customers

A commenter asserted that a portion of the cost savings from the consolidation of member regulatory operations that will be paid to brokerage firms following closing of the transaction should have been allocated towards a reduction in customer fees to use the New SRO arbitration forum.[7] While the consolidation is expected to result in certain economies of scale and increased efficiencies that might lower the overall cost to administer the New SRO arbitration forum (such as arbitrator training, qualification, and roster maintenance), investors do not shoulder those costs. It is the firms that bear the general and administrative costs to operate the arbitration program, such as staff salaries

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4 Letter from Linda D. Fienberg, President, NASD Dispute Resolution, to the Public Members of SICA (January 26, 2007). The SEC posted this letter on its Web site in connection with the proposed rule change.

5 Galvin Letter, supra note 3.

6 On March 12, 2007, NASD filed a further amendment to the public arbitrator definition to prevent an attorney, accountant, or other professional from being classified as a public arbitrator if the person's firm derived $50,000 or more in annual revenue in the past two years from professional services rendered to persons or entities in the securities industry relating to any customer disputes concerning an investment account or transaction (File No. SR-NASD-2007-021). This proposal has not yet been published for comment.

7 Caruso Letter, supra note 3.

and benefits, arbitrator training and travel, long-term leased space, computer systems, supplies, and equipment. Investors, on the other hand, pay only the marginal (that is, direct) costs attached to their particular claim, such as filing and hearing session fees, postponement fees, and arbitrator compensation for deciding contested motions. When investors file a claim, they pay only the filing fee, which is partly refundable if the case is settled or withdrawn more than 10 days before a hearing, and which may be allocated to another party at the end of the case; the arbitrators may allocate other fees and costs to the parties in the award. In addition, NASD Rule 12900(a)(1) provides that the Director may defer payment of all or part of the filing fee on a showing of financial hardship.

Dispositive Motions

Two commenters state that the NYSE has taken a different position from NASD with respect to motions to dismiss a claim (dispositive motions).[8] One letter states that NYSE Regulation does not allow for the filing of dispositive motions, and the other letter states that NYSE Regulation will not permit arbitrators to grant dispositive motions before a public investor has had the opportunity to present his or her claims at a full and complete evidentiary hearing on the merits. These statements are not supported by reference to any NYSE arbitration rule or written guidance on dispositive motions, and NASD is not aware of any prohibition on dispositive motions in the NYSE Regulation arbitration forum. Rather, NASD understands that the NYSE Regulation arbitration panel determines whether such a motion will be heard at a hearing, and whether such a hearing will be held at the beginning of the full hearing on the merits of the claim or at a separate time.

In contrast, NASD has proposed a specific rule on motions to decide claims before a hearing. The rule would provide that dispositive motions are discouraged, and would set out several procedural requirements for such motions. In addition, the rule would authorize the arbitrators to issue sanctions if they determine that a party filed a dispositive motion in bad faith. This proposal was filed with the Commission in 2006 and published for public comment.[9] NASD is reviewing the comments and preparing its response. During this process, we will consider the concerns raised by the commenters, and may further amend the proposal.

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[8] Galvin and Caruso letters, supra note 3.

[9] Securities Exchange Act Release No. 54360 (August 24, 2006), 71 FR 51879 (August 31, 2006) (File No. SR-NASD-2006-088).

NASD believes that the foregoing fully responds to the significant comments on the proposed consolidation of the NYSE Regulation and NASD arbitration forums. If you have any questions, please call me at (202) 728-8407 or Jean Feeney, Vice President and Chief Counsel, at (202) 728-6959.

Very truly yours,

Linda D. Fienberg

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