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BY E-MAIL

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090
rule-comments@SEC.gov

Re: Comment: File No. SR-NYSE-2005-48
Amendments to NYSE Arbitration Code 619(f) - Subpoenas

Dear Ms. Morris:

I write to comment on SR-NYSE-2005-48, a revision to Rule 619(f) of the New York Stock Exchange's Code of Arbitration Procedure.

Among other things, the proposed rule correctly conforms its provisions to the requirements of the Federal Arbitration Act ("FAA"), which applies in all NYSE securities arbitrations.[1] The FAA permits only arbitrators to issue subpoenas,[2] and the proposed rule permits only arbitrators to issue subpoenas. The FAA requires that the subpoena be signed by at least a

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[1] *See The Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52 *(2003)*.

[2] Section 7 of the FAA provides, in part,

> The arbitrators selected . . . or a majority of them, may summon in writing any person to attend before them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . . **Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them,** . . . .

9 U.S.C.A. § 7 (emphasis added).

majority of the arbitrators, and the rule recognizes this requirement.[3] The Exchange's recognition of the FAA's requirements will reduce the number of improperly issued subpoenas and will increase the likelihood that the courts will enforce subpoenas issued by the Exchange's arbitrators.

We commend the Exchange for these changes.

The proposed rule can be improved in at least two ways. First, the method by which parties are served with copies of subpoenas should be simplified, and second, the rule should not require payment for subpoenaed documents.

Service of copies of the issued subpoena on parties should be simplified

The proposed rule imposes an expensive, burdensome, and unnecessary service requirement on the parties.

Proposed Rule 619(f)(3) provides "If the arbitrator(s) issue a subpoena, the party that requested the subpoena **must serve the subpoena at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the subpoena**." (Emphasis added)

This provision may require that the subpoenaing party serve the other parties with copies of the subpoena by hand and in person.

Section 7 of the FAA provides in relevant part that the arbitration subpoena "shall be served in the same manner as subpoenas to appear and testify before the court . . . ." The governing rule – Rule 45(b)(1) of the Federal Rules of Civil Procedure – provides in relevant part: "Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . ."

The courts have generally interpreted this provision of Rule 45 to mean that personal service of the subpoena is required.[4] Thus, pursuant to the FAA and Rule 45, a subpoena issued

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[3] Proposed Rule 619(f)(3) provides in relevant part: "If the arbitrator(s) issue a subpoena . . . ."

[4] We cite the rule of the vast majority of courts. However, not all courts agree, a condition that in itself can lead to unnecessary motion practice during the arbitration. Moreover, most of those courts that permit service that is not by hand, do so after numerous attempts at service by hand have failed. *See, e.g., FTC v. Compagnie de Saint-Gobain-Pont-a Mousson*, 636 F.2d 1300, 1312–13 (D.C. Cir. 1980); *Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968); *Klockner Namasco Holdings Corp v. Daly Access.com, Inc.*, 211 F.R.D. 685, 687 (N.D. Ga. 2002) (citing cases); *Agran v. City of New York*, No. 95 Civ. 2170 (JFK), 1997 U.S. Dist. LEXIS 2577, at *3 (S.D.N.Y. 1997) (weight of authority requires personal

by the arbitrators must be served by personal service (i.e. by hand) on the subpoenaed party. Proposed Rule 619(f)(3) would, therefore, also require the subpoenaing party to serve copies of the subpoena to the other parties by hand.

This is expensive, burdensome, and unnecessary.

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service; the court does not have authority to sanction alternative service); *Khachikian v. BASF Corp.*, No. 91-CV-573, 1994 WL 860702, at *1, 1994 U.S. Dist. LEXIS 2881, at *2 (N.D.N.Y. Mar. 4, 1994); *Conanicut Investment Co. v. Coopers & Lybrand (In re Deposition Subpoena Directed to Smith)*, 126 F.RD. 461, 462 (E.D.N.Y. 1989) (personal service required; "the court has no discretion to permit alternative service when a party has difficulty effecting service"); *In re Johnson & Johnson*, 59 F.R.D. 174, 177 (D. Del. 1973). *Contra Hall v. Sullivan*, 229 F.R.D. 501, 503 (D.Md. 2005) (acknowledging that the majority of courts require personal service but adopting the position of the minority); *Ultradent Products v. Hayman,* No. M8-85 (RPP), 2002 U.S. Dist. LEXIS 18000 (S.D.N.Y. Sept. 24, 2002) (subpoena served on corporation's registered agent or by certified mail satisfies Rule 45); *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 84 n.5 (S.D.N.Y. 2002) ("substitute service at the [witness's] offices followed by mailing properly labeled copies [of subpoena] to the same address" is sufficient) (citing *King v. Crown Plastering Corp.*); *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 255 (S.D.N.Y. 2000) (Service on the witness's agent to accept service of process and its counsel of record); *Cordius Trust v. Kummerfeld*, No. 99 Civ. 3200 (DLC), 1999 U.S. Dist. LEXIS 19980 (S.D.N.Y. Dec. 29, 1999); (after repeated attempts at personal service, certified mail allowed); *Windsor v. Martindale*, 175 F.R.D. 665, 669–70 (D. Colo. 1997) (allowing service by certified mail by the U.S. Marshal's service; not allowing service by plaintiff by regular mail); *King v. Crown Plastering Corp.*, 170 F.R.D. 355, 356 (E.D.N.Y. 1997) (hand delivery of subpoena not required "so long as service is made in a manner that reasonably insures actual receipt of the subpoena by the witness"; allowing combination of hand delivery and mail delivery to residence of subpoenaed person to constitute proper service under Rule 45); *First Nationwide Bank v. Shur (In re Shur)*, 184 B.R. 640, 642–44 (Bankr. E.D.N.Y. 1995) (rejecting the majority rule) ("We therefore hold that the only limitation upon service under rule 45 is that the procedure employed be reasonably calculated to give the nonparty actual notice of the proceedings and an opportunity to be heard.") (citing *Doe v. Hersemann*, 155 F.R.D. 630 (N.D. Ind. 1994) (certified mail)); *Hinds v. Bodie*, No. 84 Civ. 4450, 1988 U.S. Dist. LEXIS 14437, 1988 WL 33123 (E.D.N.Y. 1988) (alternative form of service permitted after unsuccessful attempts at personal service).

Proposed Rule 619(f)(1) provides language that achieves the same result as Proposed Rule 619(f)(3), but is not as expensive or burdensome. When discussing a party's request to the arbitrators for a subpoena, Proposed Rule 619(f)(1) provides: "The request . . . must be served directly on each other party **in a manner that is reasonably expected to cause the request . . . to be delivered to all parties on the same day.**" (emphasis added)

Similarly, Rule 619(f)(3) should provide: "If the arbitrator(s) issue a subpoena, the party that requested the subpoena must serve the subpoena on each other party in a manner that is reasonably expected to cause the subpoena to be delivered on the same day to all parties and on or before the day the subpoenaed person or entity is served with the subpoena.

The proposed rule should focus on when the parties receive the copy of the subpoena, not on the method of service. In so doing the proposed rule will achieve the desired result and reduces expenses. We suggest that the rule be changed.

The proposed rule should not require payment for subpoenaed documents

Proposed Rule 619(f)(4) provides in part: "The party requesting the documents shall be responsible for the reasonable costs associated with the production of the copies, unless the panel determines otherwise."

The rule should not require payment for subpoenaed documents. The production of no other discoverable document requires payment. The production of subpoenaed documents should not require payment either. At the end of the hearing, the arbitrators decide whether to assess costs, and if so, how much to assess. Subpoenaed documents should not be treated differently.

The inevitable consequences of expecting a party to pay "the reasonable costs associated with the production of the copies" is not difficult to foresee. The parties will argue about what a reasonable cost per page is, whether labor costs should be included, and whether payment must be made before or after the documents are produced. In effect, the documents will be held hostage while the parties argue and time passes. Eventually, the issue will be presented to the arbitrators, and valuable time will again be lost.

The rule creates an opportunity to obstruct the discovery process, and some parties rarely miss opportunities to obstruct.

Accordingly, parties should not have to pay for subpoenaed documents. In this regard, subpoenaed documents should be treated as all other discoverable documents are treated.

We commend the Exchange for amending its subpoena rule to limit to arbitrators the authority to issue subpoenas. We suggest that the rule be amended again to make it easier to apply.

Thank you for the opportunity to comment. If you have any questions, please contact me.

Very truly yours,