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ADMITTED TO PRACTICE BEFORE THE
UNITED STATES SUPREME COURT
MEMBER FLORIDA BAR. NELA, PIABA

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July 17, 2003

Mr. Robert Love
Division of Market Regulation
Securities & Exchange Commission
450 Fifth St., NW
Washington, DC 20549

Re: Proposed changes to NASD Rule 10304
SR - NASD 2003-101

Dear Ms. McGuire:

As an attorney my private practice focuses upon representation of public investors. Most of my clients are elderly widows and retired couples who earned their money the hard way, managing and working in a family business, building up an IRA or 401(k) account through many years of corporate employment, or working on a family farm that they sold in order to afford retirement. One is a young widow with dependent children who received insurance money when her blue collar working husband was killed an the job. In short, they are honest, hard working but now vulnerable people who deserve protection from the SEC against being cheated and tricked by the securities industry. All of them have been let down **and** greatly injured by the unlawful actions of stockbrokers whom they had trusted to protect their investment assets.

Unfortuately, your predecessors at the SEC have too often been asleep at the switch, allowing the industry to adopt various arbitration rules and procedures that force such public investors as my clients into fundamentally unfair arbitration proceedings. These unfair rules **apply** not only whenever investors have bona fide contract disputes but also whenever their statutory and common law federal and state rights are violated by unscrupulous and even criminal actions of industry firms and their registered representatives. I am writing to help you understand the proposed changes to the above

subject NASD rule from the perspective of my clients, so you will not let this latest important industry attack on fundamental fairness slip past your busy staff

Most of the proposed changes to Rule 10304 are hostile to investors. They appear superficially palatable, but they will work to the clear advantage of the industry. Overall, the proposals are unacceptable and should be rejected. The six-year rule itself remains highly objectionable and philosophically indefensible.

Linda Fienberg promised PIABA at our Annual Meeting in Colorado Springs last October that she was finally going to abolish the rule altogether. That's what investors deserve. This proposal is just a sop to securities respondents that perpetuates their arbitration-specific defense and gives them yet another advantage in the choice of forum.

The six-year rule is fundamentally hostile to investor protection and antithetical to a level playing field and to fundamentally fair arbitration.

As long as the six-year rule exists, it gives respondents what my friend Tom Mason has aptly described as "a one-sided 'put' on arbitration." Respondents can, if they feel it's to their strategic advantage, unilaterally push the panel to dismiss the "stale" claims -- potentially forcing the claimant to bifurcate or abandon part of the case. Respondents will use the rule to move older claims to court whenever they think they can get the action dismissed on motion practice (statutes of limitations, heightened pleading standards, and other technical defenses), or when the added costs and delay will cause the claimant to back down, or when the burdens will deter claimants lawyers from taking or asserting older claims. Based upon past experience of PIABA members, some firms will do it whenever feasible, regardless of the fundamental unfairness to their customers.

The proposed rule makes three important changes:

The panel will resolve any questions regarding the eligibility of a claim under this Rule.

Dismissal of a claim under this Rule does not prohibit a party from pursuing the claim in court. By requesting dismissal of a claim under this Rule, the requesting party agrees that if the panel dismisses a claim under the Rule, the party that filed the dismissed claim may withdraw any

remaining related claims without prejudice and may **pursue** *all of the claims* **in** *court.*

[DELETED: This Rule shall not extend applicable statutes of limitations, nor shall **it** *apply to any case which* **is** *directed to arbitration by a court of competent jurisdiction.]*

The first sentence is mandated by the Supreme Court's decision in *Howsam*.

The second sentence clarifies what the SICA drafters of the rule intended all along. However, what the industry gives up in that provision, it takes back by forcing a claimant to choose between bifurcating (or abandoning) older claims or fighting the entire case in court. The **NASD** claims, "This provision will provide significant protection against involuntary bifurcation of claims...." That's disingenuous. The NASD is playing a cute word game with "'involuntary." If the claimant prefers to be in arbitration for the majority **of** the case, she will have to bifurcate or abandon the older claims.

Moreover, there is no guarantee that the statute of limitations in court will not have run while the claim was pending in arbitration. Some states have savings clauses that include arbitration. See NY CPLR 204(b), Fla.Stat. 95.051(1). Others do not. Investors in Massachusetts and Delaware, for example, are SOL. *Shafnacker* **v.** *Raymond James & Associates Inc*., 683 N.E.2d 662 (Mass. 1997)(savings statute applies only to 'actions' and "the filing of a claim for arbitration is not an 'action'" for statute of limitations purposes)..Federal claims (10b-5, **ERISA,** TILA, ADA, ADEA, etc.) are not protected regardless of what your state savings statute may say. *Friedman* **v.** *Wheat First* ***Securities,*** *Inc*., 64 F.Supp.2d 338 (S.D.N.Y. 1999) (federal law determines accrual and tolling of federal claims; holding, no tolling during arbitration unless defendants expressly agree to waive statute of limitations defenses); *Gurfein* v. *Sovereign Group,* 826 F.Supp. 890,903 (E.D.Pa. 1993) ((Lastate saving clause can not be used to extend a federal limitation period").

The deletion is the most important change. It means that the six-year rule will apply even if one of my clients is directed to arbitrate by a court. The arbitrators can then dismiss the older claims and send me and my clients back to court. It's a perfect whipsaw for the industry to grind down weak older investor claimants and their lawyers. These claimants are already suffering from illness, frailty, fear, and greatly diminished lifestyles caused by the unsuitable investment recommendations, churning of their accounts,

or outright fraud and theft of their assets by licensed securities brokerage firms.

Please reject this unfair proposed rule, and insist that the six-year rule be simply abolished. Leave securities arbitrators as the sole arbiters of whether claims are too stale to be equitably advanced, and whether claimant investors have sat too long on their rights. This one big bite is more than enough to take out of my clients' hides. Allowing the securities industry a second, additional bite is utterly unconscionable.

Sincerely,

James D. Keeney
JAMES D. KEENEY, P.A.

JDK: jk