I write to object to the request for accelerated approval of of the NASD's 5th Amendment to the Code of Arbitration Procedure. The NASD¹s 5th Amendment is certainly too important to be rushed through without benefit of publication and comment.In particular, the new proposal concerning motions to dismiss will generate chaos out of an attempt to create clarity as to the meaning of "extraordinary circumstances" . The NASD asks that it be allowed to amend the narrative portion of the rule filing to "explain under what circumstances a motion to dismiss might be granted." The new proposed explanatory text is:

"For purposes of this rule, if a party demonstrates affirmatively the legal defenses of, for example, accord and satisfaction, arbitration and award, settlement and release or the running of an applicable statute of repose, the panel may consider these defenses to be extraordinary circumstances. In such cases, the panel may dismiss the arbitration claim on the merits if the panel finds that there are no material facts in dispute concerning the defense raised and there are no determinations of credibility to be made concerning the evidence presented."

According to the NASD's letter to Lourdes Gonzales of the SEC (pp.30-32)
after objections were raised to the original rule filing the NASD held "a
policy meeting with various constituent groups of the arbitration forum, including investor and industry representatives." These groups were not "able to reach a consensus on any amendments to the proposed rule.² The idea of including this narrative to the rule filing was supposedly a compromise suggested by the NASD, following which "The various constituencies agreed to this compromise." Let me initially state that as a founder of PIABA, former president of PIABA, former member of the NAMC and a former member of the NASD's Securities Arbitration Task Force ('The Ruder Commission"), I have no idea of the identity of the investor representatives who thought this a good compromise. Having represented parties in arbitration since the mid-1980¹s, I ardently disagree with this so-called compromise.

By adding quasi-legislative history which cites certain legal defenses including statutes of repose as examples, the NASD is virtually inviting respondents to explore the limits of the kind of legal defenses that are extraordinary. If statutes of repose are amenable to motions to dismiss, why not statues of limitation? Further, by using language such as ³no material fact in dispute² in the proposal, the NASD is suggesting that pleadings, including claims and defenses, are to be tested as they are in court. Yet, even the Securities Industry Association concedes that such technicalities and the resulting costs and delays have no place in arbitration:

Testimony of Marc E. Lackritz
President, Securities Industry Association before the Committee on Financial Services ,U.S. House of Representatives (March 17, 2005)

> SRO-sponsored securities arbitration is a system that works. It is a
> fair and efficient means of resolving disputes between customers and
> brokerage firms -- fair both to customers and to individuals and
firms

> in the securities industry...
>
> Arbitration continues to be a far more efficient and cost-effective
> dispute resolution mechanism than traditional court-based litigation.
> On average, disputes are resolved much faster and at far lower cost
to
> customers in the SRO-sponsored arbitration fora than in comparable
> court cases. This allows participants to put a dispute behind them
> and move on with their lives, without the often all-consuming, years-
long battles of traditional litigation.
>
> Aggrieved customers get what so many say is what they really want:
> their "day in court." Unlike in court cases, claimants in
arbitration
> are not held to technical pleading standards. Unlike in court cases,
> pretrial discovery in arbitration is focused and limited, and rarely
> includes expensive and time-consuming taking of depositions. 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
> conclusion. The more streamlined process of arbitration, as compared
> with the 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.
>
> So the system works. But it will continue to be superior to
> court-based litigation only if we guard against what I call the
"creeping litigiousness"
> that is at the gates...
>

>
> SRO-Sponsored Arbitration Provides Claimants with an Opportunity for
a
Hearing,
 Which They May Not Otherwise Obtain in Court
> ...
> In addition to the efficiency and fairness benefits described above,
> parties who utilize arbitration are far more likely to have their
> claims aired in a full hearing, and decided on the merits, rather
than
> won or lost on technicalities. This is in sharp contrast to court
> proceedings, where a significant percentage of claims are dismissed
on
> pre-hearing motions to dismiss or for summary judgment. Many of
these
> dismissals are on what may be described as technical, or procedural,
> grounds. This includes dismissals for pleading failures,
> jurisdictional deficiencies, and statutes of limitations bars.
>
> A plaintiff in a court case may be faced with a daunting gauntlet of
> obstacles: a threshold motion attacking the sufficiency of pleading
> in a complaint; formal document requests with no presumption of
> anything being properly discoverable; written interrogatories;

> depositions of fact witnesses; discovery motions; written expert
> reports; depositions of expert witnesses; formal requests for
> admissions; a pretrial motion for summary judgment; interlocutory
> appeals of any decisions rendered before a trial; motions to preclude
> or allow certain evidence at trial; and then, finally, for the few
who
> make it that far, a trial followed by almost automatic appeals by the
> losing party. And, if a customer prevails in court after all of
that,
> he may have to hurdle additional obstacles just to get that hard-
earned judgment enforced.
>
> That is the reality facing those who need to resort to the court
> system. In contrast, arbitration allows for a simple statement of
> claim, an answer, presumptive discovery, and then a full merits
> hearing. While pre-hearing motions are permitted in arbitration,
they
> are vastly more limited than those in court. The costs to get to a
> hearing are a fraction of what they are in traditional litigation. As
> arbitration practitioners will readily acknowledge, many claims that
> would otherwise have been dismissed in court on legal grounds are
> nonetheless presented on the merits to arbitrators, allowing the
> claimants an opportunity which he or she may otherwise never have had
> - an opportunity to persuade arbitrators that fairness and equity
dictate that relief should be granted, even if the technical aspects of
the law may not be on their side.
> And, as reflected in the significant percentage of cases that settle
> before a hearing, customers are able to use the leverage of a speedy
> hearing in negotiating favorable resolutions of disputes through
> mediation or other settlement negotiations.

The inability of parties in arbitration to obtain sworn testimony before motions are decided , the fact that arbitrators need not be lawyers much less judges, the absence of meaningful review of erroneously decided motions to dismiss, and the transformation of an equitable forum where claims are decided on the facts rather than dismissed on legal technicalities, all combine to make the NASD¹s proposal deeply troubling.

I am also distressed by the NASD¹s fairly cavalier disregard for concerns about changes in the discovery rule to require parties to produce document that in in their ³control². Member firms will use this change to insist that customers contact their former brokerages to produce account statements and information going back for many years. Brokerages typically charge dearly for such copies. This will impose a huge cost on claimants and may in fact discourage the filing of small but still meritorious claims. In exchange for this added burden, investors get nothing. In the real world, there are virtually no circumstances in which firms control ,but do not have custody of , documents needed by the customer. The proposed change then basically upsets the balance accomplished when investor advocates and firms reached a consensus in proposing the discovery guide which was approved by the SEC in 1999. This proposed change too should be rejected as something which is essentially a unilateral benefit for the securities

industry at the expense of investors who are required to air their disputes in arbitration.

Sincerely,

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