I write to object to the request for accelerated approval of of the NASD's 5th Amendment to the Code of Arbitration Procedure. While the revised Code has commendable features, the NASD's 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 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." 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 member of the board of directors of PIABA, who has also had the honor of serving on the NAMC, 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-1980's, 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 "no material fact in dispute" 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 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)
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> SRO-Sponsored Arbitration Provides Claimants with an Opportunity for a
> Hearing, Which They May Not Otherwise Obtain in Court

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> 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.

The inability of parties 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 NASD's proposal deeply troubling.

I am also troubled by the NASD's fairly cavalier disregard for concerns about changes in the discovery rule to require parties to produce document that in in their "control". 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, investor 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. It 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.

Very truly yours,

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