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May 12, 2006

Ms. Lourdes Gonzalez
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Securities and Exchange Commission
100 F Street NW
Washington, D.C. 20549

Re: File Number SR-NASD 2003-158

This is in response to the NASD's filing with the SEC on May 4, 2006 of yet more proposed revisions to the NASD's Code of Arbitration Procedure. I have been following the proposed Code rewrite for several years, as a large part of my practice is representing parties in NASD arbitration proceedings.

I was surprised at the scope of the proposed amendments, and the NASD's commentary that accompanied the proposal. Some of the new proposals are enormously significant. The public should be given an opportunity to comment on those changes.

For example, the proposed new language in Rule 12504 (regarding motions to dismiss) would radically change the prior proposal, re-defining "extraordinary circumstances" to cover virtually any "legal defense" that can be raised in traditional litigation (after all, that is where the definition of "legal defenses" comes from)[1]--e .g., failure to state a claim on which relief may be granted; failure to join a necessary party; waiver; estoppel; laches; ratification; unclean hands. These defenses, and the examples the NASD gives, are anything but extraordinary. They are utterly common circumstances. The industry is often represented in arbitrations by big firm lawyers, who don't know how to do anything but turn over every stone (twice), and bring every motion under the sun that can be brought. This new language would open the floodgates to such tactics and fundamentally change the nature of NASD arbitrations.

The securities industry has justified to Congress, and the public, the fairness of forcing the investing public to arbitrate all of their claims before industry-sponsored panels *on the grounds* that SRO arbitrations are flexible, equitable, and better than expensive, hypertechnical,

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[1] "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."

procedurally burdensome litigation. In recent testimony before Congress[2], the president of the Securities Industry Association, Marc E. Lackritz, testified "on how well the securities arbitration process is serving our investors". He assured Congress that the process is fair to customers because it is a purely equitable proceeding, and allows customers to avoid technical litigation roadblocks—citing the "legal defenses" which can be asserted on motions to dismiss in litigation as the kind of burden that is *not* imposed on investors in SRO arbitrations:

> Aggrieved customers get what so many say they really want: their "day in court". [C]laimants in arbitration are not held to technical pleading standards. . . . [T]he hearings themselves . . . 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 . . . obstacles that must be overcome by a plaintiff in a court case, means that nearly every case brought in arbitration . . . goes to a full merits hearing. . . .
>
> 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 dismissal are on what may be described as technical, or procedural, grounds. This includes dismissals for pleading failures, jurisdictional failures, and statute of limitations bars. . . .

NYSE Director of Arbitration, Karen Kupersmith, likewise testified at the same hearing that securities arbitrations are better than court for investors, because they are equitable proceedings, free from rigid legal impediments to reaching a just result:

> There are numerous benefits of arbitration that render it a more productive dispute resolution process for investors than litigation. . . .
>
> Arbitration is based on principles of equity—doing what is most fair and just in light of the facts and circumstances of the particular case. Public investors receive a direct benefit from these equitable principles. Should a panel of arbitrators find that the facts of a particular case merit an award because it is equitable, an award can be made without the need to cite any precedents or other justification.

This is just to illustrate how significantly the NASD's latest rule revisions affect the pending Code rewrite. Before the NASD casually proposes such a profound change in the

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[2] March 17, 2005. House Committee on Financial Services, Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises, hearing on "A Review of the Securities Arbitration System". *See* http://financialservices.house.gov/hearings.asp?formmode=detail&hearing=36

fundamental nature is the arbitration system, the public should be given an opportunity to be heard.

Thank you for considering this.

Very truly yours,

Carlson & Dennett, P.S.

Carl J. Carlson