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Jonathan G. Katz, Esq.
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: File #SR-NASD-2003-158
SEC Release #34-51856

Dear Mr. Katz

As a securities arbitration practitioner, arbitrator and mediator, I wish to voice my concern about NASD Dispute Resolution's request for Accelerated Approval of the Fifth Amendment to its proposed Customer and Industry Codes of Arbitration Procedure. While I can understand the NASD's desire to implement its long-debated and exceptionally well-intentioned rules, since those rules present a sea change in the way customers and brokers resolve disputes with brokerage firms, I believe it would be appropriate for the NASD to consider the many comments it has received from practitioners, most of which deal with just a handful of the proposed amendments.

The editor of *Securities Arbitration Commentator*, in a thoughtful analysis of the Fifth Amendment, recently wrote," It is quite possible that those who commented previously would simply rake over the same coals, if another period for comment were provided. Nevertheless, the changes have been many, substantive or not, and they merit public attention. It is neither a compliment to the Commission staff, nor to NASD Dispute Resolution's staff, that the process of getting this admittedly large package before the Commission for approval is rapidly approaching three years in length. Considering that fact, though, it seems another couple of months for the public to address these latest changes would not cause serious, incremental injury to the public interest." (SAC Ref. No. 2006-20-01)

In reviewing the comments submitted to date, it seems the primary focus is on Rule 12504: "Prehearing Dispositive Motions" and the problematic commentary that seeks to explain what "extraordinary circumstances" are when a panel is confronted with the all-to-often Motion to Dismiss, an attempt by a brokerage firm to deprive a customer of his or her right to an evidentiary hearing under Rule 10303(a). The NASD admits, to its credit, that most of the complaints are about this rule, even though the rule seeks to

recognize the evolving reality of our practice and the lack of guidance to arbitrators when confronted with these motions. Presently, arbitrators often and mistakenly reach for Rule 12 of the Federal Rules of Civil Procedure or, in New York, Rule 3211 of the Civil Practice Law and Rules, further transplanting litigation rules to arbitration procedures.

As you know from the recent comment letters, Proposed Rule 12504 provides that "motions to decide a claim before a hearing are discouraged, and may only be granted in extraordinary circumstances." Examples of such circumstances are not listed in the rule and, frankly, that is a good thing, for as the late Supreme Court Justice Potter Stewart once wrote in attempting to define pornography, "You know it when you see it."

As an arbitrator, I know Motions to Dismiss that lack merit when I see them, which is most of the time. As an arbitrator, I would be hard-pressed to grant such a motion, although it's not out of the realm of possibilities given extraordinary circumstances. As a defense attorney, I have made them when the wrong broker was named or it was factually impossible for my broker-client to have committed the alleged misconduct. I have not made them when substantive issues are to be resolved by the arbitrators (e.g., unsuitability, unauthorized trading, material misrepresentations or omissions). Regrettably, however, that has not stopped other defense attorneys from automatically including Motions to Dismiss in every single Answer they file.

At the NYSE, its Director recently told her arbitrators in a training session I attended that Motions to Dismiss will not be granted at that forum under any circumstances unless there is an evidentiary hearing. But that is what proposed Rule 12504 would do; hence the negative comments it has received from practitioners.

The problem with the NASD's commentary to proposed Rule 12504 is that it makes ordinary what should be extraordinary.

In its initial rule filing with the SEC, the NASD said that it "believes that parties have the right to a hearing in arbitration. However, the NASD also acknowledges that in certain extraordinary circumstances, it would be unfair to require a party to proceed to a hearing." So, just what are extraordinary circumstances? According to the NASD:

> "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."

I've been practicing securities law for over 30 years and have never heard the phrase "the running of an applicable statute of repose." Statute of limitations – yes. Repose – no.

You know it when you see it is my thinking. Keep the phrase as is - undefined. That's because each case may present its own fact-intensive extraordinary circumstances.

My fear is that in providing examples of circumstances that would, in the NASD's opinion, warrant the dismissal of a case at the pleading stage, before evidentiary hearings have even taken place, the NASD's arbitration program will become a litigation *substitute* rather than a litigation *alternative*. There is also the inherent and mistaken assumption in the commentary that all its arbitrators are lawyers, able to fully appreciate "the running of an applicable statute of repose".

NASD Dispute Resolution should be complimented and complimented again for the tremendous efforts it has made to convert an unwieldy single Arbitration Code into three plain speaking ones. In doing so, however, it may have gone too far in defining the "extraordinary circumstances" under which its arbitrators should grant dispositive motions to dismiss.

Respectfully Submitted,

David E. Robbins