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Jonathan G. Katz, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549-9303

Re: File No. SR-NASD-2003-158 -- Proposed Rule Change to Amend NASD Arbitration Rules for Customer Disputes

To Whom It May Concern:

The Pace Investor Rights Project ("PIRP") at Pace University School of Law welcomes the opportunity to comment on NASD's proposal to amend its Code of Arbitration Procedure ("Current Code") and establish the NASD Code of Arbitration Procedure for Customer Disputes ("Proposed Customer Code"). PIRP's mission is to advocate on behalf of investor justice, particularly with respect to the rights of small, individual investors.[1]

Much of the impetus for the Proposed Customer Code stems from the need for clearer language and better organization. We applaud NASD's initiative in crafting a "plain-English" customer code. We agree that the Proposed Customer Code should be understandable to *pro se* investors, who, in particular, need a comprehensive set of rules that will guide them through the arbitration process.

In this letter, we first discuss the changes that NASD identifies as substantive and that do not simply codify existing practices. We also suggest some modifications to those substantive revisions that, in our view, would make the Proposed Customer Code fairer to investors. We then propose additional revisions not currently contemplated by this rule proposal that we believe will also improve the arbitration process. Finally, we address the specific issues on which the SEC solicited comment by either commenting or providing cross-references directing the reader to our earlier discussion of the issue.

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[1] We gratefully acknowledge the assistance of Pace law students Lisa DeBock, Richard Downey, Bob Kim, and Rosario Patane in preparing these comments.

I. Comments on Changes NASD Identifies as Substantive

Subject to the specific comments below, we generally approve of the substantive additions to the Proposed Customer Code to the extent that they codify current practice, *e.g.*, Proposed Rule 12205 (Shareholder Derivative Actions); Proposed Rule 12210 (Ex Parte Communications); Proposed Rule 12213 (Hearing Locations); Proposed Rule 12307 (Deficient Claims); Proposed Rule 12409 (Arbitrator Recusal); and Proposed Rule 12500 (Initial Prehearing Conference). Similarly, we approve of revisions to the Current Code that are designed to improve the efficiency of the arbitration process, *e.g.,* Proposed Rule 12411 (Replacement of Arbitrators); Proposed Rule 12414 (Determinations of Arbitration Panel); and Proposed Rule 12601 (Postponements), as well as the internal consistency or transparency of the Current Code, *e.g.*, Proposed Rules 12304 and 12305 (Time to Answer Counterclaims and Cross Claims); Proposed Rule 12310 (Time to Answer Amended Pleadings); and Proposed Rule 12406 (Appointment of Arbitrators). Finally, we certainly approve of substantive revisions designed to enhance the fairness of the process to the parties, *e.g.,* Proposed Rule 12309 (Amending Pleadings to Add Parties); Proposed Rule 12502 (Recording Prehearing Conferences); and Proposed Rule 12702 (Withdrawing Claims).

Agreement of the Parties (Proposed Rule 12105). Current Code provisions that allow parties to modify the rules have created problems in instances where there are inactive parties. We support the Proposed Customer Code's solution to allow active parties to dispense with approval from inactive parties if the Director of Arbitration or the arbitration panel approves.

Use of the Forum (Proposed Rule 12203). We believe that the Proposed Customer Code should make clear that if the Director of Arbitration or President of NASD Dispute Resolution declines to permit the use of the forum and if there is no alternative available forum specified in the arbitration agreement, a customer can pursue his or her remedies in court.

Extension of Deadlines (Proposed Rule 12207). The Current Code provides limited guidance on extending deadlines.[2] We support both the flexibility and the transparency of this proposed section, as it clarifies the circumstances under which parties may agree to modify deadlines, as well as when and under what circumstances the arbitration panel and/or the Director have the authority to modify deadlines.

Sanctions (Proposed Rule 12212). The Proposed Customer Code provides the arbitration panel with broad authority to sanction any party for failing to comply with any code provision, any order of the panel, or any order of a single arbitrator authorized to act on behalf of the entire panel. We believe it is essential for a fair arbitration process that arbitrators have broad authority to impose sanctions. We hope that arbitrators will follow NASD guidance and exercise this authority in appropriate instances.

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[2] *See, e.g.,* Rule 10314 (b) (5) (extensions for pleadings).

However, we urge that the sanctions rule be revised further to explicitly provide arbitrators with the authority to sanction parties for abusive or violative conduct that took place before the appointment of the panel. We previously have pointed out the gap in sanctions authority that exists in the Current Code due to the delay in the selection of arbitrators and the resulting inability of parties to enforce compliance with Current Code provisions.[3] Given the extensive time lag between the filing of an answer (when discovery obligations can commence) and the appointment of the panel, the Proposed Customer Code should expressly delegate authority either to the appointed panel or to some other neutral to impose sanctions on parties for conduct earlier in the process.

Hearing Locations (Proposed Rule 12213). We endorse the substance of this proposed Rule, as it codifies current practice and reflects the view that the customer's residence is the primary factor in determining the hearing location. We suggest, however, that a *pro se* customer would not necessarily understand from the language of this Rule that he could request a more convenient hearing location upon filing the claim. An unrepresented investor might not perceive that the use of the term "generally" reflects the Director's discretion to select a more appropriate, less burdensome location, as described in the commentary. As a result, a *pro se* customer might be discouraged from submitting an arbitration claim on the grounds that he could not afford to travel to a distant hearing location. For this reason, we urge NASD to clarify this provision further to avoid the unwanted effect of discouraging customers from filing arbitration claims.

Neutral List Selection System and Arbitrator Rosters (Proposed Rule 12400). We agree that there is a need for well-qualified and experienced chairpersons, given the increased responsibilities placed on arbitration panels and especially chairpersons.[4] We doubt, however, that the proposed criteria are sufficient to achieve this objective. First, the proposed rule does not explain what would constitute "substantially equivalent training and experience" in lieu of NASD chairperson training. NASD states in the release that this would "include service as a judge or administrative hearing officer, chairperson training offered by another recognized dispute resolution forum, *or the like* (emphasis added)." We have concerns that NASD plans to grandfather arbitrators who have regularly served as chair without any evaluation of their performance. Second, in some states (New York, for example), non-graduates of law schools are eligible to sit for the bar examination and be admitted to the bar under certain circumstances. There does not appear to be any reason to disqualify these individuals from the attorney category. Third, the only difference between the attorney and non-attorney categories is that the non-attorney must have served on one more arbitration through award. We agree with NASD that legal training is a valuable attribute for a chair and doubt that service on one additional arbitration case is an adequate substitute.

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[3] *See* Jill I. Gross, *Pre-Appointment Discovery: A Phase of Anarchy in NASD-DR Arbitrations,* 2003 SECURITIES ARBITRATION COMMENTATOR (June 2003), at 1.

[4] *See* Barbara Black, *Do We Expect Too Much from NASD Arbitrators?*, 2004 SECURITIES ARBITRATION COMMENTATOR (Oct. 2004), at 1.

Finally, we are concerned by NASD's statement that arbitrators on the chair-qualified list will not be on the general public arbitrator list. There may well be circumstances where chair-qualified arbitrators would be willing to serve as a member of the panel when they would not be able to make the additional commitment to serve as chair. The parties should not be deprived of the opportunity to select these well-qualified arbitrators.

Number of Arbitrators (Proposed Rule 12401). We support the proposal to remove the discretion of the single arbitrator in claims of $50,000 or less to call for two additional arbitrators. As directors of a securities arbitration clinic that provides representation to small investors, we are very conscious about the need to minimize the costs of small claims. We do not believe that a chair-qualified public arbitrator needs two additional arbitrators to decide a customer claim of less than $50,000.

Generating and Sending Lists to the Parties (Proposed Rule 12403). We support eliminating the ability of a single party to request arbitrators with particular expertise; a decision that arbitrator expertise is desirable should be mutual. We also support expanding the number of proposed arbitrators on each list to seven and limiting the number of arbitrators that a party could strike to five. This should increase the likelihood that the panel will consist of arbitrators selected by the parties. Although it is not part of this code revision, proposals for a second round of arbitrator selection have been previously discussed. We would oppose any proposal for a second round of arbitrator selection, because discovery disputes cannot be resolved until selection of arbitrators.

Motions (Proposed Rule 12503). We, like other commentators on the arbitration process,[5] decry the increased use of motions in arbitration, and it would be unfortunate if adoption of a rule encourages the filing of even more motions. Yet we, like NASD, recognize the reality of motion practice as a part of arbitration process and believe that participants would benefit from a rule that provides guidance on and transparency to the procedures. Accordingly, we support the proposed rule. We further support the addition of a provision requiring the moving party to attempt to resolve the dispute giving rise to the motion before filing it, so as to avoid unnecessary delay, cost and acrimony.

Motions to Decide Claims Before a Hearing on the Merits (Proposed Rule 12504). Although the Current Code (Rule 10303) provides that parties are entitled to a hearing, unless all parties waive it in writing, courts have held that arbitrators have the authority to decide pre-hearing motions to dismiss, so long as the arbitrator's refusal to hold a full evidentiary hearing is not fundamentally unfair.[6] In our view, there are only very limited circumstances where dispositive motions may be appropriate, since generally there are disputed issues of material fact and issues of credibility that would

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[5] *E.g.*, David S. Ruder, Chairman, SECURITIES ARBITRATION REFORM: REPORT OF THE ARBITRATION POLICY TASK FORCE TO THE BOARD OF GOVERNORS NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. (1996), at 7.

[6] *See, e.g.* Sheldon v. Vermonty, 269 F.3d 1202, 1206 (10th Cir. 2001); Warren v. Tacher, 114 F. Supp.2d 600, 602-03 (W.D. Ky. 2000).

make it fundamentally unfair to dismiss a claim without giving the claimant an opportunity to complete discovery and to present evidence, both written and oral. We note also that many motions to dismiss on eligibility rule grounds involve disputed issues of fact and are not suitable for summary disposition. We therefore support the language in paragraph (a) that dispositive motions are "discouraged" and "may be granted only in extraordinary circumstances" and recommend that the exception for motions on eligibility rule grounds be stricken.

In addition, we believe that arbitrators would benefit from more specific guidance and recommend that the proposed rule state that the panel should deny dispositive motions whenever (1) credibility is an issue; (2) there are disputed issues of material fact; or (3) the panel believes a hearing is necessary in the interests of justice. We also believe that the proposed rule should make clear that arbitrators should not apply a "failure to state a claim" standard, since claimants are not required to plead legally cognizable claims. Finally, we support giving the panel explicit authority to issue sanctions against a party that makes a dispositive motion in bad faith, because we are concerned that the use of these motions will become more prevalent with the adoption of this rule.

Discovery (Proposed Rules 12505-12511). NASD previously issued a Notice to Members expressing its concern about widespread noncompliance by member firms with discovery orders and acknowledged that NASD Discovery Guide guidelines are frequently ignored.[7] As stated above (on page 3), we are particularly troubled by the lack of discovery compliance in the phase of arbitration before the panel is appointed, but after the parties are entitled to discovery under the Current Code. Thus, we support all efforts to improve compliance, as investors' rights to redress may be effectively thwarted by brokerage firms' refusal to comply.

Specifically, we believe that the proposed rules should make it explicit that the discovery procedures are mandatory by striking the word "voluntary" from proposed rule 12505. We agree that the Discovery Guide document discovery lists should be incorporated into the Proposed Customer Code, as per Proposed Rule 12506. In our view, however, the documents covered by these lists should be automatically, and not presumptively, discoverable. Thus, we suggest deleting the option of objecting to the requested documents from Proposed Rule 12506(b).[8]

With respect to requests for information (Proposed Rule 12507(a)), we recommend incorporation into the Proposed Customer Code of the language in the Discovery Guide about the limited purpose of information requests and the admonition that they are not to be used as interrogatories,[9] to discourage the use of overly broad information requests that are the equivalent of interrogatories.

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[7] NASD NOTICE TO MEMBERS 03-70, Discovery: NASD Reminds Members of Their Duty to Cooperate in Arbitration Discovery Process (November 2003).
[8] Proposed Rule 12508(a) would also be revised.
[9] NASD NOTICE TO MEMBERS 99-90, NASD Regulation Announces New *Discovery Guide* To Be Used In Arbitration Proceedings (Nov. 1999), at 691.

Requests from brokerage firms to keep documents (particularly compliance manuals) confidential have generated controversy. The Proposed Customer Code, however, is silent on issues of confidentiality and privilege, except to provide (in Proposed Rule 12503(c)) that a party can require that the full panel decide motions relating to privilege. The discussion in the Discovery Guide, asserting that arbitration panels have the power to issue confidentiality orders, remains unchanged. At a minimum, the Proposed Customer Code should state "that the party asserting confidentiality has the burden of establishing that the documents in question legitimately require confidential treatment."[10] In our view, brokerage firms do not have grounds to assert the confidentiality of compliance manuals.[11] We urge that NASD initiate a discussion among claimants' and industry representatives to arrive at a consensus about the treatment of compliance manuals.

Finally, we support Proposed Rule 12511(a) and its provision that the panel may impose sanctions for parties' non-compliance with discovery rules or orders of the panel. As a practical matter, party adherence to the discovery rules will improve only if panels send a consistent message that they will not condone non-compliance by imposing meaningful sanctions.

Subpoenas (Proposed Rule 12512). Because there are significant legal issues about the use of third-party subpoenas in arbitration,[12] we urge adoption of the proposed subpoena rule that NASD recently filed as a separate rule change with the SEC,[13] which provides an opportunity for adversaries to object to the issuance of the subpoena. We believe NASD's version is preferable to the SICA version,[14] for the reasons stated in the NASD notice.

Exchange of Documents and Witness Lists (Proposed Rule 12514). We support the Proposed Rule's presumption that parties cannot use any documents at the hearing or call any witnesses that were not timely exchanged or identified, unless the panel

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[10] The quoted language is taken from *Arbitrators and Orders of Confidentiality,* THE NEUTRAL CORNER (Apr. 2004), *available at* http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_010040 (last visited July 7, 2005). The article was jointly written by members of the Neutral Roster Subcommittee of the National Arbitration and Mediation Committee.

[11] *See, e.g.,* Miller v. Smith Barney, Harris Upham & Co., 1986 U.S. Dist. LEXIS 28787, *18-20 (S.D.N.Y. Feb. 27, 1986).

[12] *Compare* Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 408 (3rd Cir. 2004) (holding that Federal Arbitration Act does not authorize arbitrators to issue a subpoena duces tecum to a third-party witness), *and* Odfjell ASA v. Celanese AG, 328 F.Supp.2d 505, 507 (S.D.N.Y. 2004) (following *Hay*), *with* In re Security Life Ins. Co. of America, 228 F.3d 865, 870-71 (8th Cir. 2000) (concluding that FAA implicitly empowers arbitrators to compel the production of documents from a third-party witness).

[13] NASD Dispute Resolution, Inc., File No. SR-NASD-2005-079, Proposed Rule Change to Provide for a 10-day Notice Requirement Before a Party Issues a Subpoena to a Non-Party for Pre-Hearing Discovery (June 17, 2005), *available at* http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_014508 (last visited July 5, 2005).

[14] SICA, Uniform Code of Arbitration, §23(c).

determines that good cause exists. A fair hearing requires that a party is not subject to unfair surprise.

Simplified Arbitration (Proposed Rule 12800). A simplified arbitration on the papers by a single arbitrator is a quick, inexpensive option particularly useful for *pro se* small claimants. Under the Current Code (Rule 10302(f)), however, its utility is diminished because the arbitrator can call for a live hearing even though the claimant does not want it. Thus, we endorse the proposed rule change to retain the option for the small claimant to request a hearing but to remove the option from the arbitrator to require a hearing if the customer elects to have the dispute decided on the papers.

We further approve of the revised rule to the extent that it explains in a useful, straightforward manner, the procedures and costs of filing small claims. We believe that a *pro se* claimant should be able to comprehend and follow the simplified arbitration code provisions,[15] which, when combined with the customer-friendly materials on the NASD website and/or available in print, would permit a small investor to pursue a small claim on the papers without the aid of a lawyer.

Unfortunately, the Proposed Customer Code would have a detrimental impact on simplified arbitration by extending the deadlines for responding to pleadings to conform to the standard deadlines. For example, under the Current Code (Rule 10302(d)), the answer is due twenty calendar days from receipt of the statement of claim, in contrast to 45 calendar days in Proposed Rule 12303. This change would diminish the benefits of the simplified arbitration procedure for small investors. A broker should be able to respond more quickly to a small, uncomplicated claim.

Moreover, current NASD practice permits the claimant to file a reply to the respondent's answer. However, the Proposed Customer Code does not explicitly authorize this practice. Since many claimants filing simplified arbitration claims are *pro se,* it is particularly important that the Proposed Customer Code spell out its procedures clearly and completely. Accordingly, we suggest making clear, in a proposed definition of "pleadings,"[16] that replies can be filed in simplified arbitrations. We propose that claimants have ten (10) days to file a reply following the close of the discovery period, which accords to our understanding of current practice.

Fees (Proposed Rule 12900). Arbitration is not an effective remedy if a claimant is unable to pay the forum and hearing fees.[17] We believe, therefore, that it is essential that the Proposed Customer Code expressly disclose that fee waivers may be granted to

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[15] The only exception is the vague definition of "pleadings" in Proposed Rule 12800(c) (2). *See* Comments in Section II, *infra*.

[16] *See infra section II*.

[17] *Cf.* Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 90 (2000) (suggesting that "the existence of large arbitration costs could preclude a litigant … from effectively vindicating her federal statutory rights in the arbitral forum" and thus could lead to a finding of substantive unconscionability of the arbitration agreement).

those parties who can demonstrate financial hardship. The Code should also set forth explicitly the practice and procedure for applying for such fee waivers and the criteria for granting them.

II. PIRP's Proposals for Other Changes

Definitions (Proposed Rule 12100). We suggest two additional definitions. Like the Current Code, the Proposed Customer Code does not define an important term -- "customer," a definitional issue for which courts have consulted other NASD rules for guidance.[18] We suggest that the Proposed Customer Code define a "customer" as not including a broker or dealer, the broad definition found in NASD Rule 0120(g).

We also suggest a definition of "pleadings" that lists the permissible documents: statement of claim, answer, counterclaim, cross claim, third party claim and reply (in simplified arbitration only). This will assist the *pro se* claimant who encounters the term in Part III of the Proposed Customer Code and will also make clear that no additional pleadings are permitted.

Time Limits (Eligibility Rule) (Proposed Rule 12206). We continue to believe that it would simplify the arbitration process if NASD dispensed with the eligibility rule and instead authorized the arbitration panel to apply, to the extent applicable, relevant statutes of limitations.[19]

Filing an Initial Statement of Claim (Proposed Rule 12302). We suggest that the following sentence be added in paragraph (a) after "A statement of claim specifying the relevant facts and remedies requested.": "There is no requirement that the statement of claim plead legal causes of action or legal theories." This will make clear that claimants may assert any claim whether or not it states a legally cognizable cause of action.

Composition of Arbitration Panels (Proposed Rule 12402). We believe that the recently adopted revisions[20] to the definitions of "non-public" and "public" arbitrator that are incorporated into the Proposed Customer Code (Proposed Rules 12100(n) and (r), respectively) are improvements to the prior definitions. We also support the recently announced changes to tighten the definition of public arbitrator.[21]

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[18] *See, e.g.,* Multi-Financial Sec. Corp. v. King, 386 F.3d 1364, 1368 (11th Cir. 2004) (consulting NASD Rule 0120(g) and holding that a customer of an associated person can arbitrate a dispute with the broker-dealer).

[19] *See* Barbara Black, *Securities Arbitration Is Not Supposed To Be So Complicated: Arbitrability, the Eligibility Rule, and Whose Law Decides*, 30 SEC. REG. L. J. 134 (2002).

[20] SEC Rel. 34-49573, File No. SR-NASD-2003-95 (Apr. 16, 2004).

[21] *See* NASD Dispute Resolution, Inc., News Release, *NASD Proposes Revising Definition of Public Arbitrator* (Apr. 25, 2005)*, available at* http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_013866 (last visited July 5, 2005).

Removal of Arbitrator by Director (Proposed Rule 12410). We object to this Proposed Rule to the extent that it varies from SICA's Uniform Code by not providing the parties with a preemptory strike when it is necessary for the Director to appoint an arbitrator. We believe it is essential for the perception of fairness that each side has the right to exercise one preemptory strike of any appointed arbitrator. Granting a party's request to remove an arbitrator only upon a showing of interest or bias that is "direct, definite, and capable of reasonable demonstration" is overly restrictive and unlikely to provide assurances of impartiality to an investor who objects to the appointment of an arbitrator whom he or she has had no voice in selecting.

III. PIRP's Response to Those Issues on which the SEC Solicited Comments

A. *Differences from Uniform Code of Arbitration.*

1. Appointment of Arbitrators. See discussion in Part II above.

2. Subpoenas. See discussion in Part I above.

B. *Nonsubstantive Changes.* None.

C. *Proposed Rule 12105.* We support this rule change, and believe that it is sufficiently clear what an "inactive" party is. We do not believe the rule requires further clarification.

D. *Proposed Rule 12400, NLSS and Arbitrator Rosters.* See discussion in Part I above. For a variety of reasons, including the concern identified in the Release regarding regions with small arbitrator rosters, we believe that chairpersons should be permitted to serve in a non-chairperson role. The Proposed Customer Code should not eliminate that possibility.

E. *Proposed Rule 12408, Disclosures of Arbitrators.* We believe the proposed rule clearly calls for the arbitrator to disclose "existing or past service as a mediator" on any case, not just the proceeding in question. We believe that an arbitrator's ethical obligations would preclude a more constrained reading of the disclosure requirement. No further clarification of the language is required, in our view.

F. *Proposed Rule 12600(c), Required Hearings.* We oppose the ten-day notification of a hearing date by the Director of Arbitration. In situations where a small investor is able to obtain legal representation, that counsel's schedule might not be able to appear for a hearing on ten days' notice. Short notice might cause a small investor to lose his or her counsel, and be forced to proceed without counsel, as it is very difficult for a small claimant to find counsel at all. We believe a longer notice period, such as twenty days, would have less of an adverse impact on small investors.

G. *Proposed Rule 12702, Withdrawal of Claims.* We support this rule, which remains unchanged from the Current Code. We believe it is a reasonable accommodation of the competing interests, and we are not aware that it has created any difficulties.

H. *Proposed Rule 12800, Simplified Arbitrations.* See discussion in Part I above. We suggest that the time for responding in simplified arbitrations continue to be 20 days to retain the expediency of the process.

IV. Conclusion

It is nearly twenty years since the Supreme Court decided *Shearson/American Express v. McMahon.*[22] During this time period NASD has made many substantive changes to improve the effectiveness and fairness of the arbitration process. We expect that this review will be ongoing; we acknowledge that NASD continues to file rule proposals to improve the arbitration process, such as recent proposals regarding attorney representation in arbitration and third-party subpoenas. Some claimants, for example, continue to have concerns about actual and apparent arbitrator bias; their concerns about the fairness of the SRO arbitration process are not likely to subside unless the appointment of a non-public arbitrator is at their option. Accordingly, we recommend discussions among regulators, claimants' advocates and industry representatives on the advisability of mandating a non-public arbitrator on every three-person panel. More broadly, we urge SEC, NASD and other interested parties to continue their review of these provisions after their adoption and the arbitration process as a whole, and to consider further rule changes to foster the twin goals of fairness and efficiency.

Please do not hesitate to contact us further if you have additional questions regarding these comments. Thank you for providing the opportunity to comment on this significant rule change proposal.

Sincerely,

Jill Gross & Barbara Black

Directors, Pace Investor Rights Project

[22] 482 U.S. 220 (1987).