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VIA E-Mail

Nancy M. Morris
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Proposed Rule Change to NASD Arbitration Code
SR-NASD-2003-158

Dear Ms. Morris:

I am an attorney in New York principally engaged in the practice of arbitration before the NASD, NYSE, AAA and NFA. I am also an NASD and NYSE arbitrator, a member of the Board of Directors of Public Investors Arbitration Bar Association ("PIABA"), a member of the Securities and Exchanges Committee of the New York State Bar Association Committee on Securities and Exchanges, a member of the Legal and Compliance Division of the Securities Industry Association ("SIA"). I have engaged in all or most of these activities for the past 15 years.

I strenuously oppose the Accelerated Approval request of the NASD for the Proposed Rule Change to NASD Arbitration Code, SR-NASD-2003-158.

A. The Accelerated Approval Request Should be Viewed with Great Skepticism

The Accelerated Approval Request of the NASD with respect to the Proposed Rule Change to NASD Arbitration Code, SR-NASD-2003-158 should be viewed by the SEC with great skepticism. What is proposed is not only an important departure from previous proposals and the methods previous proposals were made, but also intended to circumvent the public's comment on such an important change. Given the longstanding use of the current rules, there is absolutely no reasonable or justifiable basis for the NASD to unilaterally attempt to implement changes without a comment period. Certainly, by its very nature, this is not done to benefit the interest of public investors, just the opposite. Trying to avoid the comments of public investors and their advocates is in derogation of the NASD's mandate as a self-regulatory organization sanctioned by the SEC to carry out important responsibilities for investor protection that the SEC has delegated to it. Query whether the SEC should consider investigating how this proposal was arrived at and presented in this manner and whether any of the investor protection mandates of the NASD were breached in so making such an outrageous departure from procedures designed to protect the public investor.

Public customers in dealing with every broker/dealer in the industry - without exception - have no choice but to arbitrate their disputes in a self-regulated industry forum created, maintained and paid-for by the industry. Public customers have no right to go to third party arbitration forums. The NASD is a constituency of its members, the broker dealers that pay their dues to the NASD entity. The industry has and wants to maintain control of the process; it is obvious and undisputable, especially given this recent act of attempted unilateral rulemaking. Customers did not create the arbitration rules. However, with the input of PIABA, the North American Association of Securities Administrators ("NAASA") and the arbitration clinics at various law schools that have grown significantly in number over the past few years, public investors now have any opportunity to provide thoughtful and organized legal input into changes to the rules the industry alone created. Now that they have these mechanisms in place, the NASD is attempting to circumvent their input.

The benefit of arbitration to customers is the absence of technical defenses, avoidance of motions practice and the ability to get a claim heard on the merits and after testimony on the basis of whether the client's treatment by the firm comported with standards of fairness and equity. By law in most jurisdictions, and even historically in New York – a notoriously tough state by all standards, parties to voluntary arbitration may not superimpose rigorous procedural limitations on the very process designed to avoid such limitations. Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 362 (S.D.N.Y. 1957). That benefit should not be taken away from investors.

Granting changes to the code that would sanction dispositive motions, such as this, would exceed the powers of the arbitrators under the Federal Arbitration Act, 9 U.S.C. Sec. 10 (a) (4), unless the parties agreed to have their fate decided by motion. Moreover, it is a counter-intuitive to the expeditious nature of arbitration to add significant motion practice, as a decision incorporating a dismissal prior to a hearing may be vacated. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987)(Award set aside "[w]here the arbitrators were guilty of misconduct in refusing . . . to hear evidence pertinent and material to the controversy.").

Motion practice is contrary to the expeditious aspirations and fairness requirements of the Arbitration Rules and the Federal Arbitration Act. The current rule, as proposed, will radically change the process and is a marked step in the wrong direction. It would likely delay and weaken investors already limited arbitral rights and cause additional expense, giving the industry more leverage, especially against some of the most worthy of claimants, the elderly public investors, who are common and easy targets of wrongful conduct, but who cannot withstand a long and expensive process.

In Shearson/American Express Inc. et al.v. McMahon et al., 482 U.S. 220, 233-234 (1987) ("Shearson"), the foundation for securities arbitration, the Court made two important points:

> In short, the Commission has broad authority to oversee and to [482 U.S. 220, 234] regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights.[1]

The Federal Arbitration Act is not served when the investor is powerless and has no right to go to independent third party arbitration forums with alternative selection methods created by non-industry, neutral arbitration forms. It is shameful, however, when public customers and their advocates who have and are participating in an existing system with no meaningful choice but to have their claims heard in that system are shut out from giving input into important changes to it.

Thank you for your consideration.

Very truly yours,

Jenice L. Malecki

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[1] As cited in Shearson, fn. 3, Senator Williams, Chairman of the Subcommittee on the amendments to RICO, in speaking of treble damages (we wish), observed:

> "This legislation represents the product of nearly 4 years of studies, investigations, and hearings. It has been carefully designed to improve the efficiency of the securities markets and **to increase investor protection**. It is reform legislation in the very best sense, for it will lay the foundation for a stronger and more profitable securities industry **while assuring that investors are more economically and effectively served**."

Hearings on S. 30 and Related Proposals before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 1 (1970).