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Jonathan G. Katz, Secretary
SECURITIES AND EXCHANGE COMMISSION
100 F Street, NE
Washington, DC 20549-9303

Via Electronic Transmission

Re: Comment on File Number SR-NASD-2003-158

Dear Mr. Katz:

This letter is intended to offer solicited commentary on one aspect of the proposed amendments to the NASD arbitration rules for customer disputes. The principal focus of my practice is the defense of individual registered representatives and brokerage firms in customer initiated NASD and NYSE arbitrations. Consequently, the focus of my comments relates to those amendments that I perceive to be problematic from a defense perspective - a perspective that I have found to be increasingly overlooked or underweighted in an apparent effort to distill any perceived (albeit unsupported) bias against customers in the securities arbitration process.[1/] The creation of ambiguity in proposed Rule 12504 relating to pre-hearing dispositive motions poses problems to both sides of the bar and should not be included in the Customer Code.

Proposed Rule 12504. While this rule appears to be an attempt at pleasing both the public investor bar as well as the defense bar with respect to the long debated issue of dispositive motions, it appears to fail to satisfy either side. Instead of providing "guidance about motions", which the NASD vocalizes as the purpose behind proposed Rule 12504, the rule accomplishes the

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1/ While there has been extensive debate in recent years as to whether the securities arbitration process is stilted in favor of the brokerage industry, statistics call into question the validity of that suspicion. See Industry Arbitrator Award Survey, Securities Arbitration Commentator (May 2005) (noting that in 2003 customers won 51% of the time when appearing before a 3 arbitrator panel consisting of an industry arbitrator compared to 46% of the time when appearing before a single, public, non-industry arbitrator).

exact opposite by creating more ambiguity and uncertainty, which will only foster additional argument and expense.

For example, the rule states that motions to decide claims before a hearing on the merits "may only be granted in extraordinary circumstances." What does "extraordinary circumstances" mean? As it stands now, there are neither explanations nor examples provided within the proposed rule. By way of illustration:

- Is the expiration of applicable statutes of limitation an "extraordinary" circumstance? It certainly should be, as the expeditious resolution of questions regarding the timeliness of raising claims is beneficial to all. The parties should not be burdened with the cost of going to (and through) a final hearing when a focused hearing on the applicability of statutes of limitations could resolve the dispute at its inception, in a much more economical manner for all.

- What about the lack of standing on the part of a named claimant? Is that an "extraordinary circumstance"? It certainly should be. The proceedings would be an utter waste of time and expense if the respondent were not able efficiently to address the fact that the claimant was proceeding against the wrong party or that the stated claims did not involve the account purportedly at issue.

- What about a claim that fails as a matter of law on the basis of undisputed facts? This type of claim is one that has historically been the subject of a dispositive motion and, I submit, is clearly an instance where a dispositive motion prior to the final hearing would benefit all parties. Claims for which there is no legal basis should not be allowed to continue at the expense of all.

More baffling yet is the question of whether proposed Rule 12504 applies strictly to motions to dismiss based on the merits of a dispute. The Rule is titled "Motions to Decide Claims Before a Hearing on the Merits". It is ambiguous, at best, as to exactly what "on the merits" serves to qualify. Is it "motions" or is it "hearing"? If it simply functions to qualify the term "hearing", then how is proposed Rule 12504 consistent with proposed Rule 12211, which empowers a panel with the authority of dismissal as a tool for sanctioning non-compliant conduct. Is dismissing a claim on the basis of a Claimant's refusal to comply

with a Panel Order "discouraged", and if so, when does sanctionable conduct rise to the level of being "extraordinary" so as to justify a dismissal? Is it after violation of 1 order? 2 orders? 5 orders? or 10 orders?

Moreover, there appears to be a conflict between proposed Rule 12504, which recognizes the power of a panel to dismiss a case prior to a hearing, and proposed Rule 12600, which appears to circumscribe a limited universe of circumstances when a "hearing" would not be required, but fails to recognize the circumstance of a dismissal.

There are more questions raised as opposed to guidance provided by this proposed rule and, in light thereof, and the strong dissatisfaction vocalized on part of both the claimant's bar and the defense bar, retraction of the proposed rule and maintenance of the status quo is the best outcome.

Thank you for the opportunity to comment on the proposed Customer Code.

Very truly yours,

Rebecca C. Davis

RCD/kah