July 8, 2005

Ms. Margaret H. McFarland
Deputy Secretary
Securities and Exchange Commission

Re: ***Release No. 34-51856, file No. SR-NASD-2003-158***

Dear Ms. McFarland:

I am writing to comment on the proposed changes to the NASD Code of Arbitration Procedure with regard to customer disputes. I am a practicing attorney in Seattle, Washington, and much of my practice consists of representing customers in NASD arbitrations against broker-dealers.

While the proposed new code of arbitration procedure for customer disputes is an overall improvement upon the current code, I have the following specific comments regarding some provisions of the proposed code that I believe harm the rights of customers.

1. Proposed Rule 12400(b) Arbitrators Rosters. The use of separate and exclusive chairperson rosters and non-chair public arbitrator rosters will result in a lowering of the experience and expertise on a panel. Currently, both public arbitrators on a three-person panel may be qualified chairpersons, who necessarily have more training and experience in the arbitration process than most other public arbitrators. The proposed rule will ensure that there is only one qualified chairperson appointed to a panel. This is a disservice to the customer because trained and experienced public arbitrators are better able to resist the influence of the non-public industry arbitrators given a place on each panel by the NASD for their "industry expertise." Therefore, as long as the NASD is going to continue placing biased industry arbitrators on panels in customer disputes, the customer should have the benefit of the most experienced, best trained, and most knowledgeable public arbitrators available. The proposed three arbitrator roster should be dropped or the general public arbitrator roster should also include qualified chairpersons.

2. Proposed Rule 12503(c)(2) Authority to Decide Motions, regarding hearing location. The hearing location always should be set where most convenient for the customer, as usually indicated in the customer's statement of claim. There is no reason for the proposed provision to allow the Director to decide a motion to change the hearing location before a panel is appointed.

3. Proposed Rule 12504 Motions to Decide Claims Before a Hearing on the Merits. The proposed rule states that "motions to decide a claim before a hearing are discouraged, and may only be granted in extraordinary circumstances." This rule is provided purely to legitimize a common practice of respondent broker-dealers that is not provided for in the current rules – motions to dismiss. The proposed rule is both vague and ambiguous in failing to state whether, if such a motion were granted, it would be with or without prejudice to customers being able to pursue their remedies in court. It further fails to define "extraordinary circumstances." Thus, there is no standard for when such a motion might be appropriate, and the likely effect of this rule as proposed will be the filing of motions to dismiss by respondent broker-dealers in most cases as a matter of course. Customers are entitled to a hearing on the merits of their claims. Rather than legitimize these types of motions purely for the benefit of the industry, the Code should be amended to specifically prohibit them.

If such motions are going to be permitted, then there must be some standard to guide the arbitrators and the parties. Yet, the proposed rule provides no standard for the grant or denial of such a motion, such as in Federal Rules of Civil Procedure 12 or 56. In short, it is a hopeless muddle, which will inevitably lead to more motions practice, higher costs, and compromise the fairness of the arbitration process to investors. Therefore, if such a rule is adopted, it should explicitly utilize the standard of Federal Rule of Civil Procedure 12(b)(6), which requires that such a motion be denied if there is any set of facts consistent with the statement of claim that would permit relief in arbitration.

4. Proposed Rules 12506(b) and 12507(b) Time for Responding to Document Production Lists and Requests. The proposed rules extend the time to respond to discovery from the current thirty days to sixty days. There is absolutely no justification for the extension of time. The NASD certainly does not offer one. Arbitration is supposed to have more limited discovery than in court, yet the proposed rule provides twice as much time to respond than provided in most court rules. In my experience, respondents initially object to producing almost any responsive documents, including those in the Discovery Guide Lists. Thus, extending the time to respond simply provides an additional month for respondents to object to discovery, further delaying the process before anything can be done to compel production. Therefore, the proposed provisions extending the time to respond from thirty days to sixty days should be dropped.

5. Proposed Rule 12512 Subpoenas. Both the current and proposed rules allow for the issuance of subpoenas "as provided by law." In my practice, after failure to provide discovery, this is the most common form of discovery abuse by respondents. It causes needless motions practice and expense arising from improper attorney-issued subpoenas to third parties. The arbitration statutes in Washington and most other states, and the Federal Arbitration Act, do not provide for attorney-issued subpoenas. Yet, respondents' counsel often issue document subpoenas directly to private third parties, such as customers' accountants. The provision for issuance of subpoenas "as provided by law" is both vague and ambiguous and should be dropped. Rather, the NASD should amend the Code to state explicitly that only the arbitrators may issue subpoenas.

Thank you for your consideration.

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