I write this comment in light of the NASD's May 4th announcement of (a) amendments and changes to the Code of Arbitration Procedure and (b) the NASD's request for accelerated approval thereof. (I am unable to find reference to it on the SEC web site, but it is prominent on the NASD's site)

The NASD states in its press release that its 5th proposed Amendment constitutes an "improvement". This commentor disagrees, particularly as to two (2) areas: (1) language in the explanation of the types of "extraordinary circumstances" justifying a motion to dismiss and (2) language regarding a customer's obligation to provide documents within his "control". Both these items, presented as benign changes by the NASD in fact will create havoc in the arbitration system.

The motion to dismiss explanation inadvisedly introduces "litigation language" into the arbitration forum. References in the NASD's letter to "statutes of repose" and "material facts in dispute" open a Pandora's Box of legalisms into the arbitration forum. The language virtually invites a motion in every case, with an accompanying argument about the meaning of these very-technical legal terms. One need only recall the professor's constant question in law school about the differing standards for motions to dismiss and motions for summary judgment to know that neither of these concepts belongs in arbitration, where pro se parties and non-lawyer "industry arbitrators" are invited to participate.

Whenever motions to dismiss are made in arbitration, the process suffers and the investor is deprived of the single benefit inherent in arbitration - its expeditious and efficient nature. Even though these motions are almost invariably denied, the effort involved in the party replying and the arbitrators reading is a waste of effort, antithetical to arbitration, unjustified by the benefits obtained.

I was a member of the NASD's NAMC when this rule was drafted, and my support and endorsement of it in the past was based on the strong but vague language about motions being "discouraged", and only being appropriate under "extraordinary circumstances". That language conveyed the proper message in plain-English -- that ***making*** motions to dismiss was uncalled-for in almost every arbitration.

The explanation now given by the NASD, however, emasculates that single salutary feature of the new Rule. Instead of discouraging the motions, the NASD's inclusion of "statutes of repose" invites motions. By including a reference to timeliness in its exemplary list for motions to dismiss, the NASD implies that timeliness motions are not among those considered "extraordinary". Perhaps the NASD did not intend such a result, but I am confident sharp defense lawyers will seize on it.

The language also shifts the focus from the inappropriateness of ***making*** such motions to the circumstances under which such a motion is granted or denied. That too is an error. In court, motions to dismiss based on timeliness (whether characterized in terms of limitations, repose or whatever) are common tactical devices. If the NASD's language is accepted, the same, regrettably, will become true in arbitration.

The second area of difficulty is in the language requiring production not only of documents within the "custody" of the parties, but also of documents within their "control". It is unwise for NASD to use this language, because it suggests that the investor Claimant will be responsible to secure (e.g. from other brokerages and banks), documents sought by Respondent. Many of these institutions charge hefty fees for the reproduction of such documents. The NASD must make clear that it did not intend such a result.

Lastly, I point out that these two items are not the only items in the all-important new Code of Arbitration Procedure which are addressed in the NASD's recent release. The SEC should not

approve the request for accelerated implementation; there are too many important items in the recent NASD Document for it to un-commented upon.

Respectfully,

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