

PACE INVESTOR RIGHTS PROJECT

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Jonathan J. Katz
Secretary, Securities and Exchange Commission
100 F Street, NE
Washington DC 20549-9303

Re: File No. SR-NASD-2005-023

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 Rule 10316 and adopt Rule 10408 of the NASD Code of Arbitration Procedure to address attorney representation in arbitration and mediation. PIRP's mission is to advocate on behalf of investor justice, particularly with regard to the rights of small investors.

PIRP supports the rule proposal because it codifies NASD Dispute Resolution's current practice to allow an attorney admitted to the bar of any state to represent parties in arbitrations and mediations in its forum without regard to jurisdictional boundaries. We do not believe that the practice of NASD arbitration or mediation differs from state to state and thus does not require the expertise of an attorney admitted to practice in the particular state of the hearing location. By codifying current practice, subject to state bar limitations, NASD clarifies for parties involved in claims in the forum that there are no forum limits on attorney admission. In addition, the amendment of Rule 10316 should make it clear to courts that the fact that a party was represented in an arbitration by an attorney not admitted to practice in the forum state is not a basis for vacating an arbitration award.¹

PIRP further supports the rule proposal because the resulting clarity expands the pool of attorneys available to represent parties in the forum, and increases the possibility that investors with small claims can obtain legal representation. Small investors typically fare poorly in arbitration without legal representation,² yet are unable to find counsel because either they

¹ See *Sirotzky v. New York Stock Exchange*, 347 F.3d 985 (7th Cir. 2003) (stating that losing party had no grounds to vacate award where the other party was represented by an out-of-state lawyer, since it was for the arbitrators, not the courts, to decide whether this was proper).

² See Barbara Black, *Establishing A Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL ED. 35, 36 (2000) (explaining reasons why "[s]mall investors' perceptions that they would fare better with legal representation appear to be accurate"); see also GEN. ACCT. OFF., REP. NO. GGD-92-74, SECURITIES ARBITRATION: HOW INVESTORS FARE 40-41 (1992) (reporting that investors who receive an award were more likely to receive a higher percentage of their damages claimed when they were represented, especially investors with claims under \$20,000).

cannot afford it or their claims are too small and not economically feasible for a lawyer to handle. To some extent, law school securities arbitration clinics fill that void, as they provide free or low-cost legal representation to small investors in arbitration or mediation against brokerage firms and their associated persons.⁴ This rule change allows these clinics to proceed with representation of clients in out-of-state hearing locations without fear of reprisal from the forum or respondent(s), subject of course to applicable student practice orders, state bar rules and institutional limitations.

Finally, we disagree with NASD's characterization in a footnote to the rule filing that its "proposed rule change does not address the issue of representation by non-attorneys in arbitration and mediation cases."⁵ In our view, the amended language of Rule 10316 (for arbitration) and new rule 10408 (for mediation) unequivocally states that parties are entitled either to represent themselves or to be represented by an attorney, and does not give a third option of being represented by non-attorneys. Thus, this proposed language appears to rule out the option of non-attorney representatives, a category of representatives about which NASD "continues to be concerned" because of the "on-going problems that are caused by the practice of non-attorney representatives in the forum."⁶ We urge NASD to clarify its position in a place more prominent than a footnote in an amendment to a rule filing.

Thank you for providing us with the opportunity to comment on this proposed rule change. Please do not hesitate to contact us if you have any questions regarding these comments.

Respectfully submitted,

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⁴ To our knowledge, as of July 2005, eleven law school clinics in the United States offer representation to small investors in connection with securities arbitration and/or mediation claims. Eight of those clinics are in New York State, one is in Pennsylvania, one is in Illinois, and one is in California. See Securities and Exchange Commission, "Arbitration/Mediation Clinics in California, Illinois, New York, and Pennsylvania," available at <http://www.sec.gov/answers/arbclin.htm> (last modified Apr. 6, 2005).

⁵ Self-Regulatory Organizations; NASD; Notice of Filing of Proposed Rule Change Relating to Representation in Arbitration and Mediation, SEC Rel. 34-52045, 70 Fed. Reg. 42123, n. 4 (July 15, 2005); see also File No. SR-NASD-2005-023, Amendment No. 1, n.2.

⁶ 70 Fed. Reg. 42123 at n. 11.