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August 11, 2005

Via E-mail

Jonathan B. Katz
Securities and Exchange Commission
100 F. Street, NE
Washington, D.C. 20459-023

RE: File Number SR-NASD-2005-023

Dear Mr. Katz:

I write this letter on behalf of myself and my law firm, Goodman & Nekvasil, P.A., to respond to a request by the Securities and Exchange Commission ("SEC") for comments on a proposal of the National Association of Securities Dealers, Inc. ("NASD") to amend NASD Rule 10316 regarding representation by out-of-state attorneys in NASD arbitrations. We have a substantial interest in this issue because we have a nationwide practice representing investors in securities arbitrations, and we have litigated numerous court cases across the country in connection with these arbitrations. See, e.g., Harvey v. Salomon Smith Barney, Inc., 537 U.S. 1085 (2002); Multi-Financial Sec. Corp. v. King, 386 F.3d 1364, 1370 (11th Cir. 2004); Washington Square Sec., Inc. v. Aune, 385 F.3d 432 (4th Cir. 2004); California Fina Group, Inc. v. Herrin, 379 F.3d 311 (5th Cir. 2004); John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48, 59 (2d Cir. 2001); McCullagh v. Dean Witter Reynolds, Inc., 177 F.3d 1307 (11th Cir. 1999); Financial Network Investment Corp. v. Becker, 305 A.D.2d 187, 762 N.Y.S.2d 25 (2003).

Although we agree with much of the NASD's proposal, we disagree with the aspect of the rule which allows state law to control the issue. We request the SEC to follow the same rules that apply to SEC and NASD enforcement proceedings and adopt a rule which would prevent individual states from prohibiting or restricting representation by out-of-state counsel in NASD arbitrations. No justification exists for treating NASD arbitrations and NASD and SEC enforcement actions differently in this respect.

Traditionally, appearing in arbitration has not been deemed to be the unauthorized practice of law. Bette J. Roth *et al.*, The Alternative Dispute Resolution Practice Guide, § 7:13 (2003) ("Traditionally, . . . neither advocacy in arbitration . . . [nor] service as arbitrator . . . has been regarded as the practice of law."); Robert M. Rodman, Commercial Arbitration, § 19.12 at 383 (1984) ("Research by the American Arbitration Association disclosed that there was no support in statutes, decisional law or ethical codes for the proposition that representation of a party in arbitration proceedings by out-of-state lawyers or non-lawyers constituted the unauthorized practice

of law. The requirement that parties in arbitration be represented by lawyers admitted to practice in the forum state would greatly diminish many of the advantages of the process."); Owen Fairweather, Fairweather's Practice and Procedure in Labor Arbitration, § 7.IV (Ray J. Schoonhoven ed., 4th ed. 1999) ("[T]he union need not retain an attorney for the arbitration hearing to meet its duty to represent the employee."); Colmar, Ltd. v. Fremantlemedia N. Am., Inc., 344 Ill. App. 3d 977, 988, 801 N.E.2d 1017, 1026 (2003) ("[An out-of-state attorney's representation of a client during arbitration does not violate the rules prohibiting the unauthorized practice of law."); Sirotzky v. New York Stock Exchange, 347 F.3d 985, 990 (7th Cir. 2003) ("The rules of the New York Stock Exchange governing arbitration do not even require parties to be represented by a lawyer, let alone a licensed one . . . . There is nothing outre about this conclusion. . . ."); Siegel v. Bridas Sociedad Anonima Petroleia Industrial y Comercial, 1991 WL 167979 at *5 (S.D.N.Y. Aug. 19, 1991) ("'[R]epresentation of a party in an arbitration proceeding by a non-lawyer or a lawyer from another jurisdiction is not the unauthorized practice of law.").

The American Bar Association ("ABA") adopted this general principle in Model Rule 5.5. Rule 5.5 permits out-of-state counsel to appear in arbitrations in other states, if these appearances are reasonably related to their practice in their own state. For example, if counsel in one state have developed an expertise in securities arbitrations, they can use that expertise in other states as well. The ABA committee that developed Rule 5.5 explained this point as follows:

> It is generally recognized that, in the ADR [Alternative Dispute Resolution] context, there is often a strong justification for choosing a lawyer who is not admitted to practice law in the jurisdiction in which the proceeding takes place but who has . . . developed a particular knowledge or expertise that would be advantageous in providing the representation. . . . [I]n ADR proceedings, the in-state lawyer is not ordinarily better qualified than other lawyers by virtue of greater familiarity with state law, state legal processes and state institutions. Further, as noted by the ABA Section of Litigation and its comments to the Commission, "Clients have important considerations in ADR, which include confidentiality, consistency, uniformity, costs, and convenience. After all, non-binding ADR procedures usually require client 'buy in' to succeed. Denying a client her preferred counsel could hamper early ADR efforts and impede prompt resolution of disputes."
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> . . . .
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> [T]his provision would authorize legal services to be provided on a temporary basis outside the lawyer's home state by a lawyer who, through the course of regular practice in the lawyer's home state, has developed a recognized expertise in a body of law that is applicable to the client's particular matter. This could include expertise regarding nationally applicable bodies of law, such as federal, international or foreign law. A client has an interest in retaining a specialist in federal tax, **securities**, or

> antitrust law, or the law of a foreign jurisdiction, regardless of where the lawyer has been admitted to practice law. . . . The provision would, thus, bring the law into line with prevalent law practices. For example, many lawyers who specialize in federal law currently practice nationally, without regard to jurisdictional restrictions, which are unenforced. The same is true of lawyers specializing in other law that applies across state lines.

American Bar Association Commission on Multi-Jurisdictional Practice Report 201B to the House of Delegates, 6-8 (August 2002) (emphasis added). Approximately 15 states have adopted Model Rule 5.5, and several other states are considering adopting it.

I am aware of four litigated decisions in state supreme courts that have said that appearances in arbitration can constitute the unauthorized practice of law. Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998); In re Creasy, 198 Ariz. 539, 12 P.3d 214 (2000); Florida Bar v. Rapoport, 845 So. 2d 874 (Fla. 2003); Disciplinary Counsel v. Alexicole, Inc., 105 Ohio St. 3d 52, 822 N.E.2d 348 (2004). Creasy involved a disbarred lawyer, and Alexicole involved a non-lawyer. An Ohio bar committee, however, has recommended to the Ohio Supreme Court the adoption of Model Rule 5.5. See http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/default.asp. Arizona has already adopted Rule 5.5. See ER 5.5, Ariz. R. Prof.'l Conduct, Ariz. R. Sup. Ct. 42; Ariz. R. Sup. Ct. 31(c)(26). Consequently, Alexicole and Creasy likely do not apply to counsel with valid licenses in other states, and out-of-state counsel should be able to appear in Ohio and Arizona in securities arbitrations.

Unlike the Ohio and Arizona cases, the California decision in Birbrower did involve an attorney. The California legislature, however, quickly overruled Birbrower and amended Cal. Code Civ. Proc. § 1282.4 to permit out-of-state counsel to appear in arbitration, if local California counsel is also hired, and notice and a $50 fee is given to the California Bar. See also Cal. Rules of Court, rule 983.4.

In Florida, the Florida Supreme Court has recently adopted rules implementing Rapoport. Effective January 1, 2006, out-of-state counsel can appear in Florida arbitrations only three times in any 365-day period. Out-of-state counsel must seek permission from the Florida Bar for each appearance, pay $250, and make various disclosures regarding other Florida cases in which the lawyer has appeared, the date that legal representation commenced, and the lawyer's disciplinary history. In re Amendments to the Rules Reg. the Fla. Bar and the Fla. Rules of Jud. Admin., ___ So. 2d ___, 2005 WL 1118034 (Fla. 2005). The required disclosures, which in-state counsel would not have to make, can have obvious undesirable consequences. For example, disclosing the date that legal representation commenced could impact the arbitrators' consideration of statute of limitations issues.

The NASD has responded in different ways to these state decisions. To my knowledge, the NASD never responded to the Arizona decision in Creasy, and it has not yet responded to the Florida decisions in Rapoport and In re Amendments. In California, the NASD chose to enforce the California rules. See NASD Dispute Resolution Guidelines for Compliance with Amendments to Cal. Civ. Pro. Code Section 1282.4, dated October 14, 2002 (available on the NASD website). The NASD does not permit out-of-state counsel to appear in California unless they are associated with a California attorney and have provided the NASD with a non-California attorney certification form which contains the information required by Cal. Civ. Pro. Code § 1282.4. In Ohio, the NASD took an agnostic position. According to an undated memorandum available on the NASD website entitled "Unauthorized Practice of Law in Ohio," the NASD said it could not "advise parties or other representatives as to the effect of the Alexicole opinion on their particular circumstances."

In its filing with the SEC in this matter, the NASD generally agrees that out-of-state counsel should be able to appear in NASD arbitrations. According to the NASD:

> In the area of arbitration, . . . it is common for an attorney licensed to practice law in one state to represent a client in an arbitration proceeding in another state in which the attorney is not licensed.
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> . . . .
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> Under the proposed rule change, attorneys could represent a client in an NASD arbitration or mediation, held in any United States hearing location, regardless of the jurisdiction in which the attorneys are licensed. . . . The proposed rule change . . . is intended . . . to reflect current practice in the [NASD arbitration] forum, which, based on experience, shows that the level of knowledge, training and skill of an attorney affects the outcome of an arbitration . . . more than the jurisdiction from which the attorney received his license to practice.

Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Representation in Arbitration and Mediation, 70 Fed. Reg. 42,123, 42,124 to 42,125 (2005) ("NASD Notice").

The NASD, however, also proposes to promulgate subdivision (c) of Rule 10316,which would provide that "[i]ssues regarding the qualifications of the person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency." The entirety of the NASD's discussion of this subdivision consists of the following three sentences.

> The attorney's qualifications to participate as representatives in a jurisdiction in which they are not licensed would be subject to the applicable law of that jurisdiction. NASD believes the proposed rule change would assist attorneys in

> addressing the issue of multi-jurisdictional practice without encroaching on the states' rights to determine what activities violate the states' unauthorized practice of law provisions. The proposed rule change is not intended to prevent a state from deciding that an out-of-state attorney may have violated a state's unauthorized practice of law provision by representing a party in an NASD arbitration or mediation."

NASD Notice at 42,125.

Unfortunately, the first and third of these sentences are statements of result, not reasons in support. Moreover, the second sentence merely assumes the conclusion – "The NASD should not encroach on the states' rights because the NASD should not encroach on the states' rights." The NASD's filing thus offers no rationale in support of subdivision (c) of proposed Rule 10316.

An obvious flaw in the contention that the SEC and the NASD should not "encroach" on the states' rights to decide what constitutes the unauthorized practice of law is that the SEC and the NASD have already done so. As the NASD itself states in its rule filing, both the SEC and the NASD have rules permitting out-of-state counsel to appear in enforcement actions, and these rules have no exception allowing individual states to control this issue.

> [T]he proposed rule change sets a standard of practice for the arbitration forum that is consistent with the other rules and proceedings of NASD. NASD Rule 9141(b) states . . . that a person may be represented in any disciplinary proceeding by an attorney at law admitted to practice before the highest court of any state . . . .
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> [T]he SEC (as well as other federal agencies) also has a similar practice rule. Rule 102(b) of the SEC Rules of Practice states that, in any proceeding, a person may be represented by an attorney at law admitted to practice before the Supreme Court of the United States or the highest court of any State.

NASD Notice at 42,125. If the SEC and the NASD can properly allow out-of-state counsel to appear in enforcement actions regardless of any contrary state law, then the NASD can also do so for NASD arbitrations. In its rule proposal, the NASD articulates no reason why brokers can hire the best attorney they can find for enforcement actions against them but are limited to state-approved counsel for arbitrations against them arising from the same facts as the enforcement actions.

The reasons that the NASD identifies in its rule proposal for allowing out-of-state counsel to appear in NASD arbitrations continue to apply even if the individual state wishes to prohibit or restrict such appearances. For example, the NASD argues that in its "experience, . . . the level of knowledge, training and skill of an attorney affects the outcome of an arbitration . . . more than the jurisdiction from which the attorney received his license to practice. NASD Notice at 42,125. This

argument does not disappear, merely because an individual state, without the benefit of the NASD's expertise in securities arbitrations, decides that only state-approved lawyers can appear in arbitrations within its borders.

The nature of securities fraud is that it impacts numerous persons similarly even if they live in different jurisdictions. In our practice, for example, we commonly bring cases involving rogue stockbrokers who recommend the same fraudulent investment to numerous clients, and these fraudulent recommendations of the same investment are also made by other stockbrokers in other states. One such fraud was orchestrated only a few miles from our office in Clearwater, Florida, and sold nationwide to thousands of defrauded investors. If a state restricts the ability of attorneys to represent clients from other states, then these clients will be deprived of the expertise and knowledge which these attorneys have developed regarding particular stockbrokers and particular securities. Counsel who have the most expertise regarding a particular investment would be limited in representing persons in other states. This result is inefficient and harms the investing public. When counsel is already representing other persons who purchased the same product and that counsel has already gained substantial expertise regarding that investment, limiting that counsel's authorized representation of persons in other states who purchased the same product is inconsistent with the primary purpose of the unauthorized practice rules to protect the public.

The same conclusion holds for the other side of the aisle. For example, the same brokerage firm may be the subject of arbitration suits nationwide regarding the same investment. Generally, the resolution of stock fraud suits does not depend on the intricacies of state law and instead depends on whether the firm's conduct conforms to industry standards that are the same nationwide. In such circumstances, forcing the brokerage firm to hire in-state counsel is senseless, when the firm already has in-house counsel or counsel from outside the state who are handling dozens of arbitrations with the same issues regarding the identical investment or trading practice. The firm is better protected if it can use its own counsel, rather than be forced to hire an in-state counsel with less knowledge about the matter at issue.

This conclusion might be different if unique state law controlled the outcomes of most securities arbitrations, but this is not the case in my experience. For example, state court procedures do not apply in arbitration. Suarez-Valdez v. Shearson Lehman/American Express, 858 F.2d 648, 649 (11th Cir. 1988) ("An agreement to arbitrate is an agreement to proceed under arbitration and not under court rules."). The NASD Code of Arbitration Procedure has its own procedures for filing and amending claims, selecting arbitrators, serving and responding to discovery requests, and appearing at the arbitration, which are significantly different from those in state courts. The NASD even has its own guide, approved by the SEC, for discovery procedures. Order Granting Approval to Proposed Rule Change by the NASD Creating a Discovery Guide for Use in NASD Arbitrations, 70 S.E.C. Docket 1139, 1999 WL 688111 (Sept. 2, 1999). At least half of lawyers' particular expertise in their own state relates to their knowledge of procedural rules that are inapplicable in

arbitration. At least half of the rationale for requiring a state-licensed attorney in arbitrations in that state is dissipated on that ground alone.

The substantive law relevant to securities arbitrations is national in scope or nationally uniform and is also generally not subject to the particular knowledge which a state-approved lawyer might provide. Since the Supreme Court in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), determined that federal courts will enforce brokerage firm arbitration agreements for federal securities law claims, the vast majority of retail investor disputes are arbitrated. One consequence of this shift into arbitration is that the law in court for these disputes has stagnated, because few of these disputes are litigated. Because securities disputes are generally no longer litigated, parties in arbitration must now look to other sources to determine the standard of care applicable to the brokerage firm's conduct.

> "Since most disputes between brokers and their customers are now subject to arbitration, much of the law relating to broker-dealer obligations is likely to be frozen in a state of suspended animation preserved in much the state that it was in the pre-arbitration era." . . .
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> . . . With this backdrop, the Court writes on a slate where well-established legal principles – frozen in a state of suspended animation – collide with a reality of the modern relationships that form between broker-dealers and their customers, permeated by SEC and NASD rules and regulations.

Lutz v. Chitwood (In re Donahue Sec, Inc.), 318 B.R. 667, 672-73 (Bankr. S.D. Ohio 2004) (citation omitted).

The self-regulatory organizations ("SROs") and the SEC, through the development of the SRO rules, the SROs' communications to its members, and the SROs' and the SEC's enforcement actions, have filled the vacuum in the courts' opinions that has resulted from the universal use of the arbitration system by the brokerage industry. SRO arbitrators now generally look to the principles of conduct established by the SROs' rules and the SEC when determining the propriety of the actions of brokerage firms or their employees, rather than to state law. This reliance on national industry standards is appropriate even in courts and certainly is proper in SRO arbitrations.

> New York Stock Exchange Rule 405 requiring that each securities broker "know [his] customer" has been recognized as a standard to which all brokers using the Exchange must be held, the violation of which is tantamount to fraud. . . .
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> Appellants contend that the admission of testimony regarding New York Stock Exchange and NASD rules serve to "dignify those rules and regulations to

> some sort of standard." The admission of testimony relating to those rules was proper precisely because the rules reflect the standard to which all brokers are held.

Mihara v. Dean Witter & Co., 619 F.2d 814, 825 (9th Cir. 1980). These nationwide standards, rather than idiosyncratic laws applicable only in a particular state, now supply most of the law governing securities arbitrations.

In addition, claims for violations of the federal securities laws are the same in every state regardless of where the arbitration hearing takes place. Indeed, claims under the Securities Exchange Act of 1934 ("Exchange Act") cannot even be brought in state court. According to 15 U.S.C. § 78aa, the "district courts of the United States . . . shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter of the rules and regulations thereunder." Pursuant to this provision, "federal courts have been granted exclusive jurisdiction" over claims brought under the Exchange Act. Evans v. Dale, 896 F.2d 975, 978 (5th Cir. 1990). The SEC created the securities arbitration system pursuant to its authority under the Exchange Act. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 234 (1987) ("In the exercise of its regulatory authority [under the Exchange Act], the SEC has specifically approved the arbitration procedures of the . . .NASD . . . ."). States should have no authority to impose rules on the choice of counsel in a securities arbitration forum created under the auspices of the Exchange Act for arbitration of Exchange Act claims which cannot even be litigated in state court.

State securities laws are usually based on the Uniform Securities Act and are substantially similar in most states. Claims by investors that sales of unregistered securities through misrepresentations and failures to disclose violated state securities laws are the same in almost every state. Every state has determined that intentional, reckless, or negligent misrepresentations or omissions relating to investments constitute fraud or negligence. In every state, a broker is an agent and, under the law of agency, has fiduciary duties. The law of contracts, based as it is on black letter principles of offers, acceptances, and consideration, is the same in every state. The vast majority of substantive law applicable in securities arbitrations is the same, regardless of the state in which the arbitration takes place.

Consequently, as a matter of substance as well as procedure, the ability of counsel to represent their clients is generally not materially altered by whether they are licensed to practice in the particular state. As I have determined in my own experiences with opposing counsel across the country, the quality of my opposition depends on the quality of the individual lawyer, not on the geographic location of their bar license. Investors should be able to hire the best lawyer they can find, rather than be limited to counsel in their own jurisdictions.

Adopting a rule which would prevent or restrict the ability of parties in some states in securities arbitrations to hire the best available lawyer would violate the law governing the adoption

of NASD rules. Under 15 U.S.C. § 78o-3(b)(6), the SEC cannot approve NASD rules unless they "protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers." If the SEC adopts a rule which unnecessarily limits the representation which investors can obtain and forces them to retain counsel who may not be as competent, then the rule manifestly does not protect investors.

It also unfairly discriminates between customers, because some customers will be able to hire any lawyer to represent them, while other customers in other states such as Florida and California will not. In Jevne v. Superior Court, 35 Cal. 4th 935, 111 P.3d 954, 28 Cal. Rptr. 3d 685, 702 (2005), the California Supreme Court said that the SEC opposed California's arbitrator disclosure standards, because they "reduc[ed] the nationwide uniformity and consistency of NASD arbitrations by imposing special disclosure requirements applicable in only one state." The same conclusion applies to attorney selection standards which impose "special . . . requirements applicable in only one state."

> The comprehensive system of federal regulation of the securities industry is designed to provide uniform, national rules for participants in the securities markets. SROs are an integral part of this federal regulatory scheme. An important function of the SROs is to conduct securities arbitrations throughout the United States, and the SEC oversees the SRO arbitration programs. In accordance with the federal regulatory scheme, the SRO arbitration rules apply uniformly across the states. Allowing California and the other states to adopt different requirements as to the manner in which SROs carry out their regulatory functions would conflict with the objectives of the federally regulated scheme of securities arbitration because it would destroy the uniformity of procedural rules applicable to SRO arbitrations.
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> Further, if the SROs were forced to comply with the California standards in the absence of a nationwide rule change by the SEC, they would be subject to a patchwork of state regulation that would lead to inconsistent . . . disqualifications across the states. Such a result would be at odds with the national function of SROs. . . . Allowing the states to impose procedural rules on the SROs that are not approved by the SEC would override the federal regulatory scheme and result in different treatment of similarly situated investors based solely on their location.

Mayo v. Dean Witter Reynolds, Inc., 258 F. Supp. 2d 1097, 1110-11 (N.D. Cal. 2003).

Ironically, the NASD claims that its "proposed rule change clarifies a standard of practice in its arbitration forum, which will foster uniformity and consistency in arbitration proceedings." NASD Notice at 42,125. Uniformity and consistency, however, are exactly what proposed subdivision (c) of Rule 10316 will not foster. Individual states such as Florida and California will

continue to be permitted to impose their own individual requirements on NASD arbitrations, and those requirements will manifestly be inconsistent with the requirements of other states.

If the SEC adopts Rule 10316(c), those states that impose restrictions on the practice of law by out-of-state counsel will likely require the SROs to enforce those restrictions. Florida ethical rules, for example, now provide that "[a] lawyer shall not . . . practice law in a jurisdiction other than the lawyer's home state, in violation of the regulation of the legal profession in that jurisdiction, or in violation of the regulation of the legal profession in the lawyer's home state, or assist another in doing so." In re Amendments to the Rules Reg. the Fla. Bar and the Fla. Rules of Jud. Admin., ___ So. 2d ___, 2005 WL 1118034 at *17 (Fla. 2005). This rule is consistent with the American Bar Association's Model Rule 5.5(a), which provides that a "lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." Consequently, all of the Florida-licensed lawyers in the NASD's Boca Raton office in Florida, because they cannot assist other lawyers in the unauthorized practice of law, are on the hook to enforce not only Florida's unauthorized practice rules but also the unauthorized practice rules of all of the other geographic locations in Georgia, Alabama, and other states that the Boca Raton office administers.

I would expect therefore that, effective January 1, 2006, the Boca Raton office will adopt a certification form similar to that required in California for out-of-state counsel attempting to appear in Florida arbitrations. To the extent that any other states impose restrictions, other certification requirements will probably be necessary. The result will be an unseemly and unfortunate entanglement of the NASD arbitration department with local law, in which the NASD becomes an enforcement arm of the various state bars.

The solution to this problem is to delete from Rule 10316(c) the provision providing that "the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court." Amending Rule 10316 in this manner would preempt any contrary state law. In Sperry v. State of Fla. ex rel. the Fla. Bar, 373 U.S. 379 (1963), the Florida Bar attempted to prevent a non-attorney from representing Florida clients before the United States Patent Office. The Court rejected Florida's attempt to prohibit this practice, because the Patent Office allowed non-attorneys to represent parties in proceedings before that Office. "'[T]he law of the State, although enacted in the exercise of powers not controverted, must yield' when incompatible with federal legislation." Id. at 384 (citation omitted).

> [B]y virtue of the Supremacy Clause, Florida may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority. A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the state's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of

> activity sanctioned by federal license additional conditions not contemplated by Congress.

Id. at 385.

In Florida Bar re Advisory Opinion on Nonlawyer Representation in Securities Arbitration, 696 So. 2d 1178, 1184 (Fla. 1997) the Florida Supreme Court acknowledged that the SEC "easily could . . . preempt us," although it found in that case regarding non-lawyers that the SEC had not done so. In similar circumstances, both the Ninth Circuit and the California Supreme Court recently ruled that the SEC's adoption of NASD rules regarding arbitrator selection preempted contrary California standards. Credit Suisse First Boston Corp. v. Grunwalde, 400 F. 3d 1119 (9th Cir. 2005); Jevne v. Superior Court, 35 Cal. 4th 935, 111 P.3d 954, 28 Cal. Rptr. 3d 685 (2005). The same conclusion would apply to the NASD's proposed amendment to NASD Rule 10316, if it did not include subdivision (c) permitting state law to control.

I believe that this change would be beneficial to all parties in securities arbitrations. Accordingly, I respectfully request the SEC to delete subdivision (c) of NASD Rule 10316, before approving the remainder of the proposed rule.

Sincerely,

/s Stephen Krosschell, Esq.