PLIMPTON & ESPOSITO

DAVID PLIMPTON, ESQ.

1000 SAWYER ROAD
CAPE ELIZABETH ME 04107
■ ■ ■
TEL/FAX: 207/767-6565
PLIMPTON@MAINE.RR.COM

July 19, 2005

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington DC 20549-0609

Re: Proposed Rule SR-NASD-2005-032 - Explained Decisions

Dear Mr. Katz:

I am writing to comment on the above-captioned Proposed Rule for the NASD Dispute Resolution arbitration program. I have practiced law for 39 years. I have been on numerous charitable boards, and helped operate profit and non-profit organizations. For the last 16 years, my professional practice has been restricted to serving as a neutral (principally as a mediator and arbitrator) in all types of civil disputes. I have acted as a neutral in about 1,300 cases, divided about equally between arbitrations and mediations. I administer most of my arbitrations and mediations myself, but have served on panels for provider organizations, where in some cases the neutral proceedings are partially or fully administered, such as NASD, CPR Institute for Dispute Resolution, AAA, National Arbitration Forum, and Maine Labor Relations Board I have also worked as a facilitator, hearing officer, fact finder, court-appointed special master and court-appointed referee. I have been a public NASD arbitrator (arbitrator #10704) since about 1990. I have served in about 70 NASD arbitrations (mostly as the chair of a three-person panel). I am qualified, I believe, for NASD employment and injunctive relief arbitrations and have served for the NASD in both those types of cases, but mostly in broker-customer disputes. The panels on which I have participated have issued about 28 publicly available awards. I have participated in a number of NASD arbitration training programs, and, around 1993, served as a trainer for a NASD training in Boston (cited below). In 1998 I organized and helped present a Maine State Bar Association CLE program on NASD arbitration and mediation, aimed mostly at lawyers representing clients in securities disputes before NASD. I have been on the NASD roster of mediators for at least 10 years. I have mediated privately some customer-broker disputes. I have never been involved in customer-broker disputes as legal counsel for either side.

1. If in fact arbitrators are going to be required to write explained decisions, if requested by the claimant, then NASD should make clear to arbitrators that they are authorized to consider applicable law, whether or not it comes from the parties. Writing an explained decision as an arbitrator is akin to what a judge does, so freedom to consider applicable law and deal with it as a judge would be able to do is extremely important if arbitrators are going to be assigned this task. Who, having been required to write an explained decision as a neutral decision-maker, would not want a free hand to consider relevant law? NASD arbitrators should not be required to do legal research, but also should not be

prohibited from doing additional research beyond what the parties present by way of legal authority. Certainly arbitrators should not do factual research or consider factual matters beyond what the parties present. If there are factual matters which an arbitrator believes are crucial to deciding the dispute before the arbitrator, the arbitrator should ask the parties, in a neutral and open-ended fashion, for more information, or why the requested information is not relevant. Sometimes there may be perceived gaps in or questions about the law, including law which the arbitrator from his or her own experience believes should be considered, or conflicts between the law as presented and an arbitrator's sense of justice and fairness. Here, it has been suggested that the better practice is for arbitrators (who are not court judges, but ultimately creatures of a contract between the parties) to raise the legal questions and issues with the parties before the hearing (or arbitration record) is closed, and ask them to present further law, comment or argument. American Arbitration Association, *Manual for Commercial Arbitrators,* p.13 (1999). This would also be in aid of fulfilling the arguable professional and ethical duty of arbitrators not to decide cases based upon material not presented to them in the hearing. This currently is sometimes difficult to achieve in a NASD arbitration because of the increasing frequency of voluminous material presented by counsel, including written legal argument and case law, which arbitrators may not receive until near the end of the hearing, and which many arbitrators do not review in any event. Some of the reasons for that tendency, including inadequate compensation for the job of serving as a NASD arbitrator, are discussed below.

2. The added requirement of an explained decision, while a good idea in arbitration generally, brings into bolder relief, the real questions which exist about whether the SEC and NASD as currently staffed and funded have the resources to monitor/run the current NASD arbitration program. An independent third party organization, with no ties to the SEC or NASD, although perhaps staffed with current members of NASD, might be in a better position to run the program in accordance with generally recognized professional and ethical standards which appear to applied now in a very uneven way in the current NASD arbitration program. First, the idea of a largely *pro-bono* volunteer basis arbitration program is no longer workable, in view of the complexity of the disputes, multiple parties, necessary time-commitment per case, and required expertise and dedication to be an effective and fair arbitrator. If the securities industry still believes it is in the best interest of its members and customers to have an alternative dispute resolution system (and thereby avoid the need to be in court on theses disputes), it needs to dedicate the financial and human resources to have a quality program that passes muster on the criteria and standards discussed above. Finally, the current economic circumstances of most NASD arbitration participants is such that they should pay something much closer to market cost for the dispute resolution services involved in NASD arbitration. As with other dispute resolution programs, including the courts, there could be exceptions made for truly indigent participants. Here, the added requirement of an explained decision is yet another burden being added to a creaking system, without the fees/revenue, resources or adequate compensation to arbitrators necessary to make it workable or equitable. Resources which the SEC and NASD might consider in such any endeavor to reform the NASD arbitration program, if they have not already recently been considered, include: (a) *Securities Arbitration Reform*, Ruder Task Force Report to NASD Board of Governors (January 1996), (b) CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, *Principles for ADR Provider Organizations*, (Draft June 2000 - there may be a final or later version), (c) American Arbitration Association and other signatories, *Consumer Arbitration Due Process Protocol (*April 1998), and (d)

CPR Institute for Dispute Resolution and American Bar Association, *Commercial Arbitration at Its Best; Successful Strategies for Business Users; A Report of the CPR Commission on the Future of Arbitration* (2001).

3. NASD disputes have become much more litigious and complex, including challenges to arbitrators for cause, multiple (more than two) parties, motion practice, extensive discovery practice and disputes, drafting and issuance of prehearing orders, voluminous submissions, pre- and post-hearing briefs, need for extensive arbitrator review of the record and deliberation, awards written with reasoning and explanation, and in the few cases which don't settle at the last minute, multi-day hearings. These tendencies were noted as early as 1996 in the Ruder Report to the NASD. Counsel for the parties now bring extensive legal argument, case law, and regulations into their presentations. This is as it should be, but NASD arbitrators now get little legal training from NASD on the issues, but yet must consider and evaluate the factual and legal presentations. Judges at least have law clerks. Private arbitrators don't, but as least they get paid for reading the cases and writing well thought out arbitration decisions. Not to consider the law, as well as the facts, equity and fairness as an NASD arbitrator, would be not to live up to the professional and ethical obligations of an arbitrator. But yet NASD arbitrators are not paid to do it, nor are they often trained in law applicable to securities disputes. Thus, the minuscule stipend of $200 to be offered by NASD under this Proposed Rule for an explained decision is, while at least a start, not anywhere near adequate. Assuming my fellow panelists agree, if I am chair, I always prepare a reasoned award with an explanation of the basis for the decision, as I feel the parties deserve it and may benefit from it. That is usually a day or two of work, at least, for which there is no pay. $200 is better than nothing, but with today's complex cases and voluminous presentations by far misses the mark for fair compensation for arbitrators dealing with today's NASD arbitrations. In one NASD arbitration where I chaired the panel, I believed firmly that the losing party would appeal if we awarded punitive damages, which we did. The panel issued a many page award, with extensive reasoning, analyses and case citation. It was appealed and it took a United States District Court Judge many more pages to uphold the decision (thankfully in every respect). There I spent at least a week on the award with no compensation.

4. The compensation generally for all the time involved for NASD arbitrators is woefully inadequate, even taking into account the *pro bono* factor, probably about 5% of what I would make as an arbitrator for a comparable private case. The cases are interesting, good experience, good for the resume, and challenging. 50% of normal compensation would probably be about right, assuming one agrees, given the economic circumstances of most of the participants, that this is the type of arbitration program which should be partly *pro bono.* As a matter of disclosure, NASD should suggest that prospective arbitrators consider all relevant issues which will face them in evaluating compensation as a neutral, including serving as a NASD arbitrator. *See* David Plimpton, *"Getting Paid: What You Need to Know About Neutrals' Compensation", Alternatives* - CPR Institute for Dispute Resolution, Vol. 22, No. 10, November, 2004. Even on the cases which settle without a hearing, you can spend a lot of time for which you don't get paid - reading pleadings, submissions, briefs, cases and regulations, writing prehearing orders, and preparation for the hearing, not to mention keeping up with the NASD Dispute Resolution web site, rules, mandatory trainings, and so forth. The new initiative to have direct communication between the parties and the arbitrators is a good idea, but as I have found from the one

case I have had with that feature, it involves significantly more time for the chair, again with no compensation. Except perhaps for mediated cases, arbitrations almost always settle late (just before hearing). The recent additional $100 stipend for cases which settle within 3 days of the scheduled hearing is at least a gesture, but again woefully inadequate. And I have now learned that the NASD is taking the position that even the $100 is not payable in injunctive relief cases.

Thank you for the opportunity to comment on the Proposed Rule and the NASD arbitration program. I look forward to the results of the SEC's consideration of the Proposed Rule and the SEC and NASD's future efforts to strengthen the NASD arbitration program.

Sincerely,

David Plimpton