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WACHOVIA SECURITIES

August 5, 2005

Jonathan Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW (6-9)
Washington, DC 20549

Re: Proposed Rule Changes to NASD Code of Arbitration Relating to Written Explanations in Arbitration Awards (hereinafter the "Proposed Rule") (File No. SR NASD-2005-032)

Dear Mr. Katz:

Wachovia Securities, LLC ("Wachovia Securities") welcomes the opportunity to comment on the above-referenced Proposed Rule requiring arbitrators in National Association of Securities Dealers, Inc. ("NASD") arbitrations to issue "explained decision" when requested in advance by a customer(or an associated person suing a member). Wachovia Securities strongly opposes this amendment to the NASD's arbitration procedures as it probably is not in the best interests of investors nor is it a change that will improve the arbitration process.[1]

I. Introduction and Overview

Wachovia Securities is a full service brokerage firm serving clients in 49 states. In servicing its 5.7 million active retail accounts, the firm resolves many disputes through NASD's arbitration process.

II. "Explained Decisions" Do Not Improve Fairness, Efficiency or Cost-Effectiveness

The current system of resolving customer disputes through NASD arbitration is one that is fair, efficient and cost-effective for investors. The fairness of the system is evidenced by NASD data

[1] Wachovia Securities takes note of the Securities Industry Association's comment letter filed on August 2, 2005, and we quote liberally from it and endorse the analysis contained therein.

and other studies showing that investors receive awards in their favor in more than half of arbitration cases that complete a hearing before a panel. Coupled with the reality that a significant proportion of other cases settle before hearing, investors in NASD arbitrations receive a monetary award at least 75% of the time by some calculations.[2] Thus, the current arbitration process is fair to investors, a fairness that does not increase where there is an "explained decision" from the arbitration panel.

Arbitrations under the current system are also very efficient for investors. As noted in the SIA comment letter, from the time of filing to the actual receipt of an award, an investor using the arbitration process speeds through the system in 17 months on average[3] By contrast, in one federal court district, the wait is almost 27 months just to get to trial, with no guarantee of when the appellate process would be exhausted.[4] Written decisions by arbitrators in no way will maintain, much less enhance, the efficiency of the arbitration process. It is extremely easy to envision an arbitration panel taking extensive time to draft and re-draft a decision that builds a consensus and addresses all issues fairly raised in the statement of claim and at the hearing. This additional time will surely delay the finalizing of any award to the investor. The written decision could certainly be the subject of a motion to vacate the award if there is imprecision or glaring errors in the analysis of the written decision. That process also will delay, probably to the successful investor's detriment, the final award.

Arbitrations are a very cost-effective method for parties to resolve claims they bring against a firm. NASD arbitrations have a streamlined and predictable discovery process, lessening the likelihood that parties can engage in the protracted and costly discovery battles that often plague civil litigation. The streamlined discovery often results in a hearing that concludes in far fewer days than a case brought to trial in civil court. SIA explains this cost efficiency of arbitration well when it notes that in most cases, the arbitration award effectively ends each party's "commitment of time, money and effort." [5]

Written, "explained decisions" will undermine this cost-effective feature of arbitrations. The "explained decision" will be a catalyst to continued litigation that mimics the motions and appeals process of court trials. There will be an added cost as arbitrators work to craft a written decision that the panel can agree upon. Though NASD proposes to place a cap of $200 on the honorarium arbitrators receive when preparing a written decision, there will be a cost in the time delay necessary to prepare such decisions. Arbitrators, knowing that the written decision will probably receive close scrutiny, probably will expend additional time researching finer, or even elementary, points of law, notwithstanding that the Proposed Rule does not require a citation of legal authorities It is unlikely that many arbitration panels will be able to render the explained decision within the 30 business day time limit which currently exists under NASD rules.[6] Where there has been a request for a written decision, one can anticipate that parties will expend sums they would not other wise spend to "front-load" the information gathering phase of arbitrations by repeated requests for additional discovery and debates concerning the adequacy of discovery

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[2] See SIA letter at 3.
[3] Id. at 4.
[4] Id.
[5] Id. at 5.
[6] NASD Code of Arbitration Procedure ("Code") 10330(d).

responses. Such a front-loading also will drive down the cost-effectiveness of the arbitration process.

Written awards may also decrease the pool of arbitrators. If an arbitrator believes that a party may request a reasoned decision, she may choose not to serve because of the potential time involvement, i.e., not only is there deliberation but a draft must be prepared, circulated for comments, etc. The dramatic increase in the time commitment, particularly contrasted with the extremely modest increase in honorarium may decrease the number of arbitrators willing to serve. This decrease is particularly likely where you have "working" arbitrators, i.e., attorneys in private practice or active industry persons for whom the additional time requirement may be onerous.

The other factor to consider with "explained decisions" occurs where the arbitrators are not attorneys. Either such arbitrators may choose not to participate in a written decision arbitration because of the possibility of being forced to produce a work product that is totally out of their ken or the attorney on the panel, if any, will assume a greater role in the arbitration because of her alleged skills. There is anecdotal evidence of arbitrations where the panel members defer to the sole attorney on the panel or where the sole attorney becomes the de facto chair. The requirement for a reasoned decision will definitely have an impact on that phenomenon. The Proposed Rule's impact on arbitrators seems particularly ill-timed in light of the fact that the NASD is making a concerted effort to attract additional candidates to the arbitrator pool.

The concept of a written decision coupled with the use of discovery arbitrators who are not on the panel presents another issue. One can easily envision a situation where the discovery arbitrator denies a request and the "explained decision" is based in some way on the failure to present certain documents or evidence. Such a scenario will certainly increase the likelihood of motions to vacate the award since a document that was not particularly probative at the discovery stage could become more meaningful after later discovery when the allegations and causes of action often tend to shift.

Overall, for the reasons discussed above, "explained decisions" as contemplated in the Proposed Rule may work against the foundational principles of NASD arbitrations of fairness, efficiency and cost-effectiveness.

III. The Proposed Rule Does Not Enhance Investor Confidence

NASD's rationale for the Proposed Rule does not appear to be strongly supported upon closer analysis. NASD explains that it has undertaken this rule change to "increase investor confidence in the fairness of the NASD arbitration process". As noted earlier, most investors receive a monetary payment by settlement or award at hearing, so NASD believes written decisions will increase the confidence of those who actually lose at arbitration. NASD has presented no evidence that investors who lose at hearing will feel more confident about the process, and as SIA stated in its letter, such individuals are likely to remain dissatisfied.[7] Moreover, NASD's

[7] SIA letter at 3, fn. 3.

decision to permit, in customer arbitrations, only the investor to request an "explained decision" is based on its view that apparently a written decision may harm investors who prevail at the arbitration. It is difficult to rationalize from a cost-benefit standpoint a rule that is designed to gain the confidence of those whose claims are unsuccessful but must be crafted so it protects winners from the same rule. One believes that less costly alternatives, such as the designation of an NASD Arbitration Ombudsman,[8] could provide a means of increasing the confidence of investors who do not prevail in arbitration. Further evidence that the Proposed Rule may not be the proper remedy to the problem NASD perceives is the knowledge that an organization designed to represent investors in securities arbitrations expressed concerns about the benefit of "explained decisions" as well.[9]

Prudence alone seems to dictate that the Commission should not approve the Proposed Rule. If there is any consideration that the Proposed Rule may have merit, we would urge that the Commission recommend that NASD permit the "explained decision" concept in only certain, very limited circumstances. With the advent of a number of securities arbitration law clinics at law schools, those cases may provide a fair use of the explained decision.[10] The Proposed Rule would then impact directly those investors whose experiences may be in need of the confidence boost NASD believes will occur. With the mutual agreement of both the investor, its law school counsel and the firm, explained decisions in these cases may allow an extension of the teaching model that goes on in the arbitration clinics as the law students do a "post-mortem" of their trial. Investors, member firms and law students all may gain valuable insight while participating in what is a relatively controlled, educational environment. Under such circumstances, firms might agree to participate in the explained decision process primarily as a means of supporting the worthwhile educational goals of the arbitration law clinics in their business locales. Such participation in these limited circumstances, however, would not threaten the overall fairness and efficiency of the current arbitration process.

IV. Conclusion

Amending NASD's arbitration code to permit written explained decisions would negatively impact the fairness, efficiency and cost-effectiveness of the current arbitration process. It does not actually advance the NASD goal of increasing investor confidence in the arbitration system. We respectfully request that the Commission decline to adopt the Proposed Rule.

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[8] Contrast *Notice to Members* 99-97(Dec. 1999)(explaining that NASD's Office of the Ombudsman specifically excludes consideration of most arbitration issues).

[9] Comment Letter of Public Investors Arbitration Bar Association (July 15, 2005)(though supporting the rule noting concerns that inadequate reasons may provide a basis for prolonging the process through motions to vacate the arbitration award).

[10] See generally, the SEC website at *http://www.sec.gov/answers/arbclin.htm*, which contains an overview of securities arbitration clinics and the contact information for several throughout the country. The website notes that the clinics assist investors with limited income and relatively smaller claims, up to $50,000 in most instances.

We appreciate the opportunity to provide these comments, and we would be pleased to answer any questions or provide more information to the Commission or the Staff as they work through this important issue.

Very truly yours,

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