

July 26, 2005

**VIA FEDEX**

Jonathan G. Katz, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549-9303

Re: SEC Release No. 34-51921;  
File No. SR-NASD 2005-046  
Comment on Proposed Amendment to Arbitration  
Fees Application to Certain Statutory Employment  
Discrimination Claims (the "Fee Proposal")

Dear Secretary Katz:

The Public Investors Arbitration Bar Association welcomes the opportunity to comment on the above referenced rule proposal.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "1934 Act"), the NASD has proposed to change Rule 10217 of the Code of Arbitration Procedure to amend the arbitration fees applicable to certain statutory employment discrimination claims. We do not oppose this change as it is proposed to apply to statutory employment claims. Rather, we urge that this same relief from excessive filing fees be given to customers bringing statutory securities law claims to recover losses sustained as a result of wrongdoing by NASD members and associated persons.

Generally in a court proceeding, a litigant can expect to pay a filing fee of approximately \$150.00.<sup>1</sup> The litigant does not pay the judge and fees for jurors are token. In arbitration it is quite different. To vindicate their statutory rights in NASD arbitration, customers with substantial claims are almost always forced to pay thousands of dollars and sometimes required to pay tens of thousands of dollars to the NASD to have their case heard to conclusion.<sup>2</sup>

These are onerous fees and represent a significant burden to the vast majority of claimants in arbitration.

Charging such high fees to customers who seek to enforce their statutory securities law rights discourages such claims. This is entirely inconsistent with the mandate of Section 15A(b)(6) of the 1934 Act which requires that the NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and in general, to protect investors and the public interest.<sup>3</sup>

The proposed rule change makes no effort to justify why statutory employment discrimination claims brought by associated persons should be more favored than statutory securities claims brought by customers. The NASD indicates in its filing with the SEC that the proposed change arose "in order to ensure that associated persons who have statutory employment discrimination claims are able to effectively vindicate such claims." Why should a statutory securities law claim brought by an aggrieved customer face greater hurdles?

In both associated person and customer statutory claims, it is the securities industry that mandates arbitration, depriving both classes of claimants of the judicial forum. To compel claimants into arbitration and then impose burdensome fees and charges on them is equally offensive for both classes of claimants.

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1 See, File No. SR-2005-046, pg. 8, fn.9.

2 See for example, NASD Arbitration No. 01-03375, where forum fees, adjournment fees and initial filing fees charged to Claimants exceeded \$40,000.00.

3 This is the very provision that NASD relies on in its statement of the statutory basis for its proposed rule amendment.

Other arbitration forums have recognized the need that consumers have for fee relief. Both the American Arbitration Association (“AAA”) and JAMS have made clear that consumer protection is important and the rights of consumers should not be thwarted by excessive fees in arbitration. An investor, by his/her very nature is a consumer of financial products. The trend at AAA and JAMS is basically to shield the consumer from otherwise onerous arbitration fees by limiting the amount of fees the consumer must pay to arbitrate his or her claim. More specifically, JAMS rules find that:

With respect to the cost of the arbitration, when a consumer initiates arbitration against the company, the only fee required to be paid by the consumer is \$125.00, which is approximately equivalent to current Court filing fees. All other costs must be borne by the company including any remaining JAMS Case Management Fee and all professional fees for the arbitrator’s services. When the company is the claiming party initiating an arbitration against the consumer, the company will be required to pay all costs associated with the arbitration.

AAA takes the same basic approach with regard to smaller consumer claims:

If the consumer’s claim or counterclaim does not exceed \$10,000.00, then the consumer is responsible for one-half of the arbitrator’s fees up to a maximum of \$125.00. This deposit is used to pay the arbitrator. It is refunded if not used.

If the consumer’s claim or counterclaim is greater than \$10,000.00, but does not exceed \$75,000.00, then the consumer is responsible for one-half the arbitrator’s fees up to a maximum of \$375.00. This deposit is used to pay the arbitrator. It is refunded if not used.

The purpose of these enlightened JAMS and AAA fee relief provisions is clear, to protect the consumer from excessive fees in bringing a claim to enforce their rights under the state and federal

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consumer protection laws. Clearly, securities laws created for the purpose of protecting the consumer investor rise to this level and should be given equal consideration. Unfortunately, the mandatory arbitration clauses in universal use by NASD members do not allow use of any forum except NASD and, perhaps, NYSE, which levies fees similar to those imposed by the NASD.

The NASD has materially increased fees on customer claims. About five years ago the NASD increased its customer fees by approximately 50%. Fees for associated persons were also increased. Both NASD customers and associated persons now have identical fee schedules. Now the NASD rule proposal unfairly provides fee relief only for associated persons and not customers.

The arbitration of statutory claims arising from the securities laws should continue to be equally accessible to aggrieved customers as to aggrieved employees pursuing statutory employment discrimination claims.

PIABA urges the SEC to modify the NASD's proposed rule so that the reduced fees available on statutory employment claims would also be available to customers with statutory securities law claims.

Thank you for the opportunity to comment on the proposed revision of NASD arbitration fees. We appreciate your careful attention to these important issues. Please feel free to contact us if you have any questions or would like additional information from PIABA.

Very truly yours,

Rosemary J. Shockman  
President

RJS:dlr