



NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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May 1, 2006

VIA EMAIL: rule-comments@sec.gov

Nancy M. Morris, Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-9303

RE: SR-NASD-2005-079: Proposed Rule change to Revise Rule 10322 of the NASD Code of Arbitration Procedure, which Pertains to Subpoenas and the Power to Direct Appearances

Dear Ms. Morris:

The North American Securities Administrators, Inc. (NASAA) submits these comments on the proposed revisions to Rule 10322 of the NASD Code of Arbitration Procedure. The rule change relates to use of subpoenas in customer initiated arbitration proceedings.

It is NASAA's understanding that one of the reasons for the rule change is to curb abuse of the current process by securities industry defense attorneys. We note that one of the recent comment letters received by the Securities and Exchange Commission stated that "securities industry defense attorneys ... sign 'subpoenas' as though they are authorized by law, and they use these subpoenas to fish and harass, seeking documents from, inter alia, brokerages banks, employers, accountants and other extraneous third parties." See, Comment Letter, Seth E. Lipner, Deutsch & Lipner (July 13, 2005).¹ In an attempt to correct this serious misuse of the subpoena authority, the rule change would require that only an arbitrator be able to issue a subpoena

NASAA applauds NASD Dispute Resolution's (NASDDR) attempts to correct this abuse. However, we retain serious reservations about the process itself. NASAA believes that NASDDR must first address the arbitration process' fundamental flaw, i.e.; the current composition of the arbitration panel. It is NASAA's contention that so long as NASDDR Arbitrations are conducted on condition that the panel shall consist of a mandatory industry member and public arbitrators who may maintain significant ties to industry, the process is fundamentally unfair.

¹ Available at

<http://www.sec.gov/rules/sro/nasd/nasd2005079/selipner071305.pdf>

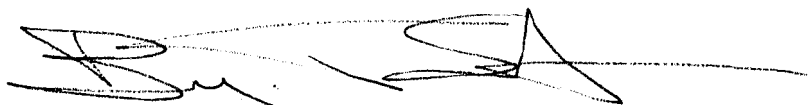
We would also note that the proposed Rule, as currently written, may be read such that the party seeking a subpoena may choose the arbitrator to whom they make the written motion. It also appears that the arbitrator receiving the motion has some degree of discretion in ruling on such a motion. Given such a reading, conferring of subpoena power solely to arbitrators will not insure against the continued abuse of subpoenas by respondents. NASAA has no degree of comfort that past abuses by the securities industry defense bar will not be replaced by the industry arbitrator's willingness to issue subpoenas that benefit the respondent. These concerns are only exacerbated by the fact that as the proposed rule, as currently drafted, requires only one arbitrator to authorize the subpoena, rather than a majority of the arbitrators. NASAA recommends that at a minimum the Chair who pursuant to Rule 10308(c)(5) must be a public arbitrator unless all parties agree otherwise be the panel member designated to issue subpoenas. Such a requirement would still be subject to an inherent weakness in the composition of arbitration panels, as discussed further below; however, the resulting clarity would provide specific direction to the parties and yield some assurance of consistency.

NASAA is also concerned that the 10-day objection period does not provide an adequate mechanism for public customers to challenge a harassing or intimidating subpoena. Again, our concerns are based primarily on the current composition of the arbitration panel. Currently, a person is qualified as a public arbitrator if they are an attorney, accountant or other professional whose firm derives less than 10% of its income from the securities industry. This definition of "public" arbitrator results in a pool of arbitrators that is not truly representative of the general public, i.e.; they have no ties to or connection with industry. In fact, such "public" arbitrators may maintain significant and substantial ties to industry such that conflicts of interest are unavoidable. As a result, even if a customer elects to challenge a subpoena and such challenge is decided by a "public" arbitrator pursuant to Rule 10321(e), there can be no assurance of a fair and unbiased hearing.

Until the NASDDR undertakes the fundamental reform of removal of the requirement of a mandatory industry arbitrator and prohibits the public arbitrator from having any ties to the securities industry, the arbitration process will remain opaque and unfair.

Thank you for your consideration of NASAA's views on these issues. If you have any questions regarding these comments contained in this letter, please do not hesitate to contact Bryan Lantagne, Director of the Massachusetts Securities Division and Chair of the Broker-Dealer Arbitration Project Group (bryan.lantagne@sec.state.ma.us).

Sincerely,

A handwritten signature in black ink, appearing to read "Bryan Lantagne", written over a horizontal dotted line.

Bryan Lantagne
Director, Massachusetts Securities Division
Chair, NASAA Broker-Dealer Arbitration Project Group