MARTIN L. FEINBERG
ATTORNEY AT LAW
365 SOUTH END AVENUE
NEW YORK, NEW YORK 10280-1043
(212) 432-0873

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BY E-MAIL

Jonathan G. Katz, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303
rule-comments@SEC.gov

Re: Comment: File No. SR-NASD-2005-079
Amendments to NASD Arbitration Code 10322 - Subpoenas

Dear Mr. Katz:

I write to comment on SR-NASD-2005-079, a proposed rule change to revise Rule 10322 of the NASD Code of Arbitration Procedure.

Among other things, the proposed rule change limits to arbitrators the power to issue subpoenas. This limitation is important and desirable. It conforms the rule to the requirements of the Federal Arbitration Act ("FAA"), which applies in all NASD securities arbitrations[1] and which permits only arbitrators to issue subpoenas. However, some provisions of the amended rule are inconsistent with the Federal Arbitration Act, unwieldy, and in at least one instance, easily misconstrued. We discuss them below.

1. The Proposed Rule is Inconsistent With the FAA Regarding Who Signs the Subpoena

Section 7 of the FAA provides, in part,

> The arbitrators selected . . . or a majority of them, may summon in writing any person to attend before them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . . **Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them,** . . . .

[1] *See The Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52 *(2003)*.

9 U.S.C.A. § 7[2] (emphasis added). Thus, at least a majority of the arbitrators must sign all subpoenas issued pursuant to the FAA.

Proposed Rule 10322(c) provides in relevant part "The arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena . . . ." This implies that only one arbitrator need sign the subpoena. While this may be the case when only one arbitrator presides over the arbitration, it is not the case when three arbitrators preside.

The FAA provides third parties certain protections that parties cannot limit merely by creating a rule. One of the protections requires that a majority of the arbitrators sign the subpoena. Proposed Rule 10322 should conform to the FAA's requirements. Otherwise, arbitration panels will issue what they think are valid subpoenas (with the signature of only one arbitrator), and third-party recipients can legitimately ignore them.

2. <u>The Proposed Rule is Unwieldy</u>

a. Receipt of the issued subpoena by all parties

Proposed Rule 10322(d) provides "If the arbitrator issues a subpoena, the party that requested the subpoena **must serve the subpoena at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the subpoena**." (Emphasis added)

This provision may require that the subpoenaing party serve the other parties with copies of the subpoena by hand and in person. This cannot be the result NASD intended.

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[2] Section 7 of the FAA provides:

> The arbitrators selected either as prescribed in this title [*9 USCS §§ 1* et seq.] or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Section 7 of the FAA provides in relevant part that the arbitration subpoena "shall be served in the same manner as subpoenas to appear and testify before the court . . . ." The governing rule – Rule 45(b)(1) of the Federal Rules of Civil Procedure – provides in relevant part: "Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person . . . ."

The courts have generally interpreted this provision of Rule 45 to mean that personal service of the subpoena is required.[3] Thus, pursuant to the FAA and Rule 45, a subpoena issued

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[3] We cite the rule of the vast majority of courts. However, not all courts agree, a condition that in itself can lead to unnecessary motion practice during the arbitration. *See, e.g., FTC v. Compagnie de Saint-Gobain-Pont-a Mousson*, 636 F.2d 1300, 1312–13 (D.C. Cir. 1980); *Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968); *Klockner Namasco Holdings Corp v. Daly Access.com, Inc.*, 211 F.R.D. 685, 687 (N.D. Ga. 2002) (citing cases); *Agran v. City of New York*, No. 95 Civ. 2170 (JFK), 1997 U.S. Dist. LEXIS 2577, at *3 (S.D.N.Y. 1997) (weight of authority requires personal service; the court does not have authority to sanction alternative service); *Khachikian v. BASF Corp.*, No. 91-CV-573, 1994 WL 860702, at *1, 1994 U.S. Dist. LEXIS 2881, at *2 (N.D.N.Y. Mar. 4, 1994); *Conanicut Investment Co. v. Coopers & Lybrand (In re Deposition Subpoena Directed to Smith)*, 126 F.RD. 461, 462 (E.D.N.Y. 1989) (personal service required; "the court has no discretion to permit alternative service when a party has difficulty effecting service"); *In re Johnson & Johnson*, 59 F.R.D. 174, 177 (D. Del. 1973). *Contra Hall v. Sullivan*, 229 F.R.D. 501, 503 (D.Md. 2005) (acknowledging that the majority of courts require personal service but adopting the position of the minority); *Ultradent Products v. Hayman,* No. M8-85 (RPP), 2002 U.S. Dist. LEXIS 18000 (S.D.N.Y. Sept. 24, 2002) (subpoena served on corporation's registered agent or by certified mail satisfies Rule 45); *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 84 n.5 (S.D.N.Y. 2002) ("substitute service at the [witness's] offices followed by mailing properly labeled copies [of subpoena] to the same address" is sufficient) (citing *King v. Crown Plastering Corp.*); *First City, Texas-Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 255 (S.D.N.Y. 2000) (Service on the witness's agent to accept service of process and its counsel of record); *Cordius Trust v. Kummerfeld*, No. 99 Civ. 3200 (DLC), 1999 U.S. Dist. LEXIS 19980 (S.D.N.Y. Dec. 29, 1999); (after repeated attempts at personal service, certified mail allowed); *Windsor v. Martindale*, 175 F.R.D. 665, 669–70 (D. Colo. 1997) (allowing service by certified mail by the U.S. Marshal's service; not allowing service by plaintiff by regular mail); *King v. Crown Plastering Corp.*, 170 F.R.D. 355, 356 (E.D.N.Y. 1997) (hand delivery of subpoena not required "so long as service is made in a manner that reasonably insures actual receipt of the subpoena by the witness"; allowing combination of hand delivery and mail delivery to residence of subpoenaed person to constitute proper service under Rule 45); *First Nationwide*

by the arbitrators must be served by personal service (i.e. by hand) on the subpoenaed party. Proposed Rule 10322 would, therefore, also require the subpoenaing party to serve copies of the subpoena to the other parties by hand.

This is expensive, unwieldy, and undoubtedly not what NASD had in mind when it drafted this provision.[4]

We suggest that the NASD Director of Arbitration send the issued subpoena to all parties at the same time and in the same manner (for example, first class mail), instead of sending the issued subpoena only to the party that requested the subpoena. The Director serves all parties at the same time and in the same manner with all other communications between the arbitrators and the parties. Subpoenas should not be an exception.

If the parties and arbitrators are able to communicate directly with each other pursuant to NASD Arbitration Rule 10334, then the arbitrators should send copies of the issued subpoena to all parties at the same time and in the same manner. At the arbitrators' option, the arbitrators can send the subpoena to the NASD Director of Arbitration for distribution to all the parties.

b. Request for copies of documents received pursuant to subpoena

Proposed Rule 10322(e) provides:

> Any party that receives documents in response to a subpoena served upon a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 days following receipt of the request. The party requesting the documents shall be responsible for the reasonable costs associated with the production of the copies.

Bank v. Shur (In re Shur), 184 B.R. 640, 642–44 (Bankr. E.D.N.Y. 1995) (rejecting the majority rule) ("We therefore hold that the only limitation upon service under rule 45 is that the procedure employed be reasonably calculated to give the nonparty actual notice of the proceedings and an opportunity to be heard.") (citing *Doe v. Hersemann*, 155 F.R.D. 630 (N.D. Ind. 1994) (certified mail)); *Hinds v. Bodie*, No. 84 Civ. 4450, 1988 U.S. Dist. LEXIS 14437, 1988 WL 33123 (E.D.N.Y. 1988) (alternative form of service permitted after unsuccessful attempts at personal service).

[4] It is true that the parties may agree to receive service by some other less costly method, but some parties may not agree to this procedure.

This proposal is unwieldy because it requires a party to request documents from a party that subpoenas documents each time the subpoenaing party receives documents and provides notice of receipt.

A provision should be added to permit a general request for subpoenaed documents. Thus, a party need only ask once for all documents received from all subpoenas (issued in the past or in the future) without the need to request the documents each time the subpoenaing party provides notice that it has received subpoenaed documents.[5] Once the general request is made, the subpoenaing party would have to produce to the requesting party all documents received pursuant to any subpoena within ten days of receipt of the subpoenaed documents.

We recognize that such a general request makes sense and most parties would agree to it. We suggest this addition to the proposed rule only because we fear some parties will claim that the procedure prescribed by Proposed Rule 10322(e) is the only procedure that can be used to obtain subpoenaed documents. By taking this position, such parties will be able to slow down the discovery process, a result that is not intended by the rule.

c. Payment for subpoenaed documents

Proposed Rule 10322(e) provides, in part, "The party requesting the documents shall be responsible for the reasonable costs associated with the production of the copies."

The rule should not require payment for subpoenaed documents. The production of no other discoverable document requires payment. The production of subpoenaed documents should not require payment either. At the end of the hearing, the arbitrators decide whether to assess costs, and if so, how much to assess. Subpoenaed documents should not be treated differently.

The inevitable consequences of expecting a party to pay "the reasonable costs associated with the production of the copies" is not difficult to foresee. The parties will argue about what a reasonable cost per page is, whether labor costs should be included, and whether payment must be made before or after the documents are produced. In effect, the documents will be held hostage while the parties argue and time passes. Eventually, the issue will be presented to the arbitrators, and valuable time will again be lost.

The rule creates an opportunity to obstruct the discovery process, and some parties rarely miss opportunities to obstruct.

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[5] Current practice is such that it is not unusual for a party to include such a request with its other document requests pursuant to NASD Code of Arbitration Procedure 10321. The subpoenaed documents are treated as any other discoverable documents in all respects.

Accordingly, parties should not have to pay for subpoenaed documents. In this regard, subpoenaed documents should be treated as all other discoverable documents are treated.

3. Proposed Rule 10322(c) Can Be Misconstrued

Proposed Rule 10322(c) provides:

> If a party receiving a motion and draft subpoena objects to the scope or propriety of the subpoena, that party shall, within 10 days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the subpoena may respond to the objections. **The arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena regardless of whether any objections are made.** (emphasis added)

The phrase "regardless of whether any objections are made" can be construed to mean that the arbitrator is to rule promptly and need not consider any objections raised. We recognize that NASD will transmit to the arbitrator objections, if any, with the draft subpoena, so that the issue in those situations may not arise. But in cases where the parties transmit documents directly to the arbitrators pursuant to NASD Code of Arbitration Rule 10334, the issue may arise. We suggest that the last sentence be written as follows: "After considering all objections, if any, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena."[6]

We commend NASD for amending this proposed rule to limit to arbitrators the authority to issue subpoenas. We suggest that the rule be amended again to conform with the requirements of the FAA and to make it easier to apply.

Thank you for the opportunity to comment. If you have any questions, please contact me.

Very truly yours,

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[6] We have not changed our position that the FAA requires that a majority of arbitrators sign the subpoena. Our recommended change to the last sentence to Proposed Rule 10322(c) ignores that position merely for the sake of simplicity.