Comments on Proposed Revision to Rule 10322
NASD Code of Arbitration Procedure Pertaining to Subpoenas

Abuse of the subpoena process has long been an area where the NASD has endeavored to assist its member firms and further disadvantage public customers in its biased and unfair arbitration forum. The current revisions offer some significant improvements but, as is its practice, the NASD includes a section which will further disadvantage small investors while allowing its members to continue predatory arbitration practices; all at an increased cost to customers.

Section 10322(e) should be changed to require the automatic production of documents to adverse parties when they are produced pursuant to a subpoena and without additional cost to the customers.

Reform is needed. As currently practiced, industry lawyers issue multiple, attorney signed subpoenas prior to the appointment of the arbitrators. The objective is to garner as much information as possible from banks, securities firms, tax advisors, insurance companies and other financial institutions prior to appointment of arbitrators. The subpoenas demand information far exceeding the scope of the Discovery Guide. The member firm, having all the information needed is then free to object, refuse, and deny all discovery requested by the customer including basic Discovery Guide documents. There is no need to cooperate in the exchange of documents as required by the Code of Arbitration Procedure and they won't. The customer is already at a disadvantage since the broker is required to "know its customer" but the customer typically knows little about the member firm or individual broker.

While the current proposal will cure this early offensive use of attorney signed subpoenas, the NASD leaves in tact another abusive member strategy while granting them the ability to substantially increase the costs to customers. Recently, member firms have waited until after the pre-hearing exchange of documents 20 calendar days prior to hearing to issue multiple subpoenas. The documents arrive too late for the customer to receive a copy before the hearing. By timing the issuance of subpoenas and the receipt of the documents, the same tactic remains viable. The proposed rule allows member firms five (5) days to notify public claimants that they have received documents. They will wait until the fifth day and then send the notice by ordinary mail which is at least two days from New York to Kansas City making the notice a week. Even if the request for copies is made immediately, members have another ten days to stall before sending the documents by the slowest method possible to arrive after the beginning of the hearing. In all likelihood, however, members will refuse to send anything prior to receiving payment at a cost that isn't reasonable to an elderly claimant.

Members' attempts to bill customers thousands of dollars in order to receive basic documents in arbitration should not be allowed.

When member firms are allowed to charge for copy costs they send dozens of boxes of irrelevant documents with huge copy bills and they still object to producing

relevant documents. In the past, members billed thousands of dollars directly to customers from copy firms. It was always the highest priced copy firms charging premium fees. Elderly widows are normally unable to engage in spending contests with large Wall Street firms. The NASD now attempts to legitimize this abuse by codifying the right of its members to charge customers fees for documents that the member determined it needed. The practice will encourage the request for multiple subpoenas in order to overwhelm customer's ability to pay. While $5,000 is pocket change to Wall Street firms which specialize in abusive arbitration tactics, it is an overwhelming amount of money to a senior citizen living on a fixed income and reduced circumstances due to the conduct of her broker.

The Code of Arbitration and the Discovery Guide have uniformly called for the voluntary exchange of documents, not the purchase or sale. This additional unseemly attempt by the NASD to limit the ability of smaller cases to pursue a fair hearing should not be allowed. If a member firm sincerely believes that it must subpoena thousands of pages of documents, it should be required to do so only if it provides a copy to the adverse party. The NASD's disingenuous excuse that its members should not be required to automatically provide copies because the other parties may have no interest in them is ridiculous on its face. It would be per se malpractice for a customer's lawyer to not review documents that the member believes will refute the customer's claim at hearing. The only purpose for optional purchase of these documents is to further disadvantage customers with even higher costs. Immediately upon approval of this abusive subsection, the member firms will be demanding outrageous sums for all discovery, not just subpoenaed documents, while still withholding relevant documents.

This is another example of why the NASD can not be trusted to provide a fair forum for customers of the members who elect it. Customers have no vote. This additional fee shifting to those least able to pay should not be allowed. The small investor who has lost most of her life savings must now pay $1,425 to file a case. Discovery hearings to obtain basic documents which should be produced automatically cost $200 each time a member refuses to produce "presumptively discoverable" documents from the Discovery Guide. The NASD has convinced most arbitrators to bill the customer half of hearing costs regardless of the merits of the case or state law and now wishes to charge these customers to receive documents that the member should produce as a matter of basic fairness. The upfront costs to a customer just to cover copy costs of the firm which has defrauded her will prevent many small investors from filing a claim. Arbitration is neither faster nor less expensive than state court and is losing all pretense of fairness. The Commission should not allow this outrageous abuse in an area that needs real reform, not additional hurdles to discourage investor complaints.