VIA E-MAIL TO RULE-COMMENTS@SEC.GOV

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: SR-NASD-2005-079

NASD Amendment to Subpoena Rule

Dear Ms. Morris:

Please accept this as a comment to the amendments filed by the NASD to Rule 10322 of the NASD Code of Arbitration Procedure pertaining to subpoenas. The primary purpose of the changes to Rule 10322 is to mandate that arbitrators and not attorneys issue subpoenas and to establish related procedures. I support this basic change in that it essentially is consistent with the requirements of the Federal Arbitration Act. My concern with the amendments relates to the provision that a party requesting copies of subpoenaed documents from the adverse party which originally subpoenaed the documents is "responsible for the reasonable costs associated with the production of the copies." The application of this provision places an unfair and unreasonable economic burden upon investors pursuing claims in arbitration.

I have represented both investors and brokerage firms in arbitration for approximately the past 20 years. In my experience, third-party subpoenas are typically utilized by the industry and not by investors. For example, a respondent brokerage firm may seek to obtain historical documents from an investor's prior broker-dealers and for which the investor does not have old account statements or account documents. Respondent brokers often also seek (i) old tax records from an investor's accounting firm; (ii) employment information from prior employers; and (iii) bank account and mortgage records from financial institutions. These document productions may be voluminous, particularly where prior brokerage and financial institutions are making production. While the vast majority of these documents may be irrelevant to the proceedings, an investor claimant has no choice but to request that the respondent brokerage firm which is issuing the subpoenas provide copies of the produced documents. In my experience, it is customary that respondent brokerage firms produce copies of the subpoenaed documents to claimants without charge. In fact, I can think of only a single instance among scores of arbitrations where a respondent brokerage firm has asked to be reimbursed for copying costs. I opposed this

request, and no payment was made. There are several reasons why the NASD's proposal to require a claimant to pay document production costs should be rejected:

1. Issuance of Third-Party Subpoenas Are Within the Control of the Respondent Broker-Dealer

As noted above, third-party document subpoenas are typically issued by industry respondents. And these subpoenas are issued in virtually every case. I have been involved in proceedings where respondents have issued up to 15 subpoenas. Even though it is respondents which are issuing the subpoenas, the NASD would impose the economic burden of getting copies on the claimants. This is unfair on its face.

2. The Scope of the Subpoenas Is Under the Control of Respondents

As noted above, the vast majority of the subpoenaed documents are typically irrelevant to the proceedings. Respondents routinely issue subpoenas which are extremely broad. They extend well beyond the document production guidelines set forth in the NASD Discovery Guide. The categories of documents go well beyond those which a claimant is required to produce with respect to his third-party accounts under List 2, Item 4, of the Discovery Guide. Furthermore, the industry subpoena, unlike the NASD Discovery Guide, typically contains no time-frame limitation. The result is that voluminous documents are produced – all at the request of the industry respondent. Productions can run thousands of pages. The cost of obtaining copies of these documents, which have been unreasonably requested by respondents, should not fall on claimants.

3. Claimant Has No Choice But to Obtain Copies of the Documents Subpoenaed by the Industry Respondent

While claimants legitimately anticipate that the documents which the industry respondents have subpoenaed are either duplicative of documents already produced in the arbitration or are irrelevant, the claimants have no choice but to obtain copies of these documents. It would be malpractice for an attorney representing a claimant not to obtain copies of subpoenaed documents that may ultimately be introduced at the hearing. Thus, the claimant has no alternative. The claimant must obtain copies of these documents, simply because respondents have chosen to subpoena them.

4. The Custom and Practice in the Industry Is for Parties to Bear Their Own Document Production Costs

To date, there has been no rule in the NASD Code of Arbitration Procedure which requires a party requesting documents to pay for production costs. The procedure which has been adopted by virtually all parties is that each party pays

the cost of producing documents requested by the adversary. This approach applies to documents which are being exchanged by the parties, as well as documents which have been subpoenaed and are being produced to the adversary. In one case, I had a respondent produce over 36,000 pages at no charge. Thus, the NASD's rule is a fundamental change in existing practice, which ironically would eliminate one of the few areas of true cooperation among arbitration adversaries.

5. The Industry Respondent Is in a Better Economic Position than a Claimant to Bear These Costs

Industry respondents are brokerage firms whose assets may total hundreds of millions or even billions of dollars. Their revenues and incomes are also in the hundreds of millions of dollars. For example, in 2005 Merrill Lynch had over $47 billion in revenues and over $5 billion in earnings, while Morgan Stanley's revenues were $51 billion with $4.7 billion in earnings. Even smaller brokerage firms typically have assets and revenues that dwarf those of most claimants. The payment of copying costs is no burden and is not in any way an impediment to these firms participating in the arbitration process. In contrast, individual investors have limited assets and limited income. Often they are people who have lost a substantial portion of their retirement assets. Many are retirees with no income other than Social Security or investment income. Many are lower-income investors. In two of my recent arbitrations, one claimant was suffering from multiple sclerosis and receiving Social Security disability and another was a retired printer whose sole source of income was Social Security. For the NASD to adopt a rule which shifts the burden for payment of document-production costs from the industry to potentially hard-pressed individual investor claimants is clearly unfair, unreasonable, and inconsistent with the NASD's position that its objective is to protect individual investors.

For the foregoing reasons, I request that the provision requiring that a party pay costs to obtain copies of subpoenaed documents be deleted from the proposed amendments to Rule 10322. Thank you for your consideration.

Very truly yours,

LSS/ch

Laurence S. Schultz

Enclosure

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