(I attempted to submit this comment on the comment submission website form, but it kept rejecting my comment because I hadn't filled out the email address field even though I had filled out the email address field.)

I am writing to offer my comment in support of the rule as originally proposed and against the rule as now proposed after the third amendment. I agree with the original proposal to require a breathing space before the subpoena is served to allow an opposing party to object, but I disagree with the amendment that requires all subpoenas, whether opposed or not, to go through the panel.

By way of background, I have been doing commercial litigation since 1984 and representing arbitration clients since 1998. I have represented and advised clients on both the customer and industry sides of the docket. I am also a public arbitrator, so I have seen this from all angles.

In all the cases I have been involved in, I have never seen a subpoena develop into a discovery dispute. Therefore, I suspect that this rule will create an additional level of burden and expense in all cases when the few cases that really need panel involvement in subpoenas can already be handled under existing procedures.

The original proposal added a 10 day breathing space after a party gives notice of intent to issue a subpoena and listed procedures to be followed if there was an objection. If there were no objections, which would be the situation in almost all cases, the parties would carry on as before. If someone objected, the panel would get involved. The panel's involvement would only have been triggered by an objection. I think this should have been sufficient for all situations. In uncontested situations, there would only be a 10 day delay in the process, and the panel would not be involved. In the few contested situations, the panel would become involved and decide the matter.

The third amended proposal, however, makes everyone jump through more expensive and time-consuming hoops even in the cases where there is no objection. Instead of allowing the lawyers to issue subpoenas, every subpoena, contested or not, must be supported by a motion and proposed subpoena that are sent to the NASD. For almost all of these, this paperwork will be run through the staff attorney, sent to the designated arbitrator, put in a pile for at least 10 days and maybe more while the designated arbitrator is waiting for a status report from the staff attorney, approved by the designated arbitrator, returned to the staff attorney, and distributed back to the parties. Why must such a cumbersome process be put in place automatically for the majority of cases where it is unneeded? This makes the default position contested subpoenas instead of uncontested subpoenas. I think this is backwards.

I am also concerned about the increased risk of gamesmanship. Under the original proposal (and the current rules), a party opposing a subpoena has to

decide whether there is any bona-fide reason to oppose a subpoena. Under the third amendment, however, objections are almost cost-free. If a party wants to delay a subpoena or raise the cost of the proceeding, all it has to do is send in a letter objecting and raising whatever reasons the minds of well-trained lawyers can find. This, by itself, will delay the process weeks if not months while a hearing date is found. In the interim, the final hearing date approaches, but discovery is delayed.

I also worry that the increased cost and effort of the proposed process will naturally benefit the side more able to bear increased litigation costs. The industry side is commonly considered the richer party, so I fear that a rule that unnecessarily adds an additional layer of paperwork in all cases will automatically be anti-customer and anti-consumer.

I suggest a return to the original suggestion of letting the lawyers issue subpoenas and only getting the panel involved when there is a contest in the 10 day breathing space. This will reduce the cost and burden on all sides.

I would also like to respond to a couple of concerns raised in the other comments.

One is the concern that continuing to allow lawyers or parties to issue subpoenas runs afoul of the FAA or state law. I see this as a red herring. If the parties have agreed to arbitrate with a particular organization under its rules, then the issuance of subpoenas is governed by that organization's rules. I do not see how the FAA's statement that arbitrators may issue subpoenas or a state court's rules that subpoenas are to be issued by court clerks, court reporters, sheriffs, or constables have any bearing on the matter.

The other concern is that subpoenas are being abused, and panels need to look at them more often. Whether one looks at the existing rules, the original proposal, or the third amended proposal, however, there is no circumstance under which all subpoenas are or will be automatically reviewed by the panel. Under all three circumstances, there should only be a review of subpoenas when an objection or motion for protective order is filed. Under all three circumstances, an objection or motion for protective order causes a review by the panel. I do not understand how any of these three rule regimes will increase supervision of subpoenas unless parties think that they will use the third amendment as an opportunity to make automatic objections to subpoenas when they did not object before.

Thank you for considering my comments.

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