

PACE INVESTOR RIGHTS PROJECT

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August 2, 2005

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

Re: File No. SR-NASD-2005-079

To Whom It May Concern:

The Pace Investor Rights Project (“PIRP”) at Pace Law School welcomes the opportunity to comment on NASD's proposed rule change to provide for a 10-day notice requirement before a party to an NASD arbitration issues a subpoena to a non-party for pre-hearing discovery. PIRP's mission is to advocate on behalf of investor justice, particularly with respect to the rights of small, individual investors.

PIRP supports the proposed rule change. The issuance of subpoenas to non-parties is an area where NASD's current Code of Arbitration Procedure provides little to no guidance, yet the federal circuits are split on whether the Federal Arbitration Act (FAA) empowers arbitrators to issue subpoenas seeking pre-hearing discovery.¹ The proposed 10-day notice requirement enhances the efficiency and fairness of the pre-hearing discovery process by providing a mechanism to challenge the propriety of third-party discovery requests. Absent such a requirement, parties could use the subpoena process for purposes other than legitimate discovery requests (e.g., harassment, intimidation, etc.).

The SEC requests specific comment on whether NASD's proposed rule is preferable to Rule 23(c) of the Uniform Code of Arbitration adopted by the Securities Industry Conference on Arbitration (the “SICA Rule”). PIRP prefers the NASD version of the 10-day notice requirement because it provides clarity and certainty by requiring that the party issuing the subpoena serve it on the same day on all parties and on the

¹ Compare *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 408 (3rd Cir. 2004) (holding that the FAA does not authorize arbitrators to issue a subpoena duces tecum to a third-party witness), and *COMSAT Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999) (same), with *In re Security Life Ins. Co. of America*, 228 F.3d 865, 870-71 (8th Cir. 2000) (concluding that the FAA implicitly empowers arbitrators to compel the production of documents from a third-party witness).

entity receiving the subpoena. The SICA Rule, on the other hand, provides too much discretion, and creates ambiguity and an opportunity for gamesmanship by requiring that the party issuing the subpoena send it in a “manner that is reasonably expected to cause” the subpoena to be delivered to all parties and the entity receiving the subpoena on the same day.

Please do not hesitate to contact us if you have any questions regarding these comments. Thank you for the opportunity to comment on this proposed rule change.

Sincerely,

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Director

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