Public Investors Arbitration Bar Association

July 13, 2005

Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: SEC Release No. 34-51856;
File No. SR-NASD 2003-158
Comment on Reorganization and Revision of NASD Rules Relating to Customer Disputes

Dear Mr. Katz:

The Public Investors Arbitration Bar Association welcomes the opportunity to comment on Reorganization and Revision of NASD Rules Relating to Customer Disputes, also known as the Code Re-Write ("CR"). PIABA is a bar association of more than 730 attorneys who practice in the securities arbitration area. We are the voice for public investors who bring claims in NASD arbitration. Our members and their clients have a strong interest in the rules governing the arbitration process at the NASD.

When the United States Supreme Court issued its historic ruling in 1987 upholding the enforceability of mandatory arbitration clauses in brokerage contracts, it did so in large part based upon the recognition that "the Commission has broad authority to oversee and to regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights." Shearson/American Express, Inc. v McMahon, 482 US 220, 233-34 (1987). We agree with the NASD that the time has come to rewrite the Code of Arbitration Procedure, and submit the following comments to assist you in ensuring that investors' statutory rights are preserved under a new Code.

Our comment letter addresses the specific questions you pose in the Release No. 34-51856. We have also commented on other sections we believe will have the greatest impact on investor rights. Our decision not to comment on particular sections should not be read to mean that we agree or disagree with them.

Definitions of "Public" and "Non-Public" Arbitrators
CR 12100 (n) and (r)

Section 12100(n) defines "non-public arbitrators" and would replace Code section 10308(a)(4). There is no real difference between the CR and the Code on the definition of industry arbitrators. However, the Code has become outdated and is in need of revision.

The proposed section provides:

(n) Non-Public Arbitrator

The term "non-public arbitrator" means a person who is otherwise qualified to serve as an arbitrator and:

(1) Is, or within the past five years, was:

(A) Associated with a broker or dealer (including a government securities broker or dealer or a municipal securities dealer);

(B) Registered under the Commodity Exchange Act;

(C) A member of a commodities exchange or a registered futures association; or

(D) Associated with a person or firm registered under the Commodity Exchange Act;

(2) Is retired from, or spent a substantial part of a career engaging in, any of the business activities listed in paragraph (n)(1);

(3) Is an attorney, accountant, or other professional who has devoted 20 percent or more of his or her professional work, in the last two years, to clients who are engaged in any of the business activities listed in paragraph (n)(1); or

(4) Is an employee of a bank or other financial institution and effects transactions in securities, including government or municipal securities, and commodities futures or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.

Comments.

1. The term "non-public arbitrator" is a euphemism for industry arbitrator. Ironically, "non-public" is not in keeping with a major impetus behind the CR – converting the Code to plain English. The NASD filing acknowledges that the SEC's Plain English Handbook recommends shorter, more common words, and states that the CR has implemented those guidelines where possible. Yet it has not done so here. If industry arbitrators must serve on all NASD panels, the CR should honestly and forthrightly call them industry arbitrators. This is more than semantics for pro se litigants or those attorneys with no experience in this forum. The CR should let them know in plain English that "non-public" arbitrators are those with ties to the securities industry.

2. More importantly, the appointment of industry arbitrators on customer cases should be made only if the customer requests it. The notion that an industry representative needs to be on every panel to explain the complexities of the cases and regulations is outdated at best. The NASD arbitration process has evolved into something that is much closer to court litigation than it used to be. Parties routinely hire experts, and file motions and hearing briefs. The length of hearings has grown considerably over the last ten years. In addition, arbitration panels have become more knowledgeable through newly developed and extensive NASD training programs, and growing experience serving on panels. There is no empirical evidence to suggest that industry arbitrators understand the facts and law better than public arbitrators, and some anecdotal evidence is to the contrary. Suitability, misrepresentation and failure to supervise claims, which are among the most common claims filed[1], are good examples. Public NASD arbitrators are every bit as capable of understanding suitability and supervision rules as industry arbitrators. Public arbitrators can identify whether there has been a material misrepresentation as easily as industry arbitrators, too. Even if they were not familiar with those concepts when the case begins (which is highly unlikely), they become educated as the case proceeds, through filings, arguments and testimony.

Many of the issues decided by NASD arbitrators challenge practices that are common throughout the brokerage industry. Examples include claims for analyst misconduct, break-point issues, the sale of variable annuities to IRA accounts, and abuse of B mutual funds. Arbitrators who work for firms who have been charged with the same misconduct that is alleged in the case should not be deciding the claims.

Imagine the public outcry if the lawyers banded together and were somehow able to declare that henceforth a lawyer must sit on every case involving legal malpractice, or if a group of doctors determined that a doctor must be a decision maker in every medical malpractice case. Yet NASD arbitration continues to require that an arbitrator with securities industry ties decide all

[1]See Dispute Resolution Statistics, available at http://www.nasdadr.com/statistics.asp.

cases against the industry where three arbitrators comprise the panel. It is high time to retire this antiquated requirement. The NASD should propose a rule which permits, but does not require, industry arbitrators in customer cases.

3. Section 12100(n)(3) provides that attorneys and other professionals who have devoted 20% of their practice representing industry clients in the last two years must be categorized as industry arbitrators.[2] The rule correctly recognizes that attorneys and other professionals who represent clients in the industry must be classified as industry arbitrators. However, the provision is drawn too narrowly. If industry arbitrators are to continue to sit in every customer case where there are three arbitrators, it is imperative that anyone with demonstrated industry ties be excluded from public panels. Otherwise, the majority of a panel can have industry ties. If the panel majority is comprised of such persons, the system no longer adequately protects customers' statutory rights under the securities laws. See: Shearson/American Express, Inc. v McMahon, 482 US 220, 233-34 (1987).

To meet the statutory requirements and the mandate of McMahon, Section 12100(n)(3) must require that any professionals who have devoted any of their practice in the last five years to representing the securities industry be classified as industry arbitrators.

4. Furthermore, the CR does not fully address the issue of retired industry attorneys. The proposed CR could classify as public a retired attorney who spent a substantial amount of his career representing the industry. After all, CR 12100(n)(2) provides that industry members who are retired from or spent a substantial portion of their career in the industry are classified as industry arbitrators. At the very least, the rule should apply the same standard to retired attorneys for the industry. Retired attorneys or those who spent a substantial portion of their careers representing the industry should be industry arbitrators.[3]

[2]The section needs to be read with CR 12100(r)(4), which states that attorneys who work for firms that derive more than 10% of their annual revenue in the past two years are ineligible as public arbitrators. Therefore, some attorneys are ineligible to serve as public or industry arbitrators, i.e., those who work at firms where 10% or more of the annual income is from the industry, but who do not meet the industry definition requiring that 20% of their professional work in the last two years be for the industry. The complexity involved with reading the two rules together will result in confusion and hair-splitting. The only workable solution is to simply require that any professional who has represented the industry be classified as an industry arbitrator.

[3]CR 12100(r)(2) offers little consolation. It seems to exclude from the *public* pool those persons who represented industry clients in 20% of their practice for 20 years, but does not necessarily include in the industry pool those arbitrators who spent a substantial portion – but less than 20% of the time for 20 years – of their career representing industry clients.

Insurance Business Exclusion
Rules 12200 and 12201

CR 12200 excludes from mandatory arbitration "insurance business activities of a member that is also an insurance company." CR 12201 permits parties to arbitrate those same disputes. One of the fastest growing claim areas involves variable annuities, according to the NASD's case statistics. Variable annuities are excluded from the definition of securities under some state securities laws, and there is some argument that they are insurance products, and not securities. The choice of whether to arbitrate variable annuity claims against NASD members should belong to the investor. CR 12201 should be changed to read "Investors may arbitrate a dispute under the code" and not "Parties may arbitrate a dispute under the code."

Class Actions
Rule 12204

The class action rule has been the cause of confusion and abuse for some time. Respondent member firms are increasingly contending that any pending NASD arbitration involving a security that is also the subject of a pending class action lawsuit bars the customer arbitration claim. For example, this defense is raised when an investor files a suitability claim against a firm for maintaining a large percentage of a portfolio into a single speculative stock. Respondents in such cases now argue that, because there is pending somewhere a class action alleging violations of Section 11 of the 1933 Act for misstatements in the prospectus of the same stock, the arbitration must be dismissed. The firms make this argument even though the claims made in the arbitration for negligence and breach of fiduciary duty are factually and legally distinguishable from the Section 11 class action. And, respondents move to dismiss where the brokerage firm is not even a defendant in the class action.

Another area of confusion involves the opt-out provision of the Code. The CR provides that a party may avoid the rule by "showing that it is not participating in the class action." The rule is problematic, because oftentimes no class has been certified, and there is some question about how a putative class member shows that he or she is not participating before there is anything in which to participate. In addition, the current rule and proposed CR provision provide no guidance as to how a party makes such a showing.

To address these shortcomings, Rule 12204(b) should be provide:

> (b) Claims based upon the same facts and law, and involving the same defendants as a pending class action or putative class action,

> shall not be arbitrated under the Code, unless the party bringing the claim shows, by a letter or pleading filed with the court in which the class action is pending, that such party will not participate in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court.

NLSS And Arbitrator Roster Rules
CR 12400, 12402, 12404, 12405, 12406

List selection and arbitrator roster rules are changed substantially in the CR, and these are perhaps the most significant changes proposed. Under the CR 12400(b), there will be three lists instead of the familiar industry and public list system. The CR adds a roster for "chair qualified" arbitrators. Chair qualified arbitrators must complete the NASD training program and be either (a) attorneys who have sat through an SRO arbitration through two awards; or (b) non-attorneys who have sat through at least three cases going to awards. CR 12400(c). An award for purposes of this section means a proceeding where hearings are held. It is not clear whether that includes the IPHC, a telephone hearing on a motion to dismiss, or whether it requires sitting through an evidentiary hearing. It is also not clear from the CR whether chair qualified arbitrators will also be included in public lists, or only in chair qualified lists.

Under the proposed system, in all three arbitrator panels, one shall be industry, and two shall be public, but one of the public members must be chair qualified, unless all parties agree otherwise. CR 12402(b). List selection would be from a list of seven candidates from each of the three lists- industry, public and chair qualified. CR 12403. In single arbitrator cases, there would be a single list of chair qualified arbitrators. Parties rank and strike from each of the lists, but are limited to a maximum of five strikes from each list. CR 12404.

Comments:

1. Some aspects of the CR represent improvements over current practices. One problem with the current system is the frequency with which arbitrators are appointed by the NASD rather than the parties when the entire roster is stricken. Requiring parties to rank at least two members on each list is an improvement over the current system. However, the new Code should require the NASD to generate a second list with limited strikes when all candidates are stricken. [4] Fairness requires that the parties be given at least some say in the selection of their arbitrators.

2. There is a likelihood for ties in the rankings of arbitrators by claimants and respondents. If each party only ranks two arbitrators from the list, the total combined ranking number for each

[4]See our discussion on replacement arbitrators at page 9, comment 5 below.

arbitrator can only be 2, 3 or 4. Under that scenario, there is a strong likelihood for ties, but th CR does not say how the NASD will resolve ties. PIABA believes ties should be resolved in favor of the public customer.

3. PIABA is fundamentally opposed to the creation of a new chair-qualified list. In our view, this proposal represents the NASD's efforts to solve a perceived administrative problem, and has little or nothing to do with improving the arbitration process for participants. It may be that inexperienced chairpersons require more NASD staff time answering questions than do experienced chairpersons. However, there has been no showing that this is a significant problem. Before the Commission even considers such a proposal, it should inquire of the NASD as to how often the problem arises.

The proposed three list system is fraught with problems. Some of them are identified below:

A. The current chairperson selection system works reasonably well, and does not need a complete overhaul. Under the current system, after the panel is selected, the parties are given an opportunity to jointly agree on a chair. If the parties cannot do so, the NASD selects the public arbitrator who was ranked the highest by the parties. Neither the industry nor the customers have complained about the chair selection process. The CR proposal does not improve that system–it complicates and detracts from it.

B. A chair qualified list makes the public non-chair arbitrator a second-class arbitrator. They are neither industry nor chair qualified. Their vote becomes easier to influence and less independent.

C. The system would create a de facto expertise for chairpersons, and would further favor so-called professional arbitrators who are devoted to the system; it favors arbitrators who depend on the process for supplemental income.

D. A chair qualified list will change the dynamics and fairness of the arbitration process. High volume arbitrators have a vested interest in appearing to be fair to claimants and respondents, even at the cost of reaching the most just result. These arbitrators understand well that experienced counsel on all sides review the arbitrator lists with care, and read every award that each potential arbitrator has signed. Arbitrators who want foremost to continue to serve as arbitrators soon learn that they must create an artificial balance in their claimant and respondent awards if they want to be chosen again. Though we are not aware of any empirical study that has been conducted on this topic, it is only logical that compromise awards are more likely to occur with repeat arbitrators. This problem is going to be exacerbated with chair qualified lists, because now there will be at least one person on every panel with significant NASD experience and, presumably, a desire to sit on more cases.

Arbitrators who sit through 2-3 cases per month also tend to lose the sense of the importance of the proceeding. What newer arbitrators lack in experience, they make up for in enthusiasm and willingness to prepare, pay attention, and deliberate. They are not jaded or cynical, they don't fall asleep in the hearing, and they are less concerned about finishing at the appointed hour. Those who decide cases on a regular basis can and sometimes do lose that sense of importance. Familiarity may not breed contempt, but it does breed apathy. This problem would only worsen under the CR, because repeat arbitrators will sit on increasingly more cases as chair qualified arbitrators.

E. There is nothing to suggest that arbitrators who have sat on more cases will be better chairpersons. Having a law degree and some litigation experience is a far better indicator of chair qualification than the experience of sitting through three, or 300, cases. A litigator is better equipped to handle discovery disputes, evidentiary issues and rulings normally left to the chair. The chair experience requirement may reduce the number of administrative questions that the NASD has to field, but it adds nothing to the quality of the result.

F. The choice on arbitrators' experience levels for particular cases should belong to the investor. Investors are being pushed further and further from having their cases decided by a "jury of their peers." We cannot approach that constitutional standard in arbitration, but investors are being given less choice on who will decide their cases. Under the proposed CR, claimants not only have to accept one industry arbitrator, but they will be forced to accept one additional category of arbitrator that the NASD determined is chair qualified. PIABA does not in any way advocate for the removal of experienced arbitrators from the pool. However, our members believe strongly that this comes down to an issue of choice. Arbitration is supposed to be a consent proceeding. The NASD should not impose yet another requirement on the type of person that decides our clients' cases. Moreover, under the new system, if the chair qualified list is stricken, the NASD will appoint a chair, even if there is a qualified public member willing to serve.

In summary, our membership feels strongly that there should only be a single list. That list should include a majority of public and a minority of industry arbitrators. It should be generated by a rotational selection process drawing from all arbitrators in the pool for the particular location. The investor party should decide whether one or more industry arbitrators should sit on the case. Parties should not be permitted to strike all arbitrators, and the parties should be allowed a peremptory strike on replacement arbitrators.

4. To help the NASD ensure the integrity of the list selection process and to bolster the confidence of our members in the list selection process, PIABA believes there should be an annual audit of the list selection system. The audit should be performed by a neutral third party, and the results should be made publicly available on the NASD website.

5. The CR provides in 12406(c) that, if the Director must appoint an industry arbitrator, it must be a person who is or has been associated with a broker-dealer in the last five years, as defined in Rule 12100(n)(1). It cannot be an industry arbitrator who is retired, or one who is an attorney or accountant that works for the industry, as defined in 12100(n)(2) and (3). The same requirement is found in CR 12411(d), relating to replacement of arbitrators. This requirement that a replacement industry arbitrator be the "purest" form of industry arbitrator is contrary to the interests of public investors and is completely unacceptable to the PIABA membership and to the investing public. There is no need for an industry arbitrator, and there is certainly no need for a "super industry arbitrator" to be forced on claimants without any input into the process. That proposal provides an incentive for respondents to strike all industry arbitrators who are not currently working for brokerage firms. The purpose for the proposed striking and ranking changes in proposed 12404 are designed to reduce the number of cases in which arbitrators are appointed. Proposed 12406(c) flies in the face of that objective. In effect, 12406(c) gives respondents the right to exclude any industry classified arbitrator who is not currently employed by a brokerage firm.

Dispositive Motions
Rule 12504

CR 12504 is new. There is no dispositive motion rule in the Code. Many PIABA members believe strongly that motions to dismiss have no place in arbitration. And, at least one appellate court has recently agreed with that view. Bates v. McQueen, (No. 04228 Va. S.Ct. June 9, 2005) (arbitrations award issued without providing a claimant with a hearing, including a right to examine and cross-examine witnesses, is subject to vacatur). PIABA is not opposing the rule outright only because of its restrictive language and the NASD's strong insistence that a dispositive motion rule be a part of the CR. Nonetheless, if there is to be a dispositive motion rule, it needs to be modified to address the troubling issues that are raised by a dispositive motion practice in NASD arbitration.

CR 12504 is in effect a summary judgment rule, and summary judgment and arbitration form an imperfect union. Important procedural protections underlying summary judgment motions simply are not available in arbitration. The non-moving party cannot take a deposition, and has limited powers to obtain other information more readily available in court. Under the CR as written, a respondent can submit supporting affidavits from a broker, BOM, and compliance director, and the moving party has little if any opportunity to challenge the "uncontradicted" statements before the hearing. A dispositive motion rule has to recognize the limitations that non-moving parties face in responding to the motions, and that the only way to test a respondent's position (absent the discovery safeguards available in court litigation) is through testimony at a hearing.

Even though motions to dismiss are allowed (though rarely granted) in court, there are many reasons why such motions need to be severely curtailed in arbitration. First, arbitrators are not judges, and are often not in a position to make the kind of exacting legal determinations required to decide a motion to dismiss. Second, arbitrators have more flexibility than courts in adhering to the strictest rules of law, making technical dismissals inappropriate. Third, arbitration pleadings are less formal than court pleadings, making dismissal based on pleadings subject to interpretation and guesswork. Fourth, arbitrators do not write reasons for their awards. Fifth, unlike court, there is little judicial review of arbitrator decisions. Such review (of court decisions) is important because it insures against legal mistakes. Sixth, the testimonial hearing requirement is the essence of arbitration, which is not an overly legalistic procedure for resolving disputes. Finally, courts are independent, government-policed fora with experienced decision makers; SRO arbitration is controlled by an organization in which respondents, but not claimants, are members.

The differences between arbitration and court thus explain the differences in procedure. The expedited nature of arbitration assures respondents that they will not be involved in lengthy proceedings (including depositions and motions) if a case is not dismissed early. Having agreed to arbitration, respondents must abide by the rules, which include not being able to obtain early dismissal.

In light of these observations, if a dispositive motion rule is to be introduced into the Code, it must specify that all factual allegations made by the non-moving party are to be taken as true for the purposes of the motion. Unlike court summary judgment, the decision makers cannot be allowed to weigh the evidence against the allegations and find that affidavits or other evidence remove issues of fact raised in the pleadings. The rule must make clear that the motion must be denied whenever credibility is at issue, there are any facts in dispute, or whenever the panel must make factual findings against the non-moving party. The rule must also provide that the motion should be denied whenever a hearing is necessary to shed light on all the issues in the case or in the interests of justice. In addition, if the non-moving party asserts that it can cure any defect by filing an amended statement of claim, that party should be given an opportunity to do so.

A dispositive motion rule with those requirements would satisfy the desire to have some procedural mechanism for a party to avoid a hearing when there are no facts in dispute, and the interests of the non-moving party to put on the evidence supporting its claims or defenses.

Document Production
Rule 12506 and 12511

Under the CR, the time to produce documents is increased from 30 days to 60 days after the answer is due, which is in turn 45 days from the service of the statement of claim. Therefore, respondents are given 105 days to produce basic documents from List 1. PIABA recognizes that it can take time for the firms to assemble and produce List 1 documents. We have no objection to

the 105 days that the proposed rule provides, provided that the rule sets a true deadline. To ensure that, the CR should be amended to provide in paragraph 12511 that sanctions will be imposed for the failure to timely produce List 1 or List 2 documents without good cause. As written, 12511 allows for sanctions for the failure to comply with the Discovery Guide, but 12506 allows a party not to produce information so long as they provide some explanation. The rule needs to be tightened to require a party to provide substantial justification for the failure to produce documents within 105 days, or face sanctions.

The rule should also make mandatory the production of insurance policies that might provide coverage on the dispute. Courts uniformly require the production of that information for good reason. It assists the parties in evaluating settlement possibilities. Insurance information also aids in screening for conflicts. Many attorney members of the arbitration pool have represented insurance companies, or have been retained by them to represent insureds, and the parties are entitled to discover that information.

In addition, PIABA believes that the CR should provide that the costs and attorney fees be immediately assessed to the losing party in discovery motions seeking the production of List 1 or List 2 documents, absent a finding of substantial justification.

20 Day Exchange
Rule 12514

CR 12514 provides that parties shall exchange all exhibits that have not already been exchanged and identify all witnesses. CR 12514(c) provides that rebuttal and impeachment exhibits and witnesses need not be disclosed. To avoid any misunderstanding of what constitutes rebuttal, the NASD now sends out a form letter advising the parties of the hearing date and location. That letter states that "Documents and lists of witnesses in defense of a claim are not considered rebuttal and, therefore, must be exchanged by the parties." PIABA recommends that the language from the NASD's letter be added to CR 12514(c).

Attendance At Hearings
Rule 12602

CR 12602 provides that "The parties and their representatives are entitled to attend all hearings." The attendance of anyone else is at the discretion of the arbitrators. The proposed rule is inconsistent with the directions given in The NASD's Arbitrator Manual, which creates a presumption for the attendance of expert witnesses and an investor's representative. The NASD Arbitrator's Manual states:

> Arbitrators should consider that expert witnesses often serve an important role in assisting parties and their counsel in the

> presentation of their cases, and may also be asked to testify about what has been said at the hearing, in addition to facts known to them prior to the hearing. Absent persuasive reasons to the contrary, there is a presumption that expert witnesses, as opposed to fact witnesses, should be permitted to attend the entire proceedings.
>
> Absent persuasive reasons to the contrary, and subject to the discretion of the arbitrators, the investor party should be permitted to designate one individual to attend the hearing, as there are many instances where an investor wishes to have a spouse, son or daughter, accountant, or other fact witness attend. These people can provide added support to the investor party, and can also provide valuable assistance when hearing the testimony of fact witnesses.

CR 12602 should be amended to include the highlighted language.

Order of Presentation of Evidence and Arguments
Rule 12607

CR 12607 addresses the order and presentation of evidence and arguments. It fails to incorporate IM 10317, which interprets the current Code. IM 10317 provides:

> In response to recent questions concerning the order of closing argument in arbitration proceedings conducted under the auspices of the National Association of Securities Dealers, Inc., it is the practice in these proceedings to allow claimants to proceed first in closing argument, with rebuttal argument being permitted. Claimants may reserve their entire closing for rebuttal. The hearing procedures may, however, be varied in the discretion of the arbitrators, provided all parties are allowed a full and fair opportunity to present their respective cases.

It has been a long standing practice in NASD arbitration to allow claimants to reserve all of their argument for rebuttal. That practice should be incorporated into the proposed rule.

Filing Fees
Rule 12900, 12902

The CR proposes to change the filing fee rules. Under the current rule, a claimant must pay a filing fee and a hearing deposit. For a $100,000 case before three arbitrators, the total amount paid at filing is a $300 filing fee, plus a $1,125 hearing session deposit. Rule 10332(k).

The claimant is then credited for paying hearing session deposits at the end of the case. Under the proposed rule, a party must pay the same amount at filing, but the rule does not provide that any of the fee is to be applied to hearing fees. For the same $100,000 case, proposed CR 12900(a)(1) requires a $1,425 filing fee and allocates none of that to a hearing deposit. CR 12902(a) then provides for hearing session fees of $1,125, which equals the current filing fee plus the amount of a corresponding hearing session deposit. The rules as written do not state that amounts deposited will be applied against the hearing session fees. So, under a strict reading of the rules, a claimant would pay for the first hearing session twice - once through the filing fee and then when the hearing session fees are assessed. PIABA is advised that the NASD did not intend this result, but the rule needs to be clarified to ensure that claimants are credited for hearing fees paid at the time of filing.

More fundamentally, however, PIABA believes that the bulk of the filing fee should be borne by the industry member. The NASD recently filed a rule proposal relating to employment disputes between members that requires a filing fee by claimants of $200. If industry members are permitted to pay filing fees of $200, public customers should pay the same amount, and the industry respondents should deposit the balance of fees owing. The NASD forum was selected by the industry, and is administered through the industry. The industry should bear the lion's share of the administration of the arbitration process. PIABA has no objection to allowing the arbitrators to make the ultimate allocation of filing and hearing fees. However, it is unduly burdensome to require a customer who has already lost $100,000 to deposit an additional $1,125 just to get the NASD to accept the filing of the claim. In addition, there is at least an appearance of impropriety for the NASD to set filing fees for its own intra-member employment disputes at $200, while requiring public customers to pay more than 5 times that amount in order to file their claims.

PIABA'S RESPONSE TO COMMENTS REQUESTED BY SEC

In its June 15, 2005 Release No. 34-51856, the Commission solicited comments on a number of specific aspects of the Code Rewrite. We are pleased to provide our views to those comments, which appear in Section IV of the Release.

A. Differences between the CR and the Uniform Code of Arbitration Procedure.

1. Appointment of Arbitrators. As the Commission has observed, CR Rules 12406, 12410 and 12411 do not give the parties any peremptory strikes if the Director appoints an arbitrator. As noted above, the Uniform Code of Arbitration Procedure ("Uniform Code") does provide one peremptory strike for appointed arbitrators. The Uniform Code's procedure is the right one. Even where an arbitrator resigns days before the scheduled hearing and a replacement must be appointed on short notice, parties can be given an expedited list by facsimile or email from

which to exercise a peremptory strike. As noted above, the Uniform Code stands in stark contrast to CR Rules 12406(c) and 12411(d), which not only fail to give the parties any say in the appointment of replacement arbitrators, but require the Director to appoint a "super-industry arbitrator."

2. Subpoenas. The Commission asks whether section 23(c)(2) of the Uniform Code, which requires parties to send copies of subpoenas to all other parties prior to issuance is preferable to CR Section 12512, which has no such requirement. PIABA supports NASD Rule filing 2005-079, filed with the Commission on June 17, 2005. That filing, if approved, would add the ten day notice provision to the CR.

B. Nonsubstantive Changes That Are Actually Substantive.

There are a number of these. One example is CR 12307, which NASD states is a codification of existing practice. The rule provides that parties shall be given 30 days to cure deficiencies, but that claims will not be processed until the deficiencies are corrected. The rule is biased in favor of the respondents. It requires claimants to provide their home address, but does not require the respondents to do the same, for example. In addition, if the claimant submits a deficient claim, he or she loses time because the claim is not processed. If the respondent files a deficient claim, the claimant also loses time, because the case is not processed. The rule should not penalize the claimant for the respondent's deficiencies. It should provide that deficient filings by the respondents shall not delay the service of the arbitrator list selection materials, so as not to delay the case.

Rule 12506(b) would require parties to produce documents that are "in their possession or control" (emphasis added). This is the first time that the word "control" has been used in this context in the Code. The concept of "control" in the discovery context has been defined as follows:

> A "party has ' control' over a document if that party has a legal right to obtain those documents." Haseotes v. Abacab International Computers, Inc., 120 F.R.D. 12, 15 (D. Mass. 1988). See also Searock v. Stripling, 736 F.2d 650, 653 (11th Cir. 1984) ("Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand"). Courts have also "interpreted Rule 34 to require production if the party has the practical ability to obtain the documents from another, irrespective[**114] of his legal entitlement." Golden Trade S.r.L. v. Lee Apparel Co., 143 F.R.D. 514, 525 (S.D.N.Y. 1992).

In Re: Nasdaq Market-Makers Antitrust Litigation, 169 F.R.D. 493, 530 (S.D.N.Y. 1996).

"Control" and all its ramifications is the subject of countless court decisions. It may require, for example, that a claimant approach all broker dealers that he has had a relationship with for the previous 9 years and ask for all monthly statements and confirmation slips. If the broker dealers choose to charge him for the document production, he would have to pay for it or be in violation of the rule. These requirements would be costly, time consuming, and inevitably lead to arguments over what is in the control of the individual. The costs in time and money just to determine what "control" means is not worth the effort. The additional costs of time and money required to going to a third party to obtain the documents is also not worth the effort.

Accordingly, the word "control" should be removed.

C. Proposed Rule 12105, Agreement of the Parties. The Commission notes that this proposed rule does not define "inactive party" for purposes of determining who has to agree to modify a provision of the Code. PIABA believes that "inactive party" should mean one which is in default for failure to file a response to a claim, counterclaim or crossclaim.

D. Proposed Rule 12400: NLSS Roster. PIABA provided an extensive comment on the proposed NLSS changes at pages 6–9 above. By preventing the pool of chairpersons from inclusion in the general public arbitrator lists, the rosters will indeed be limited. Moreover, it will allow arbitrators on chairperson lists to appear on panels more frequently than non-chair qualified arbitrators. PIABA is against such a change.

E. Proposed Rule 12408, Disclosure of Arbitrators. The Commission poses the question on the extent to which an arbitrator must disclose his or her service as a mediator. PIABA believes that the rule and sound public policy both require that there be full disclosure of all mediation matters for each arbitrator. Mediation matters may reveal information about the parties who have selected the arbitrator as a mediator, whether there is an ongoing mediation practice, and the types of cases that the mediator has mediated. Those facts could influence the arbitrators' view of the value of certain types of cases, affiliations with or allegiances to certain parties or attorneys. The parties are entitled to such information, and there is little or no burden on the arbitrator to provide it.

F. Proposed Rule 12600(c), Required Hearings. The Commission asks whether 10 days is adequate notice from the NASD for the time and place of the hearing. PIABA believes that the NASD has in the past adequately notified the parties of the hearing time and location sufficiently in advance of the hearing. In most all cases, the city where the hearing occurs and the time where

the hearing is scheduled to begin is decided at the Initial Prehearing Conference. However, in many, if not most cases, at least some parties or witnesses are traveling from out of town to attend the hearing. It would be helpful to the parties to know the location of the hearing 20 days before the beginning of the hearing, so that convenient hotel reservations can be made. The 20 day period would coincide with the 20 day witness and exhibit exchange.

G. Proposed Rule 12702, Withdrawal of Claims. As the Commission notes, this proposal requires that if a claimant wishes to withdraw a claim after an answer is filed, he must do so with prejudice. That is a draconian provision that does not exist in any court civil procedure rules, and it should not be approved. In our members' experience, there are few instances of cases in which a claim had to be withdrawn after an answer was filed. At the very least, it should be left entirely to the discretion of the arbitrators whether a withdrawn claim should be with or without prejudice.

H. Proposed Rule 12800, Simplified Arbitrations. In response to the Commission's inquiry, PIABA believes that, at least in simplified arbitrations, answers should be filed within 30 days of service of the claim. By way of comparison, answers to federal court complaints are due in 20 days, and answers in most state courts are due in 30 days.

Clerical Corrections/Miscellaneous Comments

We also offer two miscellaneous comments to the proposed rules.

1. Rule 12503(a)(4) is ambiguous. If the third sentence is to be consistent with the rest of the rule it should read with suggested addition in bold: "If a party moves to amend a pleading to add a party, the motion and a copy of all accompanying papers, if any, must be served on all parties, **including the party to be added** and the party to be added may respond to the motion in accordance with paragraph (c) without waiving any rights or objections under the Code."

2. Rule 12508(b) addresses the failure to object to discovery. The use of the word "waived" is imprecise. The word "forfeited' is appropriate. See, e.g., United States v. Thurston, 338 F.3d 50 (1st Cir. 2003) ("The government says Thurston has waived the issue and may not raise it at all. Absent an explicit agreement to waive the defense, we treat the issue as a forfeiture and not a waiver, contrary to the government's argument. This was not an intentional relinquishment or abandonment of a known right, the definition of a waiver." (footnote omitted)).

Thank you for the opportunity to comment on the proposed revisions to the customer arbitration code. We appreciate your careful attention to these important issues. Please feel free to contact us if you have any questions or would like additional information from PIABA.

Very truly yours,

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