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August 3, 2005

VIA FEDEX

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

Re: Proposed Revisions to NASD Rule 10322
NASD Rule Filing SR-NASD-2005-079

Dear Secretary Katz:

The Public Investors Arbitration Bar Association ("PIABA"), submits its comments on the proposed revisions to Rule 10322 of the NASD Code of Arbitration Procedure, relating to the use of subpoenas in customer-initiated arbitration proceedings.

PIABA's comments will address two areas of the rule filing: (1) the proposed revisions, to the extent that they allow attorney issued subpoenas, would violate the provisions of the Federal Arbitration Act, 9 U.S.C. Section 7; and (2) the proposed revisions do not contain sufficient provisions for sanctions.

A. Only the arbitrators should issue subpoenas.

NASD seeks to preserve the present language of Rule 10322 which purports to allow the issuance of subpoenas by counsel to the parties. That provision violates the Federal Arbitration Act and should be eliminated.

All securities arbitrations are governed by the Federal Arbitration Act. *See The Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003). Section 7 of the FAA provides in relevant part:

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> The arbitrators selected ... or a majority of them, may summon in writing any person to attend before them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.... Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, ...

A number of courts have found that this provision of the FAA grants subpoena power only to the arbitrators, and precludes parties or their counsel from issuing subpoenas. *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 185, 197 (2d Cir. 1999). *Burton v. Bush*, 614 F.2d 389, 390 (4th Cir. 1980) ["While an arbitration panel may subpoena documents or witnesses, the litigating parties have no comparable privilege."], *cited with approval* in *St. Mary's Med. Ctr. Of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 591 (7th Cir. 1992); *accord, Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004) and *Comsat Corp. v. National Science Foundation,* 190 F.3d 269 (4th Cir. 1999).

The solution the NASD proposal seeks is to allow opposing parties a ten-day period in which to object to the issuance of a subpoena. While PIABA agrees with the goal generally, the answer lies not in a revision to the rule, but in adhering to the procedural scheme already in place under Section 7 of the FAA. Under Section 7, a party wishing to compel the appearance of a witness or the production of materials at the arbitration hearing need only apply to the arbitrators for a subpoena. PIABA agrees that it would be advisable to impose a ten-day objection period upon such requests, so the opposing party would have the opportunity to address any deficiencies in the proposed subpoena with the arbitrators before the subpoena was issued.

B. <u>The revised rule does not provide for the imposition of sanctions for issuing noncompliant or abusive subpoenas.</u>

Unless the rule is rewritten to clarify that only the arbitrators may issues subpoenas, PIABA believes that the proposed revisions to Rule 10322 are inadequate because they do not contain any provisions

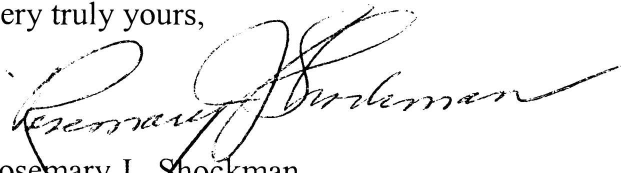
for the imposition of sanctions against parties who issue improper subpoenas.

It has been the collective experience of PIABA that when a party -- usually a respondent firm -- issues subpoenas, the subpoenas are usually not limited in scope, time or otherwise. Instead, respondents typically send out a series of subpoenas to any other brokerage firm where the claimant has ever held an account, without regard to when the account was opened, when it was closed, what investments were held in the account, or other matters. Such subpoenas are also not limited to the production of account opening documents and monthly statements (as indicated in the NASD Discovery Guide), but usually call for the production of all documents relating to that claimant. Many respondents go even further, sending subpoenas to claimant's banks, mortgage lenders, tax preparers, accounts, and even employers. No regard is given to whether the recipient of the subpoena is an industry member or arguably subject to the jurisdiction of the arbitrators.

If attorney issued subpoenas are to be sanctioned for any purpose whatsoever, the Commission must require the rule to include provisions for the mandatory assessment of sanctions against a non-complying party. In too many cases, investors have seen their private financial records and information surrendered without question simply because a respondent has managed to issue a subpoena and obtain records before the claimant could act. Once violated, privacy is impossible to recreate.

Thank you.

Very truly yours,



Rosemary J. Shockman
President

RJS:dlr