

Public Investors Arbitration Bar Association

April 28, 2006

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303

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

Dear Ms. Morris:

On August 4, 2005, the Public Investors Arbitration Bar Association (“PIABA”) submitted comments on proposed revisions to Rule 10322 of the NASD Code of Arbitration Procedure relating to the issuance of subpoenas in customer-initiated arbitration proceedings. On March 29, 2006, the NASD submitted a proposed amendment to the 2005 subpoena rule proposal. PIABA submits these additional comments on the proposed amendment. The NASD’s initial proposal, No. 2005-079, allowed opposing parties a ten-day period in which to object to the issuance of a subpoena and made no change in the provision of Rule 10322, which allowed both attorneys and arbitrators to issue subpoenas as provided by law. In contrast, the current proposed amendment would permit only arbitrators to issue subpoenas.

PIABA generally supports the new proposed amendment to the rule, with some recommended further revisions. As stated in our August 4, 2005, comment letter, under the Federal Arbitration Act, 9 U.S.C. § 7, only arbitrators, and not attorneys, may issue subpoenas. We believe that NASD arbitrations are subject to the provisions of the Federal Arbitration Act, thus precluding attorney-issued subpoenas. In addition, the new amendment requires that the party serving subpoenas must provide copies of the subpoenas to all parties to the proceeding and must provide copies of subpoenaed documents received from nonparties to adverse parties upon request. PIABA supports these amendments as well. While typically copies of documents produced pursuant to subpoenas are provided to adverse parties upon request, codifying this principle will eliminate potential dispute on this issue.

PIABA does have some recommended changes, however. Proposed subsection (b) to Rule 10322 provides that parties must make written motions for the issuance of subpoenas. We believe that a motion should not be required.

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Parties should be permitted simply to present a proposed subpoena for consideration. A required motion adds unnecessary paperwork and complexity to the process.

Proposed subsection (c) to Rule 10322 provides that “the arbitrator responsible for discovery related motions” shall rule on the proposed subpoena. We have two comments. First, this appears to be inconsistent with subsection (a), which gives “arbitrators” generally the authority to issue subpoenas. To avoid any confusion, subsection (a) should be amended to provide that “As provided in subsection (c) below, arbitrators shall have the authority to issue subpoenas.”

Second, we agree that “the arbitrator responsible for discovery related motions” should be the arbitrator to rule upon and issue subpoenas in the first instance. However, the rule should also provide that if that arbitrator is not readily available, then the other public arbitrator should rule upon and issue the subpoena. The industry arbitrator should not be permitted to decide a subpoena issue except at the customer’s request. The mandatory industry arbitrator is the major impediment to the fairness of the arbitration process. Industry arbitrators are not permitted to serve as chairpersons in customer vs. industry cases unless all parties agree, and consequently they are not normally involved in resolving discovery disputes. They should not be empowered to make decisions relating to subpoenas, either.

The proposal also indicates that the NASD will provide arbitrator training regarding subpoena issues. As in the case of all arbitrator training it is essential that training sessions and materials be thoroughly screened and approved by experienced professionals. PIABA believes the NASD’s National Arbitration and Mediation Committee is in an ideal position to oversee arbitrator training and recommends subpoena-related training be referred to the NAMC.

Thank you for your consideration.

Very truly yours,

Robert S. Banks, Jr.
PIABA President

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