

Public Investors Arbitration Bar Association

March 9, 2005

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Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: File No. SR-NASD-2004-171

Dear Secretary Katz:

Please accept the following as the comments of the Public Investors Arbitration Bar Association (PIABA) to the above-referenced NASD rule filing ("the Proposed Rule"). While, at first blush, the Proposed Rule appears well-intentioned and beneficial to the public customer, PIABA is concerned that the Proposed Rule is too limited in its application and scope and may well, in fact, operate to the prejudice of the public customer, particularly when viewed in context of the NASD's stated "purpose" for propounding the Proposed Rule.

The Proposed Rule Should Be Amended to Ensure that the Contemplated Notice Conveys the Subject Information in a Meaningful and Timely Fashion

As currently written, NASD Conduct Rule 2340 requires only that account statements be sent to customers no less than quarterly. For years now, member firms, apparently in a cost-saving effort, have chosen to only send account statements on a quarterly basis to customers, whose accounts are infrequently traded, relying instead on written confirmations to apprise the customer of any trades during the interim. If the real purpose of the Proposed Rule is to "advise customers to promptly report inaccuracies or discrepancies and to

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confirm such communications in writing, then the language of the Proposed Rule should also require the notice to be included on all written confirmations.¹

It is also imperative that the proposed language be placed on the account statements/ confirmations in such a way as to maximize the likelihood that the customer will actually see and understand it. Years of experience among dozens of practitioners have demonstrated beyond any doubt that the majority of retail brokerage customers do not read the "microprint" language printed on the reverse side of confirmations/account statements, and those who do have difficulty understanding the information which the member firms are ostensibly attempting to convey. Accordingly, PIABA suggests that the Proposed Rule be amended to require that the notice be conspicuously placed in plain language and bold print on the front of the confirmation and first page of the account statements.

**The Notice Should Specifically State that It Does Not Create
Additional Obligations for the Customer and Will Not Serve or Be
Asserted as a Defense in any Dispute Between Public Customers
and Member Firms**

The NASD's "Statement of Purpose" which accompanies the Proposed Rule states that:

The proposed disclosure requirement would not impose any limitation whatsoever on a customer's right to raise concerns regarding inaccuracies or discrepancies in his or her account at any time, either in writing or orally. Further, a customer's failure to promptly raise such concerns, either in writing or orally, does not act to estop a customer from reporting an inaccuracy or discrepancy

¹ According to the NASD's filing, "the GAO recommended that SROs explore actions to include information on periodic statements or trade confirmations." PIABA suggests that, due to the potential for damages from unauthorized trading during intervening months between quarterly account statements, the proposed language should also be included on the written confirmations.

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in his or her account during any SIPC liquidation of his or her brokerage or clearing firm.

When faced with claims of unauthorized trading, it is common for member firms to attempt to defend those claims by arguing that the preprinted form language found on the reverse side of confirmations and/or account statements created a binding legal contract with the unsuspecting retail customer or otherwise barred the customer's claims. Such misuse of the preprinted language found on confirmations/account statements is most commonly invoked to argue that the customer's failure to adhere to draconian "notification" requirements constitutes ratification by the customer of the disputed trades.

PIABA is concerned that the inclusion of the language found in the Proposed Rule will serve as yet another basis for member firms to interpose such questionable legal defenses, notwithstanding the foregoing language from the NASD's "Statement of Purpose." PIABA therefore recommends significant changes in the language of the notice.

Since the purpose of the proposal is limited to helping investors document SIPC claims relating to unauthorized trading, the notice itself is overbroad. The message of the current proposal is that the customer should police the entire account statement for "any inaccuracy or discrepancy." This suggestion is particularly unfair since many customers are simply unable to understand their account statements. Furthermore, there is no mention in the notice that its real purpose is to advise the firm of unauthorized trades. The notice should more appropriately state: "Please review your transactions to make certain you have approved all trades. If you have not authorized or approved any trade, promptly notify the following persons: [name, address, and phone number of the firm to be notified should be included in the firm's notice]."

Accordingly, PIABA also urges the SEC to require that the Proposed Rule be amended to include language which specifically states that the contemplated notice does not create additional obligations for the customer and shall not serve or be asserted as the basis for any defense to any claims that may be of unauthorized trading brought by public customers against a member firm or its representatives. As written, the proposal is unclear in that it says failing

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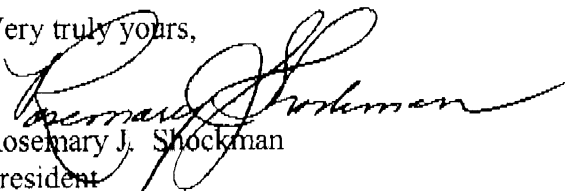
to give notice by a customer does not limit the customers' "right to raise concerns." This should be revised to state that the failure to give notice "does not limit or in any way affect your right to pursue any claims you may have against a member firm or its representatives." Further, the statement that the customer is not estopped from "reporting" should say is not estopped from "pursuing claims."

NASD members should also be told up front that it is a violation of the rules of fair practice to use the notice as a basis for any defense to a customer claim.

Our experience with the industry ignoring the provisions of the Discovery Guide is a lesson that this standard should be spelled out in the initial release. The NASD should seek to avoid another Discovery Guide type experience where the industry is advised of the threat of NASD enforcement proceedings only after multiple abuses are documented and injury has been inflicted on investors.

We further urge the SEC to take this opportunity to require NASD member firms to immediately cease utilizing any language in or on confirmations and/or account statements which purports to create contractual obligations in the customer and/or to deem any failure by the customer to communicate with the member firm in a prescribed fashion as "ratification" of trades in the customer's account. Such use of boilerplate language as a defense against unauthorized trading is fundamentally unfair to investors and is also a violation of the rules of fair practice.

Very truly yours,



Rosemary J. Shockman
President

RJS:dlr