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August 20, 1999

Richard C. Strasser
Assistant Director
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549
Mail Stop 10-1

**Re: File No. SR-NASD-99-08 - Amendments to Code of Arbitration Procedure
Relating to the Arbitration Process for Claims of Employment Discrimination -
Response to Comments and Extension of Time**

Dear Mr. Strasser:

NASD Regulation hereby responds to the comment letters received by the Commission in response to the publication in the *Federal Register* of Notice of Filing of SR-NASD-99-08 on June 4, 1999. In that filing, NASD Regulation is proposing to enhance the dispute resolution process for the handling of employment discrimination disputes, and to expand disclosure to employees concerning the arbitration of all disputes.

In order for the Commission to consider the comments received and this response, NASD Regulation hereby grants the Commission a 30-day extension of time within which to act on the proposed rule change. This will extend the final time period for Commission action to October 7, 1999.

The Commission received four comment letters on the proposed rule change.¹ Most of the issues raised by the commenters were already addressed by NASD Regulation in its

¹ Letter from Jeffrey A. Norris, President, Equal Opportunity Advisory Council, to Jonathan G. Katz, Secretary, Commission (June 24, 1999) ("EEAC Letter"); Letter from George A. Schieren, Senior Vice President and General Counsel, Merrill Lynch, Pierce, Fenner & Smith Incorporated, to Margaret H. McFarland, Deputy Secretary, Commission (June 30, 1999) ("Merrill Lynch Letter"); Letter from Stephen G. Sneeringer, Chairman of the Arbitration Committee, Securities Industry Association, to Jonathan G. Katz, Secretary, Commission (June 30, 1999) ("SIA Letter"); and Letter from Cliff Palefsky, National Employment Lawyers Association, to Secretary, Commission (July 7, 1999) ("NELA Letter").

rule filing; however, one point that apparently caused misunderstanding relates to the qualifications of arbitrators. One commenter expressed concern that NASD Regulation may have difficulty finding a sufficient number of qualified arbitrators under the heightened qualifications of Rule 10211.²

Proposed Rule 10211 contains qualifications for arbitrators who will be eligible to hear claims of statutory employment discrimination. Paragraph (a) describes the minimum qualification for all such arbitrators: it provides that they must be “classified as public arbitrators as provided in Rule 10308.”³ Proposed paragraph (b) of Rule 10211 applies only to arbitrators who will serve either as a single arbitrator or as the chair of a three-person panel, and it contains further qualifications, including a law degree, membership in the Bar of any jurisdiction, substantial familiarity with employment law, and ten or more years of legal experience that included at least five years of one of the following: law practice; law school teaching; government enforcement of equal employment opportunity statutes; experience as a judge, arbitrator, or mediator; or experience as an equal employment opportunity officer or in-house counsel of a corporation. In addition, the chair or single arbitrator may not have represented primarily the views of employees or employers within the past five years.

Rule 10212(a) provides that each panel shall consist of either a single public arbitrator or three public arbitrators qualified under Rule 10211, unless the parties agree to a different panel composition. One commenter reads Rule 10212(a) as implying that all arbitrators hearing claims of statutory employment discrimination must meet the additional requirements of Rule 10211(b).⁴ This is incorrect. Rather, the phrase “qualified under Rule 10211” refers to the entirety of Rule 10211, not just to Rule 10211(b). Therefore, arbitrators must qualify under the relevant portion of Rule 10211: paragraph (a) for the second and third arbitrators on a three-arbitrator panel, and paragraph (b) for the chair or single arbitrator.

Based on this clarification, it is apparent that NASD Regulation will have more than enough qualified arbitrators on its roster. Approximately 58% of the more than 6,700 arbitrators on the NASD Regulation roster are classified as public arbitrators, and, while the process of qualifying arbitrators for the specialized roster is ongoing at this time, at least 40 arbitrators have been identified to date as meeting the additional standards of Rule 10211(b). Recruitment efforts are also underway to attract qualified employment arbitrators. In 1998, only 107 claims of employment discrimination were filed with NASD Regulation, and only

² Merrill Lynch Letter at 2.

³ The definition of “public arbitrator” is found in existing Rule 10308(a)(5).

⁴ Merrill Lynch Letter at 2.

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40 such claims had been filed in 1999, as of August 10. Given that many cases are settled or withdrawn before going to a hearing, there will be more than enough employment arbitrators on NASD Regulation's roster. In addition, NASD Regulation indicated in its rule filing that it reserves the right to use arbitrators who have been qualified to serve as employment arbitrators on the rosters of other dispute resolution providers, provided they also meet the requirements of Rule 10211.⁵

Summary

NASD Regulation appreciates the comments made by the four commenters, and feels that their concerns have been fully addressed. Therefore, NASD Regulation believes the proposed rule change should be approved as submitted.

If you have any questions, please call me at (202) 728-6959; e-mail: jean.feeney@nasd.com.

Very truly yours,

Jean I. Feeney

cc: Anitra Cassas

⁵ SR-NASD-99-08 (February 1, 1999) at 15: "In its discretion, and depending in part on the number of statutory employment discrimination claims filed in its forum, NASD Regulation may choose to create its own specialized employment roster or may work with other dispute resolution providers to utilize their rosters of qualified employment arbitrators."