

February 3, 2004

Catherine McGuire
Assistant Director and Chief Counsel
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-1001

Re: File No. SR-NASD-2003-101 – Amendments to Rule 10304 of the NASD Code of Arbitration Procedure Governing Time Limits On Submission of Claims – Amendment No. 2

Dear Ms. McGuire:

Pursuant to conversations with Division of Market Regulation staff, NASD is filing this letter as Amendment No. 2 to the above-referenced rule filing.

Rule 10304 of the NASD Code of Arbitration Procedure provides that a claim is ineligible for arbitration in the NASD forum if six or more years have elapsed from the occurrence or event giving rise to the claim. Currently, the rule expressly exempts claims ordered to arbitration by a court from the six-year time limit. SR-NASD-2003-101 would, among other things, delete that exemption. NASD proposed deleting the exemption because, in light of the Supreme Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*¹ (holding that eligibility determinations are for arbitrators, rather than for courts, to make), it would be possible for claimants to avoid the six-year time limit by filing an older claim in court and then asking the court to order the dispute to arbitration. Deleting the exemption would eliminate that potential loophole.

However, one commenter, Mr. James D. Keeney, expressed concern that deleting the provision from Rule 10304 that exempts all court-ordered claims from the six-year bar was overly broad, because it would apply to claims ordered to arbitration upon the request of a member or an associated person, which would allow industry parties to "whipsaw" claimants between court and arbitration.²

¹ 537 U.S.79 (Dec. 10, 2002)

² Letter from James D. Keeney, P.A., to Mr. Robert Love, Division of Market Regulation, Securities and Exchange Commission (July 17, 2003);

To a certain extent, Mr. Keeney's concern is addressed by a provision in NASD's currently pending proposal to amend Rule 3110(f), governing predispute arbitration agreements.³ The proposed amendments to Rule 3110(f) include an "anti-bifurcation" provision, which states that, if a member seeks to compel arbitration of a claim based on a predispute arbitration agreement, the member agrees to arbitrate all other claims contained in the same complaint. (The member may, however, assert a statute of limitations defense in arbitration.) If approved, this proposed amendment to Rule 3110(f) would prevent a member from seeking to compel a claim filed by a customer in court to arbitration, and then seeking to avoid arbitrating the claim based on the eligibility rule, or for any other reason. This would be true even if the provision barring application of the six-year time limit to claims ordered to arbitration by a court were deleted from Rule 10304.

However, the proposed anti-bifurcation provision applies only to members, and not associated persons. Division of Market Regulation staff have expressed concern that, if the eligibility rule is amended to delete the exemption for claims ordered to arbitration by a court, jointly-represented members and associated persons may be able to join forces to undermine the anti-bifurcation provision.

To address this concern, NASD is amending the above-referenced rule filing to modify, rather than delete, the exemption for court-ordered claims. Specifically, paragraph (c) of Rule 10304 would be amended as follows:

(c) This Rule shall not extend applicable statutes of limitations; nor shall the six-year time limit on the submission of claims apply to any claim that is directed to arbitration by a court of competent jurisdiction upon request of a member or associated person.

NASD believes that this modification addresses the concerns raised by Mr. Keeney and Division of Market Regulation staff, and would still close the potential loophole created by the Supreme Court's decision in *Howsam*.

If you have any questions, please contact me at (202) 728-8275 or laura.gansler@nasd.com.

Very truly yours,

Laura Gansler
Counsel
NASD Dispute Resolution, Inc.

³ SR-NASD-98-74.