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September 15, 2005

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U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

RE: File No. SR-NASD-2005-046 – Response to Comments on Proposed Rule Change Relating to Arbitration Fees Applicable to Certain Statutory Employment Discrimination Claims

Dear Ms. Gonzalez:

NASD hereby submits its response to comments received by the Securities and Exchange Commission ("Commission" or "SEC") to SR-NASD-2005-046, a proposal to amend the arbitration fees applicable to certain statutory employment discrimination claims. The proposed rule change, including Amendments No. 1 and No. 2, was published for comment in the Federal Register on June 30, 2005.[1] The Commission received three letters in response to the proposed rule change.[2]

PIABA indicates that it does not oppose the amendments to the statutory employment discrimination fees set forth in the proposed rule change. The letters from PIABA and Mr. Caruso, however, urge NASD to take the further step of revising the fees applicable to statutory securities claims brought by customers in a manner similar to those set forth in the proposed rule change. Furthermore, SAC believes that it is difficult to justify applying the proposed fee structure only to statutory employment

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1 See Securities Exchange Act Release No. 51921 (June 24, 2005); 70 FR 37887 (June 30, 2005).

2 Letter from Steven B. Caruso to Jonathan G. Katz, Secretary, Commission (July 21, 2005) ("Caruso"); letter from Richard P. Ryder, President, Securities Arbitration Commentator, Inc. to Jonathan G. Katz, Secretary, Commission (July 21, 2005) ("SAC"); and letter from Rosemary J. Shockman, President, Public Investors Arbitration Bar Association to Jonathan G. Katz, Secretary, Commission (July 25, 2005) ("PIABA").

discrimination claims and that customer claimants may be dissatisfied with the differing fee schedules.

In response to these contentions, NASD notes that the proposed rule change is designed to address only those very limited situations where an employer requires the employee to enter into a predispute arbitration agreement for statutory employment discrimination claims, which is the issue the United States Court of Appeals for the District of Columbia Circuit was concerned with in *Cole v. Burns International Security Services, et al.*, 105 F.3d 1465 (D.C. Cir. 1997). Employment discrimination claims constitute an extremely small percentage of the total number of claims filed with NASD[3] and NASD never intended, nor believes that there is a compelling reason, for the proposed fee changes to be applied to all statutory securities claims brought by customers.

SAC further questions the need for the proposed rule change, and contends that the change will lead to several "distortions" in the arbitration process. In particular, SAC predicts that the proposed rule change will encourage associated persons to assert colorable employment discrimination claims when the heart of their dispute relates to another cause of action, such as lost compensation or wrongful termination. SAC concludes that this will result in longer arbitration hearings and create a poor "outcome record" for employee discrimination claims in arbitration.

NASD does not believe that the rule change will result in a significant increase in marginal or frivolous employment discrimination claims because arbitrators will continue to identify and dispose of such claims. In addition, arbitrators will retain the ability to allocate various costs as well as attorneys' fees, in accordance with applicable law, against parties who bring meritless claims. NASD will continue to track the employment discrimination claims that are filed in its arbitration forum and will consider whether additional changes are necessary.

Lastly, SAC asserts that it is unnecessary to establish a uniform fee-shifting policy for statutory employment discrimination cases. SAC argues that NASD instead should require associated persons who bring employment discrimination claims to apply for a fee waiver before any forum fees may be adjusted. In addition, SAC believes that in those situations where an associated person raises statutory employment discrimination claims along with other claims, arbitrators should be required to determine the amount of the forum fees that are applicable to the non-statutory employment discrimination claims and assess such fees to the associated person. According to SAC, the associated person should then be required to demonstrate that the arbitrators' assessment "offended those boundary lines" if he or she believes that the apportionment of the fees was incorrect.

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[3] For the first seven months of 2005, only 43 of the 3,602 cases filed with NASD involved statutory employment discrimination claims. In addition, statutory employment discrimination claims accounted for less than one percent of all claims filed with NASD in each of the last five years.

NASD believes that requiring such an analysis of every case involving statutory employment discrimination claims would most likely introduce significant delays, complexity, and uncertainty to the arbitration process.[4] Furthermore, NASD notes that, of the two largest arbitration forums for securities disputes, only NASD provides a forum for statutory employment discrimination claims based on predispute arbitration agreements. In connection with providing a forum that facilitates the arbitration of such claims, NASD thinks that it is fair and reasonable for members, who require their employees to enter into the predispute arbitration agreements, to pay additional filing and forum fees for this service.

NASD believes that the foregoing fully responds to the issues raised by the commenters to the rule filing. Please feel free to call me at (202) 728-8273 if you have any questions or wish to discuss this further.

Sincerely,

John D. Nachmann

[4] Fee waivers for financial hardship still will be available in all cases.