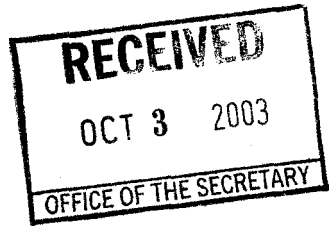
Public Investors Arbitration Bar Association



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October 2,2003

Secretary
Securities and Exchange Commission
450 Fifth St., NW
Washington, DC 20549-0609

Re: SEC Release No. 34-48444; File Number SR-NASD-98-74; Comment on Proposed Changes to NASD Rule 3110(f)

Gentlemen:

On behalf of the Public Investors' Arbitration Bar Association ("PIABA"), I write to voice our strong opposition to the NASD proposal to amend Rule 3110(f) to include subsection (f)4(B) regarding enforcement of choice of law provisions. We believe that the proposed rule change is blatantly inconsistent with the requirement of Section 15A(b) (6) of the Securities and Exchange Act of 1934 (the "Act"), which requires that the NASD's rules be designed to protect investors and the public interest.

For many years, both the SEC and the NASD have taken the position that customer agreements cannot be used to curtail any rights that a party may otherwise have had in a judicial forum or to limit the ability of arbitrators to make any award [see Exchange Act Release No. 26805, NASD Notice to Members 95-16 and NASD Rule 3110(f)(4)]. This amendment is proposed under the guise of clarification due to inconsistent application of the current rule. In reality, proposed subsection (f)(4)(B) suggests that choice of law provisions in customer agreements can be enforced when there is significant contact or relationship between (1) the law selected and (2) *either the transaction at issue or one or more of the parties (i.e. the brokerage firm).*

Brokerage firms can be expected to argue that New York choice of law clauses are enforceable in all situations where either the firm or the transaction has a contact or relationship with the State of New York. Since most major firms

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and the vast majority of securities transactions have some connection with New York, this language invites the firms to argue for their New York choice of law provisions.

This proposed amendment represents a regression from current policy. The Blue Sky laws and other statutes of most states give citizens legal rights in connection with the purchase and sale of securities in their state of residence. Some states' laws allow those rights to be contracted away.
New York's door closing statute of liitation rule is but one example of surprising consequences investors would face. Few investors, when **asked** to sign a multi-page form agreement with their brokerage **firm,** will realize that they are contracting away important legal rights which they otherwise would have.

Choice of law clauses **and** other contractual restrictions on rights should never be available to limit a customers' legal rights. Indeed, Rule 3110(f)(4) as currently written prohibits limiting
the ability of the arbitrators to make any award. Even though this prohibition remains in subparagraph (f)(4)(A) of the proposed rule, (f)(4)(B) invites the argument that the parties can contract away that right in virtually all cases. Such a scenario invites post-award challenges in almost every case in which the broker-dealer does not like the result of the arbitration. Such a result is antithetical to the very notion of arbitration as a relatively expeditious and cost-effective method of dispute resolution.

The proposed rule as written exempts agreements between brokerage **firms** and institutional investors. Thus, only the unsuspecting public customer will be negatively impacted by this rule. Further, the amendment would imposed upon existing customers by being retroactively applicable to all customer agreements signed in the last fourteen years. This is hardly fair to the investing public.

In its proposal, NASD states that it believes that it should not dictate to the parties of a predispute arbitration agreement the law that would govern their agreement. That is in fact exactly what they should do. NASD's statement suggests that it does not understand its obligation under Section 15A(b) ***(6)*** **of** the Act to make rules which protect investors and the public interest.

PIABA suggests that subparagraph (f)(4)(B) be withdrawn in its entirety and replaced with a paragraph which flatly prohibits choice of law clauses in customer agreements. At minimum, (f)(4)(B) should be amended to allow the

use of choice of a law clause **only** when significant contact or relationship exists between the law selected and *all* parties to the agreement.

It is incomprehensible to **PIABA** that, in light of the recent exposure of pervasive wrongdoing on Wall Street, either the **SEC** or the **NASD** would consider any rule change which would serve to undermine investor rights and investor confidence. Quite simply, the practical effect of this proposed rule change is to disenfranchise the legislatures of each state from the role of protecting their citizens.

PIABA also suggests that, given the importance of this proposed rule change, the comment period should be extended to allow further discussion

Sincerely,

J. Pat Sadler

J.Pat Sadler
President

cc: **Ralph** Lambiase, President **NASAA**