Subject: File No. SR-NASD-2006-088
FROM: Barry D. Estell

Dismissal Without Hearing on the Merits

I am a lawyer who represents public customers in NASD arbitration. As I have stated in prior comment, the proposed rule is an extraordinary example of NASD toadying to its member firms to the disadvantage of public customers. One of the few statutory protections available to individual investors is the Uniform State Arbitration Act which provides that, "Unless otherwise provided by agreement: . . . The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing." The NASD now seeks to remove that impediment to secret dismissals for favored members prior to any discovery, testimony or evidentiary hearing by "agreement." The Commission should require that the NASD halt all motion practice not provided in the current rules and uphold its mission of protecting the investing public. That the NASD invented a summary dismissal procedure outside its Code of Arbitration Procedure is itself outrageous.

The "extraordinary circumstances" requirement to summary dismissal has already proven to be a fraud on the investing public. The NASD's proposed narrative language interpreted "extraordinary" to routinely apply to each and every case filed. If the Commission approves this anti-investor measure, summary dismissal will become routine. Even without the proposed rule virtually 100% of all claims in arbitration are now met with a motion to dismiss which NASD staff attorneys encourage. A Senior Attorney at NASD-DR in Chicago recently directed me to respond to a motion to dismiss prior to the appointment of the panel to be forwarded to the panel, once appointed, for disposition. The arbitrators were to be instructed that they were free to dismiss the claim, on the papers, without hearing or evidence. The current rules prohibit that conduct, but the NASD has encouraged, sponsored and promoted the idea as an additional member benefit. The proposed rule seeks to make it standard procedure adding only a perfunctory phone call.

The proposed rule effectively eliminates a customer from filing a claim without a lawyer. The increased motion practice also raises the loss threshold where a lawyer can economically represent a customer. The NASD, by adopting the proposed rule, will have eliminated most small customer arbitration claims against its member firms. Even larger claims are becoming increasingly uneconomic. Customers found to have been defrauded are still routinely required to pay half the costs of arbitration hearings. Investors must be warned that only about 40% of claimants "win" in arbitration and that statistically even a "win" will recover less than half of their losses. From that fraction they must pay thousands of dollars in filing and hearing fees prior to paying attorney fees. With this rule, the public customer will be forced to pay thousands of dollars for phone hearings on the increased motion practice for the privilege of later incurring the additional thousands at a hearing on the actual merits. Only then will the individual investor get the benefit of a forced arbitration before their broker's trade association with another broker on the panel to keep track of the "public" arbitrators.

Public customers have been denied their day in court and should not be further denied an opportunity for a hearing on the merits. To approve additional costs and hurdles prior to that hearing on the merits is simply anti-customer and contrary to the Commission's purpose. If the Commission would require the NASD to enforce its current rules by informing arbitrators that there is no provision for summary dismissal, the issue would be over. The arbitrators could determine if a claim is frivolous or out of time after a hearing on the merits and fashion an award accordingly.