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August 2, 2005

Jonathan G. Katz
Secretary
U.S. Securities & Exchange Commission
450 Fifth Street, NW
Washington, D.C. 20549-0609

Re: File Number SR-NASD-2005-032
Proposed Rule Changes to NASD Code of Arbitration
Relating to Written Explanations in Arbitration Awards

Dear Mr. Katz:

The Litigation and Arbitration Committee of the Securities Industry Association ("SIA")[1] appreciates the opportunity to comment on the above-referenced proposed amendments by the National Association of Securities Dealers, Inc. ("NASD") to the NASD's Code of Arbitration Procedure ("Code"). These changes would require arbitrators to issue an "explained decision" upon the prior request of a customer or an associated person in an industry controversy. As set forth below, the SIA has a number of significant concerns about the proposed amendments which it believes require the SIA to oppose the final adoption of these proposed changes.

The NASD has indicated that the proposed amendments are sought "[i]n order to increase investor confidence in the fairness of the NASD arbitration process" and to further "transparency" with regard to the arbitrators. The SIA respectfully submits, however, that the current system is not only objectively fair to participants but that it is also subjectively perceived to be fair by the vast majority of investors who have participated in the arbitration process. Furthermore, the new rules will adversely affect many of the existing advantages of the current arbitration process, particularly the advantages of finality, efficiency, and cost-effectiveness.

[1] The Securities Industry Association brings together the shared interests of nearly 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. foreign markets and in all phases of corporate and public finance. The U.S. securities industry employs 790,600 individuals, and its personnel manage the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. (More information about SIA is available at: www.sia.com).

Requiring arbitrators to issue an "explained decision" is particularly unsuitable in the current arbitration environment. Statements of Claim in arbitration now typically allege many different causes of action which assert a host of different legal theories. To require arbitrators to provide their explanations for their liability determinations with respect to each and every cause of action will substantially increase the likelihood of motions to vacate regarding any particular claim that the losing party believes was wrongly decided. Moreover, although arbitrators under the proposed rule are not required to provide explanations with respect to the amount of damages, if any, that they might decide to award, even damage awards will be increasingly subject to attack if one side believes that they are not consistent with the reasons stated by the arbitrators for their decisions regarding the underlying claims for liability.

There also will be a likely increase in the number of cases ultimately remanded back to the arbitrators for further proceedings where the particular reasons stated for the determination of one or more specific causes of action are arguably insufficient or otherwise inadequate in some manner. In contrast, under the current system, an award may be affirmed on any basis that appears in the record. Further, the issuance of arbitration explanations is very likely to increase attempts by litigants, and perhaps by other panels or the courts as well, to use an arbitration award in an earlier case as precedent or persuasive authority in subsequent similar cases, even though that is a consequence not intended under the current arbitration process or under the new proposed rule.

Finally, the proposed changes to the Code provide only vague guidance to arbitrators as to the nature of the "explained decision" that the arbitrators are required to issue, further increasing the number of motions to vacate as the parties dispute in the courts the precise meaning of the term and whether the stated reasons are sufficient to comply with the rule, thereby further undercutting the finality of arbitration awards and adding substantial costs to the process. Consequently, the proposed changes are inconsistent with the purposes of the Securities Exchange Act of 1934 ("Exchange Act"), and thus should not be approved pursuant to Section 19(b)(2)(B). 15 U.S.C. § 78s(b)(2)(B).

I. Background

Subsequent to several Supreme Court decisions in the 1980's enforcing pre-dispute arbitration agreements contained in customers' brokerage account contracts, the securities arbitration process has become the primary means of resolving disputes between investors and their broker-dealers. To date, tens of thousands of cases have been litigated through arbitration and the process has been repeatedly recognized as providing a "fair, efficient, and less expensive means of resolving disputes between investors and their brokers."[2]

[2] *See, e.g.*, Linda D. Fienberg & Matthew S. Yeo, *The NASD Securities Arbitration Report: A View From the Inside*, INSIGHTS, Vol. 10, No. 4 (Apr. 1996), citing National Association of Securities Dealers, *Securities Arbitration Reform: Report of the Arbitration Policy Task Force Report to the Board of Governors* (Jan. 1996);

Indeed, a number of empirical studies indicate that the results of the arbitration process are well-balanced. A study by the U.S. Government Accounting Office analyzing arbitration awards over an 18-month period from January 1989 to June 1990 found that investors recovered in 59% of the cases decided by arbitration panels sponsored by self-regulatory organizations ("SROs") such as the NASD, the New York Stock Exchange ("NYSE") and the American Stock Exchange ("AMEX"), which compared favorably to arbitrations before the American Arbitration Association ("AAA"), an independent organization without any relationship to the securities industry, where AAA arbitration panels found for investors in 60% of the cases – virtually the same percentage as those arbitrations conducted before the SROs. Similarly, a report prepared by the Securities Industry Conference on Arbitration ("SICA") in 2001 found that awards in favor of customers were issued in 52.56% of the 31,001 public customer cases decided by SRO arbitration panels between 1980 and 2001. Recent "Dispute Resolution Statistics" issued by the NASD further indicate that the arbitration process continues to resolve customer disputes fairly and without any discernable "pro-industry" bias. In 2004, of the 2,019 customer cases decided by NASD arbitration panels, 1,113 cases (approximately 55%) resulted in awards where damages were awarded to the claimants. The 2004 results, moreover, were consistent with the NASD's data for the years 2000 through 2003 – when awards to customers were issued in 53-55% of all customer cases decided by NASD arbitration panels.

Public customers not only win more than one-half of the cases that proceed to an award by an NASD arbitration panel, but NASD's Dispute Resolution Statistics for 2004 also indicate that 54% of arbitration cases that were closed that year were settled prior to hearing. When the number of arbitration cases settled by monetary remuneration to the claimant is added to the number of cases where customer awards were issued, the percentage of cases where a monetary recovery was obtained by the customer increases to more than 75%. Accordingly, three out of four investors who file an arbitration claim before the NASD recover money, either through an award or through settlement.

Not surprisingly, most investors appear to consider the NASD arbitration procedure to be fair. Between December 1997 and April 1999, the NASD surveyed participants in 2,037 cases that were closed with an arbitration award. The results, which were analyzed by the U.S. Military Academy at West Point, revealed that approximately *93%* of those surveyed agreed that the process was fair. In fact, the NASD survey found that "[b]y and large … claimants viewed the process somewhat more favorably than respondents did."[3]

Melissa Brockett, *Party Autonomy and Freedom of Contract in Securities Arbitration: The Dangers of Expanding Judicial Review of Arbitral Awards*, 2 J. Am. Arb. 77, 78-79 (2003).

[3] To the extent that the proposed rule is intended to address the complaints of "psychologically unsatisfied" investors whose claims were denied without a statement of reasons, the motivation for adoption of the new procedure is not compelling. Unsuccessful claimants are likely to be dissatisfied with the award whether or not they are given a statement of reasons for their loss. Moreover, it is highly questionable whether the "psychological needs of unsuccessful claimants should drive rule-making." Aegis J. Frumento, *Can't Get No Satisfaction: How Explained Decisions Will Undermine the Arbitration Process*, Commentator (Securities Arbitration Commentator, Maplewood,

The process in place to select the arbitration panel is also already balanced and very transparent. Under the current system, each party is given a list of the public and industry arbitrators and can rank them in order of preference. The NASD provides extensive disclosures from the potential arbitrators setting forth their skills in particular controversies and securities, their employment and educational background, their training, disclosure/conflict information, a background narrative prepared by each potential arbitrator and a listing of publicly available awards. These awards, moreover, are available on the Internet and by request from the NASD. Any party can strike the arbitrator's name from the list and, even after the panel is designated, can seek removal of an arbitrator "for cause" if the party believes that the designated arbitrator is conflicted or otherwise should not be permitted to hear a particular case.

The arbitration process itself is also a far more efficient and cost-effective means of dispute resolution than traditional litigation. Arbitration significantly reduces expenses by eliminating costly depositions, by allowing for specified presumptive discovery and by streamlining the hearing itself by loosening the rules of evidence. Arbitrators are also not burdened with the time-consuming obligation to decide technical legal, procedural or evidentiary issues throughout the arbitration process or to divine "precedent" through principles of *stare decisis* in reaching their ultimate award. Nor are arbitrators generally required to articulate reasons which "explain" or support their conclusions under existing law. Accordingly, no delay is incurred in trying to reach a consensus among the arbitrators as to the reasons for the award or in drafting the language of an agreed-upon explanation for every claim that is asserted.

Customers are thus far more likely to obtain through the arbitration process the opportunity to actually air their grievances at a hearing and receive a prompt decision than through a traditional judicial proceeding, where numerous discovery procedures and pre- and post-trial motions, as well as the determination of substantive and procedural legal issues, can delay and render prohibitively expensive the customer's "day in court" and the issuance of a final judgment. In fact, in 2004, the average time from filing the statement of claim to *an award* for an NASD case was only 17 months – compared to an average of 26.8 months that it took from filing of the complaint to just the *trial* in cases pending in the United States District Court for the Southern District of New York. The resolution of any subsequent appeal which often occurs in judicial cases obviously adds significantly in terms of time and expense to already lengthier and costlier judicial proceedings associated with just the trial phase.

Perhaps the most important advantage of the arbitration process is that it provides far greater "finality" to the parties' dispute than traditional court litigation. The grounds upon which a party may seek to vacate an award are limited by statute and by common law court decisions. Section 10 of the Federal Arbitration Act, and similar state statutes, generally permit a court to vacate an award only (i) where the award was procured by corruption, fraud or undue means; (ii)

N.J.), Apr. 2005, at 4. The substantial adverse impact that the proposed changes will have upon the finality and efficiency of the overall NASD arbitration process, moreover, significantly outweighs any perceived public relations benefit achieved by a rule designed to assuage the perceptions of losing claimants.

where there was evident arbitrator partiality or corruption; (iii) where the arbitrator refused to postpone the hearing despite sufficient cause shown, refused to hear pertinent and material evidence, or engaged in other misbehavior that prejudiced the rights of a party; or (iv) where the arbitrator exceeded his or her powers or so imperfectly executed them that a mutual, final and definite award was not made. 9 U.S.C. § 10. As set forth below, the new rule will undoubtedly raise challenges that an arbitrator "imperfectly executed" his or her powers by not providing sufficient reasons for a ruling on a specific cause of action, particularly since there is no guidance as to what would constitute a sufficient enough explanation to comply with the rule.

Moreover, the recognized judicially-created ground for vacating an award – *i.e.*, the "manifest disregard of the law" doctrine – generally provides that an arbitration award may only be vacated where a well-defined, explicit and clearly applicable governing legal principle was obvious and perceived by the arbitrators yet the arbitrators intentionally ignored such governing law. Such manifest disregard has only been found in relatively few cases. In a 2003 opinion, the Court of Appeals for the Second Circuit calculated that "since 1960 we have vacated some part or all of an arbitral award for manifest disregard in … four out of at least 48 cases where we applied the standard." *Duferco Int'l Steel Trading v. T. Klaveness Shipping*, 333 F.3d 383, 389 (2d Cir. 2003). As set forth below, under the current framework, an arbitration award that is not explained may be affirmed on any basis that appears in the record, whereas that may no longer be the case if the reviewing court disagrees with the stated reasons given by the panel for their ruling on a particular cause of action. Rather, in such instances, there is a significant likelihood that the matter may be remanded back to the arbitrators for further proceedings.

Thus, under the current framework, the issuance of the arbitration award generally signals the end of each party's respective commitment of time, money and effort with a much greater degree of certainty than a judgment in a court-based litigation where various and expensive post-judgment motions and appeals may delay a final award for years. As one commentator has stated:

> [A] basic ingredient of the practical-idealistic mix that defines arbitration, and sets it apart from the Diogenesic search for truth to which litigation sometimes aspires, is the principle of finality. Finality drives the arbitration process, for it assures that expenditures of time and money will reach an end, that the process can be streamlined (i.e., no need to set a record for appeal), and that, at some reasonable point, a resolution can be had on the merits, if the parties so desire. If this important advantage over litigation becomes uncertain, then arbitration will, so to speak, lose its appeal.[4]

[4] Richard P. Ryder, *Today's Trends, Predictions for Tomorrow, in* SECURITIES ARBITRATION 2000 1141, 1148 (Practicing Law Institute, 2000).

For the reasons set forth below, the proposed rule change will seriously undermine the principal advantages of arbitration to all parties involved in the process, particularly with respect to reaching finality on a cost-effective basis.

II. Discussion of Proposed Rule Change

The SIA believes that the adoption of the proposed amendments to the Code to require arbitrators to provide "explained decisions" upon the request of a customer or associated person will substantially threaten the advantages of finality, speed and cost-effectiveness now provided by the NASD arbitration process. As the Court of Appeals for the Second Circuit long-ago recognized, forcing arbitrators to explain their awards will "undermine the very purpose of arbitration:"

> Obviously, a requirement that arbitrators explain their reasoning in every case would help to uncover egregious failures to apply the law to an arbitrated dispute. But such a rule would undermine the very purpose of arbitration, which is to provide a relatively quick, efficient and informal means of private dispute settlement. The sacrifice that arbitration entails in terms of legal precision is recognized [citation omitted], and is implicitly accepted in the initial assumption that certain disputes are arbitrable. [Citation omitted.] Given that acceptance, the primary consideration for the courts must be that the system operate expeditiously as well as fairly.

Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972).

The rationale in *Sobel* for not requiring arbitrators to provide "explained" decisions has been widely followed. *See Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 903 F.2d 1410, 1413 (11th Cir. 1990) ("We think that recommitting cases such as this to the arbitration panel for explanations would defeat the policy in favor of expeditious arbitration. When the parties agreed to submit to arbitration, they also agreed to accept whatever reasonable uncertainties might arise from the process."); *Antwine v. Prudential Bache Sec., Inc*., 899 F.2d 410, 412 (5th Cir. 1990) ("The policy behind such a rule is manifest. If arbitrators were required to issue an opinion or otherwise detail the reasons underlying an arbitration award, the very purpose of arbitration -- the provision of a relatively quick, efficient and informal means of private dispute settlement – would be markedly undermined."); *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F.2d 529, 532 (D.C. Cir. 1989) ("But the absence of a duty to explain is presumably one of the reasons why arbitration should be faster and cheaper than an ordinary lawsuit. We thus agree with the Second Circuit that an explanation requirement would unjustifiably undermine the speed and thrift sought to be obtained by the 'federal policy favoring arbitration'*"); MSP Collaborative Developers v. Fidelity and Deposit Co., of Maryland*, 569 F.2d 247, 251 n.3 (7th Cir. 1979) (lack of requirement that arbitrators give reasons for their decision is a "rule designed to lower the cost of arbitration and to expedite decisionmaking.")

The Commission itself has previously considered and rejected a requirement that arbitrators state the reasons for their awards. In its Order dated May 16, 1989, the Commission found that such a requirement was simply not "appropriate" in view of the goal of maintaining an efficient arbitration process:

> After careful consideration of whether awards ought to include reasons for arbitrators' awards . . . we have concluded that it would not be appropriate at this time to require the inclusion of written opinions in awards . . . . We also believe that there is merit in the arguments proffered by SICA with respect to the process of consensus that often may precede the reaching of a decision [in arbitration]. Arbitrators may ultimately reach agreement on an award, a dollar amount, without ever reaching agreement on the reasons for the award. Finally, the Commission is concerned that imposing a mandatory requirement for written opinions at this time could slow down the arbitration process and discourage many persons from participating as arbitrators.

Order Approving Proposed Rule Changes by the NYSE, NASD, and AMEX, Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, Exchange Act Release No. 34-26805, 54 Fed. Reg. 21144, at 21151 (May 16, 1989).

The reasons the Commission gave in 1989 for rejecting explained decisions are as sound today as they were then. Requiring arbitrators to provide "a fact-based award stating the reason(s) each alleged cause of action was granted or denied" is likely to open the floodgates to legal challenges in post-award litigation. This concern is heightened by the fact that most statements of claim now assert a multitude of different causes of action, thus introducing the possibility of a challenge being raised with respect to how the arbitrators resolved any one of those various claims. Such challenges undoubtedly will take the form of increased motions for reconsideration as well as motions to vacate. "Most arbitrators shy away from written findings of fact, conclusions of law, and legal opinions; this is not only because of the additional work required, but it also exposes the award to an attack on its face upon *vacatur*." THOMAS H. OEHMKE, Commercial Arbitration, §117.4 (3d ed. 2005). Indeed, "[e]ach added thought creates the possibility of a counter argument." *Id*., at §76.3. The issuance of an "explained decision" will thus signal the commencement, rather than the end, of a protracted and costly litigation process as avenues for appeal based upon the arbitrators' stated reasons for the award are exhaustively explored by the losing party.

In fact, the articulation of reasons by an arbitration panel may foreclose the possibility of a court affirming an award even though other valid, but unstated, grounds exist in the record for supporting the decision or the resolution of any one of the multiple causes of action addressed in that decision. Now, when a motion to vacate is filed with respect to a decision which does not set forth reasons for the award, the result may be affirmed by the district court on any basis that appears in the record. However, if reasons are required to be given for the resolution of each cause of action and the district court disagrees with the particular reasons stated by the panel for

even one cause of action, the case in all likelihood will be remanded for further proceedings even though the result reached could have been properly justified for reasons other than those stated by the arbitrators but which appear in the record. All of this will significantly undercut the finality of the arbitration award. *Compare Hardy v. Walsh Manning Sec., L.L.C.*, 341 F.3d 126 (2d Cir. 2003) (remanding case to arbitration panel to seek clarification of award and refusing to consider whether a viable, but unstated, alternative theory of liability existed where the panel expressed an erroneous reason for imposing liability) *with GMS Group, LLC v. Benderson,* 326 F.3d 75 (2d Cir. 2003) (finding that award should be upheld where a basis for affirming award can be inferred from the facts even though no reason for the award was provided by the arbitrators). Accordingly, as one commentator who supports reasoned awards has warned, "[a] rbitrators walk a fine line in explaining the basis for their awards." David E. Robbins, *Calling All Arbitrators: Reclaim Control of the Arbitration Process – The Courts Let You,* 60 Disp. Resol. J. 9, 21 (Apr. 2005).

A rule requiring arbitrators to provide "fact-based" reasons for their awards is also likely to generate ever-increasing concern among arbitrators that the parties' proof comply with formal evidentiary rules, such as those regarding the proper standard of proof, the establishment of an evidentiary foundation, the prohibition against hearsay and the demonstration of relevance. Post-award judicial review is likely to focus on challenges to the stated factual reasons provided by the arbitrators in their awards for each and every cause of action and any deficiency in the evidence upon which such factual conclusions were reached will undoubtedly be highlighted by the losing side. As the arbitrators require more stringent adherence to formal evidentiary standards and burdens of proof to protect their awards from subsequent judicial attack on *vacatur*, the parties will be required to incur greater legal costs to establish their case, thereby further prolonging and formalizing the arbitration process.

The proposed rule also threatens to deter qualified arbitrators from serving as panel members. The obligation to issue an "explained decision" would require potential arbitrators to be willing to incur the time and effort to reach a consensus with other panel members regarding the reasons for an award on all claims involved in the case, to work on proposed drafts of the stated reasons, and/or to set forth in writing his or her own independent reasons to explain his or her decision regarding any particular claim where a consensus on all of the fact-based reasons for each claim cannot be achieved. The proposed additional stipend of $200 will not remotely compensate the arbitrator for the additional time and effort required. Further, setting forth reasons for the award, as noted, is more likely to trigger a post-award judicial challenge, thereby exposing the arbitrators, approximately one-third of whom are non-lawyers, to potential public embarrassment by counsel for the losing party, and possibly, by the reviewing court, and thus further deterring them and other potential arbitrators from wanting to serve in the future.[5]

[5] The proposed rule also permits the customer or associated person to request an explained decision as late as twenty days prior to the first scheduled hearing date. Accordingly, an arbitrator who does not wish to participate in a case where an explained decision ultimately will be required, will not have the opportunity to decline a panel assignment at the outset of the case.

A significant problem also exists concerning the precedential or persuasive impact that an explained decision might have in subsequent arbitrations or litigations. Although the NASD has indicated its intent that explained decisions have no precedential value in other cases and that it plans to revise the template of all awards stating as much, the NASD itself recognizes that arbitrators in subsequent cases will still have the power to determine the relevance and materiality of such prior explained decisions pursuant to Rule 10323 of the Code and may permit them to be introduced into evidence. As one well-recognized attorney for customers warned: "it is likely that if a customer in one case received a 'zero' award and a reasoned decision, that decision could be used against investors with similar cases as grounds to deny them awards." Zamansky, *infra*.[6] Moreover, among the reasons supporting the courts' general refusal to give preclusive collateral estoppel effect to prior arbitration decisions in subsequent litigation is "the fact that arbitrators are not required to provide explanations for their decisions." *Bear Stearns & Co., Inc., v. 1109580 Ontario, Inc.*, 318 F. Supp. 2d 199, 204 (S.D.N.Y. 2004). Accordingly, explained decisions may undermine the NASD's own intention to avoid according such awards precedential effect, since in certain circumstances another arbitration panel or a court may not believe it is bound by the legend on the award. At a minimum, there will be increased litigation on this issue, and potential adverse consequences to the participants in the process that are clearly not intended by the proposed rule change.

Finally, the proposed rule is unreasonably vague in that it provides insufficient guidance as to the requirements of an "explained decision." The proposed amendment provides only a limited definition of the term: "An explained decision is a fact-based award stating the reason(s) each alleged cause of action was granted or denied. Inclusion of legal authorities and damage calculations is not required." It thus remains unclear to arbitrators and the litigants whether a simple conclusion regarding the "ultimate" facts is sufficient to explain the award, such as "the panel finds that claimant failed to prove the allegations of the statement of claim" or "the panel finds that the respondent was negligent." Further, although the proposed rule changes do not require the arbitrators to explain the calculation of damages, the issuance of reasons with respect to liability will only invite challenges that the stated reasons do not support the damages awarded. In the administrative law context, the primary purpose of the rule-making process it to "provide reasonably clear and objective criteria for application to adjudicatory proceedings." RICHARD J. PIERCE, JR., Administrative Law Treatise, §6.8 (4th ed. 2002). The proposed rule simply does not do that, and thus the way arbitrators decide to draft an "explained" decision may itself give rise to litigation as to whether the arbitrators "so imperfectly executed [their powers] that a mutual, final and definite award was not made." 9 U.S.C. § 10. In fact, litigation has already occurred in cases where the parties' contract required the arbitrator to "explain" his decision and the parties disagreed as to whether the arbitrator fully complied. *See Green v.*

[6] *See also* Constantine N. Katsoris, *Beware of What You Ask For: You Might Just Get It*, Commentator, (Securities Arbitration Commentator, Maplewood, N.J.), Feb. 2005, at 4. ("In addition, I suspect that litigants will attempt to exploit the use of opinions written in completed arbitrations as precedential or collateral value in similar or related pending or future arbitrations.")

Ameritech Corp., 200 F.3d 967 (6th Cir. 2000); *Flex-Foot, Inc. v. CRP, Inc.*, 238 F.3d 1362 (Fed. Cir. 2001).

Even attorneys experienced in representing customers have expressed similar reservations regarding the new rule and whether it benefits investors. *See* Jacob Zamansky, *A 'Reasoned' Arbitration Decision? Be Careful What You Wish For*, Wallstreetlawyer.com: Securities in the Electronic Age (Feb. 2005); Susanne Craig, *New Rule May Lead More Arbitrations Into the Courtroom*, WALL ST. J., Feb. 4, 2005; Lynn Cowan, *NASD Crafts Rule to Require Arbitration-Award Explanation*, DOW JONES NEWS SERV., Jan. 27, 2005. Further, Ms. Rosemary Shockman, the President of the Public Investors Arbitration Bar Association ("PIABA"), in testimony before Congress, stated that "the issue of reasoned awards, and PIABA believes the issue of reasoned awards, is way down near the bottom of things that really need to be addressed." *A Review of the Securities Arbitration System, Hearing Before the Subcomm. on Capital Mkts., Ins., and Gov't-Sponsored Enters., of the House Comm. on Fin. Servs.*, 109th Cong. 21 (2005) (statement of Rosemary Shockman, President, PIABA). Moreover, by letter dated July 15, 2005, Ms. Shockman commented on the proposed rule on behalf of PIABA and warned that "a reasoned award is unlikely to answer that question [as to why an investor lost] to the satisfaction of the losing party," that "[i]nadequate 'reasons' may provide a basis for motions to vacate" and that "the threat of a motion to vacate and a long appellate process, can be a basis for intimidating retired investors into settling a case they have already won, for a lower number."

One commentator has suggested that requiring written opinions "might even result in fewer awards in favor of claimants on general equity grounds." Constantine N. Katsoris, *SICA: The First Twenty Years*, 23 Fordham Urb. L. J. 483, 517 (Spring 1996). *See also* Frumento, *supra* note 3, at 5. ("Any party who asks for an explained decision . . . is really asking the arbitration panel not to apply individual notions of fairness to settle the case, but instead to apply the cold and rigorous logic of the law to reach a one-sided result.") Moreover, given the limited statutory bases for vacating an award and the difficulty of establishing "manifest disregard of the law," the "presence of a written opinion will not make it that much easier for a party to refute what it considers to be an erroneous decision." Brockett, *supra* note 2, at 94. The upshot of the "explained decision" may well be increased, rather than diminished, frustration on the part of the losing party.

Accordingly, there have been substantial issues raised on behalf of investors as well as on behalf of the industry with respect to the adverse consequences of this proposed rule on the arbitration process.

III. Conclusion

The SIA welcomes this opportunity to present its views on the question whether the Code should be amended to require written explanations of awards by arbitration panels upon the request of customers and associated persons. As our letter reflects, the SIA believes that the proposed rule will cause the arbitration process to more closely resemble the judicial process

with all of its excessive delays and costs – the very inefficiencies that the arbitration process was designed to avoid and, to date, has been largely successful in doing so. The proposed rule, if adopted, would substantially undercut the finality and cost efficiency that is now achieved for participants in the arbitration process, while providing little to those limited number of participants who are not successful in asserting their claims other than giving them additional avenues for additional litigation to challenge results not to their satisfaction. As suggested by the Commission's May 16, 1989 Order, because of these adverse consequences, the proposed rule would not be consistent with the requirements of the Exchange Act, as required by Section 19(b)(2)(B) of the Exchange Act.[7] 15 U.S.C. 78s(b)(2)(B).

If you have any questions, please feel free to contact the Committee's Staff Advisor, George Kramer, at 202-216-2047 or gkramer@sia.com.

Very truly yours,

Edward G. Turan, Chairman
SIA Litigation and Arbitration Committee

cc: Linda D. Fienberg, President, NASD Dispute Resolution Inc.

[7]Section 3(f) of the Exchange Act, moreover, provides that when reviewing a rule of a self-regulatory organization to "determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. 78c(f). For the reasons cited in this letter, the proposed action by the NASD is counter to the protection of investors and to efficiency.