COMMENTS OF ELIOT GOLDSTEIN, ESQ.
on SR-NASD-2007-021

August 9, 2007

Nancy M. Morris, Secretary
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303

Re: SR-NASD-2007-021: Proposed Amendment to Rule 12100 (u)

Dear Ms. Morris:

I am writing to comment on the changes proposed by SR-NASD-2007-021 regarding the definition of "public" arbitrators. Although these changes would be an improvement over the current rules, I believe they fall short of what is needed.

My perspective is of one who has worked as a securities and financial services attorney in the Washington, D.C. area for more than 25 years. I have served as Senior Enforcement Counsel for the SEC, as Assistant Director of Enforcement for a federal bank regulatory agency, and, in private practice, as a court-appointed Receiver and Claims Administrator for the SEC in securities fraud cases. Although the majority of my practice in recent years has involved representing public investors in securities arbitrations, I have also had substantial past experience on the industry side, including representing brokerage and investment advisory firms, individual brokers, and serving as General Counsel for a major financial services firm.

I. THE PROPOSED AMENDMENT, WITH CERTAIN KEY REVISIONS TO THE CURRENT LANGUAGE, SHOULD BE APPROVED

The proposed amendment is a step in the right direction, but does not go far enough in seeking to rectify the current problems with the definition of "public" arbitrator.

a. The proposed $50,000 exemption threshold cannot be monitored, audited, verified, or enforced and therefore makes no logical sense. The language should be revised to achieve a zero tolerance level. An arbitrator with significant monetary ties to the securities industry is conflicted – period. Even if such ties do not result in actual bias, they create the reasonable appearance of possible bias, which violates the canons of ethics by which arbitrators are bound.

b. The language currently proposed, which seeks to limit the revenue threshold only to those fees derived from "professional services" in

connection with “customer disputes,” is devoid of logic. Common sense dictates that the receipt of revenue from industry sources by an arbitrator or his firm should not be limited only to fees derived from customer disputes. For example, if an arbitrator is employed by a large Wall Street law firm that derives millions of dollars from the securities industry in underwriting fees, regulatory compliance matters, securities and other commercial litigation, or general corporate work -- but less than $50,000 from customer disputes -- he or she could still potentially serve as an arbitrator without running afoul of the proposed amendment. This would make no sense if the true goal of the amendment is, as stated, to seek to eliminate conflict of interest and bias or the appearance of conflict of interest or bias.

II. THE COMMISSION SHOULD PUT AN END TO THE MANDATORY INDUSTRY ARBITRATOR REQUIREMENT

I echo the sentiments of other commentators that the time has come to eliminate the requirement that one arbitrator on each three-member panel be an industry (i.e. “non-public”) arbitrator. Although this issue is not part of the current proposed amendment, the Commission cannot simply stick its proverbial head in the sand or turn a blind eye to this issue.

Obviously, the whole point of the current amendment is to seek to rectify the problem that some “public” arbitrators may have monetary ties to the securities industry that would create the potential for bias or the appearance of bias. At the same time, the current rules require that one of the three panelists be a so-called “non-public” arbitrator with direct and substantial monetary or other ties to the securities industry. If the Commission is to be true to its stated mission to “protect” investors, it must put an end to this unfairness.

Defining arbitrators as “public” or “non-public” does not resolve the most significant problem currently plaguing securities arbitrations. If investors are to have confidence that the arbitration process is fair and impartial, the panel must be comprised of arbitrators that are **EACH** neutral, independent, and can truly be objective. Even if an industry arbitrator seeks to be objective, the appearance to the investor claimant is that the deck has been stacked with at least one “ringer.”

The rationale that an industry arbitrator is needed to impart industry “expertise” to the other panelists is simply not true. If any such expertise regarding the securities industry is needed in order that the other panelists better understand the facts or issues at hand, such expertise can be supplied by independent “experts” and other witnesses (such as branch managers or supervision personnel) who can be questioned and cross-examined on the record at hearing, or by the parties’ respective counsel, who almost invariably are knowledgeable securities practitioners.

The industry arbitrator often holds sway over the other panelists and attempts to school them regarding his or her views as to how certain aspects of the industry are supposed to work. The problem is that this is often done in private during lunch or other hearing breaks, where the correctness and accuracy of any such views and professed expertise cannot be questioned, contested, or controverted by claimant's counsel.

One must question why the securities industry has fought so hard to prevent elimination of the industry arbitrator requirement and has gone to great lengths to recruit brokers and other associated persons to serve as industry arbitrators. The obvious reason is that they believe the industry arbitrator, more often than not, will be neither neutral nor objective.

In some cases, the industry arbitrator is actually an active broker, branch supervisor, or compliance officer who has been the subject of (or works for a firm that has been the subject of) the very same type of wrongful conduct alleged in the arbitration on which he or she is sitting in judgment. Is this a fair and level playing field? More importantly, is this kind of conflict necessary or appropriate when thousands of intelligent and qualified arbitrators are available who have no industry ties and do not pose such conflicts of interest or appearance of partiality problems?

In light of the numerous securities industry "conflict of interest" scandals in recent years, the importance of seeking to insure that NONE of the three arbitrators on a panel is conflicted by industry relationships and that NONE of them has ties that create the appearance of pro-industry bias cannot be overstated.

In sum, my recommendation to the Commission is twofold:

1. The Commission should approve the proposed rule amendment but should first require that the language be revised by deleting the $50,000 "exemption" threshold and replacing it with a threshold amount of $0. This step should be made effective immediately.

2. The Commission should require that the NASD (now "FINRA"), promptly propose a separate amendment to the Code of Arbitration requiring the elimination of the mandatory industry ("non-public") arbitrator in all future arbitrations.

Thank you for your consideration. If you have any questions or require any additional information, please feel free to contact me at (301) 613-1987.

Respectfully yours,

Eliot Goldstein