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VIA E-MAIL: rule-comments@sec.gov

April 27, 2006

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington DC 20549-1090

Re: NYSE Proposed Rule Change: Failure to Appear or Produce Documents in Arbitration (File No. SR-NYSE-2005-18)

Dear Ms. Morris:

I am writing to comment on the above Proposed Rule Change. Briefly, on my background, I have practiced law for 40 years. For the last 17 years, my professional practice has been essentially restricted to serving as a neutral (principally as a mediator and arbitrator) in all types of civil disputes, including securities matters. I have acted as a neutral in about 1,900 cases, with about 1,000 arbitrations and about 750 mediations. I self-administer most of my arbitrations and mediations, but have also served on panels of neutrals for provider organizations, where in some cases the neutral proceedings are partially or fully administered, such as NYSE, NASD, CPR Institute for Dispute Resolution, AAA, National Arbitration Forum, and Maine Labor Relations Board I have also worked as a facilitator, hearing officer, fact finder, court-appointed special master and court-appointed referee. I have not served as an arbitrator in any NYSE cases, but I have been a public NASD arbitrator since about 1990. I have served in about 75 NASD arbitrations (mostly as the chair of a three-person panel). The panels on which I have participated have issued about 28 publicly available awards. I have mediated privately some customer-broker disputes. I have never been involved in customer-broker disputes as legal counsel for either side.

In general I support the Proposed Rule Change. Under the Proposed Rule Change, presumably a finding by a panel in a NYSE arbitration decision that a responsible party, as defined, had failed to appear or produce documents or information as directed by the panel could be the basis for NYSE to bring a "conduct inconsistent with just and equitable principles of trade" disciplinary proceeding under Rules 476 (a) (6). It is not clear from the Proposed Rule Change whether such a finding alone in an arbitration decision could be the basis for such a disciplinary proceeding, or whether the panel must also specifically refer the matter to the NYSE for action after such a decision. However, the ability of a panel to initiate possible disciplinary action under Rule 619 (h) would be another mechanism for arbitration panels to enforce, at least prospectively, orders to appear or produce documents and information, and conduct consistent with just and equitable principles.

However, I submit that a much more effective way for a panel to be able to accomplish those goals would to use a Rule 619 (h) finding, or simply the fact of failure to appear or produce, as a basis for sanctions against the responsible party in the arbitration decision itself. Under Rule 619 (h), as written, the NYSE may or may not end up taking disciplinary action or imposing disciplinary sanctions. It may be that panels already have the power to take such action under NYSE Rules other than Rule 619 (h). For purposes of this letter I did not investigate those Rules to determine all arbitrator powers in this regard.

A more fundamental question for NYSE and NASD arbitration programs, however, is whether NYSE arbitrators are independent, and insulated from adverse consequences, enough to be able and willing to take appropriate actions in most cases, either as contemplated under Rule 619 (h) or otherwise in the event of failure of responsible parties to appear or produce documents or information.

Based on my experience, those appropriate arbitrator actions are not likely to become the rule, rather than the exception, until NYSE and NASD implement changes resulting in fewer, better trained, more neutral, more independent, and more committed arbitrators who can count on a reasonable amount of work, thereby becoming more familiar with the issues, and therefore able to do a better job as neutral arbitrators.

A few actions which could help in this regard include:

a. Choosing panelists by random computer method with no right to strike or challenge except for specific cause. The current method of striking or ordering priority, at least for NASD, leads to irrational forum-shopping and wasted time in getting the case moving toward resolution.

b. Lawyers or others who currently represent parties (either customers, reps or broker-dealers) in securities arbitrations and court cases should not be able to serve as public arbitrators, as currently allowed, at least by NASD. No way would those people be chosen, no matter how competent they are, as arbitrators in comparable private arbitration. In my experience, they have a very difficult time, whether consciously or unconsciously, being truly neutral. Certainly they cannot rationally be perceived as neutral.

c. Awards should not be publicly available unless all parties agree in each case. Cases are so fact-specific and also lack precedential value, such that they are of little real guidance to anyone. Yet even lawyers, who should know better, try to read them and decide whether certain arbitrators favor investors or brokerage houses, which, again, leads to extensive and irrational forum-shopping. Yes, the arbitrations involve the securities industry which is publicly regulated, but if a disciplinary referral comes out of the arbitration and leads to regulatory action or sanction, then it will appropriately become public. Other arbitration decisions are not made public and with good reason. Again, they stem from private disputes, and are specific to the particular facts of each case, just as are NYSE and NASD cases.

From discussions with counsel and other arbitrators in securities matters, I believe that I, and many other arbitrators, are routinely struck from NASD arbitrator lists, or not chosen as a mediator in NASD cases, because of analysis of their publicly available NASD awards, or because of informal ratings by groups of customer or industry counsel. In my case, with 28 awards available, anyone who looks can find at least one decision which can be read to mean that I am likely to rule against one party or the other. Yet, I have served as a neutral arbitrator in about 1,000 cases, I am listed with a number of arbitrator rosters as a neutral arbitrator and am routinely chosen in private cases by counsel, who after disclosure of my record and experience or because they have worked with me, regard me as a totally impartial professional neutral. My experience is not unique. I submit that this kind of a system is not well-calculated to foster independence, but rather a fear that sanctions or referrals to discipline, even if merited under the law and the facts, will not be beneficial to continued service as an SRO arbitrator.

As I said, I believe that groups of counsel for both customers and the securities industry share data or opinions on individual arbitrators. There may nothing wrong with that in and of itself, but when combined with the current SRO arbitration system, I submit it causes mischief by impeding the choice of independent, fair and balanced arbitration panels. A number of years ago, I chaired a NASD panel which wanted to sanction counsel for the broker-dealer due to egregiously obstreperous and dilatory conduct in that arbitration. In fact my fellow panelists felt stronger about it that I did. We awarded modest attorneys fees to the customer to send a message and compensate the other party for what we felt was its additional time and expense as a result of that conduct, and we outlined the inappropriate conduct as the reason for the sanction in the award. A staff attorney called me, I believe in an effort to be helpful to me rather than to influence the result, and noted that if the panel imposed the sanction, it was possible I and possibly the other panelists would be black-balled by the industry. Of course, the panel declined to change the result. This was only one case and I have had a number of other NASD cases since then where no such observations were passed along, as to proposed sanctions or even punitive damages. Nevertheless, that one experience, combined with my discussions with others over the years, leads me to believe there is substance to the above observations.

Thank you for the opportunity to comment on this NYSE Proposed Rule Change.

Sincerely,

David Plimpton

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