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March 4, 2005

Mr. Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609
File Number S7-40-04

Dear Mr. Katz:

The End the Fraud Coalition is pleased to submit these comments in response to the Commission's "Concept Release Concerning Self-Regulation." While we are pleased that the SEC is conducting a thorough review of the current securities self-regulatory system, we are dismayed that the document contains no reference to one of the most vital self-regulatory issues affecting investors today: *arbitration*. Nowhere in the system of self-regulation is there a larger conflict of interest. Because of this, we believe that the SEC should be especially sensitive to the need to conduct very close oversight of securities industry arbitration programs.

We appreciate the fact that the final paragraph of the Concept Release, *"VI. Solicitation of Additional Comments,"* allows us to address arbitration. We note that this paragraph encourages the submission of "empirical data." The availability of data to the public is very limited and determined by the arbitration program. While the National Association of Securities Dealers (NASD) operates by far the largest securities arbitration program, the statistics it releases to the public can be misleading.

For example, at a forum on arbitration conducted in Washington by the North American Securities Administrators Association (NASAA) on July 20, 2004, NASD's President of Arbitration, Ms. Linda Feinberg, noted that in a large percentage of NASD arbitrations, the customer wins. When asked what constituted a "win" for the customer, she replied that it meant the complainant (consumer) had received an award. If a customer lost $50,000 due to wrongdoing by a broker, and the arbitration panel awarded the customer $150, that is considered a win for the customer in the NASD's eyes.

We urge the SEC to use its regulatory authority to gather the data and develop the statistics to measure the fairness of securities arbitration.

MANDATORY PRE-DISPUTE ARBITRATION AGREEMENTS: ARE THEY FAIR?

The issue is not whether the securities industry has the legal right to force customers to arbitrate disputes as a condition of opening an account with a firm. The question the SEC must address is whether the securities arbitration system is fair to those forced to use it.

Potential securities firm customers are faced with an incredible choice: "Either agree to arbitrate any future disputes or you cannot do business with our firm." If a dispute arises, customers will find their claims adjudicated by an arbitration program that is (1) developed by the industry, (2) operated by the industry and (3) funded by the industry. A fourth point could be added: (4) is intensely defended and protected by the industry.

In many cases, customers agree to arbitrate without knowing it. Firms are not required to highlight the arbitration agreement or place it on a separate page. In addition, the firm is not required to discuss it with the customer.

Is it possible for NASD, or any other securities self-regulatory organization, to create, fund, and staff an arbitration program that is equally fair to both customers and the firms that are NASD members? We believe there is a conflict of interest. Yet in listing potential conflicts of interest in the self-regulatory scheme in the Concept Release, the SEC did not mention arbitration.

ARE THERE ADVANTAGES TO USING ARBITRATION?

The arbitration system originally was promoted as an alternative means of allowing parties to settle disputes. It was assumed, however, that the decision to use the system would evolve through a balance of power and decision-making by the parties and the process, accordingly, would function in a balanced and fair manner. This is not the case today. The present system tilts overwhelmingly toward the interests of brokers and dealers.

The appeal of arbitration over the court system largely rests on two key factors: 1) the process moves quickly and 2) the process is simple and inexpensive. Today, the average length of a NASD arbitration is almost 1 ½ years. The process has evolved into a complicated maze with few limits on motions that can delay the proceeding. There are no safeguards that provide that the customer will be able to get from the firm critical data needed to prove their cases. On top of this, the procedure has been allowed to become so complicated that customers find it necessary to hire expensive securities law experts to counter the expertise readily available to the firm from its own legal and technical staff.

Having this expertise readily available, some firms know it is to their advantage to refuse to agree to have similar cases heard together, or joined (as NASD rules allow), because it vastly increases the cost to the wronged customer, who, if forced to bring their case alone, must bear all of the cost of experts. The longer and more expensive the proceeding, the more pressure there is to settle the case for a pittance, especially if that customer already had been bilked out of most of their lifetime savings by the firm. Further, when arbitration panels rule on critical issues such as discovery or joinder of claimants, their decision is final and no written explanation of that decision is required.

ENSURING QUALIFICATIONS: ARBITRATORS vs. JUDGES

The SEC should give close scrutiny to the ability and honesty of those on the arbitration roster. At the NASAA arbitration forum last July, a veteran securities arbitrator alleged he had been blackballed by the NASD arbitration program because of a history of pressing for pro-customer decisions and awards that he felt were justified by the facts. Such allegations appear in news articles, but how can they be proved or disproved? Unless the SEC does a thorough inquiry into the operation of securities arbitration programs, there is no way to determine the validity of such claims. Certainly, allegations of that nature are unfair to the great majority of securities arbitrators who strive to be fair. However, because the present system closes the courthouse doors to securities customers, the SEC must examine this question: What process is there to subject the arbitrator to the scrutiny of other authorities that have the power to make changes?

Conversely, judges at virtually every level of the court system, Federal, State, county, or city, are subject to evaluation by some authority. State and Federal bar associations can evaluate judges as to their legal expertise. State and Federal Judges often must be subjected to background checks that involve a review of their integrity and competence and then must be confirmed by a component of the State Legislature or the US Senate. Indeed, many judges are subject to impeachment, trial and removal from their posts. In short, they must answer to some authority. This is not the case with securities arbitrators, even though they may hold sway over the livelihood of a customer who faces absolute ruin because of the incompetence or dishonesty of a securities firm and/or its agents.

THE PRESIDENT'S SOCIAL SECURITY REFORM PROPOSAL SHOULD HEIGHTEN CONCERN ABOUT SECURITIES ARBITRATION

The President wants to make private investment accounts a key element of the Social Security system. If Congress agrees, many millions of citizens will be new investors in the securities markets. If a dispute arises, these millions of citizens will be thrust into the world of securities arbitration as well. They will be introduced to this program that offers no written decisions, very limited appeals, no explanation of awards, and no chance to go to court. This alone should cause the SEC to carefully examine securities arbitration from top to bottom with a minimum of delay.

THE SEC NEEDS TO DETERMINE WHAT ARBITRATION REFORMS ARE NEEDED

While the End the Fraud Coalition believes there are a number of essential reforms that should be applied to securities arbitration programs, it is essential for the SEC to conduct its own thorough review of securities arbitration to determine what reforms are necessary. The SEC can require securities self-regulatory organizations, as a condition of maintaining their self-regulatory status, to make major changes to ensure that its arbitration programs are fair to all parties

The End the Fraud Coalition strongly believes the following list of changes needs to be made in the present securities arbitration programs. We are confident that a thorough SEC review will reach the same conclusion.

NEEDED SECURITIES ARBITRATION REFORMS

MAKE SECURITIES ARBITRATION MORE VOLUNTARY

- Eliminate the practice of requiring the customer to sign a binding arbitration agreement as a condition to opening an account with a securities firm.

ALERT CUSTOMERS TO ANY AGREEMENT TO ARBITRATE AND DISCLOSE WHAT THE ARBITRATION PROCESS MEANS

- A voluntary agreement to arbitrate future disputes must be presented to the customer on a separate page and must be signed by the customer in order to be effective.

- Any voluntary agreement to arbitrate that is presented to the customer must clearly explain that, by signing the agreement, the customer surrenders his or her right: to written decisions from the arbitrator or arbitration panel; to written explanations of any award allowed by the arbitrator or arbitration panel; and to appeal the decision by the arbitrator or arbitration panel.

MANDATE WRITTEN DECISIONS

- Direct the SEC to require securities industry arbitration programs to adopt rules providing for a concise written statement of the justification for its decisions and an explanation of any award granted to any party. This should include a calculation of how the award, if any, was derived.

- Require panels to include findings of fact in the written decision. Note: this reform is essential to ensuring fairness and also could assist in identifying potential partiality of arbitrators.

LIMIT THE DURATION OF ARBITRATION PROCEEDINGS

- Direct the SEC to establish a 16-month time limit to the duration of securities industry program arbitration proceedings. The time limit for proceedings involving any claimants who are ill, retired or disabled may not exceed 12 months. A decision must be rendered within these time limits unless all parties agree to a specific time extension.

- Direct the SEC to require arbitration programs to mandate monetary sanctions against any party offering dispositive motions that are denied.

PROVIDE UNBIASED ARBITRATORS

- Require the SEC to audit the arbitrator pool and selection process on a regular basis. Arbitrators who side with either side a statistically significant percentage should be removed from the pool.
- Allow claimants to choose one of the following panels:
    - three public arbitrators
    - three industry arbitrators
    - two industry and one public arbitrator or
    - one industry and two public arbitrators

- Possible automatic disqualification for any potential panel member who has had an arbitration claim filed against them or who has been the subject of a NASD or a NYSE disciplinary action. At

a minimum, such person should be given less of a priority relative to the number of strikes exercised if such is considered in the process.

- No person who is serving, or who within the last five years has served, as counsel for a securities firm, shall be eligible to serve as an arbitrator in any proceeding where such firm is a party in that proceeding

REDUCE CASELOADS BY ENCOURAGING COMBINING CASES WHEN APPROPRIATE AND ENCOURAGING SETTLEMENT OF JUSTIFIED CASES

- Direct the SEC to require securities arbitration programs to adopt joinder rules that presume the joinder of similar cases unless it is determined by the arbitrator or panel of arbitrators that the combining of such cases will be highly prejudicial to any party. Joinder decisions may be appealed to the Director of Arbitration and the Director's decision will be final.
- Create a system requiring the claimant to make a confidential demand upon the defendant. If claimant recovers the amount of the demand or more at hearing, the defendant shall bear the entire claimant's additional costs including such items as attorney fees, expert fees and hearing costs.

REQUIRE DISCOVERY REFORM

- Make monetary sanctions mandatory for discovery violations because discovery is often more limited in arbitration. Establishing mandatory findings of fact will also help this process.

- Direct the SEC to require all registered broker dealers to provide to the SEC a copy of all compliance manuals and changes thereto. These manuals shall be maintained by the SEC and be available pursuant to discovery requests duly made in an arbitration proceeding.

- Direct the SEC to require brokerage firms to keep a library of their current and historical compliance manuals and required documents in a place available to the public as a condition to their NASD membership – at a minimum, this information must be reserved for customers.

Again we are pleased to submit these comments on the Concept Release.

Sincerely,

End the Fraud Coalition