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December 21, 2004

Hon. Jonathan G. Katz, Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549-0609

Re: ***Release No. 34-50714***
File No. SR-NASD-2003-101
Order Granting Approval to Proposed Rule Change and Notice of Filing and Order Granting Accelerated Approval to Amendments No. 1 and 2 Relating to Time Limits for Submission of Claims in Arbitration

Dear Mr. Katz:

Thank you for giving our law firm the opportunity to comment on Amendment No. 2 to SR-NASD-2003-101. Our firm practices extensively in securities arbitration and litigation on behalf of public customers.

We write to object to the Proposed Amended NASD Rule 10304 described in SEC Release No. 34-50714. Specifically, we object to the language which would give exclusive control of the implementation of the Six-Year Rule to the NASD member or associated person; but not the public customer.

When claims are more than six years old, this rule prevents them from being arbitrated. Both sides to the dispute should be able to obtain the plain meaning of the rule.

The SRO's have done a poor job of training their arbitrators to deal with Rule 10304 issues, so an Amended Rule that clearly states that claimsthat are more than six years old belong in court is preferable. However, the public customer as well as the NASD member or associated person should be able to request that relief.

In the case of *Neal Smith v. Dean Witter Reynolds, Inc. (n/k/a) Morgan Stanley Dean Witter, Inc. and Regald B. Smith*, United States District Court For The Eastern District Of Kentucky, Pikeville Division, Case No. 01-CV-361-DCR, the United States District Court for the Eastern District of Kentucky considered the proper application of the Six-Year Rule (NYSE Rule 603) where the stockbroker converted approximately $330,000 of his client's money to his own use more than eight or nine years ago. Counsel for Morgan Stanley argued successfully that the mandatory pre-dispute arbitration clause created an exclusive remedy and that the Six-Year Rule was a "statute of repose". The federal trial judge held that it was the exclusive remedy and that this victim of alleged theft could not bring his claim in court. The investor was victimized a second time by the court's interpretation of the Rule.

Fortunately the investor appealed to the Sixth Circuit in a case styled *Neal Smith, Plaintiff-Appellant v. Dean Witter Reynolds, Inc., now known as Morgan Stanley Dean Witter & Company; Regald B. Smith, Defendants-Appellees,* U.S. Court of Appeals, Sixth Circuit, Case No. 02-6158. The three judge panel reversed and remanded due in part to *Howsam.*

The appellate court amended its decision on August 18, 2004 to make it clear that it was not ordering the case to arbitration within the meaning of the last sentence of the existing Six-Year Rule. They stated:

> We therefore REVERSE the judgment entered below and REMAND the case with directions to the district court to dismiss the case without prejudice so that the parties may pursue arbitration.

That same case is now in an NASD arbitration styled *Neal Smith v. Dean Witter Reynolds, Inc. k/n/a Morgan Stanley, DW Inc. and John Does Nos. 1-4*, NASD No. 04-07313. An Answer was filed denying liability. The panel selection process should commence shortly.

In our opinion, it would be a travesty of justice if we could not argue that this case should be dismissed without prejudice to allow Mr. Smith to attempt to recover his stolen funds through a court of competent jurisdiction. This Proposed Amended Rule would not allow Mr. Smith to do that.

There is ample evidence that the NASD, NYSE, SICA and others have always interpreted the Rule to permit parties with claims older than six years to go to court. The securities industry has consistently argued the exclusive remedy/statue of repose position and oftentimes has been successful. It is time to have a clearly interpreted rule that is fair to investors with claims that are more than six years old because the existing rule and this Amendment No. 2 are not fair.

The Charles Schwab comment letter dated August 26, 2003 points out that the Proposed Rule (prior to Amendment 2) could have the negative effect of increasing the cost and delay – to Claimants and Respondents alike – associated with state and federal court litigation. We only wish to advise that mandatory pre-dispute securities arbitration as sponsored by the securities industry is not how my clients wish to resolve their disputes with their stockbrokers. We find arbitration to be grossly imprecise, expensive and unfair. If the industry wishes to continue to force investors to such a forum, then the least they could do is adopt rules that are clearly and easily understood and fair to public customers.

Thank you for requesting and considering our comments on this important issue affecting the fair resolution of investor claims through a process of industry-sponsored mandatory arbitration.

Sincerely,

CHARLES C. MIHALEK, P.S.C.

BY: _____
Charles C. Mihalek, Esq.

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