SNSFE
ATTORNEYS AT LAW
Shaheen, Novoselsky, Staat, Filipowski & Eccleston, P.C.
20 North Wacker Drive, Suite 2900, Chicago, Illinois 60606, Tel 312-621-4400 Fax 312-621-0268

RAYMOND SHAHEEN (retired)
HENRY N. NOVOSELSKY
LAWRENCE G. STAAT
STEVEN C. FILIPOWSKI
JAMES J. ECCLESTON

WILLIAM E. HOFMANN
SCOTT E. GALBREATH
MICHAEL D. WEIS
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RONALD M. AMATO
APRIL J. LINDAUER
SCOTT A. SISSEL

www.snsfe-law.com
www.financialcounsel.com

OUR FILE NUMBER

SENDER'S EMAIL ADDRESS
jeccleston@snsfe-law.com

July 14, 2005

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

Re: File No. SR-NASD 2003-158
Comment on Reorganization and Revisions to NASD Rules Relating to Customer Disputes SEC Release No. 34-51856

Dear Mr. Katz:

Thank you for the opportunity to comment regarding the proposed rule referenced above.

I am an equity partner and shareholder with Shaheen, Novoselsky, Staat, Filipowski & Eccleston, heading the firm's four-lawyer securities law practice group. Among other experiences, at the Chicago Bar Association, I have served as a co-chair of the Securities Law Committee; a chair of the Investment and Financial Services Committee; and a co-chair of the Litigation and Enforcement Sub-Committee of the Securities Law Committee. I am the co-editor and contributing author, *Securities Law*, Illinois Institute for Continuing Legal Education (IICLE), 2003 Edition, writing the chapter, Securities Arbitration. I am qualified as an arbitrator (chairperson) as well as a mediator with the NASD and have served as an arbitrator and a mediator.

I raise two points for your consideration, discussed below.

1. The SIA's Comment Regarding Proposed Rule 12200 Is Unsound and Must Be Rejected

In its comment letter dated July 13, 2005, the SIA faults the existing rule and the Proposed Rule 12200 for permitting arbitration if requested "by the customer." Instead of that language, the SIA proposes more limiting language. That is, the SIA proposes that the new rule read that arbitration is permitted only if "requested by the customer of the member."

The SIA's proposed language is unsound, as it may lay some groundwork to challenge legitimate claims of brokerage firm customers who have been victims of "selling away" schemes. Currently, there are numerous court decisions supporting the right of the customer to file a selling away claim against a brokerage firm even if, technically, that customer had no account at that brokerage firm. See, e.g., WMA Securities, Inc. v. Ruppert, 80 F. Supp.2d 786 (S.D. Ohio 1999) (holding that persons who discuss investment possibilities with a registered representative of a NASD member, but who do not open accounts with the NASD member, are "customers" under NASD Rule 10301(a)); Lehman Bros., Inc. v. Certified Reporting Co., 939 F.Supp. 1333 (N.D. Ill. 1996) (defining customers under NYSE arbitration rules to include not only those who executed purchases with member firms, but also those who maintained a less formal business relationship at the time of the alleged misconduct); Oppenheimer v. Neidhardt, 56 F.3d 352 (2nd. Cir. 1995) (investors defrauded by a representative of a NASD member firm, but who never opened accounts with the firm, were, nonetheless, customers).

In conclusion, there is no legitimate reason to deny customers the right that those court decisions have bestowed. The ends of justice will not be served by "eliminat[ing] collateral litigation relating to those situations", as the SIA candidly frames it.

2. PIABA's Limited Endorsement and Suggestions Regarding the Dispositive Motion Rule Are Sound, Especially In View of the Extremely Limited Right of "Appeal"

It is critical that dispositive motions be allowed, if at all, only under "extraordinary circumstances" as the NASD has proposed. Furthermore, PIABA has made numerous suggestions to revise Proposed Rule 12504 which will significantly improve the application of this proposed rule.

Let me amplify one area that PIABA touches upon when it states that "there is little judicial review of arbitrator decisions." This is an understatement for the reasons discussed below.

The Federal Arbitration Act ("FAA") provides that an award may be vacated only if: (1) the award was procured by corruption, fraud or undue means; (2) the arbitrators exhibited "evident partiality" or "corruption"; (3) the arbitrators were guilty of misconduct; or (4) the arbitrators exceeded their power. *See* 9 U.S.C. § 10(a); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 fn3 (2nd Cir.1998). Additionally, a party may seek a vacatur because the arbitrators committed manifest disregard of the law or facts. "Manifest disregard of the law" by arbitrators is not a statutory basis under the FAA, but is a judicially-created ground for vacating an arbitration award. 9 U.S.C. § 10; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2nd Dist. 1986). However, judicial inquiry under the "manifest disregard" standard is extremely limited, as noted by the Seventh Circuit in *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994):

> "Judicial review of arbitration awards is tightly limited; perhaps it ought not be called review at all. By including an arbitration clause in their contract the parties agree to submit disputes arising out of contract to a non-judicial forum, and we do not allow the disappointed party to bring his dispute into court by the back door, arguing that he is entitled to appellate review of the arbitrator's decision."

Indeed, to vacate an award for manifest disregard of the law, a court must find that: "(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Halligan*, 148 F.3d at 202. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. *Bobker*, 808 F.2d at 933. Review under the "manifest disregard of the law" standard requires a finding by the court that the arbitrators *intentionally* disregarded what they knew to be the law. *Eljer Mfg., Inc. v. Kowin Development Corp.*, 14 F.3d 1250, 1253-54 (7th Cir. 1994) (emphasis added). As the court stated in *Health Services Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992):

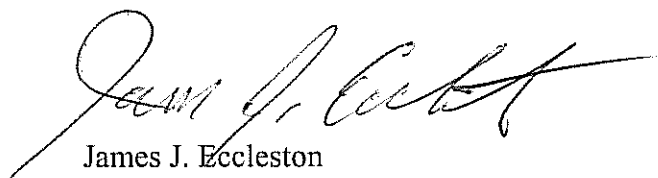
"[T]o vacate an arbitration award for manifest disregard of the law, there must be something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the laws; it must be demonstrated that the majority of the arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did."

The burden of proving that arbitrators acted in manifest disregard of the law is even heavier when numerous legal theories are presented to arbitration panel and the award is rendered without opinion. *Wall Street Associates, L.P. v. Becker Paribas, Inc.*, 818 F.Supp. 679, 686 (S.D.N.Y.1993). In fact, when the arbitrators render an arbitration award without opinion, it is "nearly impossible for the court to determine whether they acted in disregard of the law." *O.R. Securities, Inc. v. Professional Planning Associates, Inc.*, 857 F.2d 742, 747 (11th Cir. 1988).

In conclusion, because of the extremely limited right to "appeal" an arbitration award, dispositive motions should be allowed only under "extraordinary circumstances", as the NASD proposes, and only with the additional safeguards that PIABA has suggested.

Please feel free to contact me for further information.

Very truly yours,



James J. Eccleston