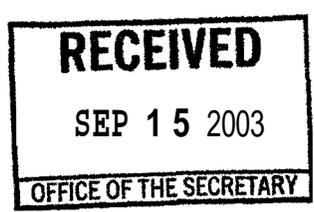


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Founder  
Paul H. Tobias  
President  
Frederick M. Gittes  
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Teriso E. Chaw

September 9, 2003

Jonathan Katz  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549



Re: SR-NASD-2003-95

Dear Mr. Katz,

The National Employment Lawyers Association (NELA) submits the following comments regarding SR-NASD-2003-95.

We have both general and specific comments on the proposed rule change. First, the proposed standard for the designation of public/non-public arbitrator is entirely inadequate.

Attorneys whose firms represent industry members should be classified as industry arbitrators regardless of the dollar volume of the business. Attorneys have fiduciary responsibilities to their all of their clients. That duty is not dependent on the percentage of the firms billings to that or other clients. Attorneys who represent brokerages are certainly looking to expand their business with that industry client and are similarly looking to obtain other industry clients. The incentive to favor the industry is too obvious to ignore.

The threshold proposed by the NASD of 10% of the law firm's billings is completely inadequate. Many of the law firms representing brokerages are among the largest law firms in the world with annual billings in excess of one hundred million dollars. That means unless the firm is billing over \$10 million dollars per year they will not be deemed industry arbitrators. There is no reason at all for such a high threshold. Is the concept that \$5 million dollars in annual billing is not enough to create the "appearance of a conflict" in the eyes of the public? If the goal is to avoid even the appearance of a conflict, any lawyer whose firm represents any industry member should be classified as an industry arbitrator.

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- Robert Belton  
Nashville, Tennessee
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- Cathy Ventresca-Morse  
Chevy Chase, Maryland
- Brad Yamauchi  
San Francisco, California

September 9, 2003  
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On a more general note, it is entirely inappropriate under developing legal standards for there to be any industry arbitrators on mandatory arbitration panels. Arbitrators need to be neutral in fact and perception. No trade association should be permitted to force its customers into a mandatory arbitration system and require that each panel have at least one industry representative on it. State law doctrines of unconscionability are routinely striking down systems where one side exercises control over the makeup of the panel. For instance, see, *Graham v Scissor Tail*, (1981) 28 Cal. 3d 807 and *McMullen v. Meijer*, 337 F.3d 697 (6<sup>th</sup> Cir. 2003).

The exchanges completely control the selection of the arbitrator pool. There is absolutely no transparency to the process. Indeed, they keep the roster of arbitrators secret so that it is impossible to examine the background and demographics of the entire panel. The selection process is secret and it is not clear to anyone what the qualifications are for selection.

The industry's domination of its arbitration systems is simply outside of current legal norms. The time has come to prohibit the industry from requiring all customers to arbitrate their claims in a captive and controlled system.

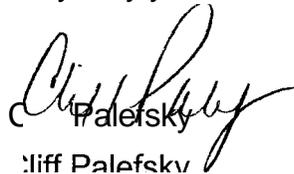
If the system were voluntary, the industry could define its procedures and categorize its arbitrators as it sees fit. The market would then determine whether or not it was deemed sufficiently fair to use.

The SEC has for too long turned its head and permitted this abuse of fundamental concepts of neutrality to exist.

We urge you not to permit firms to mandate the use of their captive systems any longer, and we urge you to use a strict definition of industry affiliation.

Thank you very much for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Cliff Palefsky". The signature is written in a cursive, flowing style.

Cliff Palefsky  
Co-chair, ADR Committee  
NELA

CP/lh