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

Re: Release No. 34- 52045

Dear Mr. Katz:

I write to comment on SR-NASD 2005-023.

This is a bad regulation. I strongly urge that Commission to reject it and to reconsider this proposal. Making it easier for attorneys to appear in SRO arbitration forums doesn't benefit the investing public. The Commission and SROs should instead take steps to ensure that all representatives who appear in these forums are knowledgeable and competent. Nothing else will work, and both public and industry participants are entitled to nothing less.

I have been an active participant in SRO arbitrations for more than 30 years. During that time I repeatedly served as an arbitrator for the SROs, and have represented member firms, associated persons, institutional and individual investors in SRO arbitration forums.

In one way or another, I have participated in the resolution of several thousand disputes through SRO arbitration. I do not believe that there are more than a handful of practitioners with more "on the ground" experience in SRO arbitration than I have.

I have also taught courses on economics and the capital markets at a well reputed business school, and have frequently testified as an expert witness in SRO arbitrations and judicial proceedings. I am currently an advisor to the Investor Justice Project at the University of San Francisco, a legal clinic that trains law students and offers assistance to public investors.

I understand that this rule-making is in response to actions taken in several states attempting to restrict representation of parties in SRO arbitrations exclusively to attorneys licensed in the state where the hearing is to be held. Such a venue based restriction is inane. Rulemaking in this area cannot be left to lawyers or regulators at the state levels.

I fully support action by the Commission in response to these state actions. I believe that the SRO arbitration process is an essential component of the national market system which the Commission regulates. At the same time, I strongly oppose this proposed rule because it is off the mark, and because it contains clauses that ultimately allow the states to continue to regulate in this area.

I believe that the proposed rule by-passes what should be the Commissions' most important concern, providing competent representation for all concerned. Instead, this rule panders to one group, lawyers, who do not need the Commission's support to resolve a problem that is largely of their own making.

Moreover, this rule leaves to the various states the opportunity to make regulations, as several have attempted to do, that directly usurp the Commissions pre-emptive rule-making authority in this area. The Commission has recently jealously guarded its pre-emption over SRO arbitration by opposing California rules that required additional arbitrator disclosures. Why does it now propose to allow the states to decide who can appear at the hearings?

Consumers should have the opportunity to be represented by the advocate of their choice, and not be limited to selecting a representative whose only qualification is licensure or residence in a particular state. No state bar examination covers federal securities laws. A standard attorney's practice will not make that attorney into an effective advocate for consumers, or any party, in these SRO forums. Yet this regulation requires no more and, indeed, focuses on state licensure. This approach simply makes no practical sense.

I have always understood that the Commissions' position was to provide SRO arbitration as a fast, efficient forum for the resolution of disputes that arise in connection with the business of the member firms. The proposed rule will have the opposite effect.

The proposal, as written, is virulently anti-consumer. It leaves consumers with less choice, higher costs and potentially no representation at all. It sets a requirement for participation, licensure by a state bar, which has no relationship to the SRO dispute resolution process.

The current proposal invites more lawyers and more litigation into the process. To do so is anti-consumer by definition. Sending in more lawyers cannot seriously be the Commission's idea of continuing to simplify the SRO process. Lawyers cannot point to a single aspect of the arbitration process that, by their presence, they have made better, simpler or more consumer friendly. More importantly, the record clearly shows that lawyers have repeatedly obfuscated and abused the process.

The proposed rule contains the phrase: "In the absence of a court order, the arbitration proceeding shall not be stayed". Specifically inviting "court orders" is like waiving a red flag in front of a bull. Lawyers will soon be telling each other that it constitutes "malpractice" for them not to attempt to enjoin every SRO arbitration, at least once.

Does the Commission think that consumers are going to be running to court to enjoin the arbitration hearings that they sought by initiating the arbitration process? Consumers

don't care if the member firm sends a lawyer from New York or Kalamazoo to defend their claim. Consumers file claims because they want resolution. Consumers don't take actions to delay an arbitration proceeding that they, themselves, initiated.

Consumers do care if the Commission, by this rulemaking, cuts them off from seeking effective representation regardless of where they or the representative resides. Consumers won't seek court orders to delay their hearings. It will be the consumers' representatives who will be challenged and enjoined.

The SROs and Commission are clear that this regulation is not intended to effect non-attorney representatives, (NARs), nor change the status quo. Nonetheless, its time for the Commission and SROs to recognize that NARs are become accepted participants in the dispute resolution process in this and other regulated forums. The Commission is not likely to ultimately adopt a "lawyers only" policy for SRO arbitration. The question of competency of representatives is going to have to be dealt with sooner or later. In the interests of investor protection, I urge the Commission to make it sooner rather than later.

The Commission should reject the proposed regulation for the following reasons:

1) it attempts to resolve a problem (restrictions on the appearance of lawyers in SRO arbitration) that the Commission can and should resolve without rulemaking;

2) it is anti-consumer, because it allows representatives to be challenged because of where they live, rather than what they know;

3) it reserves to the states an area of regulation which the Commission has heretofore jealously guarded as its own;

4) it increases the number of lawyers, and the attendant problems they bring with them, to these forums;

5) it runs counter to the trend for participation of non-attorneys in the alternative dispute resolution process.

The Commission should replace this proposal with one that provides that all parties have the opportunity to be represented by competent and effective advocates. I urge the Commission to take action as other federal agencies, such as the Social Security Association, have, to ensure that consumers have access to a wide range of competent and effective advocates when pursuing claims in SRO forums.

Problem, what problem?

The commission should know this entire controversy for what it is, a turf war initiated by attorneys, with attorneys the only beneficiaries. With billons of dollars having

disappeared from investors retirement accounts when the tech bubble burst, and the resulting explosion of claims being handled in SRO arbitrations, it should be no surprise that more and more attorneys, many of whom had never heard of SRO arbitration before 2001, are now seeking a piece of the pie.[1]

Lawyers at the state level have moved to protect their turf by passing regulations, or initiating court actions, to keep out of state attorneys (and non-attorney representatives) from participating in SRO arbitrations when the arbitration hearing is venued in their state. They have used illogical and scurrilous means to do so.

The Commission should understand that this state action has been initiated by lawyers for their own pecuniary benefit. Lawyers who claim to be "protecting customers from the unauthorized practice of law in SRO arbitrations" are actually trying to feather their own nests; consumer protection doesn't actually enter into their thinking.

The Commission should not permit this regulation at the state level. The proposed regulation does exactly that.

The actions taken at the state level cited in the release are suspect in the first place. The proposed rule cites three instances where states have interposed themselves in this process, *Birbrower* (California), *Alexicole, Inc.* (Ohio) and *Florida v. Rappaport* (Florida). None of these restrictions were placed by state legislative action. They came from courts who, in two of the three cases, were primarily dealing with other issues.

Birbrower is easiest to deal with, because the California legislature, with the backing of several major consumer groups,[2] acted swiftly to over turn it. The State of California adopted a simple registration procedure for out-of-state attorneys, contained in Code of Civil Procedure Sec. 1282. California currently offers no impediment to the SRO process that will be fixed by the proposed rule.

The *Alexicole* decision in Ohio did not apparently involve an attorney, but a non-attorney representative.[3] Nonetheless, the dicta would seem to imply that activities that normally occur at an SRO arbitration would be the exclusive province of attorneys licensed in Ohio if the hearing were to be held in that state. [4]

Left to their own devices, attorneys will always decide that what they do is the practice of law and that only they can do it. At the state level, attorneys will never acknowledge that practice at federal agencies or in regulated industries requires special expertise. Moreover, attorneys always believe that, if attorneys do it, then it must be the practice of law. This, despite, a trend toward non-attorney representation has clearly taken hold across federal and state agencies.

Nothing in *Alexicole* apparently prevents attorneys domiciled in Ohio from taking depositions in neighboring states or any number of other activities that anyone would agree constitutes the practice of law. Indeed, if the Commission accepts the logic of *Alexicole* as worthy of responsive rulemaking, then it must know that any time an Ohio attorney comes to California to meet with the Commission's staff and is "representing a client", that person is practicing law in this state, without being licensed to do so. When

this occurs, Ohio lawyers should be asked to leave the building and referred to their state bar for sanctions.

Ohio attorneys do, of course, travel and consult with and on behalf of clients around the country. They don't propose to stay home. *Alexicole* is an apparition. It should be vitiated at the state level, or challenged in the courts as the NASD did in California.

The Commission is already empowered to restrict member firms from operating in the state of Ohio unless and until Ohio agrees to play by the Commission's rules as applied to the other 49 states. Legislators in Ohio should be expected to act rationally, as the legislators in California did, to place the interests of consumers and of capital formation in their state above the overreaching interests of the lawyers who live and practice there.

The logic behind the position of the Florida Bar is the most illustrative of how lawyers approach this subject, and why that approach is suspect. The ruling in *Florida v. Rappaport* effectively bars attorneys from other states from appearing in SRO arbitrations in that state. That rule is firmly rooted in logic similar to *Alexicole*, but the record is more illustrative of why these rules are suspect.

The ruling in *Florida v. Rappaport* relies upon an earlier ruling effectively banning NAR's from SRO arbitrations in that state as well. In a Brief supporting the earlier rulemaking submitted by the Standing Committee on the Unlicensed Practice of Law, the main group of attorneys in Florida that championed this rule in that state, the Standing Committee makes it clear how it approaches the issue, and how much lawyers are willing to stretch to get what they want.

In its decision in *Mastrobuono,* the US Supreme Court discussed and relied upon the Arbitrator's Manual, specifically to decide what the Commission would and would not permit in an SRO arbitration. The Brief of Florida's Standing Committee of Lawyers, specifically adopts and relies upon the *dissenting view* of Justice Thomas in *Mastrobuono,* specifically as regarding the Arbitrator's Manual, holding, in effect, that the Commission does not know that the manual exists, nor sanctions its publication or use.[5]

I attended a law school once upon a time and I know that several of the Commissioners and many of their staff did as well. Correct me, but doesn't the majority opinion become law, and the minority opinion remain someone's opinion? Yet these lawyers in Florida clearly base their rulemaking on the minority opinion. And these are the lawyers who claim exclusive right to represent Floridians in SR0 arbitrations. Who is going to protect Floridians from these overreaching lawyers?

Moreover, the Florida lawyers' further assertion, that individuals involved in the drafting of Arbitrator's Manual, recollect that non-attorney representatives "… did not exist at the time and, accordingly, were not contemplated[6]" rewrites history. I was there at the time and my recollection is very different.

When I first came to be involved in SRO arbitrations in 1975, many of the member firms chose not to be represented by an attorney, but rather a principal or branch office

manager. Institutional customers were also frequently represented by non-attorney employees, and public customers frequently represented themselves. Public customers were also frequently represented by a retired broker, a retired lawyer, a CPA or a family friend.

Non-attorneys were very much part of the SRO landscape. No regulation by the SROs or Commission has ever changed that. No one ever contemplated that arbitration should become the exclusive domain of attorneys (until the attorneys thought it up). It wasn't a good idea then, it isn't a good idea now.

What went on in those hearings was very much the same as takes place today. Documents were examined. Witnesses gave sworn testimony and were cross-examined. I can recall one case where I sat as an arbitrator with two other arbitrators and three parties. I was the only attorney in the room. I don't think anybody thought that what we were doing was the "practice of law" or that the participants could be sanctioned for it.

We did think then, and I still believe today, that SRO arbitration is a highly specialized area. Being a lawyer isn't going to help anyone understand the investments that are at issue, or the rules, customs and practices of this industry. The proposed regulation ignores that fact. The Commission should not.

The adoption of these restrictive rules at the state level seriously impacts the interstate commerce and tramples on an area which the Commission, not the states, regulates. These rules are illogical. *Birbrower* would have made it impossible for a California corporation to get tax or patent law advice from lawyers in Washington DC or other states. That is why the California legislature abrogated it. [7]

More importantly, the capital markets have exploded in the last 30 years with myriad new products and services. The organized bar has nothing to keep its lawyer members up to date. Most lawyers don't know a fixed annuity from a variable annuity, a qualified option from a long put, or how securities analysis should be done, if it is done right.

So why send more lawyers?

More lawyers

This proposed regulation makes it easier for lawyers to appear in SRO forums. While I do not believe that there should be an impediment to lawyers appearing in SRO forums, the Commission should understand the full impact of what it is doing.

Lawyers have done little, in my experience, to help public investors, or to make the arbitration process easier or better. There is a clearly demonstrable record, that lawyers in SRO arbitrations have had just the opposite effect.

The NASD continues to voice its concerns about "on-going problems with non-attorney representatives" (Release: footnote 11).[8] At the same time, it ignores the fact that, in the

last few years, the NASD has cited dozens of member firms, for countless discovery violations[9] and other inappropriate conduct in relation to arbitration proceedings,[10] not to mention the myriad of unpaid arbitration awards by former members of the brokerage community.

In virtually every case where the NASD found the conduct of the member firm to be abusive, the offending firm was represented in the arbitration by a lawyer.[11] In every one of those instances, an attorney, licensed in some state, was representing the egregious party, and in many cases, the attorney actively participated in the abusive conduct.

Lawyers are also solely responsible for the motion practice that has crept into the SRO proceedings over the years. I say crept in, because the SROs never asked the Commission to approve any rules governing motion practice, and for the longest time never trained arbitrators to deal with it. The Commission has only recently considered the SRO's first rulemaking dealing with motion practice.[12]

Motion practice in arbitration makes money for lawyers, for sure, as it drives up costs for all concerned. But can the SROs or anyone else demonstrate that motion practice is good for consumers? Has it streamlined the process? Made it more efficient? Is there a benefit from the extensive additional cost?

All motion practice does is place an impediment between a complaining customer and his/her right to confront the member firm at an arbitration hearing. Has one customer ever written to the Commission asking for more motion practice in arbitration?

The Commission would do well to have its staff obtain and review a sampling of the motions submitted by lawyers in the SRO forums. Customers in California are routinely bombarded with briefs citing cases decided in New York, Ohio and elsewhere.[13] Witnesses from member firms often swear oaths to facts that are clearly false. [14] And all motions are presented to arbitrators, a great many of who are not themselves lawyers, nor have any training on how to sort it all out.

If the SROs or the Commission believes that lawyers are "regulated" because they are subject to discipline from state bar associations, they are being naïve, and should know that the public does not share this view. In my experience, lawyers will say and do things in front of arbitrators that they would not think about saying or doing in front a judge. As far as lawyers go, arbitrators have no teeth. And the record of state bar discipline of lawyers for misconduct in arbitration comprises an extraordinarily thin volume.

More litigation

Proposed Rules 10316(c) and 10408(c) leave "issues regarding the qualifications of representatives" to state courts and state regulators. These clauses should be removed from this rule as they effectively gut its intent.

The Commission has taken a very public position that "the SRO's are, by Congressional design, nationwide organizations with a national mandate. Allowing the states to dictate rules in this area will subject the SRO's to a patchwork of regulation, a system that cannot be responsive to the SRO's national needs."[15]

This regulation, and the clauses inviting "court orders", leave a wide hole in the SRO regulations that the states can fill in any number of ways. If the Commission does not want the states to regulate in this area, and there is no good reason that it should, these clauses should be removed.

From the outside, it appears that the NASD and Commission challenged those state regulations that were pro-consumer (in California) and are attempting to accommodate those, here, that will give consumers no benefit at all. Why is the NASD not challenging the Florida and Ohio regulations as it did California's? Why has not the Commission cautioned those states not to interfere with SRO arbitrations?

The NASD already has Rule 10106 that specifically states: "No party shall, during the arbitration of any matter, prosecute or commence any suit, action or proceeding against any other party touching upon any of the matters referred to arbitration pursuant to this Code. "

The NASD does not enforce this rule. It never has.

The Commission need only search any legal database for the hundreds of reported judicial decisions that dealt with NASD Rule 10304 (formerly, Section 15 of the NASD Code of Arbitration Procedure) across the country. That rule was also the basis of hundreds of unreported, last minute requests for injunctions, court orders and TROs filed by industry lawyers to derail SRO arbitrations.

These injunctions in fact delayed a great many arbitration hearings. In the aggregate, they added millions of dollars to the cost of the arbitration process. They never benefited any public customers. Complaints to the NASD fell on deaf ears.

Despite the clear language of NASD Rule 10106, the myriad court actions seeking to enjoin the SRO arbitrations were ignored by the enforcement staffs of the SROs and the Commission. Not one member firm has been sanctioned for violating NASD Code of Arbitration Rule 10106 for seeking to enjoin an SRO arbitration at the last minute. The public would like to know: why not?

The proposed regulation offers more of the same. Either the Commission is going to set down rules governing SRO arbitration or it is going to leave regulation to the states. The Commission and the SROs should tell the firms in no uncertain terms that membership in the SRO means arbitration with customers. Period. Filing in court to enjoin an arbitration should be sanctionable conduct, not encouraged by this regulation.

The Commission should decide where SRO arbitration is going, rather than deal with these issues piecemeal

This regulation bucks the trend**.** Alternative dispute resolution, and simplified claims procedures, are here to stay. Although America's attorneys don't want anyone to say this out loud, the trend is for greater non-attorney participation in claims and administrative procedures sponsored by state[16] and federal agencies[17]. The Commission should embrace and foster this trend toward simplified dispute resolution with competent advocates.

The Social Security Administration, after substantial public comment and discussion, has adopted specific rules governing the qualifications and conduct of individuals who participate in its claims resolution procedure. The SSA was specific in stating that its rules are "intended to ensure that representatives provide competent services to their clients and comport themselves in accordance with (our) rules and standards."[18] Aren't parties in securities arbitrations entitled to the same?

Merely increasing access for attorneys to SRO forums doesn't improve the competency of representation one iota. Can anyone point to anything in the regulation that the Commission is now considering that actually helps any consumer or any member firm? Who but lawyers will benefit ? Will the process be smoother? Less expensive? Better?

Rather than take the bull by the horns and act to improve the system, the Commission and SRO's offer consumers more lawyers. Thanks, but no thanks.

Get the right people. Please.

Virtually everyone who is regularly involved with the SRO arbitration process agrees that nothing will gum up the works more frequently than a participant who does not know what he/she is doing. A participant who does not know brokerage industry custom, practice and procedure or the arbitration process, or the mathematics of investments cannot provide adequate representation to any party.

Why shouldn't representatives in SRO arbitrations be knowledgeable and competent? The SROs already train and test brokers and principals. The SROs already train arbitrators. Why can't the SROs train and certify arbitration participants? Why can't the SROs regulate participants in SRO arbitrations and bar those who don't measure up?

The SROs and Commission would better spend their time and energy helping the process and the public by increasing the minimum requirements to be based upon competency and relevant knowledge. Instead, the SROs offer up this boondoggle for lawyers that does neither.

I urge the Commission to deal with the Florida and Ohio regulations internally, and to send this rule back to the SROs with instructions to take steps to provide parties in their forums with knowledgeable and competent representatives.

Respectfully,

Irwin G. Stein

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[1] Membership in PIABA, the largest association of attorneys representing public customers in SRO arbitrations, for example, requires only that an attorney have participated in a single SRO arbitration to be eligible for membership. Nonetheless, the imprimatur of membership in this specialized bar association, can easily lead consumers to believe that an attorney who is a member of this association is a specialist in this area.

[2] Cal. Code of Civil Proc. Sec. 1282; See: Report of Senate Judiciary Committee, AB 2086, 8/2/98.

[3] The SROs and the Commission correctly exclude this topic from this rulemaking, although I urge to Commission to act to raise the level of competency and professionalism of all participants in the forums.

[4] The SROs should immediately offer customers in Ohio (and Florida) the opportunity to have their cases heard in adjoining states, as they did while the California arbitrator disclosure issues were being sorted out. The NASD had no difficulty sending California cases to be heard in Oregon and Nevada, not once suggesting that there was anything wrong having California attorneys represent parties in those states.

[5] As the Commission has expressly approved a supplement to the Arbitrator's Manual (NASD Notice to Members 99-90, and the US Supreme Court specifically acknowledged the Manual (*Mastrobuono*), I personally believe that any argument that the Commission somehow doesn't approve of the Manual, or is not aware of its use and the practices it describes, imparts to the Commission an insulting ignorance.

[6] Answer Brief of the Standing Committee on Unlicensed Practice of Law, submitted to the Supreme Court of Florida, In re: Advisory Opinion –Non-lawyer Representation in Securities Arbitration, Jan. 1997.

[7] If the Commission wishes to review an excellent discussion of the illogic of these restrictive state rules, and their impact on interstate commerce, I recommend the dissenting opinion of Hon. J. Kennard, of the Birbrower Court. Unlike the dissent in *Mastrobuono*, which was considered only by Florida's lawyers, the majority in *Birbrower* was overturned by the California Legislature, largely on the logic of J. Kennard's dissent.

[8] Contrary to the NASD's position, these on-going problems with non-attorney representatives have not been "well documented" on the public record and the NASD has not published anything on the "problem" since 1995, when former SEC Chairman Ruder looked into it. Most of Prof. Ruder's recommendations were never implemented.

[9] In July 2004, the NASD fined Merrill Lynch, Solomon Smith Barney and Morgan Stanley DW, Inc. $250,000 each for discovery violations in a score of arbitration cases.

[10] In December 1998, the NASD sanctioned three firms for repeatedly arguing before arbitration panels that NY choice of law provisions should be enforced. Even with this sanction sending notice to the member firms that the NASD considered the practice a violation of industry standards, industry respondents continue to cite NY law to arbitrators, no matter where the customer lives.

[11] These reported problems are the tip of the iceberg. Anyone who thinks arbitration proceedings are not 'hard fought' between the parties, or that lawyers don't bring all the tricks of their trade to bear, hasn't been there. But these are the same proceedings that the industry advertises as so simple, a customer should be able to represent themselves. If the industry wants to advertise these proceedings as simple, and the Commission has indicated that it wants to keep them simple, then turning them over to more and more lawyers is not the answer.

[12] SEC Release No. 34-51856

[13] If the Commission wonders about the quality of legal scholarship in the SRO forums it should note that both the NASD staff (footnote 5)and at least one commentator failed to note that *Birbrower* had been abrogated by legislative action, and cited it to the Commission as if it were the current law, untouched by the California legislature..

[14] If the general public knew how many times lawyers for one member firm falsely swore to arbitrators that all relevant documents and records needed for customer claims were "destroyed at the World Trade Center disaster on 9/11", they would storm the offices of this investment bank and burn it down. I personally believe that hiding relevant documents behind the WTC disaster is truly despicable conduct. The NASD knows its happening, but ignores it.

[15] Brief of the SEC as Amicus Curie submitted in *NASD Dispute Resolution, Inc. v. Judicial Counsel of California*.

[16] NY Administrative Procedure Act, Article 5; Matter of the Board of Education of Union-Endicott Central School District v. NYS Public Employment Relations Board. 233 A.D. 2d. 602, 649 NYS 523 (1996).

[17] Social Security Administration 20 CFR Parts 404 and 416.

[18] Federal Register August 4, 1998 Vol. 63, No. 149 Final Rules and Supplementary Information.