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MEMBER, NASD BOARD OF ARBITRATORS

August 10, 2005

**VIA E-MAIL (at rulecomments@sec.gov)**

Mr. Jonathan G. Katz, Secretary  
U.S. Securities and Exchange Commission  
450 Fifth Street, NW  
Washington, D.C. 20549

Re: **Comment letter on File Number SR-NASD-2005-023**  
The NASD's Proposed Rule Change Pertaining to the Representation of  
Parties in Private NASD Arbitration Proceedings

Dear Mr. Katz:

I appreciate the opportunity to comment on the NASD's proposed rule change pertaining to the representation of parties before NASD private arbitration tribunals. I know that the question of multi-jurisdictional practice has been a lingering concern for the NASD and many of its member firms – particularly those with large legal departments in New York – for some time. Consequently, I am glad that the NASD is now addressing this issue, as it is an area that I agree should be addressed in the Code of Arbitration Procedure.

While the NASD's "Statement of Purpose" does provide that, "[R]epresentation by an attorney is not required under this proposal," I note that "[T]he proposed rule change does not address the issue of representation by non-attorneys in arbitration or mediation [sic] cases" (see footnote 4). I feel the proposed rule should address this issue for the reasons which follow. I have included some proposed additional language for the rule for this purpose.

As part of its consideration of the proposed rule as currently composed, the Commission may find it useful to keep in mind the following:

1. Securities arbitration specialists (hereinafter "specialists") (sometimes referred to as "non-attorney representatives") have represented and assisted consumers in private securities arbitration proceedings for 40+ years in this country;<sup>1</sup>

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<sup>1</sup> The United States Seventh Circuit Court of Appeals recently recognized the right of investors to be represented by non-lawyer specialists in securities arbitration matters. Sirotzky v. New York Stock Exchange and Sanford C. Bernstein & Co., Inc., USCA-02-C-0072 (7<sup>th</sup> Cir. October 29, 2003).

2. The rules of numerous other arbitration organizations also allow for party representation by specialists, including the American Arbitration Association (AAA) and the Inter-American Commercial Arbitration Commission;
3. Non-lawyer specialist representatives are expressly allowed to represent parties before the United States Tax Court; and,
4. The NASD publicly stated in April 2005 at the Securities Industry Association's Compliance & Legal Division Annual Conference (which was *after* the filing of the rule proposal with the Commission) that it does not intend the proposed rule to exclude representation of parties by specialists.

In light of (1) the NASD's recent public statement of its intent to not deny consumers access to representation by specialists in private arbitrations, and, (2) the reasons set forth in this letter, I think it is critical for the Securities and Exchange Commission ("Commission") to advise the NASD that the proposed rule must expressly provide for the representation of parties by specialists, subject to certain reasonable restrictions and applicable state law, if any, on this subject.

Specialists provide a valuable service to defrocked investors, often times elderly persons who have been harmed by their financial advisor. Specialists, as compared to attorneys, provide the following benefits to consumers:

1. **Securities industry experience:** Most, if not all, specialists in practice today are highly trained and educated individuals who possess a significant amount of previous work experience in the securities industry, having been licensed as a broker and/or manager. Considering the "fact driven" nature of most, if not all, NASD arbitration disputes, this practical industry experience is often enormously helpful to the successful outcome of arbitration matters for consumers (this fact was expressly recognized by the Report of the Arbitration Policy Task Force to the NASD Board of Governors<sup>2</sup>);

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<sup>2</sup> I note that although the NASD has cited the Task Force Report in a footnote in its "Statement of Purpose" for the proposed new rule, it cited the Report only to support a contention that specialists may create "negative implications" for parties in arbitration. In its Statement of Purpose, *the NASD has omitted any reference* to the various positive attributes of specialists that are expressly mentioned in the Task Force Report.

2. **Investors generally pay lower fees when represented by specialists:** Many specialists use lower fee structures (whether on an hourly or contingency basis) than attorneys. This, too, was expressly recognized by the Report of the Arbitration Policy Task Force to the NASD Board of Governors);
3. **Investors generally pay far less in costs when represented by specialists:** As the Task Force also recognized, consumers who are represented by specialists are often not forced to shoulder the expense of retaining an expert witness or consultant because of the specialist's expertise in securities matters. The Commission undoubtedly understands that the cost to retain an expert witness – which most attorneys require their clients to pay – in NASD arbitration matters can be substantial, often doubling the overall cost to an investor of pursuing an arbitration against a dishonest broker; and
4. **Specialists Often Accept Cases Too Small for Investors to Afford to Retain a Securities Attorney:** Many potential arbitration matters involve disputes where an investor's losses may be less than \$100,000. Often, experienced securities *attorneys* are unwilling to take these cases since, given their case-load and overhead, the case is deemed to be too small. In these circumstances, specialists are often willing to accept these "small" cases – assuming there is strong evidence of a violation of industry standards by the broker – and assist the consumer in recovering lost money that would have otherwise never been recovered.

As the Task Force Report states, the right of consumers to continue to choose to be represented by specialists in securities arbitration has been strongly supported by **AARP** and the **Consumer Federation of America**, among others.

As an example to the Commission, I believe that my credentials make me uniquely qualified to serve as an arbitration specialist who has represented in excess of 230 parties in private, NASD arbitration matters since 1996. I am an arbitrator for the NASD and have been a member of the NASD's Board of Arbitrators since 1995 (arbitrator number A14108), where I am classified as an "industry" panel member. Previously, I was a member of the securities industry for approximately 10 years (1986-95), having served as a registered representative at both Merrill Lynch and PaineWebber (where I held various licenses). My compliance record in the industry was "100% clean," including no customer complaints of any kind. In 1995, I obtained my Juris Doctor degree. In March of 1995, when I retired from PaineWebber, I accepted a position in Los Angeles as a law clerk at the law firm of Paul, Hastings, Janofsky & Walker. Since 1996, I have been exclusively involved in the area of securities arbitration – serving as a consultant and an expert witness (having been qualified as an expert witness by NASD arbitration panels in California and New York and by the Superior Court of California). In 2002, I represented parties to an NASD arbitration matter (arbitration

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matter number 00-00737) who were awarded \$1,086,000 following a two year arbitration proceeding which culminated in over a week of hearings before an NASD arbitration Panel in Los Angeles. The majority of claimants whom I have represented are elderly and/or infirm, including claimants afflicted with Alzheimer's disease, cancer, back and neck problems, and a variety of other health problems often suffered by elderly persons.

### **Proposed Modification to the Proposed New Rule**

There are currently three sub-sections to the NASD proposed rule (sub-sections (a), (b), and (c), respectively). I recommend that the Commission require the NASD to provide a fourth sub-section, which would include, among other things, the recommendation of the Task Force found on page 133 of the Task Force Report. Sub-section (d) to the proposed rule should read as follows:

#### **(d) Representation by Arbitration Specialist Upon Submission of Required Certification to the NASD**

At any stage of the arbitration (or mediation) proceeding held in a United States hearing location, all parties shall have the right to be represented by an arbitration specialist who is either (a) representing the party in association with a licensed attorney, or (b) has provided the NASD with the required certification form entitling the specialist to practice before NASD arbitrators in private, non-judicial arbitration proceedings. In order for an individual to practice as a specialist in arbitration proceedings at the NASD, the individual must certify, at the time of their first appearance, that they:

1. Have not been subject to a bar or suspension from the securities or commodities industry within the last 10 years;
2. Have not been denied a state securities license following an application for such license;
3. Have not been convicted of any felony or misdemeanor described in Section 15(b)(4)(B) of the Securities Exchange Act;
4. Have not been disbarred or suspended from the practice of law; and
5. Have formerly been licensed in good standing with the NASD as a registered representative or manager for at least five (5) years.

By instituting this basic criteria for specialists, the NASD would achieve its stated objective to "protect the public and benefit investors by ensuring that a party's representative has a minimum level of skill, training, and character," while at the same time continuing to afford defrocked investors access to an affordable specialist with significant securities industry experience – **which is a right that investors have had for 40 years within the private securities arbitration process.**

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To conclude, non-lawyer specialists have a 40-year history of representing parties before securities arbitration panels in private arbitration proceedings, such as those conducted by the NASD and other SROs in this country. The previous work experience in the securities industry typically possessed by such specialists is often extremely valuable in fact-driven securities disputes between consumers and their former stockbroker. The above proposed subsection to the NASD's proposed rule would insure that all specialists possess such industry experience and, together with the other components of the proposed subsection, it would help the NASD achieve its expressed goal of protecting the public and benefitting investors "by ensuring that a party's representative has a minimum level of skill, training, and character." The addition of such provisions would also be logically consistent with the NASD's most recent public statements to continue the long tradition of allowing consumers the right to choose to be represented by arbitration specialists in private arbitration proceedings. I believe that if the NASD's proposed rule were adopted as written, the Commission would create an impression for important consumer interest groups, such as AARP, that it is compromising both the integrity and validity of all future arbitration results, which in turn would leave the entire system open to serious challenge.

I hope the Commission finds these points helpful to its consideration of the NASD's rule proposal change, and I would be happy to be of further assistance, if requested.

Very truly yours,

[ Signature affixed to original ]

Montgomery G. Griffin

cc: Joan S. Wise, General Counsel for the AARP  
Richard P. Ryder, Securities Arbitration Commentator