August 9, 2005

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.

NASD arbitration was intended to be a "*quick, fair and relatively inexpensive method of dispute resolution*" (as stated in The Arbitrators Manual, published by SICA). Therefore, when reviewing proposed rule change SR-NASD-2005-023, foremost in everyone's mind ought to be if the passage of this rule is contrary to, or consistent with, a "*quick, fair and relatively inexpensive method of dispute resolution*." We believe that this rule proposal is contrary to the goal of NASD arbitration.

NASD staff has stated that its rules "*must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and in general , to protect investors and the public interest*". I have found that NASD policy as practiced is frequently 180 degrees apart from its rules. In truth, it has been the policy of NASD Enforcement to frequently permit its largest members to defraud the public with almost complete impunity. The point being that sometimes, but not always, it would appear that the foxes are in charge of the hen house. I suspect that is what, to some extent, is taking place with this rule proposal. The proposed rule change *attempts* to deny the public access to knowledgeable and affordable representation from individuals that are not attorneys (except on the industry-side where brokerage firms will be expressly permitted to be represented by a non-attorney).

Additionally, the NASD states that they "*continue to be concerned about the on-going problems that are caused by the practice of non-attorney representation in the forum*". That statement, if not entirely untrue, is misleading. To our knowledge, the NASD has done absolutely nothing in investigating this so-called problem for at least 10 years. It's certainly not documented. If the NASD has documented some anecdotal incidents, it has not compiled any statistical records concerning the win-lose rate of NARs versus that of attorneys, and there is no comparison between problems caused by non-attorneys versus those caused by attorneys. How can the NASD say they continue to be concerned when there is no evidence to back up such a concern?

We suspect that these "*ongoing concerns*" are really based upon that of having former branch managers or compliance persons representing parties. Their knowledge and credibility is frequently accepted by arbitration panels. So, it is really not in anybody's best interest, other than lawyers, to attempt to limit the practice of representing parties in arbitration to licensed attorneys. The NASD's policy statement certainly indicates that this rule proposal is not directed towards non-attorneys. However, saying that the rule is not intended to do so, does not mean that it will not be *interpreted* as doing so.

Importantly, the proposed rule change is also contrary to current NASD policy. As expressed in the Amicus brief recently filed by the Securities and Exchange Commission in the support of the SRO's suit against the California Judicial Council and sitting judges of the California Superior Court:

> ***"The SROs are, moreover, national organizations, and rules that provide for investor protection without imposing unnecessary costs can only be imposed on a nationwide basis. They cannot be the subject of patchwork regulation by the states. If California can independently impose its disclosure and disqualification standards on the SROs, so can the other states. Yet no state is in a position to know, much less control, what each other state might do in this area. The SROs would be subjected to a system of disclosure and disqualification that was imposed on a piecemeal state by state basis, by jurisdictions that are not in a position to assess, nor given the responsibility to assess, the nationwide effect of regulation on the SROs. Only a single regulator, the Commission,***
> ***can carry out that task."***
> Amicus Brief by the SEC in NASD v. Judicial Council, U.S. District Court, Northern District of California case no. C 02 3486.

The NASD has been more blunt. As George Friedman, executive vice president of NASD Dispute Resolution, testified under oath:

> "*The Code [of arbitration procedure] applies uniformly in every jurisdiction. It would not be feasible, as a practical matter, for NASD Dispute Resolution to administer arbitrations pursuant to the differing requirements of 52 different jurisdictions*." Decl. of G. Friedman, 7/19/02, in NASD v. Judicial Council of California, U.S.D.C.N.D. Cal. C 02-3486 (2002).

It makes no sense for the SEC to adopt this proposed rule change, which in effect leaves open the possibility of 50 different sets of rules regarding who can represent whom in NASD arbitrations. Therefore, the SEC should not adopt this rule change in its

current format as it is contrary to the NASD's custom of having only one set of rules that are applied equally in all fifty states.

The proposed rule change is just another example of the public not getting the fair shake it bargains for. The NASD exhorts their concern over the public's welfare but the facts frequently suggest otherwise. Not allowing any party to have the representative of their own choosing in arbitration is not in anybody's best interest, public or industry.

Perhaps best saved for another day, we would minimally suggest that the SEC consider a rule proposal making all SRO arbitrations voluntary rather than mandatory. The American Arbitration Association, which has handled literally hundreds of times more claims than the NASD has no prohibition as to who can represent who. Non-attorneys are welcome. Why is the AAA not concerned about who represents who, while the NASD has all these "*ongoing concerns"*? The answer: there is no problem, has never been a problem, and is only a problem in the minds of certain people looking to protect the NASD membership and attorneys looking for more employment opportunities. It is not in the public's best interest to approve this rule change as offered.

From its inception, NASD arbitration was intended to be heavily populated with non-attorneys. Non-attorneys are active as arbitrators, as branch managers and compliance persons representing friends and business associates, whether public or industry. NASD arbitration is an alternative to litigation, and not an alternative form of litigation.

Whether or not a parties representative is a lawyer, non-lawyer or unlicensed lawyer, the most important consideration should be who does the party, claimant or respondent, want to represent them. And most often that person should be well experienced in securities related matters, no matter their licensure standing, It's clearly in the brokerage industry's best interests that its members be represented by the attorney of their choice, whether or not that individual is licensed in a particular state should not even be an issue, since that could easily be violative of the "*quick, fair and relatively inexpensive"* doctrine behind NASD arbitration.

Forcing a brokerage firm to not be able to use the representative of its choice, but instead go out and have to hire someone else, either in addition to, or in place of, clearly drives up costs. By not allowing the parties the representative of their choice is also clearly biased and prejudicial to many (public or industry) from obtaining the type of competent representation they seek. Since when should the field of arbitration be dominated and controlled by attorneys?

Wasn't the whole point of arbitration to get away from litigation and all the negative issues attached to litigation and attorneys? Of course it was, but thanks to local bar associations, virtually anything that an attorney does is now (incorrectly) considered the practice of law. Neither the NASD nor the SEC should be dictated to by the various bar associations because these entities want more work for their members. Arbitration works just fine without making it the exclusive province of attorneys. That is not in the public's best interest.

Further, the possibility of forcing public customers to either go it alone, or be compelled to hire a local attorney they might not care for, when there is another attorney (or non-attorney) that wishes to advance their claim, on a more favorable financial basis, who may have special knowledge regarding their particular product or dispute, but is simply not licensed in a particular state, again flies in the face of a "*quick, fair and relatively inexpensive method of dispute resolution".*

For all the above reasons, it is clear that the language incorporated into this proposed rule change is contrary to NASD arbitration policy. The public and the industry should not have their hands tied based upon the whims of individual states and their bar associations. Neither the NASD nor any state should be able to possibly preclude knowledgeable former industry members from representing parties in arbitration even if they are not attorneys.

The solution we believe is to change the language of rule 10316 to read as follows:

Representation in Arbitration

"*Parties need not be represented by an attorney in arbitration. They may choose to appear pro se (on their own) or be represented by a person who is not an attorney, such as a business associate, friend or relative".* This is of course is the precise language created by SICA (Security Industry Conference on Arbitration) and is found in The Arbitrators Manual. Additionally, there should be language in a footnote stating that this rule is intended to permit out of state attorneys to represent parties in NASD arbitration proceedings anywhere in the country.

It is time that the SEC adopts this precise language into Section 10316 of the Code. By doing so, individual states will likely, based upon the recent court decisions in *Jevne v.* Superior Court (JB Oxford) (2005) 35 Cal.4th 935 and Credit Suisse First Boston v. Gunwale (9th Cir. 2005) 400 F.3d 1119, be discouraged from contesting who can represent who in arbitration. The SEC will not have abandoned any of its control over the arbitration process. There will be one set of rules applied equally in all states or jurisdictions. Brokerage firms and the public can use licensed and unlicensed attorneys, non-attorneys as all can appear as a party's representative based upon the rules of the NASD, as approved and overseen by the SEC. Neither the public nor the industry will be forced to hire an attorney they don't want or need, but instead can be represented by whomever they chose.

Most importantly, it will preserve the "*quick, fair and relatively inexpensive method of dispute resolution"* that is the cornerstone of NASD arbitration. And, in the long run that is what is really most important and what must be protected. No matter what the NASD does or says, by permitting parties to be represented by whomever they chose, and not encouraging the states to make that determination will far better "… *promote just and equitable principles of trade, and in general , to protect investors and the public interest*" rather than the proposed rule in its current form.

In closing I have included portions of a letter we recently received from a client who completed a securities arbitration claim a few months ago (Suzanne Rickwal v. Salomon Smith Barney et al, PCX Case No. 02-S055.) Most who read this letter, and who will make the decision as to whether or not to adopt the proposed rule change, has never themselves been the subject of an arbitration proceeding. Most don't understand what it is really like to go to an arbitration hearing and ask complete strangers for money. But, there is much more at stake than just money. Ms. Rickwal describes the experience better than any other person I have ever had the privilege to represent. I hope you will take the time to read her letter, because in the final analysis, arbitration is not about the law, and it is not about getting even. It is about the truth, and that is not the exclusive province of attorneys.

Respectfully,

Richard Sacks
Securities Arbitration Consultant

Founder, Investors Recovery Service, 1991
Acted as a party's representative in over 1000 arbitration proceedings,
Tried over 225 claims to a decision
Mediated more than 250 to settlement
Participated in the September, 1995 NASD Arbitration Focus Group
Trained Law Students at University of San Francisco, "Investor Justice Project" and
Not an attorney.

Enclosure: Suzanne Rickwal's Letter dated May 16, 2005

May 16, 2005

Richard,

Thank you for your candor, insights and honesty. It is clear that you know and have seen life and the world at its best and worst. I have a sense that you don't write many notes like this, which makes me feel that much more honored that you took the time to share feelings, impressions and glimpses into human conduct that I, in my very agitated and aggrieved
State of mind, could never have witnessed, let alone internalized.

Your words offer a kind of clear and steadying closure, as well as a reflection of what was for everyone in that room, other than myself, a small moment in time, to weigh the actions and conduct of people that took place nearly five years before. While everyone

else prepared for a hearing, I readied myself for what, I thought, was certain execution. The only
saving grace was the knowledge that in a matter of weeks it would all be over. Win or lose, I promised myself not to relive, rework, or attempt to retrieve what was gone and done. I have never felt so violated, sullied, abused or exposed through the behavior of someone else. And yes, absolutely, to the notions of justice and revenge. But as you so succinctly point out, is
one victim worthier than the next?

After years spent trying to restore some sense of integrity, dignity, even normalcy to myself, my psyche, my sense of well being, the thought of putting myself under the glare of scrutiny was one of the hardest and most embarrassing, humiliating, things I have ever had to do. It was as though being victimized once wasn't enough - now I had to bring it ,and
myself, out into the open to reveal the dirty little secrets, the collusion, the negligence, the reenactment of the crime. There is nothing more shameful and degrading than the feeling of helplessness at being attacked for stepping forward, speaking out, blowing the whistle. Character assassination is such a perfect and precise term. Sadly, its effectiveness all too often wins the day.

Let me move on - this note isn't meant to be about me, but about you. In all the drama and demands of those days of hearings, I am sorry I never had an opportunity to know you and the depth of your feelings, observations, and opinions. Your note was astonishing in its accuracy, conclusions and profundity. I cannot possibly describe to you how revealing and nearly cathartic it was to hear the thoughts and perceptions of someone other than myself who shared that experience, who was, in fact, in the room with me, and whose agenda was more tempered in reality, more grounded in reasoning, than my own. Naturally, you were my advocate, but your view of all you saw and heard was quietly, stoically and philosophically expressed. Your thoughts on adversity touched me deeply since that is essentially what this exercise, this defining life moment was all about.

It's curious how this whole story began and ended in San Francisco. I feel such a gravitational pull to return there. If I should, I hope one day I can meet the other characters in this happily ever after docudrama.

And finally, in this time of validation, I want to especially thank you for your own. With no model to follow and no blueprint to guide me, it means a great deal to have someone of your experience, character and integrity acknowledge what, in many ways, was as valuable to me as the monetary award.

Suzanne Rickwal