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August 10, 2005

Via email only

Jonathan G. Katz, Secretary
Securities and Exchange Commission
100 F Street, NE.
Washington, DC 20549–9303.

Re: SR-NASD-2005-23

Dear Mr. Secretary:

I am an attorney licensed to practice law in California and Wisconsin. Since 1994, the vast majority of my practice has been and continues to be representing investors in arbitrations pending at the NASD, the Pacific Exchange and the New York Stock Exchange, as well as in related litigation. I also represent individual brokers in claims against brokerage firms, and in regulatory matters. In many of my cases, my clients are also represented by a non-attorney advocate.

The NASD's proposed rule change, SR 2005-023, should not be approved in its current form, for the following reasons.

(1) The proposal itself is inconsistent with the NASD's Statement of Purpose for the proposed rule change. The plain language of the proposed rule states that arbitration participants have the right to be represented by any attorney as long as that attorney is licensed anywhere in the U.S. Yet, the NASD's statement of purpose states that issues regarding unauthorized practice of law are left to the states to decide.

If this statement of purpose is correct, why is the NASD bothering with proposing this rule change, which will (according to its own rationale) have no effect on whether an attorney can represent a party in arbitration in any particular state? At best, the rule is unnecessary; at worst, it will leave the door open to considerable interpretative difficulties and litigation collateral to arbitration (as discussed below).

(2) The proposal unfairly favors industry participants at the expense of public customers. The language in subparagraph (b) of the proposed rule gives

brokerage firms the right to be represented by a non-attorney, but in subparagraph(c) the rule seems to leave whether claimants and individual brokers have a similar right to a state by state determination. This rule therefore gives industry firm respondents favored treatment and an unfair advantage in, among other things, obtaining experienced advocates.

The SEC and the NASD have also asserted that the NASD arbitration program cannot function under 50 different sets of procedural rules (a position taken in support of its argument that NASD rules preempt contrary state law). See Amicus Brief by the SEC in NASD v. Judicial Council, U.S. District Court, Northern District of California case no. C 02 3486; and 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).

Yet, this proposed rule change will do exactly that -- whether a claimant can be represented by a an attorney licensed in another state or by a non-attorney in NASD arbitration will depend heavily on state law, and may change during the course of an arbitration should venue of the hearing be changed!

(3) Permitting 50 different approaches to who can represent parties in NASD arbitrations is also contrary to long-standing NASD practice, and conflicts with SICA-drafted "The Arbitrators Manual". As the NASD's statement of purpose makes clear, non-attorney representation has been a part of NASD arbitration since its inception.

(4) Most disturbing, however, is that even though the NASD clearly and unambiguously states that this rule proposal does ***not*** effect non-attorney representation, at least one commentator has concluded that this proposed rule will indeed bar non-attorney representatives. See comment by Michael Firestein and Navid Yadegar (attorneys who frequently represent industry parties in arbitrations).

(5) Finally, the proposal as written is an invitation for any party who would like to delay an arbitration hearing to run to court for even temporary injunctive relief on the grounds that the opposing party's representative is somehow "unqualified".

In sum, this proposal is, at best, unnecessary, and favors industry respondents at the expense of public customers. As written, the proposal will likely increase the amount of collateral litigation arising out of arbitration. Because of the language employed in the proposed rule, the proposed rule can be (and has been) interpreted in ways not intended by the NASD, and which would be contrary to decades-long practice at the NASD.

If the NASD is truly serious about addressing issues of multi-jurisdictional practice, then the rule proposal should be amended to state only:

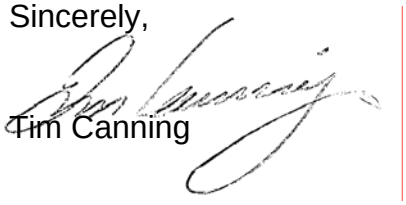
> *(alternate subparagraph a)* Parties need not be represented by an attorney in arbitration. They may choose to appear pro se (on their own) or be represented by a person who is not an attorney, such as a business associate, friend or relative.
>
> *(alternate subparagraph b)* Arbitrators do not have the authority to rule on the qualifications of any individual, firm or company to represent a party in an arbitration proceeding.

Alternate subparagraph (a) is taken verbatim from the SIA publication, *The Arbitrators Manual*, which is a truer statement of current practice at NASD Dispute Resolution than the rule proposed by the NASD. Alternate sub-paragraph (b) would eliminate the tactic of an opposing party demanding that the arbitrators bar a parties' representative. In light of the preemptive effect of SEC-approved NASD rules, the above amendments would also eliminate collateral litigation on this issue.

For the foregoing reasons, the rule proposed by NASD Dispute Resolution should not be approved.

Thank you for your consideration of this comment.

Sincerely,



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