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July 6, 2005

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

Re: File No. SR-NASD-2005-052

Dear Mr. Katz:

After writing my comments on the above referenced File,[1] I realized that the comment period had passed and the proposed change had already been accepted.[2] That is extremely disappointing given that the alleged problem had existed for about 30 years and the comment period was only 35 days.

In any case, I hope the SEC will still post and consider my enclosed comments. Thank you.

Sincerely,

Richard Skora

[1] Release No. 34-51693; File No. SR-NASD-2005-052, May 12, 2005
[2] Release No. 34-51931; File No. SR-NASD-2005-052, June 28, 2005

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450 Fifth Street, NW
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Re: File No. SR-NASD-2005-052

Dear Mr. Katz:

Thank you for this opportunity to comment on the above-referenced NASD proposal.

For several years I have been researching NASD arbitration. In particular, I am conducting a statistical study on the relationship between damage claims and awards.

The NASD's proposal recommends a payment to arbitrators for deciding discovery-related motions that are taken up outside the regular hearing. The payment would be on top of other payments to arbitrators.

The proposal does not provide sufficient information and cause to justify a rule change, and the issue of paying arbitrators for deciding discovery-related motions evidences bigger contradictions and problems within the NASD arbitration system. I recommend that the SEC reject the requested rule change.

Payment for Deciding Discovery-Related Motions

The NASD's proposal recommends a "Payment for Deciding Discovery-Related Motions Without a Hearing Session." It gives the following justification for the rule change:

> In 2002, NASD Dispute Resolution conducted arbitrator focus groups across the country. One of the consistently raised concerns was the amount of time and effort invested by chairpersons in reviewing and deciding various discovery motions, especially in situations in which the motions are decided without a hearing (i.e., on the papers). Also, Dispute Resolution staff has found that the current lack of compensation for deciding such motions has made it more difficult to recruit current arbitrators to become chairpersons.

The explanation is disappointing. It is notable more for what it does not say than for what it does. The NASD should reveal the full study so that people may critically analyze it for themselves and draw their own conclusions.

For example, what are these so-called "concerns?" What does "more difficult to recruit" mean? Did the study identify other problems? And most importantly, if arbitrators felt they were not compensated for deciding discovery-related motions, have they not been spending the appropriate amount of "time and effort?" These are all questions that should be answered.

At any rate, taking at face-value that the NASD simply wants to pay its arbitrators more, there are still some concerns. It is unreasonable to pay arbitrators more for deciding discovery-related motions when in many cases they already are not satisfactorily performing that function.

For example, many arbitrators allow securities firms to abuse discovery to the detriment of customers and employees of securities firms. Securities firms refuse to produce responsive, discoverable documents. They hide documents. Then arbitrators congratulate securities firms' counsels on their success in manipulating the arbitration process.

And countless times when securities firms are not outright breaking discovery rules, arbitrators ignore the discovery rules and steer arbitration in the securities firms' favor. Arbitrators condone obviously dubious excuses by securities firms to not produce responsive, discoverable documents. They allow the securities firms to decide which documents to be produced regardless of whether the securities firms or the individuals hold the documents. As well arbitrators allow securities firms to decide when to produce documents – sometimes as late as the time they enter the documents into evidence.

For several years the NASD has been aware of these abuses but has failed to correct them.

Also the proposal reaffirms an unfair practice. It is already common for the chairperson to unilaterally decide discovery-related motions and, therefore, choose what the other two arbitrators see. The rule change acknowledges this practice as it states, "If more than one arbitrator considers a discovery-related motion, each arbitrator will receive $200." This means that when the chairperson is an industry arbitrator, he has the opportunity to impose his bias on the other arbitrators. The practice that one person decides discovery motions is also at odds with the system that three arbitrators – at least one of whom is "classified" as a non-industry arbitrator – decide the award.

Finally, the rule change under discussion contradicts the NASD's current policy to not specifically compensate arbitrators to deliberate outside the hearing on such topics as the law, testimony, and evidence as well as their final decision and damages. Arbitrators have complained to the NASD and the SEC about this later policy. And worse when arbitrators have asked the NASD for assistance or more time to deliberate, the NASD has refused and even rushed them to just get the decision out.

Of course all of these problems are magnified because NASD arbitration is closed to public scrutiny and appeal is all but impossible.

More Rules but Arbitration is Still Not Fair

These changes need to be analyzed in the bigger context of what the NASD promised to customers and employees of securities firms. Over the last approximately thirty years, a simple but unfair arbitration process has evolved to what is now a complex and unfair process. The plethora of new rules evidences that NASD arbitration was ill-conceived from the beginning. The NASD is using customers and employees as cannon fodder for its arbitration experiment.

The NASD is playing a shell game. It is hiding a glut of problems that deny the customer and employee a fair arbitration. It does not enforce its rules. Instead it adds more rules to create the appearance of progress, yet there has been no proof of a measurable benefit and certainly no proof that the process is fair or getting fairer.

The NASD has not kept its promise to deliver fast and inexpensive as well as fair arbitration. Customers and employees (and their counsels when they can afford to hire them) must learn a parallel system for dealing with disputes. It is becoming increasingly burdensome to monitor this arbitration system. The hundreds of complaints from customers and employees and their counsels show that NASD arbitration is not fair and is biased in favor of the securities firm.

I urge the SEC to re-examine the reason for securities arbitration and determine whether NASD can be salvaged. But in the intervening period, make NASD arbitration optional for customers and employees.

Conclusion

The proposal does not provide sufficient information and cause to justify a rule change. The NASD's support for the proposed rule change is at best superficial. In particular, there is no proof that the rule change will improve arbitration for customers and employees who are forced to use mandatory arbitration. Additionally, the rule change draws attention to other contradictions and problems within NASD arbitration. I urge the SEC to reject the proposal.

Thank you for your consideration.

Sincerely,

Richard Skora