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Securities and Exchange Commission

Re: Release No. 34-52332
File No. SR-NASD-2005-094
"Public Arbitrator" Definition

I am an attorney who represents investors in NASD arbitration in Kansas and Missouri. I spent 13 years as a registered representative in the securities industry and remain a NASD "non-Public" arbitrator due to a continuing industry affiliation. I have previously expressed the opinion that industry sponsored arbitration, as practiced, is biased against public customers and heavily favors the NASD member firms. The proposed changes to the definition of "public arbitrator" is woefully inadequate and fails to address the underlying problem of inherent industry bias. The NASD seeks to apply a band-aid when public customers are in need of a tourniquet.

1. Industry Arbitrators Are Inherently Biased and Are Perceived as Such

No element of forced arbitration is more intuitively corrupt than the rule that the NASD member firm must have a fellow industry representative on every panel hearing a customer complaint. That the provision is structured for "back scratching" is obvious and endemic. It not only discriminates against public customers in arbitration cases, it discourages thousands of other defrauded customers from ever filing an arbitration complaint. Combined with high filing fees and the potential for ruinous further fees assessed by arbitrators, a great many people believe it unwise to throw good money after bad when confronted with a panel consisting of another broker and two of his golf buddies. Nor can a practitioner provide much assurance when the most common award, even when the customer "wins," is normally less than half of actual losses. The award of fees and expenses mandatory under state law is rare. Much of this overt bias is due to the presence of a "non-public" arbitrator to spy on public arbitrators in order to keep the industry informed of those who are not sufficiently industry friendly. There has

been media coverage in the last year concerning "public" arbitrators being removed from the pool for making substantial awards against influential industry firms. True or not, it is the public perception and will remain so until the Commission forces at least the appearance of fairness in arbitration by removing the most obviously biased arbitrators. The amendments to the definition of a "non-public" arbitrator suggested are of marginal value to the public investor. The NASD should be forced to initiate real reform.

2. Real Reform Would Eliminate All Arbitrators With Industry Ties

Industry lawyers, accountants or other professionals living off securities industry fees are more inherently biased than actual employees. Any percentage rule is a sham. Lawyers and other professionals are always interested in increasing their business, whether its 5% or 50% of their total. They are equally interested in not losing what they have. The securities industry does not hire professionals who do not support the industry. And a lawyer or other professional has all of the conflicts of every other member of his or her firm. The system of encouraging industry lawyers, their partners and other professionals to serve as arbitrators while soliciting industry business is inherently unethical and should be ended. A professional person should work for a brokerage firm or act as an arbitrator. To do both is anathema to a neutral forum.

3. The Proposed Amendment Does No Harm, But Does Little Good.

Inherently biased arbitrators will be reclassified as "non-public." But, the classification does nothing about the underlying bias and conflicts which require arbitrators to disregard their own financial and career interests in order to be neutral. There are those who will do so. But there are others, perhaps many more, who won't or can't afford to do so. Public customers will not have a neutral arbitration forum as long as it is dominated by members whose conduct is in question. The fox can not guard the chicken house.

Sincerely,

Barry D. Estell