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VIA E-MAIL & U. S. MAIL

Jonathan G. Katz, Secretary
SECURITIES AND EXCHANGE COMMISSION
100 F Street, N.E.
Washington, D.C. 20549-2001

Re: SR-NASD-2005-094; SR-NYSE-2005-43, "Public Arbitrator" Definition

Dear Mr. Katz:

The purpose of this letter is to provide the Securities and Exchange Commission with comments on the above-referenced proposed rule changes, which are intended to ensure that NASD and NYSE arbitration continues to provide *both* public investors and securities industry members with a fair and efficient means of dispute resolution.

The proposed rules improve the definitions of public and non-public arbitrators to provide additional clarity in the arbitrator classification process. With these changes, the NASD and NYSE have addressed specific concerns regarding ambiguity and potential errors in classification under the old rules. Some of the comments submitted in response to these rule changes, however, suggest that the rule changes do not go far enough.

Rather, some of the comments submitted (primarily by members of the securities claimants' bar) promote a radical restructuring of the arbitral process by eliminating the presence of industry arbitrators entirely. Such a result would remove a valuable resource from securities arbitration to the detriment of all participants in the forum.

The NASD and NYSE rules provide for a single industry arbitrator – who at all times serves as a minority member on a three arbitrator panel – to provide at least a basic level of industry expertise to the fact finding process. This

expertise is objective and impartial, unlike the advocacy presented by the parties, their counsel or their paid experts. An industry arbitrator's background in the securities industry does not result in bias (as specific rules are in place to ensure that the industry arbitrator has no ties to any of the parties in the dispute), but rather assists in the efficient resolution of disputes in a forum in which extensive discovery, depositions, motion practice, and competing expert witness testimony are not intended to be the norm.

Indeed, Supreme Court Justice Byron White explained the vital role performed by arbitrators with relevant experience:

> It is often because ***they are men of affairs, not apart from but of the marketplace,*** that they are effective in their adjudicatory function.... I see no reason to automatically disqualify ***the best informed and most capable potential arbitrators.***

Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150 (1968) (emphasis added).

Another federal appellate court shared this view:

> The courts have repeatedly explained... that ***an arbitrator's experience in an industry,*** far from requiring a finding of partiality, is one of the factors that ***can make arbitration a superior means of resolving disputes.***

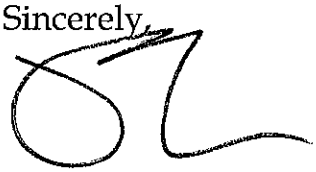
Scott v. Prudential Securities, Inc., 141 F. 3d 1007, 1016 (11th Cir. 1998) (emphasis added).

Moreover, while some of the comments to the rules suggest that the presence of industry arbitrators has "stacked the deck" against public customers, this suggestion is disproven by the objective facts. Indeed, as published on the NASD's website, over the four years from 2001 to 2004, approximately 54% of

arbitrations filed were settled, ostensibly resulting in some payment to the customer. In the arbitrations that proceeded through final hearing – which would generally be the more hotly disputed and defensible cases – ***claimants*** have prevailed more than half of the time. Such results simply do not support any argument that the forum is biased against the public customer.

For the reasons set forth by Justice White and many others, the inclusion of a single industry arbitrator on NASD and NYSE arbitration panels strengthens this method of dispute resolution.

Sincerely,



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