Comments of
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On SR-NASD-2005-094 and SR-NYSE-2005-43

Jonathan G. Katz, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: SR-NASD-2005-094 and SR-NYSE-2005-43

Dear Mr. Katz:

I have been practicing securities law for more than twenty years and have worn many hats - respondent's attorney, in-house compliance/defense attorney, NASD enforcement attorney and claimant's attorney. I have sat for and passed almost every brokerage exam that the brokerage industry offers and also serve as an arbitrator for the NASD and NYSE. I am very familiar with arbitration and the brokerage industry. I have a national securities arbitration practice with my base in Philadelphia, Pennsylvania.

With respect to the proposed changes to the rules, the proposed changes do not go far enough. The non-public/industry arbitrator should be eliminated completely. There is no logical reason to continue to have a non-public/industry arbitrator as part of the panel. I am not aware of any other industry in which one of the sitting arbitrators is in the same industry as the industry that the claimant is bringing a claim. With experienced arbitrators and experts, the original reason to have an industry panel member on the panel has been eliminated.

Claimants do not have the right to a jury trial. That has been eliminated with their execution of arbitration agreements. The U. S. Supreme court allowed for mandatory SRO arbitration because claimants were to obtain as fair a hearing as they would receive before a jury. Having an industry arbitrator serve on a panel may not give that claimant the fair hearing they deserve.

One of the problems with having a stockbroker or branch manager industry arbitrator sit on a panel is that the industry panelist comes to the arbitration not looking at the case from the standpoint of the law or the standard of care of the industry but rather how he has handled his own clients on a day to day basis.

With respect to industry arbitrators who are in-house or outside defense counsel, the law business is very competitive. Law firms are vying for the same brokerage clients. The reality is that the outside counsel who renders a large award to a claimant will not be looked at favorably by his current clients, new potential clients or even his own law firm. And how can an in-house or outside defense attorney render a meaningful award in favor of a claimant when they are

defending their brokerage firm clients and making the same defense arguments for their brokerage clients that are being presented at the arbitration they are serving as an arbitrator. The goal of the in-house or outside defense counsel is to keep claimant awards at zero or low and have statistics that show low claimant awards so they can try to settle their cases along the lines of the statistics. This population should not be sitting as arbitrators.

Regarding the public arbitrator, the 10% rule should be eliminated. Claimants cannot audit law, accounting or other professional firms to confirm that their revenues are below 10%. Second, large law or accounting firms may have offices across the country that bringing in multi millions of dollars. A percentage less than 10% can be a very significant dollar number leaving the same problems as the in-house and outside counsels.

Further, any law, accounting or other professional firm that has less than 10% of its revenue stream from the industry wants to bring in the business to make that industry revenue stream more than 10%. It is not as if they are trying to stop at a percentage that is less than 10% of their revenue stream. They are going out and marketing themselves to bring in more brokerage industry business and has the same mind set as the firms that have a revenue stream of 10% or more of their income. The professional employed by such a firm has the same problems that the in-house or outside counsel has. The public arbitrator who works for a firm that has brokerage business and renders a large award to a claimant will not be looked at favorably by his current clients, new potential clients or even his own firm.

The way to eliminate the situation is to modify the definition of Public Arbitrator as set forth in Rule 10308 (A) (5) to exclude any person whose firm has represented any persons or entities listed in paragraph 10308 (a) (4) (A) of the NASD Code

Statistically, there are very few arbitrations brought in relation to the number of people that invest their money with brokerage firms. It is the best interest of Claimants, the SRO's and the brokerage industry to not have a biased system or one that even has the appearance of bias. If investors believe they cannot get a fair outcome in arbitration, they may be less inclined to invest with brokerage firms causing America's capital markets to not have the investor capital that makes the American economy strong.

Respectfully,

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