Comments of Eliot Goldstein, Esq.
on SR-NASD-2005-094 and SR-NYSE-2005-43

September 19, 2005

Jonathan G. Katz, Secretary
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303

Re: SR-NASD-2005-094 and SR-NYSE-2005-43 (Classification of Arbitrators)

Dear Mr. Katz:

I am writing to comment on the rule changes proposed by the NASD and NYSE regarding the classification of arbitrators. Although these changes would be an improvement over the current rules, I believe they fall short of what is needed.

My perspective is of one who has worked as a securities and financial services attorney in the Washington, D.C. area for more than 25 years. I have served as Senior Enforcement Counsel for the SEC, as Assistant Director of Enforcement for a federal bank regulatory agency, and, in private practice, as a court-appointed Receiver and Claims Administrator for the SEC in securities fraud cases. Although the majority of my practice in recent years has involved representing public investors in securities arbitrations, I have also had substantial past experience on the industry side, including representing brokerage and investment advisory firms, individual brokers, and serving as General Counsel for a major financial services firm.

I echo the sentiments of other commentators that the time has come to eliminate the mandatory requirement that one arbitrator on each three-member panel be an industry ("non-public") arbitrator.

Defining arbitrators as "public" or "non-public" does not resolve the most significant problem currently plaguing SRO securities arbitrations. If investors are to have confidence that the arbitration process is fair and impartial, the panel must be comprised of arbitrators that are EACH neutral, independent, and can truly be objective. Even if an industry arbitrator seeks to be objective, the appearance to the claimant is that the deck has been stacked with at least one "ringer." Whether this perception by claimants is accurate or not, it is not necessary and it can be avoided.

In my experience, the industry arbitrator does not serve a positive purpose. The rationale that one is needed to impart industry "expertise" to the other panelists is

simply not true. If any such expertise regarding the securities industry is needed in order that the other panelists better understand the facts or issues at hand, such expertise can be supplied by independent "experts" and other witnesses (such as branch managers or supervision personnel) who can be questioned and cross-examined on the record at hearing, or by the parties' respective counsel, who almost invariably are knowledgeable securities practitioners.

The industry arbitrator often holds sway over the other panelists and attempts to school them regarding his or her views as to how certain aspects of the industry are supposed to work. The problem is that this is often done in private during lunch or other hearing breaks, where the correctness and accuracy of any such views and professed expertise cannot be questioned, contested, or controverted by claimant's counsel.

One must question why the securities industry has fought so hard to prevent elimination of the industry arbitrator requirement and has gone to great lengths to recruit brokers and other associated persons to serve as industry arbitrators. The obvious reason is that they believe the non-public arbitrator, more often than not, will be neither neutral nor objective.

In some cases, the industry arbitrator is actually an active broker, branch supervisor, or compliance officer who has been the subject of (or works for a firm that has been the subject of) the very same type of wrongful conduct alleged in the arbitration on which he or she is sitting in judgment. Is this a fair and level playing field? More importantly, is this kind of conflict necessary or appropriate when thousands of intelligent and qualified arbitrators are available who have no industry ties and do not pose such conflicts of interest or appearance of partiality problems?

Finally, with respect to the proposed rule revisions of the definition of "public" arbitrator, I concur with the recommendations of others that the definition should exclude any person who is an attorney, accountant, or other professional whose firm has represented industry members within the past five years. In light of the numerous securities industry "conflict of interest" scandals in recent years, the importance of seeking to insure that public arbitrators are not conflicted by industry relationships and do not have the appearance of pro-industry bias cannot be overstated.

Thank you for your consideration. If you have any questions or require any additional information, please contact me.

Respectfully yours,

Eliot Goldstein