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Jonathan G. Katz, Secretary
Securities and Exchange Commission
100 F Street, NE Washington, D.C. 20549-9303

Re: File No. SR-NASD-2005-0094, "Public Arbitrator" Definition

Dear Mr. Katz:

I am an attorney who has been representing investors for the past 13 years before the NASD/NYSE arbitration panels. Please accept the following as my comments concerning the above proposed rule filing.

I support the proposed rule to the extent that it removes additional persons from the "public arbitrator" definition who may have industry-related conflicts of interest. But the new rule falls far short of meeting the compelling need of the industry-sponsored forums: providing panels of truly neutral arbitrators to hear the complaints of investors. The requirement that there be an “industry” arbitrator on all three-person arbitration panels is unconscionable. All representatives of the industry, as well as professionals with industry-related conflicts of interest, should be excluded from the panels if they are to afford a fair hearing to aggrieved investors.

Placing an industry representative on all three person panels has been defended in the past with the fig leaf that the industry panelist brings industry expertise to the deliberations. While this may be true to a greater or lesser extent, such expertise comes a dear price. First, whatever opinions or perceptions the arbitrator holds will not be subject to examination like the other evidence offered at the hearing by expert witnesses. Second, the industry panelist will bring biases to the deliberations. He or she may have sold the very product being criticized as unsuitable. If the investment product is unsuitable for the claimant, the panelist may be guilty of the same offense. It is easy for matters to become personal for an industry representative. Third and finally, the industry arbitrator, wearing the mantle of an expert at the time of deliberations, will have an undue influence on the other two panelists.

At a recent Congressional hearing that touched upon the fairness of securities industry arbitration a NASD Dispute Resolution representative defended the current system

with metrics showing that the investor (a) settled with the respondent(s) about half the time, and (b) in cases that went on to hearing, won those about half the time. Hence, it was suggested, investors win three-quarters of the time. What's to complain about?

Just this: you have to understand the game afoot to understand those simple statistics. Those that have had experience with the securities arbitration process understand that panels will not hesitate to give a claimant all or most of a small claim. The securities industry has no objection to that. Such an award goes into the investor win column and makes the process look fairer. Large claims, however, whether compelling or not, will be scrutinized very carefully. Granting a large portion of such a claim will anger industry litigants, and may affect the future selection chances of panelists. Hence, a large portion of these claims are either denied entirely (they only count as one loss in the investor loss column) or given a nominal award (a win for investors).

[Of course, metrics that set out the *median size* of awards, as well as median size of forum fees (with the session fees) would give us three truly meaningful measures of central tendency. I believe it would be possible to see at a glance with those figures the source of investor frustration with the securities arbitration process.]

Settlements are an entirely different matter, and in my view, not something for which the self-regulatory bodies can take credit. They are based upon the parties' expectations of what the award might or might not be, and are developed using such things as maximum/minimum award payoff charts and probabilities, with litigation expense an important consideration. Awards have more to do with the experience and reasonableness of counsel than the fairness of the process. One of the reasons experienced claimants' counsel come to the table are the fears outlined above.

In sum, there is no reason in the twenty-first century, if there ever was, for an industry arbitrator to sit with neutral panelists in hearing investment disputes.

If the Commission determines that it does not wish to eliminate the industry arbitrator at this time, I urge that it at a minimum modify Rule 10308(a)(5) to exclude from the term "public arbitrator" any person who is an attorney, accountant, or other professional whose firm has represented within the past five years any persons or entities listed in paragraph 10308(a)(4)(A).

Sincerely,

John W. Barnes