Law Offices of
LES GREENBERG
10732 Farragut Drive
Culver City, California 90230-4105
Tele. & Fax. (310) 838-8105
E-Mail: LGreenberg@LGEsquire.com
www.LGEsquire.com

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VIA EMAIL: Rule-Comments@SEC.gov

Mr. Jonathan G. Katz
Secretary
SECURITIES AND EXCHANGE COMMISSION
450 Fifth Street, NW
Washington, D.C. 20549-0609

Re: Proposed Rule Change – Rule 10308 - SR-NASD-2005-094

Dear Mr. Katz:

The following comment deals with recently proposed change to Rule 10308 with respect to the classification of arbitrators and panel composition. The proposed rule change is nothing more than a miniscule effort to cure numerous severe problems facing securities industry arbitration.

My Background

From 1971 to 1973, I served as the Associate General Counsel and/or Compliance Director of Mitchum, Jones & Templeton, Inc., a regional New York Stock Exchange ("NYSE") Member Firm.

From 1973, I have been engaged in the private practice of law as a sole practitioner where substantially all representation dealt with financial/investment litigation. I have represented many individual investors and more than twenty (20) regional securities brokerage firms before arbitration panels and in various state and federal courts in hundreds of securities industry related disputes.

I was admitted to the NASD Dispute Resolution ("NASD") panel of arbitrators in 1976. Also, I have served on the panels of arbitrators of the American Arbitration Association, Pacific Stock Exchange, NYSE and Municipal Securities Rule Making Board. Further, I serve the Los Angeles civil courts and the Los Angeles County Bar Association as an arbitrator.

Petition for Rulemaking

On May 13, 2005, I filed Petition for Rulemaking (SEC File No. 4-506)("Petition") with the Securities and Exchange Commission ("SEC"), which consisted on 25 pages of detailed analysis and empirical data. It was supplemented with my comment letter dated June 22, 2005. The Petition pertained to the severe problems with arbitration sponsored by the NASD and related questionable SEC oversight. The Petitioner requested the creation of rules designed to:

(1) specifically permit arbitration panel members, should they elect to do so, to conduct legal research, or, in the alternative, forbid Self-Regulatory Organization ("SRO") sponsored arbitration forums from restricting arbitrators from conducting legal research;

(2) abolish the requirement that a securities industry arbitrator be assigned to each three person panel hearing customer disputes or, in the alternative, require that information presented to a panel of arbitrators by a securities industry arbitrator be revealed to the parties during open hearing;

(3) require SROs to conduct continuing evaluations of ability of every arbitrator on their panels to perform his/her duties, including, but not limited to mandatory peer evaluations;

(4) require SROs to train arbitrators in applicable law;

(5) require SROs to reveal in pre-dispute arbitration agreements whether their arbitrators are required to follow the law in their decision-making process, the training of their arbitrators in the law, their process, if any, to evaluate their arbitrators on a continuing basis; and,

(6) require the SEC's Division of Market Regulation to specifically oversee SROs to determine whether they are in compliance with rules adopted pursuant to items (1) through (5), inclusive.

On August 19, 2005, the SEC replied by stating that the matter would be best addressed by the Securities Industry Conference on Arbitration. On August 30, 2005, I replied to the SEC by stating:

> You stated, "Your petition … raise(s) important issues, most of which would be best addressed by amendments to the Uniform Code of Arbitration…" Referring the Petition to the Securities Industry Conference on Arbitration ("SICA"), a group composed of representatives of various SROs, the Securities Industry Association ("SIA") and "public" members, does not provide confidence that the severe problems described in the Petition would be effectively addressed. One of the SROs is the subject of the complaints set forth in the Petition. In a letter to the SEC dated August 2, 2005, the SIA described itself as follows: "The Securities Industry Association brings together the shared interests of nearly 600 securities firms to accomplish common goals." Essentially, the Petition would not receive a fair hearing before the SICA as it sets forth complaints against most of the SICA's members' vested interests.

It has become obvious to me that the SEC is more concerned with protecting the interests of the securities industry than establishing and maintaining a level playing field where all parties --- securities industry, associated persons and public customers --- can seek and obtain a just resolution of disputes.

Securities Industry Persons Should Be Barred from Serving on Arbitration Panels

Basic Problem

Under the current structure in arbitrations before the NASD, a three-member panel hearing customer disputes is required to include one arbitrator associated with the securities industry. The NASD considers securities industry arbitrators, who present information (not presented by the parties), to be helpful and necessary. However, the NASD considers arbitrators who present legal authority (not presented by the parties) to be biased. Persons familiar with the law, who attempt to inform their co-panelists and the parties of applicable case law of which they are aware, but was not presented by the parties, are asked to disregard that law and, if the refuse, they are accused of doing "legal research" and asked to invite and grant a motion for recusal based upon alleged bias. Contrary to the NASD's point of view, the presence industry arbitrators, who have the opportunity and incentive to provide "secret information" to co-panelists, on arbitration panels demonstrates bias.

There is no rationale for such disparate treatment, except to replace applicable law with industry folklore as the standard for the decision-making process.

Disingenuous Justification

In recent testimony before Congress, the Securities Industry Association attempted to justify the existence of securities industry arbitrators assigned to customer cases by stating: "This … (provides) a level of expertise that would not otherwise be available to the panel… [I]n light of the ever-growing complexity of the financial products that are often the subject of arbitrations … and the technical issues that sometimes arise … SIA believes that the presence of one arbitrator who is more familiar with these products and their appropriate and/or inappropriate use greatly increases the chances for the fairest resolution of claims. … An arbitrator with experience in the business is in the best position to evaluate, and to help co-arbitrators evaluate, that testimony. In addition, arbitrators who have had some experience in the securities industry are more likely to be well-versed in the supervisory and compliance structure of brokerage firms, the duties and obligations of brokers and other financial professionals, and the regulatory framework under which these individuals and firms are required to operate." (Testimony of Marc E. Lackritz President, Securities Industry Association before the Committee on Financial Services U.S. House of Representatives March 17, 2005, p. 6-7.)

He further stated, "*The Process of Arbitrator Selection and Panel Composition Is Fair* … The truth is that the arbitrator selection process and the inclusion of an independent industry arbitrator on three-member arbitration panels are both fair and beneficial to all of the parties. The notion of a systemic problem of conflicted arbitrators is fiction. As Professor Michael Perino concluded, in his 2002 Report commissioned by the SEC, 'there is little if any indication that undisclosed conflicts represent a significant problem in SRO-sponsored arbitrations. Available empirical evidence suggests that SRO arbitrations are fair and that investors perceive them to be fair.'" (Id., at p. 6.) He cites, "Michael A. Perino, Report to the Securities Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations, Nov. 4, 2002, at 48." ("Perino Report")

The argument is disingenuous. The underlying assumption is that every securities industry arbitration panelist has more expertise and objectivity than any expert witness who might testify on behalf of a party and any non-securities industry co-panelist. Also, the justification ignores the problem that the parties do not know of or have an opportunity to rebut any information that the securities industry arbitrator could privately present to his/her co-panelists.

The Perino Report is so seriously flawed that its purported conclusions are suspect. The SEC commissioned the Perino Report for the specific purpose of supporting its publicly declared position that California Ethics Standards should not be applied to securities industry sponsored arbitrations. At the time of writing the report or soon thereafter, Professor Perino represented several securities brokerage firms and the New York Stock Exchange. The Perino Report relied upon the GAO Report in that "That report examined results in arbitrations over an eighteen-month period from January 1989 to June 1990 and found no evidence of a systemic pro-industry bias." (Perino Report, p. 31.) However, "While GAO's review showed that an investor was no more likely to prevail in an independent forum than in an industry-sponsored forum, it did not directly address the fairness of the arbitration process." (GAO Report, p. 6.) Further, the GAO Report's analysis was flawed as it treated all parties, all cases and all arbitrators as being the same. However, the only valid way to compare results between the arbitration forums would be to try each case before a panel from each forum and compare the results. From a practical standpoint, such data would never exist. Without that data, all the remaining numbers are meaningless. The Perino Report, which used fifteen (15) year old data and was authored by one with a vested interest to produce specific results and financial ties or expected financial ties to parties advocating a particular bias, is not credible.

The NASD Has Ignored the Problems Since, At Least, 1992

On October 1, 1992, I complained to the NASD of what I described as "arbitrator's judicial notice." I explained what true judicial notice is and how it was being subverted in NASD arbitration. I wrote, in part: "If the trial court resorts to any source of information not

received in open court … such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken. The aforesaid procedure has been established so that a court may not decide cases based upon secretly obtained information of which the adversaries are unaware and thereby unable to respond. …. I have … personally observed (that) … the securities industry representative, during the deliberations, will, for the first time, inform the other arbitrators of crucial information which he/she claims existed within the securities industry at the relevant period…. In each situation, the hearing, for all practical purposes, has been closed so that neither the expert witnesses nor the parties can be asked to comment upon the information. The aforesaid approach to 'arbitrator's judicial notice' is nothing but a blatant attempt to sway the panel's decision based upon what can be and sometimes is false and/or misleading information…." The NASD never responded to my letter or complaints.

Conclusion

It is time to remove this securities industry arbitrator vestige that has long outlived any initial usefulness and creates the appearance of bias.

For those within the securities industry, who would resist removing all industry personnel from arbitration panels, there is an effective alternative. The NASD has recently testified before Congress, "Transparency is a cardinal value of the federal securities laws. … NASD believes that transparency should be a hallmark of securities arbitration as well." (Testimony of Linda D. Fienberg, President, NASD Dispute Resolution, Before the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises Committee on Financial Services United States House of Representatives, March 17, 2005, p. 3.) The NASD, consistent with its purported desire for transparency, should require securities industry arbitrators to inform the parties of the details of the supposed "more likely to be well-versed" information that they currently whisper into the ears of their co-panelists. Further, NASD rules should provide the parties with an adequate opportunity to rebut the accuracy of that "secretly obtained information."

Please communicate with me in the event that further information is desired.

Very truly yours,

LES GREENBERG

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