September 13, 2005

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

Re: "Public Arbitrator" Definition
File No. SR-NYSE-2005-43; SR-NASD-2005-094

From: Michael J. Willner

Dear Mr. Katz,

Please accept this as my comment.

I am a commercial litigator in private practice as a partner with the law firm of Miller Faucher and Cafferty LLP. I have represented investors in securities arbitration since the mid 1990's. I been involved in arbitration in a variety of federal, state and private contractual arbitration fora for more than 15 years and involving more than 100 cases. I have served as an arbitrator and have represented both claimants and the defendants as an advocate.

I support the comments of the Public Investor Arbitration Bar Association in support of the proposed rule in that it removes some of the persons with industry conflicts of interest. I further support the comments of PIABA that further changes are needed to achieve basic fairness and a conflict-free resolution system.

In my view, basic fairness warrants a more complete revision to the process of arbitrator selection to remove the inherent conflict of interests from both: (i) the inclusion of an industry arbitrator; and (ii) and the involvement of the SRO arbitration staff in arbitrator selection, recruitment, replacement and disqualification. Investors should be able to opt out of an SRO controlled system in favor of a system where each party chooses an arbitrator and the chosen arbitrators select a third arbitrator. In addition, investors should be given the additional choice of a panel of public arbitrators free from inherent industry conflicts.

There are inherent and obvious conflicts and due process concerns from the inclusion of an industry arbitrator. The stated justification is that the industry arbitrator adds some relevant expertise. First, the proffered justification of "expertise" is a pretext. There is no data whatsoever to support the argument that an industry arbitrator adds expertise, let alone the kind of expertise that is helpful or relevant in a particular case. Second, in cases where special expertise is important, by relying on the industry expert to provide the public arbitrators expert opinions in secret, investors are deprived of due process in that they and their counsel are not permitted to have notice of these industry arbitration expert opinions and an opportunity to cross examine the industry arbitrator offering expertise as to his or her purported expertise and opinions and a fair opportunity to present rebuttal expert testimony that the public arbitrators might find more persuasive. Third, in my view, the effect of industry arbitrators is to establish and maintain a system where fidelity to the law and equity

is undermined in favor of the industry and at the expense of investors and justice. In addition to unfair arbitration results, this manifests itself in the bargaining leverage of the parties in mediation and settlement because respondents expectations of accountability for wrongdoing is greatly diminished. The current system is so bad that it can be difficult for aggrieved investors with smaller claims to find counsel to take many cases.

Michael J. Willner

Miller Faucher and Cafferty LLP