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

Re: File No. SR-NYSE-2005-43
Public Arbitrator Definition

Dear Secretary Katz:

I am an attorney in Portland Oregon and have practiced securities law for 27 years. I was formerly assistant commissioner for enforcement for the Securities Division of the state of Oregon and in the course of my practice have represented brokers, registered representatives and customers in a wide variety of cases, including arbitrations.

The NASD and NYSE have proposed minor changes in the definition of "Public Arbitrator", however major changes are truly needed now. Certainly the changes being proposed are necessary however they do not go far enough to ensure both procedural fairness and the appearance of fairness to public customers.

There is simply no need for an industry arbitrator on every customer arbitration panel any more than there would be a need to have a plaintiff's or claimant's attorney on every customer arbitration panel. The industry panelists bring with them an inherent bias in favor of the way they have done things their entire career and the way they believe the system should work, as opposed to the way the law says the system will work. They routinely manifest this bias in their questions and awards. Any required industry expertise may be provided by expert testimony. In fact that is the current standard of practice except in the smallest cases where the customer has the right to a hearing before one panelist who is a public member.

The appearance and, in my opinion the fact, is that customers start the hearing with the customer, and their attorney on one side and the opposing counsel, the broker dealer, the branch manager, the registered representative, the self regulatory organization staff, and at least one member of the panel on the other side. The proof of the pudding is in the tasting and any objective review of customer awards will demonstrate precious few where the customer who managed to prevail got their statutory remedy of rescissionary damages, costs and attorney fees. Why? I believe it

is because the industry members effectively minimize damages and because the staff provides guidance that does the same thing.

Wasn't the whole basis for the US Supreme Court agreeing to allow the self regulatory organizations to impose mandatory arbitration that the customers would get the same protection in arbitration as they would in court? Can you imagine a judge sitting on a case where there are the kinds of inherent conflicts of interest that exist for industry arbitrators?

A second, if less obvious, aspect of this problem is the definition of "Public Arbitrator". Permitting any attorney with industry ties to serve as a public arbitrator is inherently unfair. If an attorney or his firm has a conflict of interest that would preclude representing the customer, that attorney should not be allowed to decide the customer's case. That includes issue conflicts where the attorney or his firm has taken positions adverse to similarly situated customers. The net effect of such attorneys serving on panels is to place two industry members on the panel.

Given the large number of well qualified independent arbitrators there is no practical reason to continue to require that an industry arbitrator be on every panel and there are numerous reasons to exclude them. Similarly, there is no need to qualify attorneys with industry ties as Public Arbitrators and numerous reasons to exclude them. Customers should be entitled to the same fair and unbiased decision maker they could get in court. Anything less denies customers a fair hearing and the ability to believe that they got a fair hearing whether or not they did in fact.

Thank you for the opportunity to comment and for your courtesy and attention to this matter.

Very truly yours,

LAYNE & LEWIS LLP

Richard M. Layne

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