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

VIA E-MAIL TO RULE-COMMENTS@SEC.GOV

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

Dear Mr. Katz:

I appreciate the opportunity to comment on the NASD proposal to amend Rule 10308 of the NASD Code of Arbitration Procedure. I have practiced securities law since 1980 and, since 1992, have represented numerous investors in securities arbitration proceedings before the NASD, the Pacific Exchange and the NYSE.

The NASD's proposal to amend the definition of "public arbitrator" in Rule 10308(a)(5) fails to address the essential unfairness of the existing definition.

Under the NASD rules, every three-person panel must contain one industry arbitrator and two public arbitrators. Because one of those three arbitrators is required to be from the securities industry, it is imperative that the public arbitrators be free from industry influence; otherwise, they cannot be deemed "public" and the promise of a panel consisting of a majority of public arbitrators is broken.

Like the current rule, the proposed rule is fundamentally unfair to investors because it allows attorneys to sit as public arbitrators even though they and their firms represent the brokerage industry. Thus, under the NASD rules, a panel may consist of an industry arbitrator and two so-called public arbitrators, both of whom have existing conflicts of interest in the form of an appearance and often a reality of pro-industry bias on behalf of their clients.

The NASD's purported method of limiting this industry influence on public arbitrators is to prohibit an attorney who represents securities industry clients from serving as a public arbitrator if those clients comprise 10 percent or more of his or her firm's practice. But a 10-percent limit is not an answer. Ten percent of a firm's billings can be a substantial amount of money. The loss of revenue that might result from an arbitration award that offended a big client would be most unwelcome. Moreover, current clients aside, even those firms with a small percentage of securities industry representation in their practices invariably would like to have more. Thus, an attorney whose firm represents *any* securities industry clients is inescapably subject to securities industry influence *regardless* of the percentage of industry business.

This is not just a matter of law firm marketing and revenue. It can be a matter of safeguarding the interests of existing clients as well. A securities industry attorney on an arbitration panel has to consider whether a finding that a certain activity or practice by a respondent firm was wrongful will have an adverse impact on his or her own client broker-dealers which may have engaged in the identical activity and may face similar claims in arbitration or mediation. A percentage limitation doesn't address this problem. Any industry influence is unacceptable in a public arbitrator.

Let me ask you to step back from the canvas for just a moment and try to see how this looks to a member of the investing public. Suppose you tell the average investor that he or she will be forced to give up the right to have a dispute – a matter that could involve the loss of the investor's life savings – resolved by a judge and jury. When the investor asks who the arbitrators are, you tell him or her that one of the three must come from the securities industry. That alone creates a strong appearance, not to mention a frequent reality, that the industry's pecuniary interests will influence the outcome. Then, as if that were not bad enough, you have to tell the investor that the other two "public" arbitrators might be attorneys who represent securities brokerage firms! If you were that investor, wouldn't you smell a rat? Wouldn't you suspect that you were being set up? Although it may sound unkind, can you see how someone might think that arbitration before such a panel was going to be a kangaroo court?

There should be no securities industry representatives on arbitration panels. And the process cannot possibly be fair to investors when a majority or potentially all of the arbitrators may be subject to industry influence. In a system where

investors are required to accept an industry member on every arbitration panel, the “public” arbitrators must be truly public.

The NASD’s proposal should be amended to prohibit lawyers, accountants and other professionals from sitting as “public” arbitrators if they represent securities industry members at all, regardless of the percentage of their business that those clients represent.

Thank you for your time and attention.

Very truly yours,

Scot Bernstein

SDB:msw