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November 12, 2004

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: File Number SR-NYSE-2004-29

Dear Mr. Katz:

The purpose of this letter is to provide the Securities and Exchange Commission ("SEC") with comments on the above referenced proposed rule change that was filed by the New York Stock Exchange, Inc. ("NYSE") on June 10, 2004.[1]

Summary:

The proposed continuation of the traditional method for the staff appointment of arbitrators, in the absence of the *mutual* agreement of *all* parties, is based on misguided information and would continue to deny the investing public of its right to a fair and impartial forum for the resolution of their disputes.

Discussion:

When the United States Supreme Court issued its historic opinion in 1987, which upheld the enforceability of mandatory arbitration clauses in agreements between public investors and their securities brokerage firms, it is clear that one of the primary predicates for the Court's decision was its belief that "arbitration procedures subject to the SEC's

[1] These comments are also applicable to Amendment Nos. 1 and 2 to the proposed rule change, which were filed by the NYSE with the SEC, dated October 6, 2004.

oversight authority" would be sufficient to "protect the substantive rights" of the public investor in an arbitration forum.[2]

Notwithstanding this mandate, through the submission of the proposed rule change, which would only permit even a "modified form" of "Random List Selection" if *all* parties were to *consent* to the same, the "substantive rights" of the public investor are once again being subrogated to the administrative facilitation offered by the "traditional" appointment of arbitrators by the staff of the NYSE.

This opinion is supported by a number of factors which include, but are not limited to, the following:

• There is absolutely no basis, in fact, for the NYSE having submitted to the SEC, in support of its continuation of the "traditional method" of arbitrator appointment, the proposition that "parties have rarely requested Enhanced List Selection or other alternative methods" of arbitrator selection.

To the contrary, if the SEC were to exercise its "oversight authority" with respect to this proposition and request the underlying information which supports its validity, the SEC would discover that it is based solely on the absence of written complaints to the NYSE when one party (such as a Claimant) requested list selection and the other party (such as a Respondent) did not agree to the same.

In other words, if a Claimant requested list selection and the Respondent did not consent to the same, unless the Claimant notified the NYSE, in writing, that its request for list selection had been denied by the Respondent, the NYSE would attribute this situation as a preference for the "traditional method" of arbitrator appointment.

It is respectfully submitted that this approach is both statistically and intellectually deficient.

• There is absolutely no basis, in either perception or reality, for the public investor to have any confidence in the integrity of the exercise of the SEC's "oversight authority" when the "traditional method" of arbitrator appointment is delegated to sole to the discretion of the staff of the NYSE.

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[2] See, e.g., Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987).

To the contrary, if the SEC were to exercise its "oversight authority" with respect to this proposition and conduct an audit of the "traditional" appointment of arbitrators at the NYSE, the SEC would discover that the process has been entirely entrusted to the subjective "opinions" of the staff of the NYSE as to the "expertise" of the proposed arbitrators for a given dispute – opinions which are neither defined[3] nor subject to any reasonable inquiry by any of the parties involved in the underlying proceeding.

These subjective opinions - whether intended or not - may lead to situations where a given arbitrator, whose availability to serve on a panel is known to the staff of the NYSE, may be given priority in the selection process. Similarly, the exclusive reliance on these subjective opinions may very well explain the perception that there are "habitual" arbitrators who are continuously appointed to numerous panels to the exclusion of other arbitrators who are equally as competent to decide a given dispute.

• Finally, it must be noted that the proposed rule change continues to include the archaic process of forcing an "industry" arbitrator on the public investor in every customer initiated arbitration proceeding – a notion which is outdated at best and should be immediately ended.

For so long as the securities industry continues to require the mandatory arbitration of disputes with its customers, the only way in which the public investor will truly have a "fair and impartial forum" is through the recognition and disavowal of the inequities that are associated with the presence of industry arbitrators in all arbitration proceedings.

Conclusion:

For all of the reasons set forth above, the SEC should institute proceedings to determine whether the proposed rule change should be disapproved.

Very truly yours,

Maddox Hargett & Caruso, P.C.

Steven B. Caruso

[3] For example, the utilization of subjective opinions is neither specified nor contemplated by NYSE Arbitration Rule 608.