

Mary Yeager
Assistant Secretary

New York Stock Exchange, Inc.
11 Wall Street
New York, NY 10005

tel: 212.656.2062
fax: 212.656.3939
myeager@nyse.com



November 14, 2005

Ms. Katherine A. England
Assistant Director
Division of Market Regulation
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Response to Comments to File Number SR-NYSE-2005-02 – Relating to
Appointment of Arbitrators

Dear Ms. England:

The New York Stock Exchange, Inc. (“NYSE” or the “Exchange”) hereby submits its response to public comment letters received by the Securities and Exchange Commission (“SEC” or the “Commission”) after the publication of File Number SR-NYSE-2005-02 in the Federal Register on June 23, 2005.¹

The SEC received four comment letters,² one of which supports the proposed amendments.³ The other three letters contain suggested amendments, some of which the

¹ Exchange Act Release No. 34-51863 (June 16, 2005), 70FR36451 (June 23, 2005) (SR-NYSE-2005-02).

² See Letters from Robert S. Clemente (“Clemente”), Of Counsel, Liddle and Robinson to Jonathan G. Katz, dated February 3, 2005 and July 7, 2005; Letter from Rosemary J. Shockman (“Shockman”), President, Public Investors Arbitration Bar Association to Jonathan G. Katz, dated July 14, 2005; and Letter from Richard P. Ryder (“Ryder”), President, Securities Arbitration Commentator, Inc. to Jonathan G. Katz, dated July 15, 2005.

³ See Letter from Shockman.

Exchange believes are beyond the scope of the filing.⁴ Set forth below is the response of the Exchange to those comments that are within the scope of the filing.

Background

Rule 607 provides for the appointment of arbitrators. On January 4, 2005, the Exchange filed with the SEC proposed changes to Rule 607, which retained the traditional method of staff appointment of arbitrators, and made permanent the random list selection method, whereby arbitrators are randomly selected for appointment by computer. The proposed changes to Rule 607 did not include the enhanced method of arbitrator appointment as it was rarely chosen by the parties. To address subsequent comments from the staff of the SEC, the Exchange filed an amendment on May 12, 2005 to clarify the random selection process, and an amendment on June 16, 2005 to reference the differences between the proposed amendments and the applicable rule of the Securities Industry Conference on Arbitration. Proposed Rule 607 was published for comment in the Federal Register on June 16, 2005.

Response to Comments

1. The Exchange should embrace list selection.⁵

In its proposed amendment to Rule 607, the Exchange has embraced list selection for appointing arbitrators. The proposed amendments give the public customer/non-member the ability to elect to use list selection without the agreement of the member firm. The Exchange has also preserved the traditional method of staff appointment so that public customers/non-members who prefer that the Exchange staff pre-screen arbitrators for availability on particular dates, conflicts, and/or expertise may choose this method for selecting arbitrators. It is this choice that gives the public customers/non-members effective input into the process of arbitrator selection.

2. The parties have limited strikes on the list of proposed arbitrators and the second list is eliminated.⁶

The Exchange, in its proposed amendment, limits the number of strikes to four for each party on regular claims and two for each party on small claims. Throughout the pilot

⁴ See Letters from Clemente and Ryder.

⁵ See Letter from Ryder.

⁶ See Letter from Clemente.

program, the Exchange found that parties often struck all names on the first list. This necessitated distribution of a second list, thereby both delaying the appointment of a panel, and potentially increasing costs for the parties as a result of additional attorneys fees incurred in reviewing the second list. The Exchange also found that the parties often exercised all peremptory challenges on the second list, leaving few, if any, arbitrators available to serve on the panel. In this situation, arbitrators had to be randomly appointed, and the parties often had no remaining peremptory challenges.

By limiting the number of strikes and eliminating the second list, the Exchange believes that the careful review and ranking of the proposed arbitrators by the parties will result in less delay in panel appointment, potentially reduced costs for the parties, and less random appointments.

3. The proposed amendments may result in administrative appointment.⁷

The Exchange recognizes that administrative appointments may be necessary under the proposed amendments. However, under these amendments, arbitrators would not be appointed administratively unless no arbitrators who serve on panels in a particular region at their expense or the Exchange's expense are available to serve.

Additionally, with careful review and ranking of proposed arbitrators, the number of administrative appointments should be reduced.

4. The Exchange eliminated the enhanced method of arbitrator appointment.⁸

The enhanced method of arbitrator appointment that was a part of the pilot program is still available to the parties.

The pilot program provided that the parties could agree to receive the names of nine arbitrators, six public and three securities, pre-screened for availability on particular dates, conflicts, and/or expertise. Each party had 10 business days to exercise up to three strikes, and rank the remaining arbitrators. This method of appointment was called enhanced selection. As the parties rarely requested to use enhanced selection, it was not specifically included in the proposed amendments.

⁷ See Letter from Shockman.

⁸ See Letter from Clemente.

However, under the proposed amendments, the parties may agree to any reasonable method of arbitrator appointment. The parties may, therefore, agree to use enhanced selection exactly as they were able to do under the pilot program. When so agreed, arbitrators will be appointed to a panel in the same manner as under the pilot program.

5. The Exchange should provide parties with the ability to access arbitrator awards and with hard copies of the last three awards.⁹

The Exchange does provide the parties with the ability to access arbitrator awards. First, the Exchange currently advises the parties that arbitrators' awards are available on the Exchange website, www.nyse.com, in the cover letter that is sent to the parties with the proposed names of the arbitrators. Second, the proposed arbitrators' profiles that the parties receive list all cases concluded by hearing on which a particular arbitrator has served with: (1) the names of the parties (unless the public customer requested her/his name be redacted¹⁰); (2) the NYSE case docket number; and (3) the decision date. With this information, the parties can easily access all awards for each arbitrator on the NYSE website.

The Exchange has not eliminated the parties' ability to receive hard copies of the arbitrators' last three awards. Historically, the Exchange sent to the parties the arbitrators' last three awards with their profiles. This was a practice that began prior to the widespread use of the internet and electronic data retrieval. In today's environment, one in which internet use continually expands and increases, it is not efficient to send hard copies of the arbitrators' last three awards, which often total over 50 pages, when all of an arbitrator's awards are readily available and easily accessible on the NYSE website.

However, under the proposed amendments, the parties may still receive the arbitrators' last three awards if they request. The Exchange will advise the parties that they may do so in the cover letter sent them with the proposed names of the arbitrators. Accordingly, the parties remain able to receive hard copies of the last three awards without having to use the internet.

6. The Exchange should review its classification of arbitrators with securities industry ties.¹¹

⁹ See Letters from Clemente and Ryder.

¹⁰ See NYSE Arbitration Rule 629(f).

¹¹ See Letters from Clemente and Shockman.

Although this comment is beyond the scope of these proposed amendments, the Exchange notes that it filed a proposed rule amendment with the SEC on June 17, 2005,¹² which, if approved, would result in arbitrators not being classified as public if they: (1) are associated with a person that directly or indirectly controls, is controlled by, or is under common control (“control” being defined in the rule filing) with an organization engaged in the securities business; or (2) have immediate family members (as enumerated in the rule filing) who are associated with an organization engaged in the securities business.

7. Arbitrator Disclosures.¹³

Although this comment is beyond the scope of these proposed amendments, the Exchange notes that arbitrator profiles are sent to the parties when arbitrators are appointed to a panel for a case. The duty to disclose pursuant to Rule 610 is a continuing duty, and any additional information received by the Exchange from arbitrators pursuant to Rule 610 is immediately forwarded to all parties.

Conclusion

The Exchange notes that the comment letter from the group routinely representing public customers in arbitration, which is comprised of over 700 members, supported the amendments in their proposed form.¹⁴ This comment letter did note that the proposed amendments could result in administrative appointments and suggested that the Exchange review its arbitrator classification, both of which items are discussed above.

Accordingly, and for the reasons set forth above, the Exchange believes that no further amendments should be made to the proposed rule filing and the rule should be approved as noticed in the Federal Register.

Thank you for the opportunity to respond to the comment letters.

Please contact Karen Kupersmith at 212-656-4865 if you have any further questions concerning the above.

Very truly yours,

¹² Exchange Act Release No. 34-52314 (August 22, 2005), 70FR51104 (June 17, 2005) (SR-NYSE-2005-43).

¹³ See Letter from Clemente.

¹⁴ See Letter from Shockman.

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A handwritten signature in black ink, appearing to read "Mary Yeager". The signature is fluid and cursive, with a long horizontal stroke extending to the right from the end of the name.

Mary Yeager
Assistant Secretary