July 15, 2005

Jonathan G. Katz, Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-9303

Re: File Number SR-NYSE-2005-02 (SEC Rel. No. 34-51863)
NYSE Rule 607 – Appointment of Arbitrators

Dear Secretary Katz:

I write with appreciation for the fact that the Commission takes interest in arbitration and understands that public comment regarding this service program for investors (and others) is the best way to locate the correct path for improving the ability of investors with claims to redress their grievances. Arbitration is not a regulation-driven program; consequently, and, with respect, the Commission is less able to trust to its own expertise or to that of the staff. That makes public comment essential.

By the same token, Commission guidance to the forums can be more vigorous in this area than it has been. Strong oversight by the Commission is expected by the judiciary and federal preemption is based upon the expectation the Commission has set a course for SRO arbitration. Arbitration is not powered by the same sensitive, intangible forces that govern our markets. Its mission is to deliver justice with efficiency, not price discovery or seamless execution and trade consummation. Approving this Rule, with one modification, should only be a first step in offering such strategic guidance.

Throughout the 60's and 70's and into the early 1980's, the New York Stock Exchange ("NYSE" or "Exchange") was the leading arbitration forum for the resolution of securities disputes. In 2005, NYSE Arbitration will oversee fewer than 5% of the new cases being filed by customers and others against broker-dealers. If that decline were due to NYSE Arbitration becoming more Respondent-oriented, one would expect to see brokerage firms flock to bring their claims there. They, too, have migrated to the NASD.

NYSE Arbitration has simply not chosen to maintain a modern, service-oriented forum that will adjust its rules and practices, as NASD Dispute Resolution has done (to excess, but) very effectively. NYSE Officials had the opportunity, when NYSE Director of Arbitration Robert Clemente left the Exchange, after more than a decade of service as head of the Arbitration Department, to cede its program, as the Philadelphia, MSRB and the American Stock Exchange have, to NASD. NASD may not always get it right, but NASD as an institution cares about arbitration and sees dispute resolution as part of its strategic vision for maximizing investor protection.

Mr. Clemente left at a time when Richard Grasso had stepped down, the NYSE had an interim Chief, and Richard Ketchum – a person of considerable experience with securities arbitration -- was taking hold of NYSE Regulation (and the Arbitration

Department). In that turmoil and transition, NYSE could have made a strategic choice to off-load the arbitration program. If it did not want to do the job right, it had the opportunity to change. I submit that, having elected to remain tied to its moribund arbitration program, NYSE should be tasked by the Commission to reviving it and making it a more equal choice for investors with grievances. Choosing list selection is a step in the right direction, but this Rule's approval should come with a blueprint for NYSE Arbitration's change.

The Exchange does many things as well or better than NASD Dispute Resolution. The staff will take a more active hand in assisting parties, prior to arbitral empanelment, to work out their discovery differences. The staff attorneys more often attend the hearing sessions than do NASD staff and, accordingly, have a better opportunity to see arbitrators in action. NYSE still maintains a stenographic transcript as a record of the proceeding. Until recently, NYSE was much faster than NASD in moving cases from start to finish (average turnaround time). NYSE remains a less expensive choice for investors than NASD (we have reckoned a 30% cost differential).

NASD does not publish statistics about which brokerage firms are named as Respondents or how often, but judging from the decided cases, we believe that more than half of the cases that are filed with NASD would be eligible for filing with NYSE. The choice of SRO forum remains with the investor in these circumstances and, yet, the overwhelming choice is NASD. There must be deficiencies in the NYSE's arbitration program that have led the Claimant's Bar to choose NASD and not NYSE. True, NASD dominates the scene and is doing a better job of marketing arbitration's availability than NYSE, but experienced attorneys with knowledge of the two programs and their differences are also selecting NASD and avoiding NYSE.

One can conclude, as NASAA, Congressman Frank and others (including Mr. Clemente) have, that this steady march by NASD to gain "market share" argues for a single agency to act as <u>the</u> securities arbitration forum. We see this move as inadvisable and. certainly, premature. The Exchange evidently wants the opportunity to *offer* an alternative to NASD Arbitration, but it needs to demonstrate that it can provide a true alternative! Investors have free choice to select between NASD and NYSE and NYSE must reach par before it will *be* a *reasonable* alternative to NASD Arbitration.

How must the Exchange change its program? Here is a four-step program:

1. <u>Embrace list selection.</u> NASD offers list selection as the exclusive method for organizing a Panel. List selection gives parties the right of participation on a critical choice.
2. <u>Provide Arbitrator Award histories</u>. Parties must have the tools to evaluate the candidates for their Panel. Picking your Arbitrator is the most important tactical choice one makes in the arbitration process and the Awards are the steppingstone to significant knowledge about each candidate. NASD offers Award histories in all cases "automatically."

3. Appoint the Panel earlier in the case. The Panel, not the staff, needs to control the administration of the case. Postponing appointment until the parties agree with the staff on a hearing date works when nobody is busy, but it led to serious delays when volume surged after the tech-Crash. NASD begins list selection following the pleading stage and the arbitrators set the hearing date.
4. Give equal encouragement to claims outside NYC. NYSE Arbitration is geo-centric. NYSE Awards are rendered by New York-based Panels in about 44% of the customer-initiated cases decided after hearing (paper cases excluded). NASD, in contrast, renders only 17% of such Awards from a New York hearing location. The SEC should understand why this is the case – it is more likely for negative reasons than positive and it hints at administrative biases that require adjustment.

Fix these four substantial deficiencies, relative to NASD Arbitration, and investors will have a real choice between the two forums. In fact, all sides of the dispute will be more satisfied with NYSE Arbitration. List selection, as offered by the current proposal, is half-heartedly extended to parties, but the unilateral option is better than requiring mutual agreement. For that reason, we believe the Commission should approve the proposal.

The Commission asks specifically whether providing three Awards per Arbitrator candidate to each party should be an automatic privilege or an optional right. A related question seeks input on whether NYSE should disclose the availability of Awards on its WebSite. The implicit question is really whether the administrative burden that the Exchange would undergo to provide Awards in all cases is warranted by the benefit. In that limited context, we think not, but we also think the question should not resolve there. Indeed, the Exchange could offer parties in all cases far more information about the Award histories of the Arbitrator candidates with less administrative burden and the SEC should invite NYSE staff to do so.

Viewing the Awards that an Arbitrator has rendered in prior service is extremely helpful in determining whether to select that candidate. Party names in past Awards can lead to information showing that the Arbitrator has heard cases involving a party to the instant case. The Awards are required to include the names of the other Arbitrators with whom the candidate has worked and, oftentimes, patterns will emerge in terms of service with certain others. Party representatives' names must be disclosed, an information element that enables lawyers to network with other lawyers about the competence and attitudes of the candidate. Listing representatives in the Awards also lets parties know if the candidate has served in prior cases where opposing counsel have appeared.

Viewing three Awards that an Arbitrator has participated in rendering is better than nothing. In some cases, it will be all that the NYSE has to disclose. I have been a NYSE Arbitrator since 1983 and have served once. Where NYSE Arbitrators have served on numerous Panels – some have hundreds -- disclosing three Awards is not sufficient at all. NASD has a better approach. NYSE Awards going back to 1989 are available for free and in PDF format on at least three Internet sites. What parties need is the information to get to those Awards. NASD provides Award information – major party names, docket number, and issue date -- rather than copies of the Awards. The information allows

people to retrieve the Awards on the Internet on their own and at no cost. If they do not have Internet access, then NASD supplies the copies.

NYSE should develop reports from its docket records that disclose for each Arbitrator candidate the Award ID number, the issue date of the Award, and a party caption, just as NASD does. Then parties will have more complete Award information and NYSE will be able to supply the reports more swiftly, more easily and with lower delivery costs. Were the report to include five or seven or more years of Award information about a candidate, parties would be able to access and view all of the Awards and have, with little effort on NYSE's part, access to a full record of a candidate's recent Award history.

With respect to NYSE disclosing the availability of the Awards on its WebSite, of course it should! The Commission should know that PDF copies of NYSE Awards are available at no charge, along with copies of Awards from other active SRO forums, at two other Web Sites besides the Exchange's. Thus, there are ample resources available on the Internet to provide a complete SRO Award history for NYSE arbitrators. The Award report we recommend would at least allow parties to find and retrieve all listed NYSE Awards.

Thank you for the privilege of offering comment on the instant rule proposal.

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Disclosure: SAC reports to subscribers on events and developments in securities arbitration. In 1989 SAC began collecting securities arbitration Awards from all active SRO forums and today maintains a library of 37,000+ Awards (SAC's Awards Library). A database of information on these Awards permits easy searching and distilled reports in customized formats (SAC's Award Database). Together with CCH Incorporated, SAC has established its Award Database and Awards Library online and, through SCAN (SAC-CCH Awards Network), offers field- and word-searching capabilities to subscribers and others.