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UNITED STATES SUPREME COURT
MEMBER FLORIDA BAR, NELA, PIABA

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September 15, 2005

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 — 19
"Public Arbitrator" Definition

Dear Mr. Katz:

I write in regard to the referenced NYSE rule filing concerning the "public arbitrator" definition, Rule 607 of the NYSE arbitration rules.

As an attorney who primarily represents elderly retired investors in NASD and NYSE arbitration proceedings, I support the NYSE's proposal to exclude from the definition of "public arbitrator" persons with relationships to entities controlling or controlled by securities or commodities firms.

However, the NYSE proposal does not go far enough. The "public arbitrator" definition must be further modified to assure public arbitrators are completely free from the appearance of industry influence. I urge on behalf of myself and my clients that the definition of "public arbitrator" should be further limited to exclude all professionals with any degree of industry-related conflict of interest whatsoever.

Currently, Rule 607 provides that an attorney, accountant, or other professional whose firm derived 10 percent or more of its annual revenue in the past two years from brokerage or commodity firms or their associated persons is barred from being a public arbitrator. The problem with this definition is that it allows professionals who have existing relationships with the industry which account for less than 10 percent of their firm revenues to serve as so-called public arbitrators, ignoring the fact that even these limited industry relationships present an unacceptable conflict of interest and an unseemly appearance of pro-industry bias.

A professional serving as a **public** arbitrator should have absolutely ZERO, NO, NADA representation of **industry** members. The obvious and fundamental reason for this is that a professional owes the same obligation of loyalty to every client. Whether the client represents a large or small portion of the firm's business, the duty is identical. Under the legal canons, a lawyer must aggressively advocate the interests of every client, even those that may be pro bono.

A lawyer with any conflicted industry representation will be less likely to render a decision adverse to the interests of the industry. If the industry client sells B shares, for example, its lawyer is unlikely to rule that B shares are unsuitable investments. The same is true with respect to the improper sale of variable annuities if these are sold by the lawyer's industry client. Obviously, a conflicted lawyer is less likely to render a large arbitration award or a punitive damage award or an award of attorneys' fees because it is well understood that every industry client will react negatively to the discovery that their lawyer made such a ruling. Another industry lawyer seeking to obtain the client's business will research the present industry attorney's awards and bring them to the client's attention, in order to steal away the client, whenever the opportunity arises.

One who is engaged in representing industry members also has a continuing interest in acquiring new industry clients. An industry lawyer is far less likely to render arbitration awards that would be troublesome to potential new industry clients

Establishing any percentage cutoff for the amount of industry business a professional may have before concluding that an appearance of bias or prejudice exists is an arbitrary and fictional standard. Any industry business on the part of a professional establishes the same conflict. Combined with the existence of mandatory industry arbitration and the mandatory industry arbitrator, a public arbitrator with any appearance of industry bias or prejudice is outrageous and unacceptable.

Based upon the foregoing, the definition of "public arbitrator" as set forth in Rule 607 should be modified to **exclude from the term "public arbitrator" any person who is an attorney, accountant, or other professional whose firm has represented within the past five years any persons or entities listed in Rule 607(a)(2).**

Very truly yours,

James D. Keeney

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JAMES D. KEENEY, P.A.

JDK:jk

Public arb definition comment