

Law Offices of
LES GREENBERG
10732 Farragut Drive
Culver City, California 90230-4105
Tele. & Fax. (310) 838-8105
E-Mail: LGreenberg@LGEsquire.com
www.LGEsquire.com

July 16, 2005

VIA EMAIL: Rule-Comments@SEC.gov

Mr. Jonathan G. Katz, Secretary
SECURITIES AND EXCHANGE COMMISSION
450 Fifth Street, NW
Washington, D.C. 20549-0609

Re: Arbitrator Selection Process – SEC Administrative Judge
Petition for Rulemaking (SEC File No. 4-506)

Dear Mr. Katz:

Essentially, the Petition for Rulemaking of Avery B. Goodman dated July 15, 2005 (“Petition”) seeks a rule by which an Administrative Judge, accountable to the Securities and Exchange Commission (“SEC”) and not to NASD Dispute Resolution (“NASD”), would ultimately decide arbitrator selection disputes between parties involved in arbitrations pending before the NASD. The Petition sets forth two egregious examples, based upon the Petitioner’s personal knowledge, where the NASD improperly classified arbitrators. The Petition describes the Herculean efforts (time and money) that have been required to attempt to correct the situation. The Petition raises issues of: (1) NASD conflicts of interest; (2) lack of NASD accountability; and, (3) lack of effective oversight of the NASD by the SEC.

Negligible Costs and Substantial Benefits to Implement Proposal

The costs to implement proposed procedure should be negligible. If NASD knew that its selection decisions could be quickly appealed to a SEC Administrative Judge, an independent decision-maker, such potential accountability would reduce the need for such appeals to a minimum. Further, any appeals would be heard on the papers and/or via telephonic conference. The SEC could then reduce its direct oversight efforts, if any, in the area of arbitrator selection. The parties, e.g., public investors, could assume greater confidence in the fairness of the arbitration process.

“Black Box” Arbitrator Selection System

The NASD selects arbitrators to serve on each panel through a computerized “random” selection process and otherwise. The fairness of the computerized aspect of the process is dependent upon programming and data, which the NASD controls and which is not transparent to the parties. In substance, the NASD vouches for the quality of its “black box” arbitrator selection process. If sufficient proposed arbitrators are rejected by the parties, the NASD selects, in its discretion, replacements. NASD Arbitration Manual, Section 10308(c)(4)(B). The NASD decides any challenges to the selection of those arbitrators, who it previously selected using its discretion.

An arbitrator described his experience with this process as follows:

I have a guy here in ... who was appointed off-list to about 13 cases in a two year period. He actually lives in ... and goes to ... and other places. Those cases are ones that went to award. I looked them up and called the lawyers to confirm he had not been selected from the list. Some sent me the appointment letter, but most not. There were more awards where I couldn't confirm whether appointed or selected. Even so, that he has been on so many cases that went to award is highly unusual. Either (1) he was appointed to 80-100 cases in 18 months, or (2) cases don't settle when he's on the case. Why not? He's an industry slug and respondents do not offer to settle if they have him. He has two claimant awards, both to the same law firm, but I don't believe anything is going on there. I know the lawyers. I'm going to try to get my congressman to ask for a GAO study limited to arbitrator appointment and how the list works.

(Identifying information has been omitted. I would seek the arbitrator's permission to reveal further details in the event that the SEC would wish to investigate his allegations as part of its oversight process or otherwise.)

Conflicts of Interest

The Petition contends that, because a party's objection to a selected arbitrator is presently decided by the NASD and NASD personnel are effectively selected and financed by the securities industry, the NASD has an obvious conflict of interest and arbitrator disqualification decisions would favor the securities industry party. Basically, due to its conflicts of interest, the NASD cannot even purport to be a neutral forum.

There is another conflict of interest. The NASD has, in substance, informed the parties and the SEC that its process functions properly. If the NASD grants a motion

Mr. Jonathan G. Katz
July 16, 2005
Page Three

containing the objection, the NASD is, effectively, stating that its arbitrator selection process functions improperly, e.g., the “block box” is broken, discretion was improperly exercised. By rendering a sufficient number of decisions in favor of objecting parties, the NASD’s arbitrator selection process would become suspect and the decision-maker might feel the need to seek other employment.

Conclusion

Examples cited in the Petition demonstrate that the NASD’s arbitration selection process is seriously flawed and that purported SEC oversight of the NASD leaves much to be desired. Greater accountability and reduction of conflicts of interest are necessary. The proposed Administrative Judge solution is economically feasible and would engender more confidence in the arbitration process. At the least, the Petition and the example cited in this comment raise serious specific allegations, which should be investigated during the SEC’s oversight of the NASD.

Please communicate with me in the event that further information is desired.

Very truly yours,

LES GREENBERG

LG:ms