DAVENPORT
& COMPANY
Building Wealth Together

July 20, 2005

Jonathan G. Katz
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-9303

Re: File Number SR-NASD-2003-168

Dear Mr. Katz:

This is in response to the Securities and Exchange Commission's invitation for comment on the rule change proposed by the National Association of Securities Dealers ("NASD") to expand the types of information NASD makes available through its public disclosure program. Among other things, NASD proposes to make publicly available so-called "Historic Complaint" information that NASD would not otherwise publicly disclose if a registered representative's record has, in NASD's view, "demonstrated a pattern." However, a substantial portion of the criteria that NASD proposes to use as the basis of concluding that a "pattern" exists does not justify such a conclusion. Accordingly, the Commission should not approve the proposed rule change until NASD corrects the flaws in its proposal.

By way of introduction, I am the president and chief executive officer of Davenport & Company LLC. Founded in 1863, Davenport is a member of the New York Stock Exchange and NASD. Wholly owned by its employees, Davenport is the largest independent stock brokerage firm headquartered in Virginia. Davenport is a full-service firm employing nearly 400 associates, including over 150 registered representatives, in its home office in Richmond and its 18 branch offices in Virginia, North Carolina, and Maryland.

Few, if any of Davenport's registered representatives have records that would trigger NASD's proposed Historic Complaint disclosure. Nevertheless, I write because I firmly believe that NASD's proposed criteria are flawed and fundamentally unfair.

Under NASD's proposal, a pattern exists where a registered representative has, within a ten-year period, three or more:

- currently disclosed regulatory actions;
- currently disclosed customer complaint, arbitration, or litigation disclosures
- disclosures of customer complaints that are more than two years old that have not been settled or adjudicated
- customer complaints, arbitrations, or litigation that have been settled for an amount less than $10,000;
- of any combination of the above.

Where such a pattern exists, NASD proposes to release all "Historic Complaints," regardless of age. NASD's justification for this is that such disclosure "would enable public investors to make an informed assessment as to whether a particular broker has demonstrated a pattern of conduct over the years," and public investors could "determine for themselves the significance, if any, of the Historic Complaint(s)."

An "informed assessment," by definition, cannot be based on unsubstantiated allegations. Yet, NASD's proposal includes using pending, unsubstantiated, and unadjudicated regulatory and customer complaints. This is fundamentally unfair. The bedrock of American justice is due process: the right to notice and to the opportunity to be heard—to confront and present appropriate evidence regarding allegations. NASD's proposal significantly erodes this bedrock principle of fairness. NASD's proposal places far too much emphasis on unsubstantiated allegations. Certainly, there are well-grounded customer complaints. But there are also a significant number of customer complaints that result from disappointment, misunderstanding, and sometimes actual malice. We have a well-developed customer arbitration process to separate the wheat from the chaff of customer complaints. NASD's proposal undermines that process, and unfairly tarnishes representatives who have meritorious defenses, by inviting the public to form a conclusion about the representative based merely on allegations.

The use of unadjudicated regulatory allegations is also problematic. To be sure, the commencement of a regulatory action is a serious matter. But even then, regulatory allegations are not always a reliable basis to form conclusions. One recent study found that over 10% of the disciplinary actions brought by NASD staff between 2000 and 2004 resulted in a finding of no liability, and, even where the staff met its burden of proving liability, the sanctions imposed were often less severe than requested.[1] A customer relying on allegations, as opposed to the results, of disciplinary actions may well be misinformed about the true nature of the registered representative.

Moreover, the regulatory hearing process provides for the prompt adjudication of disciplinary matters. Permitting a registered representative the opportunity to defend against regulatory allegations before using such allegations as the basis of expanded adverse disclosure is a matter of fundamental fairness and would not cause undue delay in public disclosure.

NASD's proposed reliance on settlement under $10,000 is also misplaced. Many times it makes sound business sense to offer a customer a modest settlement in order to preserve a relationship and avoid the expense of arbitration even if the customer does not have a valid claim. If NASD's proposal to rely on such settlements is accepted by the Commission, it would certainly alter the current cost benefit analysis attendant to modest settlements. The result would be fewer settlements and more arbitrations. The current system of public disclosure encourages mutually agreeable resolution of disputes involving modest amounts, which is beneficial to customers,

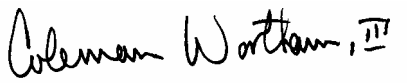
[1] See Brian L. Rubin and Christian D. Cannon, "The House That The Regulators Built: An Analysis of Whether Respondents Should Litigate Against NASD," Securities Regulation: Law Report, Vol. 37, No. 781 (May 2, 2005) (BNA, Inc.).

registered representatives, and member firms. NASD's proposal will certainly discourage such settlements, and it is difficult to see any significant advantage to customers from that result.

I agree with one underlying purpose of NASD's proposal: registered representatives who have abused the trust of their customers should not be permitted to continue such actions in this industry. But the Commission, state regulators, the NYSE and NASD have the necessary authority to remove such brokers from our industry, and the public customer arbitration process provides an avenue for redress to wronged customers. Moreover, it is important to our system of justice to insure that the understandable zeal to identify and punish unworthy brokers does not result in injustice to innocent registered representatives.

In sum, NASD's proposal to disclose Historic Complaints tips the balance out of its proper line. The proposal is far too reliant on the presence of unsubstantiated allegations and far too discouraging to the resolution of modest claims. I respectfully urge the Commission to reject the proposal as presented, and to require NASD to remove from its proposed criteria of pattern those shortcomings.

Very truly yours,



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