State of Utah
Department of Commerce
Division of Securities

MICHAEL O. LEAVITT
Governor

OLENE S. WALKER
Lieutenant Governor

KLARE BACHMAN
Executive Director

JASON P. PERRY
Deputy Director

S. ANTHONY TAGGART
Division Director

December 12, 2003

Re: Choice of Law Provisions in Arbitration

Dear Broker-Dealer:

The Utah Division of Securities ("Division") has received numerous complaints about broker-dealers that argue, during arbitration proceedings involving Utah clients, for dismissal of claims and remedies under Utah law based upon choice of law provisions in arbitration agreements. This letter is to put you on notice, for the reasons articulated below, that the Division considers such agreements to be contrary to public policy and unenforceable. Furthermore, any future assertion of this defense in an arbitration proceeding involving a Utah citizen will subject the broker-dealer to discipline and sanction by the Division for engaging in Dishonest or Unethical Business Practices.

The purpose of state securities regulation is to protect investors. Utah has a strong interest in protecting its citizens and deterring wrongful conduct. The Utah Uniform Securities Act ("Act") provides numerous rights and remedies to Utah investors. The Utah Legislature made it clear that these rights and remedies may not be waived by contract or agreement. Specifically, § 61-1-22(9) of the Act states: "A condition, stipulation, or provision binding a person acquiring a security to waive compliance with this chapter or a rule or order hereunder is void." Based upon this statute, the Division considers the choice of law provisions in new account documentation to be void to the extent that the provisions may be interpreted to eliminate any protections or remedies that Utah citizens have under the Act. However, the Division does not dispute the ability of broker-dealers and clients to agree by contract to submit disputes to arbitration.

The Division's position is supported by past actions of the courts, the SEC, and the NASD. When faced with a broker-dealer's defense that an investor should be deprived of a statutory remedy from his or her state of residence because of an out-of-state choice of law contractual provision, courts have consistently focused on the states' anti-waiver provisions and the states' public policy of protecting investors and regulating sellers. *See Hall v. Superior Court*, 150 Cal.App. 3d 411 (Cal.Ct.App.1983); *Ito Intern. Corp. v. Prescott, Inc.*, 921 P.2d 566 (Wash.App. Div. 1, 1996); *Getter v. R.G. Dickinson & Co.*, 366 F.Supp. 559 (S.D. Iowa 1973); *and Boehnen v. Walston & Co., Inc.*, 358 F.Supp. 537 (D.C.S.D. 1973).

160 East 300 South, 2nd Floor, PO Box 146760, Salt Lake City, Utah 84114-6760 • telephone (801) 530-6600 • facsimile (801) 530-6980
email: security@utah.gov • www.securities.utah.gov

Utah!
Where ideas connect™

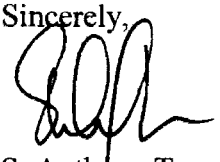
In 1989, the SEC stated, "[Customer] [a]greements cannot be used to curtail any rights that a party may otherwise have had in a judicial forum." (Securities Exchange Act Release No. 26805) Furthermore, NASD Rule of Fair Practice 3110(f)(4) states: "(4) No agreement shall include any condition which limits or contradicts rules of any self-regulatory organization or limits the ability of a party to file a claim in arbitration or limits the ability of the arbitrators to make any award." The NASD has initiated numerous disciplinary proceedings against broker-dealers for asserting New York choice of law arguments in violation of Rule 3110(f)(4). *See* NASD Notices to Members – Disciplinary Actions (December 1998); NASD Notices to Members – Disciplinary Actions (December 2002).

I note that the NASD recently proposed a change to Rule 3110(f)(4). Please be aware that regardless of how the NASD may amend Rule 3110(f)(4) now or in the future, the status of the law in Utah and the Division's policy regarding enforcement of Utah law will not be affected. Furthermore, please be aware that Utah supports the position of the North American Securities Administrators Association on this issue, which was articulated in their comment letter in response to the recent NASD rule proposal.

In summary, based upon Utah law and public policy considerations, if the Division discovers any Utah licensed broker-dealer attempting to limit the rights and remedies of a Utah citizen with a choice of law provision, the Division intends to file appropriate actions and to seek appropriate sanctions. Please advise any attorney that represents your firm in arbitration proceedings of this letter. The Division will not accept as a defense in a proceeding before the Division, that the attorney representing the firm was not aware of the Division's position.

If you have any questions about the position of the Division on this or any issue, please contact George Robison, Director of Licensing and Compliance, or myself, at (801) 530-6600, or by email at *security@utah.gov*.

Sincerely,



S. Anthony Taggart
Director