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August 30, 2005

VIA EMAIL: McGuireC@SEC.gov

Ms. Catherine McGuire  
Chief Counsel  
Division of Market Regulation  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

Dear Ms. McGuire:

Receipt of your letter dated August 19, 2005 is hereby acknowledged.

In your summary, you stated, "In your petition, you propose that the Commission proceed with rulemaking designed to encourage arbitrators serving on self-regulatory organization ("SRO") arbitration panels to conduct legal research..." That is not totally correct. The proposal stated, "The petitioner requests the creation of rules designed to: (1) specifically permit arbitration panel members, should they elect to do so, to conduct legal research, or, in the alternative, forbid Self-Regulatory Organization ('SRO') sponsored arbitration forums from restricting arbitrators from conducting legal research." The Petition set forth an explicit example of how NASD Dispute Resolution sanctions arbitrators who wish to employ the law as it is known to them or revealed through legal research in their decision-making process, to-wit:

The NASD policy requires that an arbitrator's extensive knowledge of securities law and requests for full disclosure to co-panelists and the parties be considered as bias, when it should be considered as a demonstration of competence. An NASD Regional Director recently attempted to dissuade an arbitrator, who is well-versed in securities law and experienced in securities litigation/arbitration, from informing co-panelists and attorneys for the parties of applicable case law. (The relevant legal opinion describes the decision making process/criteria without specifying whether the ultimate decision was in favor of the plaintiffs or defendants.) The arbitrator desired to learn the attorneys' opinions as to whether the case law was applicable to the matter and, if so, how it was applicable. The co-panelists refused to consider the law (as they believed that such would be a violation of some unspecified rule as the parties did not supply

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the legal authority) and/or allow its disclosure to the parties. The NASD Regional Director solicited a promise from the arbitrator not to employ that law in the decision-making process. When the arbitrator refused to disregard the law, the NASD Regional Director suggested that the arbitrator invite and grant a party's motion for recusal based on grounds of bias. After the motion was granted, the two remaining arbitrators granted a motion to strike from the record all questions asked by the recused arbitrator and all answers thereto.

You stated, "Your petition ... raise(s) important issues, most of which would be best addressed by amendments to the Uniform Code of Arbitration..." Referring the Petition to the Securities Industry Conference on Arbitration ("SICA"), a group composed of representatives of various SROs, the Securities Industry Association ("SIA") and "public" members, does not provide confidence that the severe problems described in the Petition would be effectively addressed. One of the SROs is the subject of the complaints set forth in the Petition. In a letter to the SEC dated August 2, 2005, the SIA described itself as follows: "The Securities Industry Association brings together the shared interests of nearly 600 securities firms to accomplish common goals." Essentially, the Petition would not receive a fair hearing before the SICA as it sets forth complaints against most of the SICA's members' vested interests.

In any event, the *Oversight of Self-Regulatory Organization Arbitration* (Audit 289) dated 8/19/2004, stated, "The Commission staff regularly attend SICA meetings." It would be most appreciated if, after the next SICA meeting, you would advise me whether the SICA did, in fact, review the Petition and SICA's associated comments thereon.

You stated, "[T]his responsibility (to oversee SROs' compliance with their arbitration rules) resides with the Commission's Office of Compliance Inspections and Examinations ('OCIE')." The *Oversight of Self-Regulatory Organization Arbitration* (Audit 289) dated 8/19/2004, stated, "Most arbitration complaints are received by OIEA. OIEA forwards significant complaints to MR (Division of Market Regulation), which then forwards appropriate data to OCIE. OCIE reviews these complaints upon receipt and considers them in planning SRO arbitration inspections." You state, "Your Petition and letter raise important issues..." Please consider the Petition and its supplement, which is contained in my letter of comment dated June 22, 2005, as a "complaint" and forward same to the OCIE for consideration in planning NASD arbitration inspections.

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

Very truly yours,

LES GREENBERG

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