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NASD's involvement in survey is questioned

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A survey intended as an independent inquiry into investors' perceptions of the securities arbitration system has come under attack before even seeing the light of day.

The Securities Industry Conference on Arbitration, a balanced group of public members, self-regulatory organizations, defense lawyers and plaintiff's attorneys that studies and develops model rules for securities arbitration, has been developing the survey for the past several years.

The survey is ready to be sent out but has been delayed in part by continuing contract negotiations between Washington-based NASD and the outside administrator of the survey, said SICA chairman Constantine "Gus" Katsoris, a professor at Fordham University School of Law in New York.

In the meantime, plaintiff's attorney Les Greenberg of Culver City, Calif., said NASD has no business handling the contract. In fact, he questioned why the SROs that run the arbitration programs were closely involved in developing the survey.

NASD shouldn't be involved in any part of the survey process, Mr. Greenberg contended.

As an outspoken critic of arbitration, Mr. Greenberg runs a blog documenting his complaints at lgesquire.com/lg_links.html.

NASD is involved in the contract because it is paying for the survey, according to a public member of the SICA, Theodore Eppenstein, a senior partner with Eppenstein & Eppenstein in New York. The cost is being shared with the New York Stock Exchange, according to NASD spokesman Herb Perone.

Mr. Greenberg bases his criticism on minutes of SICA meetings he recently obtained from the Securities and Exchange Commission via a Freedom of Information Act request.

One of the issues uncovered in the minutes of the normally closed SICA meetings was a concern by Linda Fienberg, president of NASD Dispute Resolution Inc., about ownership of the survey data.

Mr. Greenberg is adamant that NASD, which administers 90% of industry hearings, not control administration of what the SICA will bill as an independent survey of investors who have been through the arbitration process. "If [NASD] doesn't like the results, [and if] they own the data, [we'll] never see the results," he said.

But according to Mr. Perone, the SICA is sponsoring the survey, over which it has complete editorial control.

Mr. Eppenstein said the survey results will be reported to the SICA, "and we're going to publish them. It will be transparent."

But to Mr. Greenberg, a more important issue is whether the survey questions will be fair. He pointed out that according to minutes from an SICA meeting last January, George Friedman, NASD executive vice president of dispute resolution, said that it would "not be appropriate for SROs to drive the process of collecting information on the fairness of SRO arbitrations."

In the past, NASD itself has surveyed investors who have used its arbitration forum, and reported generally positive results.

Minutes of the SICA meetings show that representatives of both the NYSE and NASD were closely involved in developing the current survey questions.

According to minutes of a meeting late last year, Ms. Fienberg at one point threatened to reconsider NASD's participation in the project if the survey contained what she felt were "somewhat inflammatory" questions proposed by the Public Investors Arbitration Bar Association, a Norman, Okla., group that represents plaintiff's attorneys.

The plaintiff's bar wanted to ask if mandatory arbitration should be eliminated and whether investors felt that the industry arbitrator on three-person panels should be eliminated.

Mr. Perone, however, said that a question about the inclusion of an industry representative on arbitration panels is being included in the survey, with the full support of NASD and Ms. Fienberg.

Mr. Greenberg said a "truly independent" outside consultant should have determined the questions in the survey. But according to Mr. Eppenstein, that is what the SICA did, at least in finalizing the questions.

The outside administrator of the survey, the Pace Investor Rights Project at the Pace University School of Law in White Plains, N.Y., consulted polling experts affiliated with Cornell University in Ithaca, N.Y., to ensure the neutrality of the questions, he said.

Meanwhile, Mr. Greenberg has complained to the SEC inspector general about the SICA.

In a letter to the inspector general last September, he claimed that the 29-year-old advisory group, which advises the SEC and was formed with its support, violates the 1972 Federal Advisory Committee Act, which requires open meetings of groups that advise the federal government on policy.