

Guest Commentary from Les Greenberg

Two recent WSJ articles mentioned a potential SEC compromise --- more "equal access" to the corporate ballot in exchange for mandatory arbitration of disputes between shareholders and corporations. This is a marriage of convenience. There should be premarital counseling and/or a detailed prenuptial agreement in any compromise.

In August 2002, James McRitchie, Editor of CorpGov.Net, and I re-initiated the issue of equal access by filing Petition for Rulemaking ([SEC File No. 4-461](#)) with the SEC. A background paper prepared by the Council of Institutional Investors stated that the Petition has "re-energized" the "debate over shareholder access to management proxy cards to nominate directors and raise other issues." (CII, "[Equal Access – What is It?](#)" California Public Employees' Retirement System ["CalPERS"], Investment Committee, Agenda Item 8d, 3/17/03)

In May 2005, as an arbitrator/litigator with many years of representing securities brokerage firms and customers with claims against securities firms, I filed Petition for Rulemaking ([SEC File No. 4-502](#)) and a [Supplement](#) with the SEC. That Petition enumerates the many deficiencies of the mandatory securities arbitration process and seeks associated rule changes.

As Chairman of the [Committee of Concerned Shareholders](#), I foresee the Business Roundtable touting the illusory benefits of mandatory securities arbitration to deflate legitimate shareholder requests for equal access to the corporate ballot.

The Business Roundtable may attempt to buttress its arguments by using a tool that is being developed by NASD Dispute Resolution. The NASD has commissioned a "Securities Arbitration Fairness Survey - 2006," dealing with whether participants of mandatory securities arbitrations before the NASD and NYSE believe that the process was "fair." The public is informed that the survey was conducted for the Securities Industry Conference on Arbitration. (In my opinion, which is now the subject of federal court litigation, SICA is a securities industry dominated group functioning as an advisory committee of the SEC, in violation of the Federal Advisory Committee Act.) Through a FOIA request of the SEC, which sought all communications between SICA and the SEC, the SEC produced thousands of pages of documents, including a copy of the [survey form](#) and [SICA Meeting Minutes](#).

While anticipating the results of the Securities Arbitration Fairness Survey - 2006, one might observe SICA's prior experience with "surveys." From January 2000 until January 2002, pursuant to SICA's recommendation and guidance, the NASD and NYSE arbitration forums provided claimants with alternative forums before which their claims could be heard. Of 277 eligible cases, eight claimants elected to participate (to some degree). SICA debated how the results of the "survey" would be portrayed to the public. A SEC representative described the internal debate by stating, "After tedious debate on how to characterize the replies (with the SROs wanting them to be a proxy for widespread joy with the process, and public member Ted Eppenstein asserting that he was privy to secret information indicating great woe with the process), I suggested that someone draft a short, flat report that doesn't say too much...."

As for the pilot itself, there are rumoured (sic) citings (sic) of a couple of cases, with unclear status or case stage."

In response to comments letters to SR-NASD-2006-023 (Consolidation of the Member Firm Regulatory Functions), wherein "Public Members of SICA" and the NASD dispute whether mandatory securities arbitration is "fair," I [commented](#) and [supplemented that comment](#) on the NASD's disingenuous citation of prior studies, surveys and reports to prove that arbitration is "fair."

I have much concern that the SEC may rely upon the Business Roundtable's citation of the results of the "Securities Arbitration Fairness Survey - 2006" to deny us, shareholders, our legitimate rights to equal access to the corporate ballot.

"Go for the jugular," that's what Les Greenberg said about proxy access. While allowing investors to set executive pay is a noble exercise, he believes the most important change must be to allow shareholders to nominate independent directors. ([Direct proxy access gaining momentum](#), Financial Post, 4/14/07)