UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
MARKET REGULATION

September 10, 1987

[LETTER SENT TO ALL SICA MEMBERS]

James E. Buck
Senior Vice President & Secretary
New York Stock Exchange, Inc.
11 Wall Street
New York, New York 10005

Dear Mr. Buck:

The Commission staff has been examining self-regulatory organization-sponsored arbitration over the past 18 months. The focus of the review was broad and was designed to test both the fairness and efficiency of self-regulatory organization ("SRO") arbitration programs. This review reflects the Commission's belief in the need for thorough oversight of SRO arbitration systems in light of the Supreme Court's decision in Shearson/American Express, Inc. v. McMahon. The staff has presented its findings to the Commission, which has endorsed the recommendations set out in this letter.

The Commission believes that securities industry arbitration generally operates fairly. However, there are numerous ways in which the process can be improved. Securities industry arbitration has changed a great deal since the Uniform Code of Arbitration ("Uniform Code") was adopted by the Securities Industry Conference on Arbitration ("SICA"). Those changes broadened investor, particularly small investor, access to justice. At that time, arbitration forums were conceived by the Commission and the SROs as providing an alternative dispute resolution mechanism to the courts for investors. Now, recent cases upholding predispute arbitration agreements together with increasing post-dispute selection of SRO-sponsored arbitration suggest that SRO-sponsored arbitration may become the primary forum for the resolution of disputes between broker-dealers and investors. This reduces the degree of informality properly available to the systems. At the same time, the Commission believes that the fundamental speed and efficiency of the arbitration system should be maintained.

The need for change in SRO arbitration derives directly from the limits inherent in the current arbitration rules. Significant changes should be instituted at the SRO arbitration programs in the coming months. In addition, further changes may be necessary as SRO arbitration systems adapt

to handle more complex cases and as the Commission continues its review of SRO arbitration programs. Because of the SROs' history of working closely together through SICA to implement effective arbitration policy and procedures, the Commission is sending to all SICA members this letter, which addresses the necessity of instituting changes to the existing arbitration rules and pamphlets.

Selection of Arbitrators

One key area of the Commission's review concerned the selection and standards for arbitrators that serve on the SRO-sponsored arbitration panels. A balance was struck in the existing rules between the need for impartial arbitrators and the need for industry expertise, resulting in the current provision for a majority of public arbitrators in cases involving public customers. The Commission continues to believe that the provision of mixed public/industry arbitration panels will contribute to fair and accurate resolutions of disputes between investors and broker-dealers. The absence of clear guidelines for qualifying public arbitrators, however, and the inclusion in the pool of public arbitrators of persons with clear affiliations with the securities industry is a source of great concern.

Public Arbitrators

The Commission recommends that arbitration panels include persons who are not so connected with the industry that it may hinder their ability to make independent judgments with respect to specific industry practices. Accordingly, we recommend that SICA revise the Uniform Code to limit clearly those persons who may serve as public arbitrators.

The Commission is concerned that industry affiliations of public arbitrators may undermine public confidence regardless of the character of the individual arbitrator. Securities industry retirees who have spent all or virtually all of their professional careers in the securities industry should not be permitted to serve as public arbitrators, regardless of the number of years that have passed since retirement. On the other hand, the current standard, which permits a person who has left the securities industry to serve as a public arbitrator after the passage of three years, is appropriate for persons who have left the securities industry for non-industry positions. Earlier securities experience of these arbitrators, however, should be disclosed to the parties in order to permit them to use their challenges effectively.

Lawyers and accountants who regularly provide services to the securities industry should not serve as public arbitrators. 1/ However, we would agree that professionals whose partners regularly represent broker-dealers could serve as public arbitrators so long as that fact is disclosed to the parties. Spouses of, and family members financially dependent on, securities industry personnel also should not serve as public arbitrators. Clearly, many spouses of industry personnel have independently formed ideas and independent sources of income. It would be impractical, however, to distinguish between these groups, and their serving as public arbitrators creates an appearance of bias that, in our view, is too strong.

Changing current criteria for the selection of public arbitrators will decrease somewhat the current public arbitrator pool. A expanded network of contacts may have to be established to locate and select arbitrators who meet the standards we recommend for public arbitrators. Accordingly, it would be appropriate for SROs to permit persons currently serving as public arbitrators who would not qualify as public arbitrators under the new criteria to continue to serve for up to three years, so long as the arbitrators' affiliations are disclosed to the parties, and, as discussed below, are grounds for challenges for cause. This should avoid scheduling difficulties for the arbitration departments.

Industry Arbitrators

The review did not disclose any problems involving the use of industry arbitrators in investor arbitration. There is no reason to change the standards for or use of industry arbitrators except to add those securities lawyers, accountants, and retired industry personnel who presently qualify as public arbitrators but would no longer qualify under the new standards.

Disciplinary History of Arbitrators

It is important for the SROs that administer arbitration programs to perform thorough checks for disciplinary backgrounds for all of its arbitrators. Arbitration department staff should check the Central Registration Depository ("CRD") or similar systems of other SROs for disciplinary history of arbitrators (except public arbitrators who have no prior industry experience) at the time they are enrolled. No person subject to a statutory disqualification should be permitted to serve as an arbitrator.

1/ In implementing such a standard, it would be appropriate to allow a de minimis exception where such lawyer's or accountant's billings to the securities industry do not exceed 10% for the preceeding two years.

SROs should also re-check CRD or another similar system when industry arbitrators are used if no check has been made in the last year.

The Commission is also concerned that the new arbitrator card adopted by SICA at its June 29, 1987 meeting, which is to be sent to all arbitrators, does not ask for sufficient disciplinary data. We recommend that SICA amend the card to ask whether the arbitrator has ever been convicted of or, in a regulatory proceeding, found to have engaged in conduct involving any offenses relating to theft, the taking of a false oath, or fraud. Similarly, the card or a letter sent with the card should ask that arbitrators undertake to update all information on the cards, including disciplinary information, and not just the information on conflicts of interest, as is requested in the recently adopted cover letter for the new cards. We believe that an undertaking to update all information on the cards should provide the necessary assurances with respects to public arbitrators and may provide additional useful information about industry arbitrators.

Arbitrator Training

Our review found that the SROs have administered virtually no formal training for arbitrators on matters relating to either arbitration law, including the scope of arbitrators' authority, relevant state law, or securities law. The current level of training should be addressed promptly.

The Commission believes that the SROs can make important progress in educating arbitrators through the immediate institution of a regular newsletter and the development of a comprehensive manual for arbitrators. The newsletter should serve both to provide general information on important issues and to distribute new case law or important articles in the field. A written newsletter, available to parties' attorneys as well as arbitrators, would help assure the presentation of both sides of issues and would allow counsel to formulate arguments tailored to the information level of arbitrators as gauged by the newsletter.

In addition, a basic manual that describes the arbitrators' job should be a valuable tool. The manual should explain arbitrators' power and responsibilities, which should aid them in achieving correct results. We are aware that SICA recently appointed a subcommittee to draft an outline for an arbitrator handbook that would cover some issues concerning arbitrator authority. The scope of the proposed handbook has not been set.

If SICA undertakes to carry out this project, the SROs that will utilize it should contribute the resources necessary to assure that the project is timely and thoroughly executed. 2/

Arbitrator Evaluation

In our view, the best assurance of effective arbitrator monitoring by SRO staff would be for it to keep an ongoing record of arbitrator performance by instituting a system of written evaluations. Parties, their counsel, and other arbitrators should all be requested to fill out a questionnaire seeking evaluations of arbitrator competence, preparedness, and fairness. To the extent possible, care should be taken to design the evaluation system so as not to interfere with a party's ability to vacate an adverse award. Evaluations should be used exclusively for the administration of the arbitration department and should not be available to parties in subsequent litigation. It may be efficient for SICA to develop such a questionnaire in order that all future assessments of arbitrators can be communicated easily and uniformly among SROs.

We have been informed of the current efforts to pool arbitrators among SRO arbitration systems. We recommend that SICA members work together to assure that all SRO forums are advised of each others' evaluations of arbitrators. One way of addressing the greatest of our concerns, which is the concern that an arbitrator who would not be used under any circumstances by one SRO in an investor-related dispute will be referred to other SICA forums, is to purge the files of unqualified arbitrators.

Arbitrator Disclosure

Questions of arbitrator disclosure within SRO-sponsored arbitration are addressed in Section 11 of the Uniform Code, educational pamphlets, and we understand, at some SROs, correspondence with arbitrators. We believe the SICA provisions generate insufficient information either for the forum to use in order to determine whether to include an individual on its roster or for parties to use in determining whether to accept an arbitrator.

The Commission recommends that SICA amend Section 11 to incorporate the specific scope of disclosures that are provided in the American Bar Association/American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes ("ABA/AAA

2/ In addition, policies or interpretations announced in the newsletter or manual that come under the broad definition of a stated policy or practice of an SRO as defined in Rule 19b-4 should be filed pursuant to that rule.

Code"). 3/ Adapting Section 11 to parallel the disclosure required by the ABA/AAA Code would provide the necessary guidance to arbitrators about the types of relationships that may create conflicts of interest.

In addition to incorporating these types of disclosure into SICA's disclosure rule, SICA's rule should add to those disclosures similar relationships that the arbitrators have with the industry generally, rather than to just the parties, witnesses, and counsel. Industry-related disclosures would ensure that accurate descriptions of the arbitrators are provided to the parties.

We support SICA's current efforts to improve arbitrator disclosure, including the recent vote at its June 29, 1987 meeting to remind arbitrators by letter each time they serve to use the ABA/AAA Code in determining whether a conflict of interest or appearance of bias may exist. In light of your recent efforts, we recognize that this recommendation codifies and expands a developing practice in SRO-sponsored arbitration.

The Arbitrator's Oath currently used by some SROs should also be changed so that it does not refer to only a limited range of conflicts relating to direct employment or blood relationships. It should be amended to reflect the full range of relationships recognized in the ABA/AAA Code.

In addition, the Commission has concluded that practical considerations limit the usefulness of disclosure information provided to the parties under the current rules. SROs could reduce these problems by amending Section 9 of the Uniform Code to provide that parties be given all of the information disclosed by the arbitrators at the time that the parties are first given the arbitrators' names. Full disclosure of arbitrators' backgrounds to parties at the earliest possible stage in the process should avoid unnecessary postponements of hearings and promote knowledgeable use of challenges.

3/ The ABA/AAA Code provides for broad reaching arbitrator disclosure of any financial, business, professional, family or social relationship with any party, its lawyer, or an individual whom he has been told will be a witness. It also requires arbitrators to disclose any such relationships involving members of their families or their current employers, partners or business associates.

We believe that such full and early disclosure is preferable to the current system, where under Section 9, only the names and current business affiliations of the arbitrators are provided to the parties. More information is provided only if requested under the disclosure provision in the educational pamphlet. Given this two-tier system for obtaining arbitrator data, the time frames provided in the rules are not realistic, since they do not allow sufficient time for the parties to obtain enough information to exercise their judgment about whether to challenge an arbitrator. We believe that, given more complete initial disclosure, the time frames would work better. We also believe that further inquiries concerning background information for particular arbitrators should still be permitted, and the right to make such requests should be codified in the Uniform Code. Where such inquiries are timely and there are delays in obtaining information, extensions of time to challenge an arbitrator should still be given.

We also recommend that the "script" for the arbitration hearing itself be modified to provide for the introduction of the arbitrators and to permit an inquiry before they are sworn to ensure that there are no known conflicts between the arbitrators and the parties, their counsel, or the witnesses and, as required by the ABA/AAA Code, to inform the other arbitrators of the existence of any relationship that would be required to be disclosed thereunder.

Challenges for Cause

Under the Uniform Code, parties are allowed one peremptory challenge and unlimited challenges for cause. We found, however, that there is nothing in the rules or pamphlets that gives any guidance on what might constitute a challenge for cause. SICA should provide guidance to parties on what might constitute a challenge for cause. First, during the three year period for the transition to public arbitrators who meet the standards proposed above, parties should be allowed to object for "cause", as of right, to those arbitrators who would not qualify as public arbitrators under the new standards. That right should be set out in the Uniform Code.

After the transition period, however, SICA should discuss the availability of cause challenges in more general terms in the educational pamphlets provided to the parties, rather than in the rules. The pamphlet should advise parties that certain business, family, or social relationships may be sufficient to substantiate a challenge for cause.

Preservation of a Record

One important function for the SROs' arbitration departments is to make and preserve an adequate record for courts to use in those narrow situations under which they review arbitral awards, using the developing "manifest disregard" standard. Current SRO practices are not uniform with respect to the maintenance of a record, and the rules do not provide for the making of a record unless one of the parties requests a record in advance of the hearing. SICA should amend the Uniform Code to provide for a sufficient record for appellate courts to use for their review. This should be accomplished either with high quality tape recordings or by engaging a court reporter to record testimony, which can later be transcribed on request.

Awards

The Commission recommends that arbitrators be required under the Uniform Code to include in their awards a summary of the legal issues resolved in a dispute and to indicate whether they concur with or dissent from the award. SROs should make such awards publicly available in order to balance out the inherently unequal familiarity with the system of investors and member firms. Information available regarding awards should include the names of the parties in each case, a summary of the issues in the dispute, a summary of the legal issues, including jurisdictional issues, resolved, the relief sought or the amount of monetary damages claimed and the damages awarded, the names of the arbitrators and whether each concurred with or dissented from the award in the case. For those cases where a claimant does not prevail, the award should distinguish between those cases dismissed on the merits, and those cases dismissed because of the arbitrators' determination that they do not have jurisdiction over the party who allegedly harmed the claimant.

Direct access to this data will help investors to check the track record of proposed arbitrators in order to exercise their peremptory challenge more effectively. It is important for the public and other infrequent users of the system to have ready access to summary results of arbitration cases and, therefore, have some ability to evaluate the system.

Data currently available to the public consist solely of the percentage of cases in which public customers were awarded some portion of the amount they claimed against their broker. No data are available with respect to particular arbitrators' awards. Conversely, brokers who use the system frequently keep detailed records on the cases and arbitrators they deal with.

Discovery

The Commission's review of the procedures for prehearing discovery disclosed a need for the SROs to expand existing procedures in order to provide both for the resolution of discovery disputes by either the chairman or full panel prior to the hearing and for prehearing conferences and preliminary hearings for cases that are sufficiently complex to warrant such procedures.

Under existing rules, documents that a party requests pursuant to subpoena do not have to be produced until minutes before a hearing is to begin. We do not believe that is sufficient time for a party to prepare for a hearing.

While the parties are expected to exchange documents informally, we understand that on occasion the parties refuse to turn over certain documents that are, in their view, privileged or irrelevant. Customer complaints and other documents evidencing supervision or lack of supervision of a registered representative, which are in the sole possession of the industry party and are often relevant to a complainant's case, should be turned over in a timely fashion. There is, however, no established enforcement mechanism to ensure that parties cooperate in document production. Although the failure to produce documents may be deemed inconsistent with SRO rules requiring that their members conform with just and equitable principles of trade, we are not aware of any disciplinary actions to enforce this obligation.

We do not believe that the risk of being assessed costs for a postponement resulting from one party's failure to produce documents in a timely fashion is sufficient incentive to produce documents voluntarily where the other party has a good case. The party that does not produce documents or produces them pursuant to a subpoena on the day of the hearing risks only hearing costs and obtains either a delay or a hearing where the adverse party does not have access to, or adequate time to review, documents he believes to be necessary. The practical problem under the Uniform Code is that the requestor does not know whether, on the day of the hearing, he is going to argue over discovery matters only or whether the arbitrators will proceed to resolve the case on the merits.

Arbitration department staff has represented that it informally tries to encourage the parties to resolve discovery disputes in advance of the hearing and, at some SRO's, may involve the arbitrators in that process. The Commission is impressed with this development. We are concerned, however, that it takes place outside of the rules. We also do not understand that all parties are regularly informed that SRO staff can facilitate the production of documents through these informal means.

We recommend that these problems be avoided by the adoption of rules that would codify the process of drawing the arbitrators into the discovery process prior to the hearing of the case. We understand that SICA is now considering a rule, suggested by the National Association of Securities Dealers, that, if adopted, would largely codify the NASD's informal practice of forwarding discovery disputes to arbitrators prior to hearings on the merits, including giving the panel chairman the authority to be sworn and to resolve discovery issues in advance of the hearing. The draft SICA rule should promote more efficient and fairer document exchange and it should be adopted with only minor revisions to lengthen by five days the time frames for document requests (from 15 to 20 business days) and responses thereto (from 10 to 15 business days) and with conforming amendments to Section 14 of the Uniform Code, which currently permits a notice of hearing to be issued as little as eight days prior to the date fixed for the hearing.

Particularly for larger, more complicated cases, procedural hearings would also help delineate the issues in dispute, result in stipulations, and otherwise set the focus for the hearing on the merits. One source for a model prehearing rule to cover disputes that the draft SICA rule does not adequately address is Section 10 of the American Arbitration Association's ("AAA") Commercial Arbitration Rules, which provides for a prehearing conference and preliminary hearing. Accordingly, the Commission recommends that SICA explore the use of prehearing conferences and preliminary hearings for large cases.

The Commission is also concerned that the Uniform Code currently does not provide an ability for the parties to seek the deposition of witnesses in appropriate cases. We share the desire to limit wholesale use of depositions. However, depositions to preserve the testimony of ill or dying witnesses, or of persons who are unable or unwilling to travel long distances for a hearing, as well as to expedite large or complex cases, will add measurably to the fairness of the forum. By granting the arbitrators the ability to determine whether to permit depositions of witnesses who will not appear at the proceedings or depositions that will facilitate a faster or fairer resolution of large or complex cases, unnecessary and dilatory requests may be controlled, and the discovery issues may still be resolved prior to the hearing. For these reasons we recommend that SICA amend the Uniform Code to provide for depositions in these limited circumstances.

Public Members

Currently, there is no system for bringing in new public members for SICA. Three of its members have served since its creation in 1977. We believe that SICA's public members have made a substantial contribution to SICA. Nevertheless, a rotation of public members might provide SICA access to a wider variety of perspectives regarding the arbitration system. Accordingly, we recommend that SICA adopt staggered four-year terms of office for its public members. We also recommend that SICA implement a system for selecting new public members that assures that they are considered by the remaining public members to be truly public representatives and to be people whom they believe will make a contribution to SICA deliberations.

Educational Pamphlets

SICA should also amend the educational pamphlet for parties to make clear the obligations of the claimants. The pamphlet now advises parties, at p.8, that "parties must prove their respective cases." The pamphlet should clarify parties responsibilities to brief novel theories of recovery and requests for special damages and to document carefully their proof of damages.

Increasing Pressure on SRO Arbitration Systems

SRO arbitration case load has increased dramatically in the past five years and is growing rapidly. We recommend that SICA encourage broker-dealers to include in their arbitration clauses the option of using AAA arbitration as well as SRO arbitration forums. A choice of forums could reduce case load and the case turnaround time of SRO sponsored forums.

Adherence to Rule 19b-4

The SRO members of SICA should review their unwritten policies and procedures for the administration of their arbitration programs, and file under Rule 19b-4 any policies and procedures that constitute a "stated policy, practice, or interpretation" under that rule. Where SICA has not formulated uniform policies, the differences in SRO systems should be clear from the rules and SICA-developed educational pamphlets should provide information about the differences in procedures at various forums where applicable.

Relationship Between the Arbitration Department and Disciplinary Authorities

We understand that the arbitration departments are administered separately from other offices of the SROs largely because of the acceptance of arbitration as a private means of dispute resolution. We recommend that the SROs include in the arbitrator manual they will develop, the ability of arbitrators to refer to appropriate disciplinary authorities cases in which they believe the conduct alleged against a broker, dealer, municipal securities dealer, or associated person thereof is particularly egregious.

SICA's information pamphlets should point out clearly that investors should draw regulatory attention to their allegations when they believe that there has been fraud or that other investors may be at risk.

Large Cases

Our review has led us to conclude that special guidelines for the administration of large and complex cases are needed. The AAA has developed excellent guidelines for defining the role of arbitrators in expediting large and complex commercial cases. We recommend that these guidelines be used by SICA as a model for guidance to large-case arbitrators. These guidelines rely to a large extent on the initiative of well trained and active, rather than passive, arbitrators to guide cases fairly and expeditiously. None of the techniques in the guidelines for narrowing issues and promoting timely exchange of documents and deposition of witnesses conflicts with the Uniform Code as we recommend it be modified. Rather, these guidelines reinforce the importance of an effective arbitrator education program, such as we have recommended above, to teach arbitrators how to use the tools provided in the rules. These procedures should be incorporated into SRO training materials, and future SRO training should encourage arbitrators to understand and use them.

In addition, we understand that some members of the American Bar Association's Subcommittee on Civil Liabilities and Litigation ("ABA Subcommittee") that have been reviewing securities industry arbitration and other commentators have expressed a preference for alternative forms of arbitrator selection and written opinions for large cases. In particular, they advocate either tripartite or the AAA list selection methods. Although we do not advocate SICA's adoption of different arbitrator selection methods, we encourage SICA to discuss these ideas with the ABA Subcommittee and others. We would have no objection to a provision allowing both parties to

agree to those alternate methods in large cases if arbitrators were paid by the parties. Further, we believe that it would be reasonable for SICA to respond to parties' requests for written opinions specifying rationales for the resolution of all underlying claims and would encourage SICA to engage in discussions with the ABA Subcommittee on how to fashion a rule that would permit one or both parties to request opinions in appropriate cases. In addition, we believe that when arbitrators prepare written opinions, those opinions should be made publicly available through the procedures developed for making available summary data on arbitration results. This will provide a body of precedent that, while not legally binding, may be of assistance to arbitrators particularly in large and complex cases.

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As we stated at the outset of this letter, our review was broad and designed to evaluate the fairness and efficiency of the systems. The arbitration systems are complex and subject to competing policy considerations. It is important for arbitration to be efficient, inexpensive, and accessible. It is paramount that arbitration be fair. The changes recommended in this letter should help SICA and the SROs to assure the fairness of arbitration under the Uniform Code.

I would appreciate receiving SICA's views on the recommendations made in this letter by December 15, 1987. Please contact me at 272-3000 or Catherine McGuire at 272-2790 to discuss any of the specific recommendations in this letter.

Sincerely,

Richard G. Ketchum
Director

School of Law

FORDHAM UNIVERSITY

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Faculty

PERSONAL AND UNOFFICIAL

October 9, 1987

Dear Mr. Ketchum:

The undersigned members of the Securities Industry Conference on Arbitration (SICA) representing the Public (Public Members) respond to your letter of September 10, 1987.

Although three of the Public Members (PMs) have been members of SICA since its inception and are well known to the SEC, none of these long time members was apprised of the contents of your letter or in any way consulted before it was released to the press. We find that extremely disturbing.

Your staff was present at the SICA meeting of June 29th and thus knew that the next meeting of SICA was scheduled for September 15th. No SEC staff member, however, at the June 29th meeting, then or thereafter, informed the PMs that a report was to be submitted to the Commission; nor, was any input requested from the PMs. Moreover, the information was released to the press before 3 of the 4 PMs were informed. Furthermore, your letter was not received by us until shortly before the September 15th meeting, giving us very little time to thoroughly analyze it.

For the past ten years the PMs have been actively advocating the vast majority of the positions now belatedly presented by the SEC. Staff members of the SEC have been regularly present at SICA meetings, but very little, if any support, has in the past been given by the SEC to the positions urged by the PMs.

A reading of the agenda for the September 15th meeting, prepared and distributed prior to your letter of September 10th shows that at least three of those items were on the agenda and had previously been discussed at previous SICA meetings. In addition, we believe that the minutes of the SICA meetings will show that many more of those issues have been considered and discussed.

We would like to make the following general comments regarding some of the points raised in your September 10, 1987 letter:

1. We are in agreement with your recommendation concerning the qualification of public arbitrators (p.2). We find, however, that the "de mimimus" standard is too high. Even 5% of the income of a single practitioner earning a gross of $100,000, per year is appreciable. Given a large firm with a very substantial income, 5% to 10% must render the appearance of impartiality even more suspect.

2. Regarding arbitrators' background disclosure (p.3), SICA has for many months been attempting to perfect a better and broader "arbitrator profile" to procure as much information on a proposed arbitrator's background as possible. The profile should be filed at the time the arbitrator is first appointed and updated from time to time by both the Arbitration Department of the SRO and the arbitrator. One of the PMs is a member of and has been active in the committee preparing the proposed "profile". A copy of it, as last amended, was attached to the agenda for the September 15th meeting. It requests information as to revocation or suspension of any license, registration or authority to practice any business or profession and whether any disciplinary action has been taken, with the details if any. We agree that this should be expanded to include convictions or penalties of any kind in a regulatory or formal criminal proceeding.

3. As to the issue of arbitrator training (p.4), the PMs have for many years brought up the question of arbitrator education. SICA is presently engaged in the preparation of an Arbitrator's Handbook which addresses nine items. A rough outline of those items is attached as Exhibit A.

4. We strongly disagree, however, with your suggestion that arbitrator evaluation be done by the parties, or their counsel (p.5). Such an opinion can rarely be objective after decision; but, even in the course of a hearing and prior to a decision will be subject to and affected by an arbitrator's rulings in respect of one or the other of the parties. An evaluation by other members of the panel and/or the Arbitration Counsel is a fairer and more objective approach.

5. Regarding your comments as to a record of proceedings (p.8), we are in complete agreement that an adequate record must be kept of every hearing. Most importantly, a transcript should be furnished to each arbitrator (in a multisession arbitration) a reasonable time before an adjourned date, so that the testimony may be read and properly evaluated. It is unrealistic to expect that the details and minutae of testimony will be retained over any protracted period. Notes taken in multisession hearings are generally insufficient for that purpose. Moreqver, consideration should be given to also providing such copies to the parties at a nominal cost.

6. We strongly disagree with your general comments regarding the publication of awards, written opinions and summaries of the legal issues involved (p.8). We feel that the result would be to turn what is intended as an efficient and unconvoluted method of disposing of conflicting claims into an intricate court system which in time will rival the formal court in delay and inefficiency. We do feel that more information should be given to the parties but not as to how any arbitrator voted in previous arbitrations. To label any arbitrator as pro public or pro industry does a distinct disservice to the ideal that all arbitrators public or private are neutral and decide only on the oral and written evidence.

7. Although your suggestion of rotating PM's (p.11) has some appeal on its face, there are some drawbacks. Three of the PMs have served since the inception of SICA; and, a reading of the minutes of the last ten years should show that they have lost neither their zeal nor their ability to plead for the public's best interest. A rotation system with a limitation of term would discard the experience that the PMs have built up over the years. Indeed, the very fact that the SEC has belatedly decided to recommend the adoption of so many of the reforms that the PMs have been advocating for years should be more than sufficient proof that the public has been well served.

Our above comments are by no means complete and subject to additional study. Indeed, the Public Members of SICA look forward to continuing to assist the SEC and the SROs in shaping a fair forum for the arbitration of Securities Disputes between the public and the industry. It continues to be the PMs' contention, however, that no matter how fair the forum, criticism of the system will not ease until a new and separate independent arbitration organization--specializing in securities matters--is also established in lieu of, or in addition to the present SROs. Such independent forum could be created to be subject to the regulatory authority of the SEC.

We remain,

Very truly yours,

Peter R. Cella, Jr.

Mortimer Goodman

Constantine N. Katsoris

Justin P. Klein

Richard G. Ketchum, Esq.
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MUNICIPAL SECURITIES RULEMAKING BOARD

December 8, 1987

Mr. Richard G. Ketchum
Director
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: SRO Arbitration Programs

Dear Mr. Ketchum:

The Municipal Securities Rulemaking Board is pleased to respond to your letter concerning self-regulatory organization ("SRO") arbitration programs. You suggest certain modifications to current SRO arbitration rules and practices. As discussed below, a number of the suggestions will improve existing arbitration facilities and are being implemented.[1] Other suggestions, however, could engender far-reaching changes in arbitration law and policy and the Board believes that additional discussion and evaluation by the SROs and the Commission is necessary.

The Board, as the sponsor of one of the larger SRO arbitration facilities, is committed to providing fair and efficient facilities for resolving municipal securities disputes. Accordingly, it has determined to present its views directly to the Commission.

Background

1. Objectives of Arbitration

In evaluating SRO arbitration facilities, it is important not to lose sight of the objectives of arbitration. The most important objective is to provide a fair, relatively speedy and less expensive alternative to

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1 Among other things, the Board is reviewing its arbitration policies and interpretations for purposes of Section 19(b) of the Securities Exchange Act ("Act") and rule 19b-4 thereunder.

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litigation for resolving disputes.[2] Formal rules of evidence do not apply to arbitration hearings and, while there are certain procedural requirements, the process is relatively informal. A second, concomitant objective is to relieve the congested state and federal judicial systems through use of binding, generally nonreviewable arbitration.[3] These objectives have evoked a strong public policy in favor of arbitration that has been recognized by the Congress and by state legislatures through the adoption of arbitration statutes, and by the courts in enforcing such statutes and voluntary arbitration agreements. If both of these objectives cannot be served, the public policies supporting increased use of arbitration to resolve disputes may be diminished.

2. MSRB's arbitration program

The Board was created by Congress in June 1975.[4] Its arbitration program began in December 1978 when the Commission approved rule G-35, the Board's Arbitration Code, and rule A-16, on arbitration fees, pursuant to Section 15B(b)(2)(D) of the Securities Exchange Act ("Act") which expressly authorizes Board rules regarding the arbitration of disputes relating to transactions in municipal securities. Rule G-35 incorporates the Uniform Code of Arbitration which

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2 Under Board rules, municipal securities professionals can be compelled to arbitrate disputes. Arbitration by members of the public is voluntary. Upon presentation of an enforceable arbitration agreement, a court may compel a public customer to arbitration.

3 Federal law expressly permits arbitration awards to be vacated by the courts in only three instances: (1) fraud or corruption on the part of the arbitrators; (2) arbitrator misconduct in refusing to postpone a hearing or in refusing to hear pertinent evidence; or (3) arbitrators exceeding their authority. An award may be modified: (1) if there is an evident material miscalculation of figures or material mistake in description; (2) if the award relates to a matter not submitted to arbitration; or (3) if the form of the award is imperfect. See, United States Arbitration Act, Title 9, U.S. Code Sections 1-14, at Sections 10 and 11.

4 The Board's authority is derived from Section 15B of the Securities Exchange Act.

sets forth procedural requirements developed in 1978 by the Securities Industry Conference on Arbitration ("SICA"). The Board is an original SICA member and has been active in the organization's ongoing review of the Uniform Code.[5]

The interpretation and administration of the Board's Arbitration Code is delegated, subject to active Board oversight, to its Arbitration Committee. The Arbitration Committee is made up of three Board members, three non-Board members, and the Director of Arbitration.[6] The Arbitration Committee is contacted when interpretive issues arise and, approximately five times a year, reviews informational memoranda about the status of the program, arbitrator candidates and other developments.

In the first years of the Board's program, which is limited to disputes involving municipal securities, the caseload was very small.[7] In April 1979, the Board signed an agreement with the National Association of Securities Dealers, Inc. ("NASD") under which the NASD, which was more experienced in arbitration, handled most of the day-to-day

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5 The Board agrees with your recommendation that SICA's four public members serve staggered four-year terms. The membership of the Board rotates in a similar fashion and we have found this approach useful in bringing fresh perspectives.

6 Section 3 of the Arbitration Code. One of each of the three Board and three non-Board members is drawn from dealer banks, securities firms and the public. The membership of the Board's Arbitration Committee is attached. Non-Board members serve two year terms that may be renewed. Board membership can change each year. The Director of Arbitration generally has been the Board's General Counsel.

Under Section 7 of the Arbitration Code, the Committee may determine whether a type of dispute is an appropriate matter for arbitration under the Board's Code. Recently, the Board's Arbitration Committee determined not to permit antitrust claims to be subject matter for arbitration. The Committee concluded that such claims were not within the expertise of its arbitrators.

7 For example, in 1979 the Board received eight claims, in 1980 it received 21 claims and in 1981 it received 25 claims.

administration of the Board's arbitration cases subject to Board oversight. At all times, the Board retained sole responsibility for interpreting the Code, establishing a pool of arbitrators, receiving claims, and selecting arbitrators for particular cases.

From the program's inception, the Board has been strongly committed to providing efficient, professional, reasonably-priced facilities for resolving municipal securities disputes. We believe that our record suggests the successful accomplishment of this goal. As the Board and the NASD's programs grew, the Board, in 1985, determined to bring its program totally in-house over a two-year period. All MSRB cases filed since early 1986 have been handled through the Board's offices.[8] Under the Board's direct administration, the average duration of a case, from the date it is filed to the date it is closed, is five months for all cases and six months for cases decided by arbitrators. The Board receives approximately 100 cases a year and has budgeted $120,000, exclusive of staff salaries,[9] to underwrite arbitration expenses for fiscal year 1988.

In addition, the Board has taken steps to publicize its sponsorship of arbitration facilities. The Board has printed and makes available to the public its Arbitration Information and Rules (a booklet containing the Board's Arbitration Code and excerpts from SICA's Arbitration Procedures booklet) and Instructions for Beginning an Arbitration (a booklet containing step-by-step instructions and necessary forms for filing a Statement of Claim). In addition, the Board recently adopted, and the Commission approved, new rule G-10 which requires dealers to deliver the Board's Information for Municipal Securities Investors brochure to a customer promptly upon receipt of a written complaint from that customer. The brochure, among other things, publicizes the availability of the Board's arbitration program for the resolution of municipal securities disputes and identifies the appropriate regulatory authorities with which to file

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8 Only five cases remain under the NASD's administration.

9 The Board employs two full time staff members, the Arbitration Administrator and his assistant, who administer the arbitration program and act as hearing officers. These staff members are under the supervision of the Director of Arbitration (the Board's General Counsel) and the Deputy General Counsel.

complaints involving municipal securities dealers.[10] The Board intends also to incorporate information about the enforcement agencies in its Instructions for Beginning an Arbitration in its next printing scheduled for the end of this year.

Qualifications of Arbitrators

The individuals who serve as arbitrators are indispensable to the Board's arbitration program. They perform an important public service and the continued success of the Board's arbitration program depends on their participation. It should be emphasized that arbitrators are asked to take a leave of absence for one or more days from their offices; they often must spend considerable time reviewing all pleadings, deciding preliminary motions or other requests, and considering evidence submitted during and after a hearing. In return for their service, they are given a honorarium of only $100 for each hearing day. In 1985, the Arbitration Committee recommended, and the Board agreed, that the Board not increase its honorarium as other SROs have done specifically to avoid the appearance of remunerating arbitrators and developing a cadre of professional arbitrators.[11]

1. Selection of Arbitrators for the Board's Arbitration Program

Pursuant to section 3 of the Board's Arbitration Code, the Arbitration Committee has the duty to establish and maintain a pool of public and industry arbitrators. The Committee specifically seeks individuals who are known for their good judgment and integrity; while some knowledge of municipal securities is helpful for public arbitrators, it is

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10 Copies of the Board's Instructions for Beginning an Arbitration, Arbitration Information and Rules, and Information for Municipal Securities Investors are attached. This information also routinely is provided to any individual who lodges a written or oral complaint with the Board.

11 The NASD and the NYSE currently pay an arbitrator an honorarium of $150 for a single session (defined as a half day), $250 for a double session (defined as a full day) and an additional $50 per session for the chairman of the panel. The Board does not differentiate between half day and full day sessions and does not pay additional money to the chairman of a panel.

not a prerequisite.

Historically, in order to be considered as an arbitrator candidate, an individual was required to supply the Arbitration Committee with a resume. As you are aware, SICA recently has developed an Arbitrator Profile Form. The Board has approved the new form and arbitrator candidates now are required to complete such a form in lieu of submitting a resume. The Committee reviews this information and, upon its approval, the Chairman of the Board formally invites candidates to participate in the Board's program. The Board plans to send the form to all existing arbitrators to ensure that it has up-to-date, uniform information about its arbitrators.

In addition, pursuant to your recommendation, the Board has amended the Arbitrator Profile Form to request information on convictions regarding theft, the taking of a false oath or fraud. Language also has been added requesting that arbitrators update the information contained on the form when changes occur.[12] In addition, upon receipt of an arbitrator candidate's name, Board staff has begun checking the individual's disciplinary history on the NASD's Central Registration Depository System ("CRD") prior to submitting the name to the Arbitration Committee. An arbitrator's disciplinary history also is being rechecked on CRD prior to asking the individual to serve on a particular case.

2. Evaluation of Arbitrators

The Board sends a hearing officer to every arbitration hearing. One of the purposes for doing so is to evaluate arbitrator performance and to purge arbitrators from the Board's pool who are observed performing poorly. When individuals are purged, their names and addresses are placed on a separate list to avoid the possibility of their rejoining the pool at a later date.

You recommend that SICA and the Board develop a questionnaire for the parties, their counsel and the other arbitrators to evaluate arbitrator performance. While a questionnaire could assist in evaluating arbitrator performance, the Board believes that it is essential for such

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12 A copy of the Board's Arbitrator Profile Form is attached. The Board treats as confidential an arbitrator's work and home addresses, telephone numbers, and the identity of any accounts held by the arbitrator or his immediate family at banks and securities firms.

questionnaire also to include other aspects of the administration of the program, such as the timely dissemination of pleadings and scheduling of hearings. The Board believes, however, that such a questionnaire should be completed prior to the arbitration award. Otherwise, arbitrators likely would receive a good evaluation from the party that prevails and a poor evaluation from the party that does not. A major drawback of utilizing questionnaires is there do not appear to be any grounds to protect completed questionnaires or records prepared from questionnaires from subpoenas, which could result in very subjective information about arbitrators being made public.

As you may be aware, the Chicago Board of Options Exchange ("CBOE") recently has developed an arbitration evaluation form. The Board will review the results of the CBOE's program over the next few months and determine whether it would be appropriate to utilize questionnaires.

3. Selection of Arbitrators to Decide a Particular Dispute

The Board's staff is responsible for selecting individual arbitrators to decide each dispute.[13] When contacting a potential arbitrator, the staff member discloses the names of every individual, securities firm, bank and law firm involved; the names of all witnesses, if known; the identity of the security; and the nature of the particular dispute so that the individual is able to determine whether any conflicts of interest exist that might preclude him from making a fair and unbiased decision.

In addition, Board staff provides arbitrators with a copy of the American Arbitration Association's ("AAA") Code of Ethics for Arbitrators in Commercial Disputes and a letter advising the arbitrators of their ongoing duty to make a reasonable effort to learn and disclose any present or past financial, business, professional, family or social relationships they or their employers may have that may give

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13 In disputes involving customers, the majority of the panel must be public arbitrators and, in disputes involving only industry members, the entire panel must be comprised of industry arbitrators. Section 12(a)(i) of the Arbitration Code permits public customers to request a different composition of the arbitrator panel, however, this rarely has occurred in MSRB arbitrations.

rise to a conflict of interest in deciding a dispute.[14] We have found these materials to be very effective at sensitizing arbitrators in this area. As you suggest, the Board has incorporated similar language from the AAA's Code of Ethics in the Board's Oath of Arbitrator and the hearing script.[15]

In informing the parties about the arbitrators, the Board has been providing the names and business affiliations of the designated arbitrators, as required under section 8(b) of the Arbitration Code, and disseminating more detailed information about arbitrators' backgrounds upon request.[16] The Board concurs with the Commission, however, regarding its recommendation that parties routinely be provided with more extensive information about the arbitrators' backgrounds. As the Board begins compiling Arbitrator Profile Forms it will automatically forward the public portions to the parties. The Board also intends to amend Section 8(b) of the Arbitration Code to state that the Board will provide the "names and business affiliations and other background information of the persons appointed..." to reflect this procedural change.

Under current procedures, the parties are asked to confirm that they have no objections to the designated arbitrators at the beginning of the hearing. This permits parties and arbitrators to disclose any newly discovered conflicts of interest at the initiation of the hearing. The Board is concerned, however, that your suggestion to permit parties generally to question arbitrators regarding conflicts at the hearing may delay the arbitration process. Permitting a voir dire-type procedure would allow parties to delay obtaining information necessary to make challenges until the hearing. This would require adjournment of the hearing until a replacement arbitrator is found and a new hearing date is set.

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14 A copy of this letter is attached. The letter is based on a draft letter approved by SICA.

15 A copy of the Board's Oath of Arbitrator and hearing script are attached.

16 The Board generally attempts to assemble a panel of arbitrators a month before the hearing date and communicates arbitrator information to the parties at that time.

4. Definition of Public Arbitrators

Your letter suggests that a broad segment of the Board's pool of public arbitrators be reclassified as industry arbitrators. These suggestions apparently are being made because of fears about a perception that these individuals intrinsically are biased in favor of the industry. The Board is troubled by this suggestion. It has implemented the important safeguards summarized above to ensure that its public arbitrators make fair, unbiased determinations, and believes that all of its arbitrators -- public and industry -- act according to these standards and seek to make a fair determination in each case. Several thousand securities-related disputes have been resolved through SRO arbitration facilities over the past nine years. The Board has received few complaints about the process from municipal securities customers.[17] While the Board is aware of certain recent negative newspaper articles and other reports about arbitration, it is not convinced that there is any widespread belief that SRO arbitrations are flawed.

In a customer arbitration a majority of the arbitrators must not be associated with a broker, dealer or municipal securities dealer. In general, the Board has utilized the statutory definition of public representative for Board membership as the standard for public arbitrators.[18] In addition, the Board and SICA, with the Commission's previous knowledge, have adopted policies under which industry personnel may serve as public arbitrators three years after they retire from the industry.[19] This policy specifically was adopted because it was recognized that these individuals

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17 Moreover, to our knowledge the Commission has never forwarded any complaints to the Board in this area.

18 Section 15B(b)(1) of the Securities Exchange Act defines the Board's public members as individuals who are not associated with any broker, dealer, or municipal securities dealer (other than by reason of being under common control with or indirectly controlling, any broker or dealer which is not a municipal securities broker or municipal securities dealer). Section 3(a)(18) of the Act defines "person associated with a broker or dealer" as a person who is a partner, officer or employee of a broker or dealer or a person directly or indirectly controlling, controlled by or under common control with such broker or dealer.

19 This would include people who leave the industry for other employment.

are cognizant of the need for upholding high ethical standards in the securities industry and often qualify as individual investors. The Board's practice has been to disclose to the parties when arbitrators are retired industry personnel and to permit a party to exercise a peremptory challenge against them. The Board has received few complaints about retired industry personnel acting as public arbitrators and Board staff has been vigilant in scrutinizing their performance.

The Board also strongly disagrees with your recommendations that lawyers and accountants who have securities firm and/or bank dealer clients should be deemed to be industry arbitrators. As discussed earlier, the Board carefully screens arbitrators for actual or perceived conflicts of interest and educates arbitrators about their duty to be truly impartial and sensitive to the potential for conflicts of interest. This process has been effective in avoiding conflicts of interest and the Board does not accept the premise that these individuals are hindered in their ability to make independent judgments with respect to specific industry practices. The Board has found that these individuals make excellent arbitrators; in addition to having the integrity and good judgment required of all arbitrators, these individuals understand how securities trade and what general ethical principles govern. This knowledge should not automatically be deemed biased; in fact, it heightens the qualifications of a public arbitrator. The Board doubts whether the public interest would be served by consciously developing a pool of public arbitrators that have no knowledge of the municipal securities industry or by having the only expertise reside in the industry arbitrator.

Before requiring that these individuals be reclassified, the Commission should consider whether permitting a challenge for cause in these circumstances would cure the concerns of a particular customer who is a party to an arbitration. Finally, if the Commission were to require that the Board adopt the suggested definition of public arbitrator, it should be aware that these excellent arbitrators may be excluded from serving.[20] It is unlikely that municipal securities dealers will view most lawyers or accountants in private practice or industry retirees as suitable for

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20 If the Commission pursues the proposed de minimus percentage exemption, a more realistic percentage would have to be chosen, and some means of administering the test would have to be devised.

industry arbitrators as they generally require individuals who currently are employed in the industry. There is a danger, therefore, that these capable and experienced individuals will fall into a grey area, unable to serve as public or industry arbitrators.[21]

Information for Arbitrators and Parties

Your letter outlines a number of areas in which SROs should provide training and other information to arbitrators, and similar information to parties. As you are aware, SICA is preparing an arbitrator manual which will discuss procedural requirements in greater detail, and outline some of the available options and relevant considerations arbitrators should be aware of in disposing of a case.[22] This material will be available to all interested persons and should be useful to parties in arbitrations.[23] The manual, however, must be drafted in such a way as not to lead or otherwise limit the broad discretion arbitrators possess.[24]

Records of Hearings and Form of Awards

You suggest that the Board should tape or engage a court reporter to record testimony at arbitration hearings in order to provide a sufficient record for appellate courts to use

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21 Retired individuals comprise 12 percent and attorneys and CPAs represent 46 percent of the Board's public arbitrators.

22 The manual will discuss referrals for disciplinary review, and other procedural issues, including discovery (which is a current area being reviewed by the SROs and SICA) and challenges for cause.

23 Given the size of the Board's program (approximately 100 cases per year), a newsletter, as suggested by the Commission, does not seem appropriate. Most of the Board's arbitrators are used only once a year or every other year and, hence, the costs of printing and distributing a newsletter would likely outweigh any potential benefits. Moreover, there are a number of newsletters and services on arbitration available to interested parties that may be subscribed to or reviewed at local libraries.

24 We are concerned that if arbitrators do not make rulings in concert with the manual, parties may seek judicial review.

for their review. Section 27 of the Code already provides parties and the arbitrators with the opportunity to have the proceedings recorded. This accords with the practice of the AAA, and preserves the private, contractual nature of arbitration.[25] The Board is troubled by the suggestion that more detailed records are necessary because securities arbitrations may be susceptible to routine or substantive judicial review under the "manifest disregard" standard. Such a development would undermine the purposes of arbitration and would not necessarily further the public interest.[26]

You also suggest that arbitrators be required to include in their awards a summary of the legal issues resolved in a dispute and to indicate whether they concur with or dissent from the award. Traditionally, arbitrators are not required to explain their awards although they can agree to do so.[27] Arbitrators are charged with determining a fair and equitable resolution of a dispute. While arbitrators should take notice of applicable rules and regulations,[28] they are not bound by those rules if the facts and circumstances dictate a different result. These aspects of arbitration explain why arbitration awards do not have precedential effect. In fact, many municipal securities disputes do not raise or do not require disposition of alleged legal issues in order for a case to be resolved.

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25 See Section 23 of the AAA's Securities Arbitration Rules.

26 If the Commission were to require that records be made, the Board believes that tapes should not be permitted since they are not susceptible to accurate transcription or identification of speakers. Creating a record would greatly increase the costs of arbitration; we understand that court reporters charge an average of $200 for a half day session. A written transcript would be an additional charge.

27 The Supreme Court has ruled that "arbitrators need not disclose the facts or reasons behind their award," Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203 (1956), and that "arbitrators have no obligation to the Court to give their reasons for an award," United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960).

28 Section 24 of the Board's Arbitration Code.

The suggestion that arbitrators summarize the legal issues resolved may present problems when cases are resolved on grounds other than legal ones, or when not all legal issues are considered relevant to a fair resolution by the arbitrators. The Board is concerned that such a requirement may intimidate arbitrators, who may not be lawyers and who may be uncomfortable making "legal" findings.[29] In addition there is a danger that imprecisely reiterating, or omitting, a legal issue could be construed as grounds for judicial review.[30] Accordingly, the Board believes that arbitrators should not be required to explain the legal bases of their awards.

The Commission also should be aware that arbitrators do not "vote" on an award. Awards usually are arrived at by a consensus of the panel and, to our knowledge, no arbitrator has ever dissented from an award in the Board's program. Thus, there is no information on concurrence with or dissention from awards.

There is, however, a certain amount of information about arbitrations that the Board could make available. Board staff currently prepares summaries of cases for review by the Board's Arbitration Committee. These summaries characterize the case (e.g., suitability, failure to disclose call features, etc.), the case file number, whether the case is an inter-dealer or customer-dealer dispute, the date the claim was filed, the amount of the claim, the name of the arbitrators, the hearing date and location, the closing date, whether the case was settled, dismissed or who prevailed, and the amount awarded. Because of the private nature of arbitration and the possible liability of Board members using information about arbitration cases, names of parties are not

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29 "[A]rbitrators, who regard their office as a civic duty to the business community, might be reluctant to devote the extra time and effort required to produce a written opinion and loathe to lay the basis of their decision open to criticism by the community and the courts." Domke, Commercial Arbitration, Section 29:06 at 436 (Rev. Ed., Wilner) (August 1986).

30 As arbitrations become more legalistic, arbitrators may rely more heavily on the SRO staffs for substantive support. The Board is concerned, however, that intervention by Board staff in the deliberative process could be viewed as ex parte communication and possibly prejudicial.

included in these summaries and the Board sees no reason to include them in summaries that are made public. In addition, there is the likelihood that arbitrators may be chilled from exercising their best judgment or serving on a case if statistics about their decisions were published. The Commission should consider whether the proposed items of information, other than identifying the type of cases being filed, will be meaningful since none of the filings or evidence pertaining to the dispute will be available.[31]

Some of the Commission's suggestions regarding the form of awards appear to be based on a concern that industry members keep statistics on arbitrators or generally have more information about arbitrators than public parties. However, peremptory challenges rarely are exercised against arbitrators by industry members in MSRB arbitrations, which would likely occur if this is being done. In addition, the Board avoids using an arbitrator more than once or twice a year, preventing a useful "track record" from developing.

Arbitrations Becoming more Trial-Like

Many of the suggestions contained in your letter relating to requiring formal discovery, pretrial hearings, detailed awards, and records of proceedings assume that SRO arbitrations should be more formal and trial-like. It is important to reiterate that arbitration is intended to provide a relatively speedy, informal and inexpensive alternative to resolving disputes through litigation. Board and other SRO brochures advise investors that it is not necessary to retain a lawyer to pursue or defend an arbitration claim. However, customers increasingly are utilizing counsel to bring claims and virtually all dealers now are represented by lawyers in MSRB arbitrations, even in small claims. Customers who are pro se claimants often are intimidated when the respondent-dealer is represented by counsel and may not be able to reply to legal or statutory defenses or counterclaims.[32]

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31 In a judicial proceeding, of course, filings and testimony generally are publicly available.

32 For example, in one of the Board's recent customer arbitrations, the claimant asked an arbitrator to sign an oath which states that he realizes that, although the dealer-respondent is represented by an attorney, the claimant is not. The oath states that the arbitrator, who is an attorney, will not be swayed by claimant's lack of legal expertise and will decide the case only on the facts.

The involvement of attorneys in MSRB arbitrations has resulted in efforts to obtain more trial-like procedures. Parties represented by counsel more frequently seek broader discovery rights, routinely subpoena a wide variety of documents,[33] and file motions for pre-hearing rulings. Postponement requests frequently are based on the attorney's scheduling problems rather than the client's. Finally, there are more requests for attorneys fees and punitive damages.

These developments are increasing the practical burdens on individuals agreeing to serve as arbitrators. While the Board and SICA are considering developing specific rules for discovery, such rules may institutionalize, rather than limit, discovery requests. While more formal discovery and other procedures may be necessary to handle "complex" arbitrations, such a differentiation essentially is arbitrary and parties to noncomplex cases may seek the full panoply of "rights" available in other cases.[34]

Also, arbitrators strive to make the right decisions and may be reluctant to sit on cases raising complex legal and statutory issues when they are not knowledgeable in the area of law. Such cases may be difficult for arbitrators to decide particularly when the issues are not adequately briefed by the parties. Nor may the Board provide legal research or counsel to arbitrators as law clerks do for judges. These factors may make it more difficult to attract public and industry arbitrators willing to fulfill this important public service.

Independent Arbitration SRO

The Board believes that the issues raised by your letter and in this reply require careful and ongoing consideration. The arbitration mechanism is a delicate one that may be

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33 In New York and California, attorneys are allowed to issue subpoenas without resorting to the courts or the arbitrators. In these jurisdictions routine subpoenas are more common.

34 Our experience is that a complex case is difficult to define. The amount of damages sought, the number of parties or the number of issues may not be indicative of complexity in a particular case.

seriously undermined if the procedures and other requirements are changed unnecessarily. SICA has played an important role in assimilating ideas and building a consensus among the SROs in this area. However, given the increasing differences among the various SRO programs,[35] it is becoming more difficult to reach a consensus among the SROs with respect to certain procedures.

Recently, members of SICA have been discussing the possibility of a new, independent agency to administer all securities arbitrations. For example, a new organization could be formed through amendment to the Securities Exchange Act.[36] The organization could be run by a board of directors composed of a majority of public representatives, and of representatives of the various SROs.[37]

The major advantage of an independent arbitration organization is that it may dispel the public perception of securities arbitration not being independent of industry influence. In addition, it would provide for a uniform administration of the arbitration code and should promote some administrative efficiencies. The Board believes the Commission and Congress seriously should consider this idea.

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The Board appreciates the opportunity to comment on the Commission's suggestions regarding SRO arbitration programs. The Board believes that a number of the Commission's concerns readily can be addressed by revising arbitration procedures

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35 For example, although the Board now receives approximately 100 claims a year, it rarely receives a complex case. The other SROs may receive anywhere from zero to over 1,500 cases annually and, therefore, are structured differently to accommodate their particular needs.

36 Funding could be through the existing SROs, or by direct assessments on industry members.

37 The idea of an independent SRO for securities arbitrations is not a new one. On November 15, 1976, the SEC released certain recommendations by the Office of Consumer Affairs regarding "an integrated nationwide system for the resolution of investor disputes." Among the Office's recommendations was a proposal that "a new, quasi-independent entity be established by the self-regulatory organizations to administer the [investor dispute resolution] system," especially for customer small claims.

as noted above. However, those suggestions that fundamentally would change the way arbitrations are administered, especially in regard to written summaries of legal issues addressed by arbitrators and the definition of public arbitrators, should be subject to further discussion and analysis by the Commission and the SROs. The Board welcomes the opportunity to discuss its views in more detail with the Commission. If you need any additional information, please contact Angela Desmond, General Counsel of the Board's staff.

Sincerely,

James B.G. Hearty
Chairman

Enclosures

A - Arbitration Committee
B - Instructions for Beginning an Arbitration
C - Arbitration Information and Rules
D - Information for Municipal Securities Investors
E - MSRB Arbitrator Profile
F - Letter to Arbitrators
G - Code of Ethics for Arbitrators in Commercial Disputes
H - Oath of Arbitrator
I - MSRB Hearing Procedure

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December 11, 1987

Richard G. Ketchum, Director
Division of Market Regulation
Securities and Exchange Commission
Washington, DC 20549

RE: Uniform Code of Arbitration

Dear Mr. Ketchum:

Fidelity Investments welcomes the opportunity to respond to the Commission's request for comments on the staff's recommendations relating to securities industry arbitration. There are four corporations within Fidelity which, as broker-dealers registered with the Commission, are subject to securities industry arbitration: Fidelity Brokerage Services, Inc. is a discount securities broker and is a member of both the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE"); National Financial Services Corporation acts as a clearing broker for other broker-dealers and financial institutions and is a member of both the NASD and NYSE; Fidelity Distributors Corporation serves as the principal underwriter for the investments companies in the Fidelity Group and is a member of the NASD; and Fidelity Investments Institutional Services Company, Inc. which plans to serve as principal underwriter for Fidelity Group Funds sold to institutional investors.

The recommendations of the staff are based on a review of the fairness and efficiency of self-regulatory organization ("SRO") arbitration programs. While the recommendations clearly identify some areas in which improvements or revisions may be necessary, there are other areas in which the staff's recommendations overlook certain types of disputes which are the subject of arbitration. The following comments are based on Fidelity's experience as a participant both as claimant and respondent in the SRO arbitration system. They will not be directed toward various legal issues relating to the authority of the Securities Industry Conference on Arbitration ("SICA") to adopt certain of the recommendations nor

will they be directed toward those recommendations which more clearly effect the administration of the arbitration system by the various SROs. Those issues would be addressed by other commenters. This letter will comment on two recommendations made by the staff dealing with written awards and discovery in addition to suggesting other areas in which improvements could be considered.

Written Awards

The recommendation that arbitrators be required to include a summary of the legal issues involved would present an unnecessary burden on the arbitration panel and negate many of the benefits derived from the arbitration system by both public customers and brokerage firms. It must be remembered that the makeup of many arbitration panels does not include a majority of individuals trained in the law. Consequently, the arbitrators, through the SROs, will be forced to request memorandum of law on the legal issues involved. While a number of legal issues are clearly identified in the initial pleadings which will permit the parties to prepare the appropriate briefs in advance, as the Commission is well aware issues will invariably arise during a proceeding which entail additional research. In the arbitration forum with parties generally traveling distances to the hearings, the ability to prepare a follow-up brief in a short period of time is not always present. Further, as is often the case, public customers appear without counsel. Certainly these individuals will be put at a great disadvantage if the arbitrators are relying on the parties to direct them relative to applicable points of law. Most broker-dealer agreements contain clauses indicating that the law of a particular state will control any proceedings. It has been the experience of this firm that the arbitrators in many instances refuse to recognize the law of the state specified in the agreement and impose local law instead. This determination results in additional costs and the necessity of retaining local counsel by broker-dealers. Clearly, the outcome is not one which helps in providing a simplified process for the resolving of disputes.

In contemplating this requirement, the Commission should consider the use to which written awards would be made. It would be unrealistic to think that these awards would not be used in subsequent judicial proceedings or cited as controlling in other arbitrations. In its examination the Commission was obviously influenced by arbitration proceedings which were the subject of significant publicity (i.e., Shearson / American Express, Inc. v. McMahon) or other cases in which public customers expressed dissatisfaction with the outcome of the proceeding and faced with

In general, the concept of pre-hearing telephonic conferences should be pursued in greater detail. All too often hearings that could have been completed in one or two days are delayed by clearing up administrative matters which should have been addressed well in advance by the SRO staff attorney.

In reviewing the recommendations, it is evident that the staff has overlooked a critical stage of the arbitration process - preliminary review by SRO staff. In order to progress toward a more efficient and comprehensive adjudication of arbitrations involving public customers, Fidelity would suggest for reasons detailed infra, that consideration be given to SRO staff review of claims prior to forwarding those claims to the named respondent(s).This review might encompass two threshold issues: (1) specificity of claims and allegations of damages/losses; and (2) jurisdiction over the named parties.

1. Specificity of Claims

It is not uncommon for a public customer, particularly if unrepresented by counsel, to file a Statement of Claim containing only vague allegations of account mismanagement, lack of responsiveness in correcting alleged errors, or undefined/unsubstantiated damages or losses. Fidelity's experience has also shown that some public customers use the arbitration forum simply as a means of venting customer service-related frustration, when no actual claim and related losses are at issue. Such claims fall short of SRO arbitration rules requiring a Statement of Claim to specify relevant facts and remedies sought. Some Statements of Claim are so vague that no well-focused and complete response can be prepared, leaving the Respondent no alternative but to file a request for a more definite statement of claims and losses. This is particularly true because SRO rules governing responsive pleadings require all available defenses and facts be raised in an Answer, with the failure to do so precluding the right to later raise omitted issues at a hearing. When a Respondent is forced to submit a request for resubmission of a claim in order to more fully understand its substance, the resolution of the dispute will be delayed and the request will unfortunately contribute to the public perception that SRO arbitration works only to the benefit of the securities industry.

Recognizing that public customers should not necessarily be held to a legal standard of drafting pleadings, Fidelity would suggest that SRO staff could review claims to at least ensure that there is sufficient detail and specificity on both substantive issues and damage calculations to enable a Respondent to research and prepare a complete response. One potential standard of review could be that used to determine whether a complaint would survive a motion to dismiss for failure to state a claim upon which relief may be granted. This approach does not appear to be unwarranted or burdensome in light of other of the recommendations which lead one to conclude that the arbitration system, if the recommendations of the staff are adopted, would look very much like litigation. Whatever standards are adopted, SRO review of claims would reduce delays in processing legitimate but vaguely drafted claims, and also reduce the number of non-justiciable matters on SRO arbitration dockets.

2. Jurisdiction Over Named Parties

A second function which could be served by SRO review of claims is the verification that individuals or corporate entities are properly named and fall within the arbitration jurisdiction of the forum. Experience has shown that public customers often name the wrong corporate affiliate, name a firm which is not a member of the selected SRO, or name an individual who is neither employed by the member firm nor is himself a member. Preliminary SRO review could, in many cases, eliminate a response consisting simply of a challenge to jurisdiction. In certain cases, SRO contact with the customer could accomplish accurate identification of potential Respondents and confirm their amenability to arbitration in that forum. It is interesting to note that the staff has touched obliquely on this in suggesting that the arbitrators be required to include a summary of the legal issues resolved. In cases where a claimant does not prevail, the staff suggests that the award should distinguish between those cases dismissed on the merits and those cases dismissed because of the arbitrators' determination that they do not have jurisdiction over the party who allegedly harmed the Claimant. Why should the latter determination be made after the hearing? In order to promote the fairness and efficiency of SRO arbitration programs, this should be part of the SRO staff review of the initial pleadings As the Commission is well aware, court

clerks routinely screen both civil and criminal complaints to determine that the parties are properly before the court. Fidelity recognizes that excessive screening of claims could create an appearance of industry bias by the SROs. However, some SRO intervention would also promote more prompt and substantive responses to Statements of Claim filed by public customers.

It is hoped that the comments will be helpful to you and your staff. Fidelity appreciates the opportunity to comment on these recommendations.

Very truly yours,

John I. Fitzgerald

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James E. Buck
Vice President and Secretary

NYSE
New York
Stock Exchange, Inc.

December 28, 1987

Richard G. Ketchum, Esq.
Director
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N. W.
Washington, D C 20549

Dear Mr. Ketchum:

The Securities Industry Conference on Arbitration (SICA) has responded to your letter of September 10, 1987 recommending changes in the arbitration system. The Exchange concurs in the response and this letter supplements the response on behalf of this Exchange.

The Exchange was one of the founding members of the Securities Industry Conference on Arbitration and is a long-time sponsor of arbitration of investor-broker disputes. We are always interested in improving the arbitration system and believe the Commission's suggestions will help insure that arbitration not only is fair but that it is also perceived to be fair by both investors and member organizations. The Exchange has already acted to implement some of your recommendations and is close to implementing others.

Perhaps the most critical issue raised in your letter is the perception that public arbitrators are not truly public. While all arbitrators appointed to cases by the Exchange are screened for conflicts and qualify as neutral arbitrators under state and federal law, the Exchange agrees that individuals with industry affiliations should not be classified as public arbitrators. Accordingly, the Exchange has adopted the attached guidelines for the classification of public arbitrators. We believe that these new guidelines will greatly enhance the perception of Exchange arbitration.

The Exchange has long relied on written materials and on service with more experienced arbitrators as its primary method for training new arbitrators. The Exchange realizes that as the universe of arbitrators increases a more formal training program is desirable. The Exchange has been developing such a program and held its first formal training session for arbitrators in November 1987. We are continuing to work closely with SICA in developing an expanded and more detailed arbitrator manual and a more comprehensive training program.

During 1987 the Exchange has been gathering detailed biographical information on our arbitrators. This information is invaluable in assigning arbitrators to cases and is being requested more and more frequently by parties. By early 1988 the Exchange will be routinely providing this more detailed information to parties, thus enabling them to make more informed use of their peremptory challenges.

The Exchange has also recently returned to its system of having a stenographic reporter present at all of its arbitration hearings. While the Exchange incurs a substantial additional expense by retaining these reporters, we do believe that a record is important and that a stenographic record is most suitable for our purposes.

These measures are only the first steps the Exchange is taking in responding to your suggestions. The Exchange is committed to maintaining the highest standards for its arbitration service, and we were pleased to note the Commission's favorable observations about securities industry arbitration. We look forward to working with both the Commission and SICA to insure that Exchange arbitration continues to offer investors a quick, fair and inexpensive forum for the resolution of their disputes.

Very truly yours,

Enclosure

NEW YORK STOCK EXCHANGE, INC.

GUIDELINES FOR
CLASSIFICATION OF ARBITRATORS

In order to insure continued investor confidence in the arbitration process, the New York Stock Exchange has adopted the following policies with regard to the classification of securities industry and public arbitrators and to the exercise of challenges for cause:

1. Individuals with close securities industry ties such as attorneys, accountants or other professionals who routinely represent industry firms or individuals, will either be reclassified as industry arbitrators or not be used.

2. Individuals who have spent a substantial part of their business careers in the securities industry shall always be classified as industry arbitrators.

3. Individuals who have spent a relatively minor portion of their career in the securities industry shall not be classified as public arbitrators until at least five (5) years have elapsed from the date of their last industry affiliation. All such past affiliations shall be disclosed and challenges for cause based upon such past affiliations shall be sustained.

4. Close family relationships with broker/dealers shall be disclosed and challenges for cause based on such relationships shall be honored.

5. Attorneys, accountants and other professionals whose firms have close securities industry ties will still be classified as public arbitrators provided the attorney or other professional does not routinely represent industry firms or individuals. Challenges for cause based on such industry ties will be honored.

6. All arbitrators shall read and become familiar with the Code of Ethics for Arbitrators developed by the American Bar Association and the American Arbitration Association.

7. Any close question on arbitrator classifiaction or on challenges for cause shall be decided in favor of public customers.

8. Spouses of securities industry personnel may not serve as arbitrators.

LR.

THE PACIFIC STOCK EXCHANGE INCORPORATED

January 7, 1988

Mr. Richard G. Ketchum
Director
Division of Market Regulation
Securities & Exchange Commission
450 Fifth Street, NW
Washington, D.C. 20549

EXPRESS MESSENGER

Dear Mr. Ketchum:

In response to your letter of September 10, 1987, concerning the Arbitration Program of the Pacific Stock Exchange Incorporated ("PSE" or "Exchange"), this letter will give you an oversight of the program and respond specifically to some of the recommendations which you have made.

Selection of Arbitrators

Over the past year, the Exchange has appointed a majority of public arbitrators to all its public customer cases unless the parties request differently or in the judgement of the hearing administrator it would be extremely helpful to have a public arbitrator with a securities background. In such an instance, the arbitrator's background is disclosed to the parties and any concerns they may have are addressed.

Public Arbitrators

The Exchange has eliminated the perceived problem of public vs. industry arbitrators by ensuring that public arbitrators have no industry ties. An arbitrator's securities background is fully disclosed to the parties along with the reasons why the arbitrator has been chosen. If any party objects to such an arbitrator it is considered a challenge for cause and, as you know, a party has unlimited challenges for cause.

Industry Arbitrators

The Exchange is extremely proud of its industry arbitrators and we feel that they are one of the strengths of our program. If there is any indication that an industry arbitrator does not uphold a high standard of integrity for industry performance he or she is simply removed from our arbitration pool.

With the parties' agreement, the Exchange will appoint a sole industry arbitrator to hear a Simplified Arbitration. The Exchange has never received any complaints about such an arrangement. In fact, the Exchange has received many favorable comments from public customers concerning the knowledge and fairness of our industry arbitrators.

Disciplinary History of Arbitrators

The Exchange is in complete agreement with the Securities and Exchange Commission's ("Commission") recommendations concerning background checks on industry arbitrators. The Exchange is currently implementing the arbitrator profile developed by the Securities Industry Conference on Arbitration ("SICA") and will make any necessary changes to its own present procedures. Fortunately, most of the Exchange's industry arbitrators have been a part of the program since its inception. These arbitrators have demonstrated, time and time again, to all parties involved that they are fair minded, conscientious individuals. Great care is taken in recruiting industry arbitrators.

Arbitration Training

The Exchange believes that some arbitrator training is important. However, the Exchange values the different backgrounds of its public arbitrators and strongly feels that such diversity should be maintained.

The Exchange fully endorses the development and implementation of an arbitrators manual. I am currently working with SICA in developing a handbook.

Arbitrator Evaluation

Given the relatively small arbitrator pool maintained by the Exchange, such an evaluation system as recommended would not really be useful. The Exchange is currently updating its arbitrator list to include a section for comments.

When a prospective arbitrator is contacted concerning his or her willingness and availability to handle a case, the names of the parties and attorneys are disclosed and the arbitrator is asked if any conflict exists. This includes past employment, family

employment, industry ties and any other possible conflicts. The public customer is contacted by telephone and informed of the identities and business affiliations of the arbitrators. The Exchange is proud of its record of never having any case appealed on the issue of an arbitrator's failure to disclose possible conflicts of interest. Full disclosure is the key to eliminating most arbitrator conflicts of interest.

The Exchange concurs with the Commission's recommendation to amend the arbitrators' oath to allow the arbitrators to make any disclosures at the hearing with the understanding that the parties are given every opportunity to raise any possible conflicts prior to the hearing. The oath has now been expanded.

Challenges for Cause

The Exchange has never questioned a challenge for cause against an arbitrator made by any party for the simple but important reason that there must be no doubt in any party's mind as to the suitability of any arbitrator. The Exchange will not go forward with a hearing unless the parties are satisfied.

Preservation of a Record

The Exchange maintains a high quality audio tape recording of every hearing conducted. The Arbitration Rules clearly provide that the parties must arrange and bear the expense of a formal record. As a matter of practice, the Exchange raises the issue of record preservation with the parties in a case which has the appearance of going to multi-sessions. The parties are informed that a tape recording will be kept but that it is for the Exchange's use and possibly the arbitrators' use. The Exchange will provide a copy of its tapes to either party upon request.

Awards

The Exchange does not discourage its arbitrators from rendering a decision setting forth its underlying reasons. It is important that the reasoning behind a decision is apparent.

The Exchange believes that the names of the parties should not be made available to other individuals because it may constitute an invasion of privacy. Please keep in mind that the Exchange openly and freely discusses the background of any of the

arbitrators assigned to a case with any of the parties. It is stressed to all parties that the Exchange's arbitrators, especially its industry arbitrators, have extremely high standards for industry performance.

The Exchange also makes every effort to respond to a party's inquiry concerning a decision. The Exchange will inquire of the Hearing Chairman whether he or she will accept a telephone call from a party and whether the arbitrators are willing to clarify their decision. If the arbitrators are unwilling to accept a direct call, the Exchange will ask the arbitrators whether they would be willing to respond to a written inquiry by one of the party's to the arbitration. In general the Exchange's arbitrators will respond to a written inquiry as long as it is clearly set forth in the written response, drafted by the Exchange, that decisions are not subject to review or appeal under the Arbitration Rule. An initial reaction to this informal procedure might be that it could lead to problems. However, to my knowledge, the Exchange has never had a public customer case appealed in a court of law.

Discovery

Under the Exchange's Arbitration Rule, the parties to an arbitration shall participate in the voluntary exchange of documents and information as this will serve to expedite the hearing. The Exchange brings its full weight to bear on any party that does not fully cooperate in such an exchange of information and documents. If there are any unresolved issues among the parties, the Hearing Panel is appointed and the disputes are resolved by the arbitrators who may, in their discretion, compel the production of any document or the appearance of any individual.

A majority of discovery disputes are caused if not fueled by our member firms' refusal to turn over the most routine of documents. Discovery disputes occasionally arise when an attorney representing a public customer is inexperienced in arbitration proceedings. Some discovery disputes arise as a matter of gamesmanship between the parties. Understandably,this sort of behavior is taxing not only on the Exchange's resources, but also to the arbitrators.

The Exchange makes a diligent effort to accommodate discovery requests and encourages member firms, in particular, to comply with such requests. The Exchange's files show that no party has ever complained following a hearing and the rendering of a decision that lack of discovery proved to be an insurmountable problem.

Public Members

Please Refer to the SICA response letter.

Educational Pamphlets

The Exchange endorses the recommendation by the Commission to expand the educational pamphlet to make clear the obligations of the claimants. In its efforts to fully disclose to the public customer, the Exchange contacts by telephone each and every public customer prior to the hearing to answer any questions he or she may have and to inform what to expect at the hearing. The Exchange, as the only information source on the West Coast, has been reviewed by the Commission's office in Los Angeles and customer complaints are routinely referred to us.

Increasing Pressure on SRO Arbitration Systems

In response to the increased case load over the past five years, the Exchange has allotted an adequate amount of staff time and resources to handle the increase.

Adherence to Rule 19b-4

Please refer to the SICA response letter.

Relationship Between the Arbitration Department Disciplinary Authority

Please refer to the SICA response letter.

Large Cases

The burden of facilitating the progress of a large case at this Exchange falls upon the hearing administrator. It is dependent on the hearing administrator to move a case along quickly and fairly. The arbitrators are not expected by the Exchange to

become overly involved in the discovery or the submissions of pleadings. An honest and well meaning effort by an arbitrator to narrow issues usually results in further delays mainly because the parties feel that they are being denied the opportunity to fully present their case. A Hearing Panel can narrow issues after the first day of a hearing when the parties can plainly see that the arbitrators are fair minded and diligent in their roles.

In any event, the Exchange does not handle the same proportion of large cases that the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE") handle. The Exchange has handled numerous cases involving claims of $100,000 and more, and several claims in the range of $500,000. No case at this Exchange has ever required more than two hearing sessions. And its arbitrators have never been convinced that a case could not have been presented in less time.

The Exchange appreciates the concern and interest that the Commission has taken in our arbitration program. It concurs with the Commission that arbitration should be efficient, inexpensive and accessible. The Exchange believes that its program is all of these things and that, more importantly we can assure everyone of a fair disposition of an arbitration claim.

Very truly yours,

Theodore B. Crum

Theodore B. Crum
Director of Arbitration

TBC/dmc