SECURITIES ARBITRATION REFORM

Report of the
Arbitration Policy Task Force

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To the Board of Governors
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Appendix 1 - Biographical Information
Appendix 2 - NASD Arbitration Policy Task Force: Speakers

Appendix 3 - NASD Arbitration Policy Task Force: Correspondence

Appendix 4 - The NASD Arbitration Process: Currently and Under the Task Force Recommendations

I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

The Report on Securities Arbitration Reform (the Report) has been prepared by the Arbitration Policy Task Force, appointed by the Board of Governors of the National Association of Securities Dealers, Inc. (the NASD) in September of 1994 for the purposes of studying the securities arbitration process administered by the NASD and making suggestions for its reform.

A. BACKGROUND

The Task Force is composed of eight persons who have various backgrounds in the area of securities arbitration. The Task Force began its work in September 1994 and met monthly through January 1996 for the purposes of receiving presentations from numerous persons reflecting varied viewpoints and discussing Task Force recommendations.

B. SUMMARY OF RECOMMENDATIONS

Although the Task Force found securities arbitration to be a relatively efficient, fair, and less costly forum for resolution of disputes involving public investors, member firms, and firm employees, it believes that many areas for improvement of the system exist.

The most important issues we identified and our recommendations to the NASD Board of Governors are summarized briefly in this section and then set forth in detail in Section V of this Report. All members of the Task Force support all of the recommendations in the Report. Although our recommendations are directed to the NASD Board, we hope that other securities arbitration forums will give them serious consideration. The recommendations, if adopted, will be most effective if applied uniformly and consistently by all self-regulatory organizations (SROs) that offer arbitration forums.

In summary form, the following are the most significant of our recommendations:

1. The securities industry should be permitted to continue to include predispute arbitration agreements in customer contracts, but disclosure should be improved.

2. The NASD six year eligibility rule should be suspended for three years during which time recommended procedures for early resolution of statute of limitations issues should be firmly applied.

3. Parties should be prohibited from bringing actions in court raising procedural arbitrability issues before an arbitration award has been entered.

4. Punitive damages should be permitted in all jurisdictions (determined by the investor's domicile) where available in a judicial forum for the same types of claims, subject to a cap of the lesser of two times compensatory damages or $750,000.

5. The NASD should expand its voluntary mediation program and institute a two year pilot program in early neutral evaluation.

6. The NASD should continue to offer an arbitration system with three tiers: simplified, standard, and complex, and the ceiling for the simplified procedures should be raised from $10,000 to $30,000.

7. Automatic production of essential documents should be required for all parties, and arbitrators should play a much greater role in directing discovery and resolving discovery disputes.

8. Arbitrator selection, quality, training, and performance should be improved by various means, including adoption of a list selection method, earlier appointment of arbitrators, enhancement of arbitrator training, and increased compensation.

9. Employment disputes, including statutory discrimination claims, should continue to be subject to arbitration, but with the enhancements recommended for customer disputes.

10. NASD pilot rules for injunctions in member-member disputes are beneficial and should be closely monitored.

11. Non-lawyers should be allowed to continue representing parties in arbitration, subject to certification; the NASD should conduct a study to examine whether to continue to permit non-lawyer representation.

12. The staffing and budget of the NASD Arbitration and Mediation Department should be increased.

13. The NASD should provide budgetary and operational autonomy for the arbitration system, which should be administered either as a unit of the newly created NASD regulation subsidiary or as a separate unit reporting directly to the NASD parent holding company.

14. Procedures for monitoring the implementation of the recommendations of this Report should be established by the NASD.

II. TASK FORCE MEMBERS

The Task Force consists of the following members:

David S. Ruder (Task Force Chairman), the William W. Gurley Memorial Professor of Law and former Dean (1977-85), Northwestern University School of Law and Senior Counsel, Baker & McKenzie; Chairman, Securities and Exchange Commission (1987-89); Member, NASD Board of Governors (1990-93); and Chairman, NASD Legal Advisory Board (1993-96).

Linda D. Fienberg (Task Force Reporter), Partner, Covington & Burling; Securities and Exchange Commission senior staff, including Associate General Counsel and Executive Assistant to the Chairman (1979-90); Member, NASD Legal Advisory Board (1994-present); Member, NASD National Arbitration and Mediation Committee (1996-present); and Member and current Chair, Executive Council of the Securities Law Committee of the Federal Bar Association (1988-present).[1/]

JohnW. Bachmann, Managing Principal, Edward D. Jones & Co.; Chairman, Securities Industry Association (1987-88); Chairman of the Task Force on T + 3 of the U. S. Steering Committee of the Group of 30; former Member, Chicago Stock Exchange, Board of Governors; and former Chairman, NASD District 4.

Stephen J. Friedman, Partner, Debevoise & Plimpton; Executive Vice President and General Counsel, The Equitable Life Assurance Society of the United States

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[1/] Ms. Fienberg and her firm, Covington & Burling, were retained by the Task Force to draft the Report. Matthew S. Yeo, an associate at Covington & Burling, assisted in the drafting.

(1988-93); Executive Vice President and General Counsel, The E.F. Hutton Group, Inc. (1986-88); Commissioner, Securities and Exchange Commission (1980-81); Deputy Assistant Secretary for Capital Markets Policy, Department of the Treasury (1977-79); Member, NASD Board of Governors (1988-93); and Member, CBOE Board of Governors (1982-88).

Stephen L. Hammerman, Vice Chairman, Merrill Lynch & Co., Inc. and Chairman, Merrill Lynch, Pierce, Fenner & Smith; Member and Chairman, NASD Board of Governors (1986-1988, Chairman 1988); Member, New York Stock Exchange Board of Directors (1995-present); Member, Securities Investors Protection Corporation Board of Directors (1985-87); Regional Administrator, Securities and Exchange Commission, New York Regional Office (1979-81); and Assistant United States Attorney, S.D.N.Y. (1964-68).

J. Boyd Page. Partner, Page & Bacek; Public Member, NASD National Arbitration and Mediation Committee (1991-95); Director, Officer, and past President, Public Investors Arbitration Bar Association; Member, Advisory Board, Securities Arbitration Commentator; and Member, Securities Arbitration Rules Task Force, American Arbitration Association.

Francis O. Spalding, Professional Arbitrator and Mediator; consultant, author, and lecturer on alternative dispute resolution; Public Member and former Chair, NASD National Arbitration and Mediation Committee (1991-96, Chair 1993-94); and Professor of Law, Northwestern University School of Law (1965-82).

Richard E. Speidel, the Beatrice Kuhn Professor of Law, Northwestern University School of Law; co-author with Macneil and Stipanowich, of five volume treatise, Federal Arbitration Law: Agreements. Awards and Remedies under the Federal Arbitration Act: and co-author of two casebooks: Sales and Secured Transactions and Studies in Contract Law. [2/]

The members were chosen to provide a diverse group representative of the various constituencies of the arbitration process and/or because of their expertise and

[2/] John A. Wing, Chairman and Chief Executive Officer of the Chicago Corp., was initially a member of the Task Force but resigned because of other commitments.

familiarity with the issues. (Biographies of the Task Force members are attached at Appendix 1.)

III. TASK FORCE INFORMATION GATHERING

To gather information and to permit representative groups to present their views, the Task Force held meetings, reviewed correspondence, and generally examined existing arbitration rules and studies and literature on the securities arbitration process. The Task Force held sessions in New York, Illinois, and California and conducted telephone conferences in order to receive presentations from diverse groups interested in the securities arbitration process or in arbitration generally and to discuss Task Force recommendations. The Task Force met with investor and consumer groups, member firm representatives, other industry representatives such as the Securities Industry Association (SIA), staff of the Securities and Exchange Commission (SEC), lawyers and non-attorney representatives who participate in NASD arbitration, arbitrators, staffs of several of the SROs, American Arbitration Association (AAA) staff, and others. (A list of the groups and individuals with whom the Task Force met is attached at Appendix 2.)

In addition, the Task Force received hundreds of letters from persons and groups interested in the securities arbitration process. The Task Force reviewed these letters and, in some cases, asked the authors to appear before the Task Force to share their views at greater length. (A list of the organizations and individuals who provided written information to the Task Force is attached at Appendix 3.)

Finally, the Task Force undertook an examination of the rules and procedures of the NASD and the other SROs, read studies of the securities arbitration process (for example: studies released by the United States General Accounting Office (GAO), materials prepared by the Securities Industry Conference on Arbitration (SICA), and relevant symposia), and generally familiarized itself with the literature in the field.[3/]

[3/]The New York Stock Exchange's Symposium on Arbitration in the Securities Industry, held on November 21 and December 5, 1994, provided a particularly useful resource. An edited (continued...)

During and at the conclusion of its information gathering processes, the Task Force met on numerous occasions to consider the issues surrounding securities arbitration and to formulate its recommendations for the future of dispute resolution at the NASD.

IV. SUMMARY OF THE ISSUES SURROUNDING SECURITIES ARBITRATION

In this section, we note the phenomenal growth in securities arbitration in less than a ten year period and then, in summary fashion, describe the most significant of the issues surrounding securities arbitration. These issues relate to the increased litigiousness in securities arbitration, predispute arbitration agreements, the eligibility rule, punitive damages, and matters relating to arbitrators. In Section V, these issues, as well as numerous others, are presented in greater depth, along with our recommendations.

A. McMahon and the Exponential Growth of Securities Arbitration

Securities arbitration is over a century old. It was initiated in 1872 when the New York Stock Exchange (NYSE) began an arbitration program to resolve disputes between member firms and their customers. The exponential growth in securities arbitration did not occur, however, until the Supreme Court's 1987 decision in Shearson/American Express. Inc. v. McMahon.[4/] In McMahon, the Court held that customers who sign predispute arbitration agreements with their brokers could be compelled to arbitrate claims arising under the Securities Exchange Act.[5/] As a result of the McMahon decision, most individual investors who transact business with broker-dealers, and virtually all individual investors who have margin or options accounts, must resolve claims with member firms SRO sponsored arbitration.

[3/] (…continued) transcript of the proceedings, covering many of the issues raised in this Report, appeared in the Fordham Law Review in April 1995. See 63 Fordham L. Rev. 1501 (1995). The Symposium provided a helpful overview and insights into the issues considered by the Task Force.

[4/] 482 U.S. 220 (1987), reh'g denied, 483 U.S. 1056 (1987).

[5/] In 1989, the Court applied the reasoning of McMahon to compel arbitration of claims arising under the Securities Act of 1933. Rodriguez de Ouiias v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

McMahon transformed securities arbitration from a voluntary alternative to civil litigation to the principal means of resolving securities disputes between investors and member firms. The volume of securities arbitrations filed with all SROs rose from 2,837 in the year before McMahon to 6,097 in the year after, and to 6,531 by the year 1994. Among the ten SROs that sponsor an arbitration forum, the NASD receives by far the largest number of cases, representing 85 percent of all SRO arbitration. In 1995, the NASD received over 6,000 new cases.

B. The Increased Litigiousness of Securities Arbitration

The increasingly litigious nature of securities arbitration has gradually eroded the advantages of SRO arbitration. Many participants in the securities arbitration process expressed concern that SRO arbitration has incorporated too many characteristics of civil litigation, thereby undermining what many commentators believe are the essential advantages of arbitration - speed and low cost.

Among the factors commonly cited as contributing to litigious arbitration are: (i) a significant increase in motions practice relating to discovery, eligibility, statutes of limitations, and other pre-hearing matters; (ii) a somewhat intangible, but widely perceived increase in a "lawyering" approach to arbitration, illustrated by extensive discovery requests, stonewalling on responses to discovery, and attempts to delay hearings for tactical reasons; (iii) resort to the courts, frequently to challenge the eligibility of a claim for arbitration or to assert a statute of limitations defense; (iv) a departure from the relaxed evidentiary and procedural standards that were meant to guide arbitration; and (v) hearings that take longer than the one or two days expected for resolution of customer claims.

Taken together, these factors, and others discussed in the Report, have given rise to a widespread concern that securities arbitration is moving away from a model of informal, expeditious, and inexpensive dispute resolution. While we do not wish to exaggerate the extent to which SRO arbitration has taken on the less attractive characteristics of civil litigation, we believe it is essential that securities arbitration continue to provide clear and significant advantages over the civil litigation system it has replaced.

C. Predispute Arbitration Agreements

One of the most frequently expressed criticisms by investor and employee representatives is that SRO arbitration is the exclusive mechanism for resolving disputes between investors or employees and member firms. Since McMahon, broker-dealers uniformly require individual investors who open margin or option accounts to sign a predispute arbitration agreement, and the majority require it for all customer accounts.[6/] The agreement obligates the customer to submit to arbitration any dispute concerning the account that might arise in the future.

Similarly, associated persons are required to arbitrate employment disputes as a result of uniform language in Form U-4 which all associated persons must sign in order to work in the industry. The Supreme Court's recent decision in Gilmer v. Interstate/Johnson Lane Corp. [7/] suggests that employees who have executed valid predispute arbitration contracts must arbitrate all claims, including statutory civil rights claims.

To the extent that investors are unable to open accounts or employees are unable to obtain industry jobs without signing predispute arbitration agreements, they perceive that their participation in securities arbitration is involuntary. This perception is intensified because most agreements limit the customer or employee to arbitration in forums sponsored by the securities industry, which some investor or employee proponents argue are biased in favor of the industry. It is these perceptions of compulsory and potentially biased arbitration that underlie much of the criticism of securities arbitration from investors, employee groups, consumer advocacy organizations, the plaintiffs' bar, and the press.

The industry favors predispute arbitration agreements as a means of controlling the high costs of defending customer and employee lawsuits in state and federal courts. From the industry's standpoint, securities arbitration is neither compulsory nor

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[6/] Broker-dealers are required by NASD rule to arbitrate all customer claims unless the parties mutually agree to civil litigation.

[7/] 500 U.S. 20 (1991).

The industry points out that customers voluntarily enter into contractual relationships with member firms. The use of predispute arbitration agreements is not uncommon in other industries and other contractual settings. Moreover, both federal law and policy, as expressed most significantly in the Federal Arbitration Act (FAA), have long favored the use of arbitration as a means of resolving disputes outside the courtroom, as the Supreme Court observed in McMahon. The enforcement of clear contractual agreements to arbitrate future disputes is an important element of this policy and has been upheld by the Supreme Court.

The industry argument that the allegations of bias are unfounded is supported by a 1992 survey by the GAO which found no evidence that SRO sponsored securities arbitration forums were biased against customer participants. Moreover, securities not by individual member firms. Further, disputes between customers and member firms are heard either by a single "public" arbitrator, that is, a person not affiliated with the securities industry, or, in most cases, by two public arbitrators and one arbitrator associated with the securities industry, thus furthering the goal of impartiality.

D. <u>The Eligibility Rule</u>

The threshold issue for any party filing a claim in arbitration is whether the claim is eligible for arbitration under the rules of the NASD or any other SRO forum. Section 15 of the NASD Code of Arbitration Procedure (NASD Code) provides that no claim is eligible for arbitration "where six years have elapsed from the occurrence or event giving rise to the" dispute. Like statutes of limitations, the purpose of the eligibility rule is to eliminate stale claims. Unlike statutes of limitations, however, it is not subject to equitable tolling or estoppel doctrines. The member firms have sought to retain the eligibility rule because of their concern that applicable statutes of limitations will not be strictly applied.

The eligibility rule has fostered extensive collateral litigation, created great uncertainty about its application, and contributed to an erosion of investor confidence in SRO sponsored arbitration. Member firms have sought the aid of courts to bar from arbitration claims they allege are outside the six year period. The argument by some firms

that a bright line transaction date should be applied to determine eligibility, even where there have been intervening factors that might toll a statute of limitations, has been accepted by many courts.

Further, many courts have interpreted the eligibility rule as an election of remedies. Under this interpretation, a claim ineligible for arbitration also may not be brought in court. Thus, with regard to claims more than six years old but not barred by a statute of limitations, the investor or employee is deprived of any forum in which to pursue his or her claim against the member firm.

E. Punitive Damages

No subject has generated more controversy or so polarized opinion between the investor community and the securities industry than the availability of punitive damages in securities arbitration.

1. The Industry View

Broadly stated, the industry views punitive damages as inappropriate in and inimical to the goals of securities arbitration. Punitive damages are awarded to punish egregious misconduct and to deter future misconduct; they are not intended to compensate individual claimants for actual losses. Most importantly, the industry argues, arbitration does not have the procedural protections, such as reasoned decisions, the right to an appeal, and the right to a jury trial, that are essential elements of due process. Moreover, the punishment and deterrent functions of punitive damages are unnecessary in light of the extensive regulation to which the securities industry is subject.

The industry also argues that punitive damages detract from the goals of a prompt and inexpensive means of dispute resolution. Requests for punitive damages require the arbitrators to consider the elements of culpability and the deterrent purposes that will be served by a punitive award. The request for punitive damages also raises the stakes for all parties, resulting in a more litigious, time consuming, and expensive means of resolving

2. The Investor View

The investor community's position on punitive damages begins with the observation that, as a result of McMahon and the widespread use of predispute arbitration

clauses, the investors' only forum for pursuing their claims against member firms is SRO arbitration. If punitive damages were not available in securities arbitration, investors would be deprived of a remedy available in civil litigation.

Investors also interpret the NASD Code and other NASD rules, as approved by the SEC, to guarantee parties the same remedies they would have in a judicial forum. Investors have criticized perceived efforts by member firms to circumvent these rules. In particular, investors are concerned because many predispute arbitration agreements incorporate the law of New York, which does not permit the award of punitive damages in arbitration.

F. Arbitrator Selection. Quality, and Training

Many securities arbitration participants expressed concerns about the selection, quality, and training of arbitrators. Investors and employees in particular felt that they did not have sufficient input in the selection of arbitrators. They contrasted the selection process of the SROs with that of the AAA where parties strike names from lists of proposed arbitrators to select a panel. Issues concerning the selection process have been exacerbated at the NASD because of the shortage of trained, available arbitrators.

Commentators also complained about the quality and training of the arbitrators. They felt that the arbitrators lacked sufficient expertise in the relevant substantive law and were not sufficiently trained in arbitration procedures.

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In the remainder of this Report, the Task Force describes in detail each of the issues it examined and provides detailed recommendations addressing these issues. We emphasize that we are suggesting an interrelated series of reforms, and we strongly urge the NASD to implement all of our recommendations.

ARBITRATOR BACKGROUND INFORMATION AND EVALUATION

1. Issues

a. Information provided to the parties on the arbitrator's background and experience may not be complete.

In order to make informed judgments about selecting arbitrators, parties must be provided with adequate information about the arbitrator's background, experience, and potential conflicts of interest. At present, parties are provided with a record of the arbitrator's employment and education history, a disclosure of any categorical potential conflicts, such as present or former clients, and a brief narrative background statement prepared by the arbitrator. To the extent possible, the NASD Arbitration Department verifies this information on the CRD system. Arbitrators are requested to update this information continually, and must attest to its accuracy each time they are appointed to an arbitration panel.

Nonetheless, there are some concerns about the accuracy of arbitrator information. A recent SEC examination of the NASD Arbitration Department noted instances of inaccurate record keeping concerning arbitrators. Some of these instances involved a failure to disclose an affiliation that might present a conflict of interest. In other cases, arbitrators were classified as "public" when the SEC believed they should have been classified as "industry."

Currently, parties are given a list of panels on which the arbitrator previously has served in NASD arbitrations, indicating whether the arbitrator concurred or dissented from the final award. However, the NASD cannot provide comparable information from other SROs or AAA securities arbitrations in which the arbitrator participated as the information is not reported to the NASD.

Additionally, parties and their counsel usually want to obtain copies of awards previously rendered by a potential arbitrator. The parties can obtain the awards from the NASD, but they must expressly request them.

Some law firms that specialize in securities arbitration systematically collect arbitrator awards for their own reference. In addition, the Securities Arbitration

Commentator provides a service whereby parties can obtain copies of past arbitrator awards for a fee. Securities arbitration awards rendered since 1989 also are available on Westlaw. None of these sources is easily available to all parties, however, and may require substantial cost. Thus, some parties may lack critical information needed to assess whether to challenge an arbitrator.

b. Evaluations of the arbitrators are not routinely made.

At the end of every arbitration, the NASD asks all parties and their counsel to fill out evaluations of the arbitrators and the arbitration process generally. Unfortunately, very few parties or their counsel complete these evaluations. The NASD staff has tried different methods to induce the parties to complete the evaluations, including making the evaluations easier to fill out, but it has had little success. Apparently, some parties are concerned that a negative evaluation could affect a subsequent arbitral award, despite assurances that an evaluation is not shared with the arbitrators if the evaluator requests that it not be disclosed.

The NASD also asks arbitrators to evaluate the other arbitrators on their panel. Again, the rate of return is very low. When members of the NASD arbitration staff attend a hearing session, which they do in less than 50 percent of all hearing sessions, they submit evaluations of the arbitrators.

Overall, the information garnered from these various evaluations is very limited. As a result, the NASD is missing an important element of feedback about the quality of individual arbitrators and overall satisfaction with the arbitration process.[137/] This lack of information limits the NASD's ability to address specific concerns about individual arbitrators and to make improvements to the process based on participant concerns.

[137/] The NASD Arbitration Department has responded to this information gap by commissioning an outside organization to conduct surveys of recent arbitration participants.

2. Recommendations

Under the list selection process recommended above, parties will play a much greater role in the selection of arbitrators. In order for the parties to take full advantage of this process, the NASD should significantly improve the quality and quantity of available information concerning potential arbitrators.

a. The Task Force recommends that the NASD database of arbitrator information be expanded significantly and regularly updated.

The Task Force recommends that the NASD automated database of arbitrator information be significantly expanded and made available to the parties on-line. Hard copies also should be available. The database should include a fuller statement of the arbitrator's employment history, professional activities, and other areas that could reveal potential biases or conflicts of interest. The database also should include a detailed record of awards that the arbitrator has rendered in all SRO arbitrations, also available on-line.

Every effort should be made to keep the database accurate and current. As part of this effort, arbitrators should be required to submit annual updates in order to remain eligible for selection. Upon selection for a panel, arbitrators should be required to review their records and to attest that they are accurate, complete, and current.

b. The Task Force recommends that arbitrators be required to provide written disclosures of circumstances that might create a reasonable impression of possible bias.

We recommend that, as a part of their appointment process, arbitrators be asked to make written disclosure of any circumstances or relationships particular to the case at hand that are not fully revealed by the information given to the parties. The arbitrators should disclose any information that might create, to a neutral observer, a reasonable impression of possible bias.[138/]

[138/] This procedure is used in AAA arbitration and provides an additional safeguard against a potential conflict of interest or a perception of a conflict.

c. The Task Force recommends that evaluations by participants remain voluntary, but that innovative steps be taken to encourage a greater number of responses.

Evaluations of arbitrators by participants in the arbitration process are a vital source of information. They are used by the NASD staff to develop training programs, counsel arbitrators about deficiencies or problems, and to determine if certain arbitrators should continue to be selected. Unfortunately, getting participants to provide evaluations has proven extremely difficult. Nonetheless, a greater effort must be made to obtain candid and complete evaluations from parties, their counsel, and from other arbitrators One option that has been recommended is to require submission of evaluations before the parties can receive the arbitral award. We are concerned, however, about the effect that this approach would have on the quality and honesty of the evaluations, especially if me panics did not trust that their evaluations would be kept confidential.

Thus, we believe that evaluations should remain voluntary, but that greater efforts should be made to follow up with parties and lawyers who do not respond The NASD should develop incentives to encourage counsel and the parties to evaluate the arbitrators' performance.

We also recommend that from time to time the NASD retain an outside organization, such as an independent research company or a public accounting firm to conduct regular surveys of parties regarding the performance of arbitrators. We believe parties are more likely to offer candid and honest evaluations to an independent neutral party.

d. The Task Force recommends that arbitrators be required to evaluate co-panelists before they are asked to serve again and before they receive their honoraria.

While we recognize that a "carrot" approach might produce more thoughtful evaluations than a "stick" approach, the NASD has been stymied in the past in obtaining evaluations. Thus, we reluctantly recommend that arbitrators should be required to evaluate the co-panelists before they are asked to serve again and before they receive their honoraria for their participation in the case. Arbitrator evaluations should be required even

if the case settles before the award is granted. Again, attempts might be made to conduct independent surveys of arbitrators to learn their views about other arbitrators.

ARBITRATOR RECRUITMENT AND COMPENSATION

1. Issues

a. There is a shortage of qualified arbitrators.

The NASD is encountering a serious challenge in recruiting qualified arbitrators to meet the rapidly growing caseload. There are currently approximately 4,600 arbitrators in the NASD arbitration pool, conducting arbitrations in 43 cities. The size of the pool was dramatically reduced in 1993, when the NASD required, for the first time, all new arbitrators and all arbitrators who had not decided a case prior to January 1, 1993, to attend an arbitrator training session. Because many arbitrators in the pool at that time had never heard a case through grant of an award, the number of eligible arbitrators was reduced from 7,000 to approximately 2,600. [139/]

Simultaneously, the number of new cases filed with the NASD increased from approximately 4,400 cases in 1992 to slightly more than 6,000 cases in 1995. In addition, the number of challenges to arbitrators selected by the staff has increased, necessitating the consideration of more than three arbitrators for many of the claims.

In response to this shortage, the NASD established a nationwide program to identify, recruit, and train potential arbitrators in all of the cities in which it conducts arbitrations. Since the mandatory training requirement was instituted in 1993, the NASD Arbitration Department has conducted over 150 introductory arbitrator training sessions around the country.[140/] As a result, the pool of eligible arbitrators increased significantly to its current level of close to 5,000 arbitrators.

[139/] This reduction exemplifies the tension between adequate arbitrator training and the effect of increased training demands on arbitrator recruitment, a problem that we address in our recommendations.

[140/] Some of the sessions were conducted jointly with the NYSE, the Amex, and the AAA.

Additionally, the NASD recently initiated a new recruitment plan whose goal is to recruit and train 3,000 new arbitrators in 1995 and 1996. To assist in attaining this goal, the NASD has established Regional Arbitrator Recruitment Councils.

Despite impressive progress in recruiting and training new arbitrators, there remains a shortage of available arbitrators in many areas. The NASD staff estimates that it must add a substantial number of arbitrators to the pool over the next two years to meet existing demand and projected caseload growth. Approximately one-third of these arbitrators will have to be qualified to serve as panel chairs. The shortage of arbitrators is largely regional. Some areas, including New York, have a sufficient number of available arbitrators, while other areas, including Los Angeles, Las Vegas, and Salt Lake City, are facing an urgent shortage. Moreover, the need for public arbitrators is several times greater than the need for industry arbitrators.

Although no systematic study of the causes of the arbitrator shortage has been conducted, several factors have been identified by the participants in the arbitration process. Those most frequently cited include: non-competitive compensation; increased training requirements; hearing postponements, delays, and scheduling problems; infrequent use of arbitrators who complete the requisite training program; and constantly increasing NASD caseloads.

The shortage of arbitrators has adverse consequences for the arbitration process. In many cases, the NASD cannot offer parties a range of qualified arbitrator candidates. Appointment of a panel may be delayed while the NASD staff seeks arbitrators who are available to hear the case, thus unnecessarily prolonging the arbitration process. Some commentators also have expressed concern that the small size of the pool results in the overuse of certain arbitrators.

b. <u>The level of compensation for NASD arbitrators is a factor in the reduced arbitrator pool.</u>

One cited cause of the shortage of qualified arbitrators is the level of compensation. NASD arbitrators currently are paid an honorarium of $225 per day, with the panel chair receiving an additional $50. These relatively low amounts reflect a view that serving as an arbitrator is a form of public service. The low level of compensation

necessarily affects the number of persons willing to participate in SRO arbitrations. As the time demands placed on securities arbitrators have continued to grow, arbitrators have been forced to consider the financial costs of serving on a panel, since the amounts paid are insignificant compared to the earnings that many arbitrators generate in their regular business. If the compensation were more attractive, it is likely that many more persons would be willing to serve. But at the present compensation levels, the NASD is likely to confront a continued retrenchment of the available arbitrator pool.

c. The level of compensation for NASD arbitrators also affects the composition and quality of the arbitrator pool.

Over time, the low level of arbitrator compensation also has had an affect on the composition of the arbitrator pool. As the demands on arbitrators increase, the most likely to be deterred from serving are those for whom the opportunity costs are highest -- working professionals. Those who remain in the pool are more likely to be either retired persons or those who work as full-time, professional securities arbitrators. Both of these groups bring a body of experience to NASD arbitration whose value cannot be underestimated. At the same time, however, it is important to attract arbitrators from a wide range of backgrounds and professions. Serving as an arbitrator should remain a viable opportunity for people with active careers in other areas.

Additionally, the low levels of compensation have an adverse impact on the quality of available arbitrators. Highly skilled arbitrators whose services are in demand in other forums, where compensation is often substantially higher, are likely to eschew lower paying NASD arbitration. Thus, the NASD risks losing the opportunity to recruit experienced arbitrators because it is not competitive in the compensation it offers.

2. Recommendations

a. The Task Force recommends that arbitrator compensation be raised to a level that will attract well qualified arbitrators and create incentives for training.

We are aware that many of the recommendations that we make with respect to arbitrator training and the arbitrator's pre-hearing duties will only further exacerbate the

problem of recruiting new arbitrators. Imposing new requirements and time commitments on potential arbitrators necessarily involves this trade-off.

Nonetheless, we believe that it is essential for the NASD to improve the overall quality, training, and effectiveness of NASD arbitrators while continuing the effort to expand the arbitrator pool. For these two objectives to be met, arbitrator compensation should be raised.

The Task Force believes that arbitrator compensation must be raised to a level that will (i) expand the arbitrator pool as required; (ii) create sufficient incentives for arbitrators to undergo the training that we recommend; and (iii) compensate arbitrators for the additional pre-hearing responsibilities we recommend, such as managing the discovery process and deciding pre-hearing dispositive motions. We do not know the precise level of compensation that will satisfy these objectives and thus have commissioned Coopers & Lybrand to conduct a study (see recommendation b. below). We do know that compensation must be higher than the honoraria currently offered. We recognize that the NASD cannot compete with more lucrative opportunities available to some potential arbitrators, such as lawyers who charge very high hourly fees. However, the level of compensation must be sufficient to attract well qualified persons to serve as arbitrators.

b. The Task Force recommends that the NASD examine various factors in establishing competitive levels of compensation.

To examine the compensation issues more closely, the Task Force has commissioned Coopers & Lybrand to survey arbitrator compensation practices in a variety of arbitration forums. Coopers & Lybrand will try to ascertain what level of compensation would attract the required number of arbitrators with the skills and training that we recommend. Aided by these findings, and experimentation with rates of compensation, the NASD will be able to determine levels of arbitrator compensation it will have to offer to ensure a quality system.

The Task Force has several general suggestions for Coopers & Lybrand, and ultimately the NASD, to consider in examining what level of compensation will be required to attract well qualified arbitrators. Arbitrator compensation should be structured to

promote the overall goals of a faster, more efficient, and fairer arbitration system by compensating individual arbitrators fairly. Thus, we suggest that Coopers & Lybrand to factors such as the arbitrator's training and experience, the complexity of the case, and the amount of time that the arbitrator is asked to commit to the arbitration proceeding. The NASD could consider whether to develop an appropriate schedule of arbitrator compensation built around these factors. At a minimum, the Task Force believes that arbitrators should be compensated for time expended in arbitration related responsibilities where no hearings are conducted,[141/] such as resolving discovery disputes or dispositive motions on the papers or preparing for hearings on the merits.

c. The Task Force recommends that compensation for panel chairs be raised, and that the differential between panel chairs and other arbitrators be increased.

To implement our recommendations with respect to panel chairpersons, we believe that it will be necessary to increase their compensation relative to other arbitrators. The exact amount is one of the questions under review by Coopers & Lybrand and, to a large extent, only experience can provide the answer. Once again, however, the amount must create sufficient incentives for panel chairs to undergo the additional training and to assume the enhanced responsibilities that we recommend. We expect that the resulting differential between chairs and other arbitrators will be somewhat greater than the current 20 percent; however, it should not be so great as to create antagonisms or an imbalance of influence among the panelists.

d. The Task Force recommends that other, non-monetary improvements be implemented to attract and to retain qualified arbitrators.

In addition to the amount that arbitrators are paid, there are non-monetary improvements that would assist the NASD in attracting and retaining qualified arbitrators. Most of these are discussed in our other recommendations. They include: greater arbitrator

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[141/] At the present time, arbitrators are compensated only for hearing sessions.

input and control of the scheduling of hearings; regular placement of the names of arbitrators who have undergone training on the list of arbitrators circulated to the parties as eligible to serve on arbitration panels; and opportunities for those who complete training as panel chairs to be considered as candidates for service as mediators or evaluators.

We expect that these steps, along with increased compensation, will assist the NASD staff in its efforts to recruit and retain qualified arbitrators.

e. The Task Force recommends that the NASD intensify its efforts to recruit experienced arbitrators.

In addition to the increased compensation and other steps that we recommend to attract more experienced arbitrators, the Task Force also recommends that the NASD intensify its recruitment efforts. We believe that the recent establishment of the Regional Arbitration Recruitment Councils represents the kind of creative initiative that the NASD should promote. The NASD also might consider other steps such as (i) advertising campaigns in appropriate professional journals, (ii) establishing working relationships with professional alternative dispute resolution organizations, (iii) canvassing academic institutions, and (iv) contacting professional securities related groups such as bar associations and industry trade associations.

ARBITRATOR QUALITY AND TRAINING

1. Issues

a. The performance of NASD arbitrators is inconsistent and. overall, not as high as it could be.

The Task Force received many comments about the performance and training of NASD arbitrators. The most frequently expressed concern was that the skills and training of NASD arbitrators are not always adequate to meet the challenges of contemporary securities arbitration. We also were told of widely varying levels of skills and experience among NASD arbitrators.

In particular, the advent of "new" types of claims in securities arbitration, including punitive damages, RICO, and employment discrimination, has led some participants in the securities arbitration process to question whether the typical securities arbitrator is equipped to handle all issues. Moreover, claims involving complex financial

instruments such as derivatives may prove challenging even to an arbitrator otherwise familiar with the securities industry.

There is, as noted above, a divergence of opinion on the question of to what degree the arbitrator pool should be professionalized. Nevertheless, it is clear that the overall performance of NASD arbitrators is not as high as it could be. Surveys commissioned by the NASD Arbitration Department reveal concern by arbitration participants about NASD arbitrator quality. When asked how the NASD arbitration process could be improved, 20 percent of the respondents in a 1993 survey indicated "better quality arbitrators." In a follow-up study in 1994, 15 percent of the respondents chose "better quality arbitrators" - second only to "quicker scheduling for hearings." The two characteristics for which arbitrators received the lowest ratings in both the 1993 and 1994 surveys were "ability to cope with complex material" and "ability to analyze problems and identify key issues." By contrast, arbitrators received high ratings for their professional conduct and their ability to listen to the parties.

b. The NASD has made extensive efforts to improve arbitrator performance.

In response to these concerns, the NASD has made significant efforts to improve the quality and frequency of arbitrator training. Most importantly, as noted above, the NASD has required all new arbitrators to receive mandatory arbitration training since 1993.[142/] The mandatory program is typically a day long program and provides a basic overview of the securities arbitration process. More than 2,100 arbitrators have now completed this program.

In addition to the introductory training, the NASD offers a training program for panel chairs. Unlike the initial arbitrator training session, however, this program is not required for arbitrators who are to serve as panel chairs. Approximately 270 arbitrators have completed this one day course. The NASD also has started to offer specialized training in particular areas of substantive law and arbitration practice, including employment

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[142/] The NASD adopted this requirement after the 1992 GAO study concluded that the SROs lacked sufficient standards and training for potential securities arbitrators.

discrimination, discovery issues, and remedies. The NASD conducted 83 such programs in 1994 and 12 in 1995. These programs are typically offered in cities that have the highest volume of cases, and provide arbitrators with an opportunity to learn about specialized topics and to share experiences in an informal setting.

c. The NASD has worked with other SROs and the AAA to co-sponsor arbitrator training programs.

Since 1993, the NASD has co-sponsored training programs with the AAA, Amex, NYSE, and other SROs. These organizations also have agreed to recognize each other's training programs on a reciprocal basis. Thus, an arbitrator trained in the NYSE program is eligible to serve on an NASD arbitration panel. While this reciprocity expands the size of the arbitrator pool, it also has placed much of the burden of training SRO securities arbitrators upon the NASD, which conducts the largest training program. In addition, the AAA recently suspended its securities training program because it has a sufficient number of trained securities arbitrators for its declining caseload.

Many commentators question the necessity and cost effectiveness of maintaining separate SRO arbitrator training programs. Many believe that the SROs should consolidate their arbitrator recruitment, training and selection functions — in short, maintain a single pool of securities arbitrators.

2. Recommendations

Although there are many excellent arbitrators in the current NASD pool, the overall quality is not as high as it could be. The NASD has made significant efforts to increase arbitrator training, but it is not clear how these programs have affected arbitrator performance. Based on the comments we received and the surveys of participants in the process, we believe that further improvement is necessary.

a. The Task Force recommends that the scope and frequency of mandatory arbitrator training be expanded.

We recommend that the scope and frequency of arbitrator training be expanded even further. In particular, we believe that there should be a continuing education requirement beyond the introductory session presently required of new arbitrators. Appropriate programs should be available for all levels of experience, emphasizing

arbitration procedure, arbitration techniques, and relevant areas of substantive law. These programs also should take a variety of forms, as appropriate, including lectures, seminars, role playing exercises, and discussion groups.

The NASD might also wish to experiment with new training approaches. For example, some of the more experienced arbitrators may agree to serve as mentors to less experienced arbitrators. The NASD might also keep its eligible pool of arbitrators current on developments with a newsletter or other similar publication.

The Task Force does not have adequate data to recommend the specific frequency with which arbitrators should be required to attend continuing education programs. The NASD may wish to look at continuing education programs in the legal, accounting, and securities industry fields to determine the relationship between the depth and frequency of educational programs and competence. Additionally, the staff and the NAMC will want to review the NASD's experience with its expanded programs to determine how these programs can be improved and how frequently arbitrators should attend.

The training requirements should be applied flexibly based upon an arbitrator's demonstrated knowledge of relevant substantive law or the arbitration process. For example, an arbitrator who regularly practices employment law should not be required to attend a training session on the subject; rather, the staff should have the discretion to waive the requirement. The requirements should be structured, however, to ensure that arbitrators remain current with important new developments in the arbitration code and relevant law.

The Task Force recognizes that the increased training demands could result in a reduction of the number of eligible arbitrators. Thus, the NASD may have to intensify its recruitment efforts at the same time that it implements the enhanced training requirements.

b. The Task Force recommends that panel chairs receive more extensive training.

As we have recommended throughout, the Task Force believes that panel chairs should play a greater role in the arbitration process. The early appointment of a skilled, experienced arbitrator who can help to resolve and expedite the pre-hearing process

is a critical element of our attempt to streamline the arbitration process and to provide firmer control over the parties' conduct. The skilled, experienced arbitrator also will be important to our effort to assure greater consistency in the conduct of arbitral proceedings and the rendering of awards.

Accordingly, panel chairs should be required to demonstrate a strong command of NASD arbitration procedure and general arbitration techniques, as well as familiarity with industry practices and substantive law. We believe that panel chairs, unlike other arbitrators, should undergo a qualification process involving evaluation of their training and experience.

To prepare arbitrators to serve as panel chairs, the NASD should develop an extensive training program and should aggressively recruit experienced arbitrators to participate. Arbitrators who believe that they already possess the requisite skills should be subject to a thorough evaluation of their background and experience to determine whether they qualify as panel chairs. Ultimately, we envision a pool of trained and experienced panel chairs serving along with panelists from the larger pool of lay arbitrators.[143/]

As an incentive for arbitrators to complete this additional training, we believe these arbitrators should be given the opportunity to become candidates to serve as mediators and early neutral evaluators. Opportunities to serve in these other capacities should help justify the extra training involved in becoming panel chairs and perhaps attract more arbitrators to the position.

We foresee two problems with our recommendation for more training and experience for panel chairs. First, we are concerned that there will not be a sufficient number of qualified chairs to meet the needs of the NASD's expanding caseload.[144/]

Second, we are concerned that the chairs might dominate the other panel members. We strongly believe that all members of an arbitration panel must play an active role in the

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[143/] The concept is not unlike certain European systems in which a professional judge sits with two or more lay judges in civil cases.

[144/] The NASD may have to provide additional financial incentives to attract arbitrators to undertake this training and to serve in this heightened capacity. This question was addressed in the section on arbitrator compensation.

proceedings, and that decisions should be reached by consensus whenever possible. In the rendering of awards in particular, it is important that each arbitrator have an equal voice. Accordingly, the training for panel chairs must carefully define the role that they are to play and emphasize the importance of building a consensus with other panel members. In recruiting potential panel chairs, the NASD should make every effort to identify arbitrators whose temperament and judgment are well suited to the position.

We recognize that it will take at least several years to develop the training programs that we recommend and to develop sufficient numbers of arbitrators who are qualified as panel chairs. It will therefore be necessary to phase in the requirement over time. We note that there are likely to be periods during which certain regions will not have developed a sufficient number of panel chairs. In those cases, the NASD arbitration staff should be given the flexibility to waive the requirement where necessary.

c. The Task Force recommends that the NASD continually evaluate the quality and effectiveness of its training programs.

We recommend that the NASD continually evaluate the effectiveness of its existing training program in order to determine whether improvements or changes are required. While we have not examined the arbitrator training program in detail, a recent analysis commissioned by the NASD has identified several shortcomings in the program. We note, in particular, the report's observation that new arbitrators are not currently required to demonstrate any sort of proficiency prior to sitting on a panel. While we do not believe that a testing requirement need be established at this time, the NASD must make a greater effort to ensure some minimum standard of arbitrator preparedness. The NASD also should consider whether a testing program would be useful, practical, and cost efficient.

d. The Task Force recommends that the SROs consolidate their programs for arbitrator training.

We recommend that the SROs consolidate their functions relating to arbitrator training. The SROs have cooperated in training efforts and sharing of arbitrators. We recommend that this trend be formalized.

H. ARBITRATION OF EMPLOYMENT RELATED DISPUTES

1. Issues

a. As a result of employment agreements and the language of Form U-4, SRO arbitration programs routinely consider employment related disputes, including statutory civil rights claims.

Although the primary purpose of NASD arbitration is to resolve disputes between member firms and their customers, NASD arbitrators also hear disputes between member firms and their employees. Employment related disputes make up a very small percentage of the total arbitration caseload — less than one percent — but raise a distinct set of issues that we review here.

The NASD arbitration program handles employment related disputes largely as a result of the Form U-4, the "Uniform Application for Securities Industry Registration or Transfer." All registered representatives must sign Form U-4 as a condition of employment in the securities industry. Form U-4 requires registered representatives to submit to arbitration any claim that is eligible for arbitration under the rules of the SRO with which they register. [145/] The NASD Code of Arbitration Procedure, in turn, requires arbitration of employment related disputes.[146/] In addition to Form U-4 and the NASD

[145/] Form U-4 states: "I agree to arbitrate any dispute, claim or controversy that may arise between me or my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which I register ..."

[146/] Section 8 of the NASD Code requires arbitration of "any dispute, claim or controversy ... between or among members and/or associated persons ... arising in connection with the business of such member(s) or in connection with the activities of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) with such member(s)."

d. The Task Force recommends that the NASD consider ways in which fee structures might be used to create incentives to further the goals of arbitration.

Because we do not believe that customers and employees should bear more than a small share of the increased cost of implementing these recommendations, we do not believe that customer or employee fees should be significantly increased. Nevertheless, the Task Force recommends that the NASD consider ways in which fee structures might be used to create incentives to promote less costly and more expeditious proceedings for participants. For example, fees for all parties might vary based on the rules under which a claim proceeds, the length of the arbitration hearing, the number of motions filed, or the amount of time that the case remains on the open docket.[205/] We believe that, without unduly burdening customer or employee parties, these types of mechanisms could be used effectively to provide incentives for appropriate and considered decisions about the conduct of the case.[206/]

L. GOVERNANCE OF THE ARBITRATION PROCESS

1. Issues

Currently, although ten SROs provide forums for the arbitration of customer disputes, over 90 percent of the claims filed are submitted to the NASD (85 percent) and the NYSE (11 percent). Because of the very substantial increase in the number of claims submitted since the McMahon decision in 1987 and the issues created by multiple forums, the idea of a single forum has received intensified consideration from SICA, the SROs, and public commentators.[207/] Accordingly, the members of the Task Force believed it was important to review this matter.

[205/] To some extent, the NASD already uses the fee structure to create certain incentives. Claim filing fees and hearing session deposits, for example, vary according to the amount in controversy.

[206/] As noted above, the AAA assesses a periodic fee based on the length of time that a case remains on the open docket. This provides an incentive for the parties to expedite the conduct of the case.

[207/] See. e.g., New York Stock Exchange. Inc. Symposium on Arbitration in the Securities Industry. 63 Fordham L. Rev. at 1643 (1995); Coopers & Lybrand, Single Forum Study: Final Report (prepared for the Securities Industry Conference on Arbitration) (1991) (C&L Report).

The Task Force reviewed the 1991 study commissioned by SICA and conducted by Coopers & Lybrand on the benefits of a single forum and heard from a Cooper's representative and others on this issue. In addition, the Task Force compared the advantages and disadvantages of the present multi-forum system with those of a potential single forum. Based on this review, the Task Force determined that there are significant issues relating particularly to funding, authorization, and governance that would have to be studied and resolved prior to the establishment of a single forum. Thus, in the recommendation section, we make suggestions for a more comprehensive study of these issues and for changes that can be instituted within the NASD structure in order to enhance the governance of the arbitration system.

a. SRO arbitration programs are regulated by the SEC and coordinated through the Securities Industry Conference on Arbitration.

The SEC oversees all arbitration programs conducted by the SROs under its general authority, granted by the Securities Exchange Act of 1934, to regulate the securities exchanges and the NASD.[208/] The SEC must approve all rules proposed by the SROs for the conduct of arbitration. The SEC also conducts regular inspections of SRO arbitration programs to ensure compliance with SEC and SRO rules. The SEC also takes an active role in suggesting changes to SRO arbitration policies and procedures.[209/]

The securities industry established SICA in 1977 after a request by the SEC to the industry to conduct a review of existing arbitration procedures for small claims. SICA's membership is comprised of a representative from each SRO that sponsors an arbitration program,[210/] a representative from the SIA, and four public members who have

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[208/] The SEC does not have authority over securities related arbitration conducted by the AAA or any other forum which is not an SRO.

[209/] The SEC oversees securities arbitration through a special office located within the Division of Market Regulation. Recently, SEC oversight was divided between this office and an inspections unit located in the newly created Office of Compliance Inspections and Examinations.

[210/] The SRO members of SICA are the American Stock Exchange, the Boston Stock Exchange, the Chicago Board Options Exchange, the Chicago Stock Exchange, the Cincinnati Stock Exchange,

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a demonstrated interest and involvement in securities arbitration.[211/] The SEC also participates in SICA's activities, providing input and oversight in the early stages of proposed revisions to the securities arbitration system.

In an attempt to unify the many inconsistent arbitration rules adopted by the various SROs, SICA's first major effort was to draft a Uniform Code of Arbitration.[212/] The Uniform Code, first published in 1980, established a recommended set of rules to govern all SRO arbitration. Each SRO, however, has promulgated its own arbitration rules, which sometimes differ from provisions of the Uniform Code, or add features not present in it. NASD arbitration is governed by the NASD Code of Arbitration Procedure. In the late 1980s, in the wake of the Supreme Court's decision in McMahon. and in response to comprehensive suggestions for change by the SEC[212/], the Uniform Code and individual SRO rules underwent major revisions regarding a wide range of issues relating to the fairness and speed of the arbitration process.

Today, proposed changes to the arbitration rules are first discussed within SICA as possible amendments to the Uniform Code. Occasionally, NASD and other SROs seek approval for changes to their arbitration rules outside of the SICA framework.

Proposed rule changes are often discussed informally with the SEC before the SROs take any formal action. After the governing boards of the individual SROs approve the proposed changes, they are submitted to the members of the SROs for comment. Formal proposed changes are then submitted to the SEC, which publishes them in the Federal Register for a period of public notice and comment. The SEC may seek modification of the proposed

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[210/] (... continued) the Municipal Securities Rulemaking Board, the National Association of Securities Dealers, the New York Stock Exchange, the Pacific Stock Exchange, and the Philadelphia Stock Exchange.

[211/] SICA increased the number of public members from three to four in 1983.

[212/] Prior to implementing the Uniform Code, SICA had drafted standardized procedures for the arbitration of small claims.

[213/] See Letter from the Securities and Exchange Commission to the Securities Industry Conference on Arbitration (Sept. 10, 1987), reprinted in J. Schropp, Securities Arbitration: New Approaches to Securities Counseling and Litigation After McMahon at 141-53 (1988).

changes early or late in this process. The SEC will then approve or disapprove the proposed rule change.

b. The SICA Study recognized potential advantages to be derived from establishment of a single forum.

In 1990, SICA commissioned Coopers & Lybrand to study the viability and cost effectiveness of a single forum. Coopers issued its final report in mid-1991. Although the Coopers report was not conclusive, it noted opportunities for improvements in a single forum in customer service, arbitrator pool management, and case record management. With respect to cost effectiveness, the report noted that there would be economic benefits only if all classes of SRO arbitration were moved into a single forum, that is, customer-broker, member-member, and employee-member arbitration. The report also identified broad issues to be considered, such as funding and governance. The Coopers study did not examine issues of fairness or perceptions of fairness of the arbitration process. Accordingly, its report did not reach conclusions regarding the impact that a single forum might have on these issues.

c. Numerous problems relating to industry sponsored arbitration in ten different forums could be addressed by a single forum.

Coopers & Lybrand and other commentators have identified numerous potential advantages of a single forum. We discuss below some of the more significant ones, focusing on those that address problems identified with the present multi-forum structure. Some of the issues relate to problems generated by the existence of ten separate forums, and others relate to the fact that the forums are industry sponsored.