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August 16, 2009

VIA EMAIL: rule-comments@sec.gov

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090.

Re: Elimination of FINRA-DR Mandatory Industry Arbitrator Petition for Rulemaking (SEC File No. 4-586)

Dear Ms. Morris:

This letter supplements my comments dated June 20, 2009 and July 5, 2009 and deals with the proposed "survey" mentioned in the letter dated August 3, 2009 of the Financial Industry Regulatory Authority ("FINRA").

FINRA, with the knowledge and/or assistance of the Securities and Exchange Commission ("SEC"), has a sordid history of using "surveys" as a stalling tactic and/or a means to mislead the investing public into believing that mandatory securities arbitration before FINRA is fair. FINRA states, "[F]INRA is working with a Subcommittee of the NAMC to develop a survey to elicit feedback from all participants in Pilot cases. We welcome suggestions from the SEC staff regarding ways to measure the results of the Pilot." With regard to the Subcommittee, FINRA states, "This group includes lawyers who represent investors." Documentary evidence[1] indicates that one should always be suspicious of "surveys" conducted by and/or financed by FINRA (and/or its predecessors) and that, in matters of securities arbitration, the investing public should not rely upon the SEC to protect its interests.

I. Securities Arbitration Fairness Survey - 2006

FINRA desired a façade of independence for the Securities Arbitration Fairness Survey - 2006. For all practical purposes, FINRA controlled the activities of the Securities Industry Conference on Arbitration ("SICA"), who sponsored the Securities

[1] I obtained documents mentioned in this comment from the SEC pursuant to Freedom of Information Act requests and related federal court litigation against the SEC.

Arbitration Fairness Survey - 2006. FINRA paid SICA's operating costs.

SICA Meeting Minutes, dealing with the Securities Arbitration Fairness Survey - 2006, are most instructive. SICA meetings were private. SICA did not make its Meeting Minutes available to the public. Linda Fienberg of FINRA attended each SICA meeting. Securities industry members exercised extensive control over the content of the "survey." SICA "stacked" the subcommittee dealing with the "survey." Linda Fienberg issued a thinly veiled threat to withdraw FINRA's funding if the "survey" asked "inflammatory" questions ("e.g., eliminating mandatory arbitration and getting rid of the industry arbitrator"). SEC Staff extensively participated, *e.g.*, multiple SEC Staff attended each SICA meeting, SEC Staff reviewed and commented upon drafts of SICA meeting minutes. The SEC did not criticize the "survey" process.

SICA Meeting Minutes state, in pertinent part:

Minutes of the January 16, 2004 Meeting of the
Securities Industry Conference on Arbitration
Washington, DC

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Independent Research on Fairness of SRO Arbitrations - Update

George Friedman (NASD) stated that it would not be appropriate for SROs to drive the process of collecting information on the fairness of SRO arbitrations. Given the personnel changes at the NYSE, there has been a hiatus in the project, but the NASD is prepared to move forward. Tom Stipanowich explained that he would be touching base with Bob Barrett of CDRI regarding Bob's plans for California and joint efforts for nationally based surveys, and would be glad to arrange a conference call with Dan Beyda (NYSE), David Carey (NYSE), George Friedman, TJS, and Bob Barrett of CDRI.

Minutes of the March 22, 2004 Meeting of the
Securities Industry Conference on Arbitration
Scottsdale, Arizona

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Research on Fairness of SRO Arbitrations

David Carey summarized the report of the subcommittee. A subcommittee was appointed to help evaluate bidders: George Friedman, David Carey and Professor Katsoris will be on the subcommittee. Steve Sneeringer (A.G. Edwards & Sons) said that SIA representatives should not be on the committee. Tom Stipanowich said that CPR would not be involved as a bidder, so he was added to the subcommittee.

Minutes of the June 8, 2004 Meeting of the
Securities Industry Conference on Arbitration
NASD Dispute Resolution, New York, New York

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Independent Research on Fairness of SRO Arbitrations

Mr. Friedman updated the Conference on the work of the subcommittee, consisting of Mr. Friedman (NASD), Chairman Katsoris, Ms. Kupersmith (NYSE), and Kenneth Andrichik (NASD). They are currently working on picking a vendor to administer the survey on the perceptions of fairness between SRO arbitration and litigation. They hope to have a vendor selected by September 1, 2004. The subcommittee asked for delegated authority to select a vendor, which was approved unanimously. Mr. Friedman will report back at the October SICA meeting.

Minutes of the January 12, 2005 Meeting of the
Securities Industry Conference on Arbitration
New York, New York

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Independent Research on Fairness of SRO Arbitrations

Mr. Andrichik updated the Conference on the status of the SICA survey on the perceptions of fairness of SRO arbitration. He reported that the Subcommittee has chosen Professors Barbara Black and Jill Gross of Pace University School of Law to administer the survey. The Subcommittee will meet again shortly to design the questionnaire.

Minutes of the March 15, 2005 Meeting of the
Securities Industry Conference on Arbitration
New York, New York

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Update on Independent Survey

Mr. Friedman updated the Conference on the work of the Subcommittee, consisting of himself, Kenneth Andrichik (Senior Vice President and Director of Mediation - NASD), Chairman Katsoris, and Ms. Kupersmith. Mr. Friedman informed the Conference that the Subcommittee has chosen Professors Barbara Black and Jill Gross of Pace University School of Law Investor Rights Project to administer the survey on the perceptions of fairness between SRO arbitration and litigation. They hope to have this survey completed by the end of the year. He said that the Subcommittee is currently working on designing the questionnaire for the study.

Minutes of the June 23, 2005 Meeting of the
Securities Industry Conference on Arbitration
New York, New York

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Report from Independent Research Subgroup

Mr. Sadler distributed a memo updating the Conference on the status of the survey on the perceptions of fairness of SRO arbitration that is being administered by Professors Barbara Black and Jill Gross of Pace University School of Law. Mr. Sadler said that Professors Black and Gross have sent him a first draft of the survey. He will distribute the draft to the Conference members to return to him with their comments.

Result: The Subcommittee was authorized to resolve any conflicts with Professors Black and Gross in drafting the final survey.

Minutes of the October 11, 2005 Meeting of the
Securities Industry Conference on Arbitration
Chicago Board Options Exchange, Inc.

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Report from Independent Survey Subgroup: Fairness Survey

Pat Sadler distributed various proposed changes (from NASD, SIA, PIABA, Chairman Katsoris) to the draft survey prepared by the outside vendor (Professors Black and Gross of the Pace Law School Investor Rights Clinic). There was a prolonged discussion, with several suggested amendments.

- Linda Fienberg pointed out that the revised draft did not seem to reflect NASD's changes; Pat replied that he intended to accept NASD's proposed changes.
- Some members suggested separate surveys geared toward individuals, firms, and attorneys, with different instructions (especially for those who participate often in SRO arbitrations). George Friedman pointed out that the vendor might view this change as significant, and outside the scope of the current contract (which called for a single survey).
- Linda Fienberg observed that some of PIABA's suggested questions (e.g., eliminating mandatory arbitration and getting rid of the industry arbitrator) were somewhat inflammatory, and beyond the scope of the original suggestions in the "Perino Report" that gave rise to the survey project. She reserved the right to reconsider NASD's participation if the final survey contained such questions.

● Ted Eppenstein supported the PIABA suggestions and noted that this is a good opportunity to receive input from the public. Mr. Eppenstein also suggested that the Conference not attempt to adhere strictly to the original suggestions made in the Perino Report in developing the survey.
Result: 1) Pat Sadler will synthesize the various suggestions and prepare a single revised draft survey. He will distribute it to the membership within two weeks (by October 25, advance of our January meeting, so work can begin on the survey.

Minutes of the January 12, 2006 Meeting of the
Securities Industry Conference on Arbitration
New York, New York

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Professor Jill Gross joined the meeting as a guest to discuss the survey that she and Professor Barbara Black, of Pace Law School, have been commissioned by SICA to administer on the perception of fairness in securities arbitration.
Professor Gross discussed in detail the methodology used in determining the content of the questions. Some Conference members were concerned that the data mined from the survey would be more substantive if the participants were asked to look at a broader range of arbitrations, as opposed to only their last experience in the forum. The Conference reviewed the draft of the survey, and after a lengthy discussion there were some technical amendments made to the draft. The survey appears to be on track to be released by summer 2006.
Result: Professors Black and Gross will incorporate SICA's suggestions and present a new draft of the survey to the Conference before its March meeting. The survey will be presented as a SICA survey, administered by Pace Law School. The Subcommittee will meet before the meeting to resolve any remaining issues.

Minutes of the March 21, 2006 Meeting of the
Securities Industry Conference on Arbitration
Hollywood, Florida

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INDEPENDENT RESEARCH ON FAIRNESS OF SRO ARBITRATIONS

Pat Sadler presented the final draft. A few technical amendments were offered, including:

> - in the introduction, change first sentence so it reads: ". . . made up of representatives of securities regulators, the Securities Industry Association, and investors.. . "
> - add somewhere that SICA was "created with the encouragement of the SEC."
> - Question 14a becomes: Did you know, prior to the filing of the arbitration, that one arbitrator would be connected in some way with the securities industry (an "industry arbitrator")?
>
> Participants discussed whether to ask Pace to include questions seeking overall impressions about arbitration, in addition to, or in place of, questions about one's last case.
>
> The participants also discussed the following:
>
> ● Whether to add at least one "general experience" question (since the survey now asks parties to respond re: their last case)
>
> ● Whether and how to disseminate the survey to industry registered representatives
>
> ● Possible concerns about Pace's insistence that it be allowed to use the confidential survey data for research and publication purposes.
>
> Linda Fienberg called participants' attention to an open contractual issue, i.e., a lack of clarity as to who owns the data. Pace desires to publish an article based on the results of the survey. While this is not necessarily problematic, several Committee members expressed concerns about maintaining confidentiality of the data. Linda Fienberg agreed to provide copies of the contract to interested SICA members. [2]
>
> Results: 1) approved unanimously, as amended. 2) Pat Sadler was authorized to negotiate for a "general experience" question, with the understanding that he can yield if Pace insists on excluding such a question; 3) the Subcommittee [Kastoris, Kupersmith, Eppenstein and Sadler] was given delegated authority to give final approval on the survey's content (Pat Sadler will circulate the language to SICA by email, as an "FYI"); Pat Sadler will consult with Ken Andrichik, and then work out the confidentiality/use data issue with Jill Gross (including consultation with NYSE and NASD contract counsel).

(Underline emphasis added.)

"George Friedman (NASD) stated that it would not be appropriate for SROs to drive the process of collecting information on the fairness of SRO arbitrations." However, it is obvious that FINRA did "drive the process."

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[2] Evidently, the SEC did not obtain a copy of the contract, as one was not produced in response to my FOIA requests to the SEC. SICA members appear to have been uninterested in reviewing the contract negotiated by FINRA.

In February 2008, "Perceptions of Fairness of Securities Arbitration: An Empirical Study" was published. FINRA did not appreciate the customer criticisms of the securities arbitration process that were revealed in the "study." In her letter dated July 22, 2008, Linda Fienberg wrote to the SEC, with a copy to Mary L. Schapiro (former CEO of FINRA), as follows:

> ***Perceptions of Fairness of Securities Arbitration: An Empirical Study***
> In your letter, you also requested that FINRA examine the recently released report, *Perceptions* of *Fairness of Securities Arbitration: An Empirical Study*....
>
> Pace mailed the survey to almost 30,000 participants (parties and counsel) in investor-initiated arbitration cases conducted at the NASD and NYSE in 2005 and 2006. Cornell processed approximately 3,100 survey responses and, after factoring out bad address returns, concluded the return rate to be approximately 12 to 13 percent of the total.
>
> ***FINRA 's Reaction to the Survey Findings***
> ... [T]he survey's finding are mixed - and in some cases inconsistent. We are troubled that the survey participants rated positively several *objective* standards ... while at the same time evaluating the process negatively from the *subjective* standpoint of fairness. ...
> > Many of the same people who cited the thoroughness and openness of the process and praised the competence of the arbitrators also questioned their impartiality. FINRA is concerned about this clear disconnect in the Survey Report's findings.
> > A sizeable percentage of investors - about 40 percent of those responding - held negative views of the process prior to even filing their case....
>
> FINRA also notes that responses were received from only 13 percent of those to whom the survey was sent. ... The combination of these factors means that the survey results are informational, but we are cautious about drawing conclusions based on the survey results alone.
>
> FINRA also is concerned that investors do not fully understand the FINRA arbitration process or know about the many improvements we have made to the process in the past twelve years....The survey results indicate that investors may need additional education about the many FINRA procedures designed to protect and assist them. ... We will continue to review the results, explore ways to educate the consumers

> about our services, and improve the forum through appropriate changes to rules and procedures.

In substance, FINRA concluded that the results of the "survey" should be ignored, as FINRA did not obtain the results it desired. FINRA determined that the few persons who responded to the "survey" failed to recognize the fairness of securities industry arbitration. FINRA claims, "[I]nvestors may need additional education..."

FINRA rewarded Professor Jill Gross, one of the "administrators" of the "Perceptions of Fairness of Securities Arbitration: An Empirical Study," with a membership on FINRA's National Arbitration and Mediation Committee.

II. SEC Aids FINRA to Spin "Survey" Results of a Pilot Project

From January 2000 until January 2002, pursuant to SICA's recommendation and guidance, the NASD and NYSE arbitration forums provided claimants with alternative forums before which their claims could be heard. Of 277 cases eligible for this pilot project, eight claimants elected to participate (to some degree).

On December 8, 2000, SICA informed Robert Love, then Special Counsel, SEC:

> At the time of implementation of the program, we were aware of the possibility that the program might not see a lot of cases.

SICA conducted a "survey" to confirm the obvious. On January 24, 2001, at a time when SICA had received four responses to its "survey," Robert Love, emailed Catherine McGuire (then, Chief Counsel, Division of Market Regulation, SEC):

> After tedious debate on how to characterize the replies (with the SROs wanting them to be a proxy for widespread joy with the process, and public member ... asserting that he was privy to secret information indicating great woe with the process), I suggested that someone draft a short, flat report that doesn't say too much, and give others an opportunity to edit. ... As for the pilot itself, there are rumoured (sic) citings (sic) of a couple of cases, with unclear status or case stage.

FINRA currently seeks "suggestions from SEC staff" on its most recent pilot project. One should wonder whether there will be a "tedious debate on how to characterize the replies" and whether the SEC will suggest another "short, flat report that doesn't say too much." On the other hand, FINRA may unilaterally proclaim "widespread joy with the process."

There is further evidence in the same email of how the SEC Staff (Robert Love) asserted itself into questionable areas when it advised stock exchanges to "protect themselves" from investors by stating:

> NASD gave only the briefest of presentations of its rule that would allow investors access to court in cases against a defunct broker-dealer. I expanded in order to advised (sic) the exchanges of the need to protect themselves. After the meeting, I asked ... the secretary, to please make certain she looked at and understood the rule and possible implications for the exchanges so that the minutes reflect this, and help them protect themselves with similar filings if they feel exposed.

One might ask why the SEC advised SICA on how to spin "survey" results and stock exchanges on how to protect themselves from the investing public. Is FINRA tacitly seeking similar assistance from the SEC with regard to its planned "survey"?

III. National Arbitration and Mediation Committee

The existence of the National Arbitration and Mediation Committee ("NAMC") and its membership roster raise many questions. Who at FINRA determines whether a person should become a candidate for NAMC membership? What securities arbitration recommendations has NAMC made to FINRA? Which recommendations have been rejected or ignored by FINRA? Why are NAMC's meetings not open to the public? Why are the minutes of NAMC's meetings not publicly available?

FINRA's website currently lists 13 members of NAMC. Six members are employed in the securities industry. Five members are current or former members of PIABA's Board of Directors. FINRA published the résumé of a non-PIABA and non-securities industry NAMC member by stating, "He also trains new arbitrators for FINRA." One might reasonably assume that FINRA compensates him for those services and that that compensation might impede his desire to speak truth to power. Another non-PIABA and non-securities industry member "administered" the recently published "Perceptions of Fairness of Securities Arbitration: An Empirical Study" --- under "contract" with and compensated by FINRA.

Are NAMC's subcommittees "stacked" to obtain predetermined results? It is interesting that FINRA states, "This group (Subcommittee of the NAMC to develop a survey) includes lawyers who represent investors." However, FINRA does not specify who else is a member of the subcommittee or whether the membership alignment ratios of FINRA Rule 12102 apply to "subcommittees."

It is obvious that the PIABA associated members of NAMC feel that FINRA has little or no respect for their recommendations. The fact that PIABA felt compelled to file Petition 4-586, rather than proceed internally through NAMC and FINRA, tells much as to the lack of influence of public investors at FINRA.

IV. Conclusion

The sad and sordid history presented herein shows that, with respect to securities arbitration, the goal of the SEC and FINRA is to subvert searches for truth and justice and mislead public investors. It is truly unfortunate that FINRA has prejudged "eliminating mandatory arbitration and getting rid of the industry arbitrator" as "inflammatory."

Very truly yours,

Les Greenberg

Digitally signed by Les Greenberg
DN: cn=Les Greenberg, c=US, o=Law Offices of Les Greenberg, ou=Attorney at Law, email=LGreenberg@LGEsquire.com
Reason: Petition for Rulemaking 4-586
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