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VIA EMAIL: Rule-Comments@SEC.gov

Mr. Jonathan G. Katz, Secretary
SECURITIES AND EXCHANGE COMMISSION
450 Fifth Street, NW
Washington, D.C. 20549-0609

Re: Arbitration Award – "Explained Decision"
SR-NASD-2005-032

Dear Mr. Katz:

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I. <u>Introduction</u>

For approximately thirty (30) years, while serving as a National Association of Securities Dealers and NASD Dispute Resolution (collectively "NASD") arbitrator or as legal counsel for either claimants or respondents appearing before NASD hearing panels, I have witnessed the NASD arbitration system evolve. In the low volume 1970s, circuit-riding Staff would participate in arbitrator deliberations. In the 1980s and early 1990s, a Staff member would attend/observe each hearing session. From the mid-1990s to the current time, arbitrator training in substantive law by the NASD and effective evaluation of arbitrator competence has effectively ceased.

The current watchword of Securities Industry Arbitration is: "Arbitrators should realize that they are viewed by parties in an arbitration proceeding much as a judge would be viewed in a court of law." (The Arbitrator's Manual [8/04]("Manual"), p. 3.) However, the operational reality is that arbitrators function as jurors, but without instructions from a judge and without access to approved jury instructions.

The proposed rule, in material part, states:

> 10330. Awards … (j) Explained Decisions. … (2) An explained decision is a fact-based award stating the reason(s) each challenged cause of action was granted or denied. Inclusion of legal authorities and damage calculations is not required.

The sole stated justification for the proposed rule is "In order to increase investor confidence in the fairness of the NASD arbitration process." As presently drafted, it would not accomplish that purpose. The proposed rule that arbitrators provide an "explained decision" for arbitration awards is deficient, unwarranted and pre-mature. Its enactment would result in a sham upon the investing public.

The NASD has known for at least thirteen (13) years that the investing public and the securities industry desired arbitrator statements of the reasons for arbitration awards. ["Investor groups … generally supported … a requirement that arbitrators state the reasons for their decisions." United States General Accounting Office ("GAO") Report

(5/92), Securities Arbitration --- How Investors Fare ("GAO Report"), p. 50.] Much better alternatives to an "explained decision" were discussed at that time. ["Representatives of the securities industry and the investors we talked with generally supported federal legislation requiring arbitrators to … complete a checklist explaining the reasons for their decisions." GAO Report, p. 53.] (Emphasis added.) The NASD has had adequate time to better draft a rule requiring a statement of decision and to implement other procedures needed to make statements of decision other than a mirage.

A properly drafted rule, requiring arbitrators to set forth their decision-making reasons, which contains an enforcement mechanism, is only one of several steps necessary to move the arbitration process in the proper direction. Without those other improvements, the "explained decision" could not serve its stated purpose, i.e., "investor confidence in the fairness of the NASD arbitration process". It is first necessary to overcome the NASD's resistance to arbitrator training in knowledge of applicable law and the NASD's lack of an effective system to evaluate arbitrator competence. Thus, as set forth herein, I oppose the proposed rule as it is currently drafted, but suggest an alternative approach.

II. My Background

From 1971 to 1973, I served as the Associate General Counsel and/or Compliance Director of Mitchum, Jones & Templeton, Inc., a regional New York Stock Exchange ("NYSE") Member Firm.

From 1973, I have been engaged in the private practice of law as a sole practitioner where substantially all representation dealt with financial/investment litigation. I have represented many individual investors and more than twenty (20) regional securities brokerage firms before arbitration panels and in various state and federal courts in hundreds of securities industry related disputes. I no longer represent securities brokerage firms.

I was admitted to the NASD panel of arbitrators in 1976. Also, I have served on the panels of arbitrators of the American Arbitration Association, Pacific Stock Exchange, NYSE and Municipal Securities Rule Making Board. Further, I serve the Los Angeles civil courts and the Los Angeles County Bar Association as an arbitrator.

III. NASD Resists the Use of Applicable Law by Arbitrators in Customer Disputes

One can reasonably conclude that the NASD disdains an arbitrator's knowledge and/or use of applicable law in customer disputes. Without that knowledge, drafting an "explained decision" becomes a farce.

A. Importance of Arbitrator Knowledge of Applicable Law

An arbitrator's knowledge of the law applicable to disputes is especially important. If an arbitrator does not understand the applicable law, the arbitrator cannot

determine which facts are relevant and which are not or their significance. Thus, justice is not served. Current ambiguous NASD guidelines to "do justice" or render a "fair and equitable" decision are, effectively, no guidelines and an excuse to foster and enable incompetence.

B. GAO Report Recommended Arbitrator Training and Evaluation Programs

Congress requested that the GAO study the arbitrator education process. ["In response to the concerns of industry members and individual investors, the Chairmen of the House Committee on Energy and Commerce and its Subcommittee on Telecommunications and Finance, and the Chairman and four members of the Senate Committee on Banking, Housing, and Urban Affairs requested that we examine arbitration practices in the securities industry. As agreed with the Committees and Subcommittee, we examined issues related to … the selection and training of arbitrators." GAO Report, p. 21.]

The GAO Report expressly stated that it did <u>not</u> deal with the fairness of the arbitration process. ["GAO's review … did not directly address the fairness of the arbitration process." GAO Report, p. 6.] By implication, the GAO Report did not deal with lack of fairness that would result from an arbitrator's lack of knowledge of applicable law.

The GAO Report partially responded to the Congressional request, which dealt with "training." The GAO Report dealt with training in the "arbitration process," i.e., procedure as opposed to substantive issues, e.g., applicable law. ["Recommendations to SEC. GAO recommends that the Chairman, SEC, require SROS that administer arbitration forums to … establish a system to ensure these arbitrators are adequately trained…." GAO Report, p. 61.]

By 1992, the GAO, Securities and Exchange Commission ("SEC") and NASD were able to examine years of arbitration experience with respect to thousands of arbitration hearings. Yet, they suggested an additional study as to providing "better" arbitrator training. ["Finally, with respect to our recommendation concerning arbitrator training, SEC stated that 'it would be appropriate to study whether there are cost-effective means to assess arbitrators' training needs and provide better training.' This action is consistent with the intent of our recommendation, and the SROS told us they plan to begin such a study." GAO Report, p. 63.] Thirteen (13) years have passed. The investing public and the securities industry have yet to receive the results of the "study." On the other hand, the SROs only stated that "they planned to *begin* such a study" not to complete or publish one. (Emphasis added.) In 1996, the NASD published the results of such a study. (See, Section III.C, below.)

The SEC commented to the GAO that the NASD should expand arbitrator training and evaluation efforts. ["Nevertheless, while the SROs should expand their training efforts, the Staff does not believe that a prescription of specified courses should,

or could, become an acceptable substitute for careful, varied evaluation by the arbitration departments to assure the independence and capability of arbitrators." GAO Report, p. 102.] Subsequently, the NASD reduced its training program related to applicable law and informally advises panelists to ignore applicable securities under threat of being recused from serving as an arbitrator on grounds of bias. (See, Sections III.E.1 and III.E.4, below.) Further, the NASD has disabled itself from being able to effectively evaluate an arbitrator's competence by eliminating Staff's direct observations of arbitration hearing sessions. (See, Section III.F, below.)

C. Ruder Report Recommended NASD Arbitrator Training in Substantive Law and an Effective Arbitrator Evaluation Procedure

The "SECURITIES ARBITRATION REFORM --- Report of the Arbitration Policy Task Force To the Board of Governors National Association of Securities Dealers, Inc." (January 1996) ("Ruder Report") recommended that the NASD improve arbitrator training as to applicable law and implement an effective evaluation procedure concerning arbitrator competence. The Ruder Report stated, in part:

> Many securities arbitration participants expressed concerns about the selection, quality, and training of 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…
>
> [T]he information garnered from these various evaluations (provided by the parties and their legal counsel) is very limited. As a result, the NASD is missing an important element of feedback about the quality of individual arbitrators…. 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.
>
> ….
>
> 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.
>
> ….
>
> [W]e 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.
>
> ….
>
> 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."
>
> ….

> 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 … relevant areas of substantive law.
>
> ….
>
> The training requirements should be applied flexibly based upon an arbitrator's demonstrated knowledge of relevant substantive law.... The requirements should be structured, however, to ensure that arbitrators remain current with important new developments in … and relevant law.

Ms. Linda D. Fienberg, Esquire, was the "Task Force Reporter" of Ruder Report. Subsequently, she became President of NASD Dispute Resolution. The NASD has not implemented the aforesaid recommendations.

Since, 1993, the NASD has <u>not</u> offered any training in applicable law. (See, Section III.E.1, below.) However, in 2004, it sought additional funds to provide a "two-hour … session… on … videotaped training on civility." (SR-NASD-2004-001) The NASD did propose a rule concerning "arbitrator web literacy," but that was withdrawn. (SR-NASD-2004-122)

D. NASD Requires That Intra-Industry Disputes Be Heard Before <u>Arbitrators Who Have Extensive Knowledge of Applicable Law</u>

The NASD recognizes that knowledge of the law is important and is willing and able to employ very competent arbitrators in intra-industry disputes, but <u>not</u> in customer oriented disputes.

Parties receive some assurance that arbitrators are knowledgeable of applicable law only in disputes among NASD members or NASD members and their employees. ["Special Arbitrator Qualifications for Employment Discrimination Disputes … (b) Single Arbitrators or Chairs of Three-Person Panels … (C) <u>substantial familiarity with employment law</u>; and (D) <u>ten or more years of legal experience</u>…." NASD Code of Arbitration Procedure, Rule 10211.] (Emphasis added.) ["Temporary Injunctive Orders; Requests for Permanent Injunctive Relief … (3) Selection of Arbitrators and Chairperson. (A)(i) In cases in which all of the members of the arbitration panel are non-public … At least three of the arbitrators listed shall be <u>lawyers with experience litigating cases involving injunctive relief.</u> (B)(i) In cases in which the panel of arbitrators consists of a majority of public arbitrators … At least a majority of the arbitrators listed shall be public arbitrators, and at least four of the arbitrators listed shall be <u>lawyers with experience litigating cases involving injunctive relief</u>. … (4) Applicable Legal Standard. The <u>legal standard</u> for granting or denying a request for permanent injunctive relief is that of the state where the events upon which the request is based occurred, or as specified in an enforceable choice of law agreement between the parties." NASD Code of Arbitration Procedure, Rule 10335.] (Emphasis added.)

The NASD should have the same concern for the correct application of the law and the competence of arbitrators in customer disputes as it does in intra-industry disputes. Parties to customer disputes should not be treated as second class citizens.

E. NASD Prefers That Customer Disputes Be Heard Before Arbitrators Who Have Little or No Knowledge of Applicable Law

1. Cessation of Arbitrator Educational Forums

In 1993, the NASD ceased educating arbitrators as to applicable law. Prior to 1993, the NASD (Los Angeles Region) would conduct Arbitration Improvement Discussions and Arbitrator Educational Forums. The Discussions were chaired by the NASD Director of Arbitration and attended by a limited number of local attorneys who represented parties in NASD arbitrations. Attendees were afforded an opportunity to discuss arbitration problems and suggest solutions. In addition, all members of the arbitration panel were invited (without charge) to the Forums, which were held in grand ballrooms of local hotels. Speakers presented topics of current interest, including applicable law, and the sessions were opened to questions from all present.

2. Rules Provide Little or No Guidance

The Manual and the NASD Code of Arbitration Procedure provide little or no guidance to arbitrators as to how to learn and/or deal with applicable law.

The NASD informs arbitrators that they are viewed by the parties "much as a judge would be viewed in a court of law." (Manual, p. 3.) However, it further informs arbitrators that they are not really required to follow the law in rendering their decisions. ["Deliberations. … Arbitrators are not strictly bound by case precedent or statutory law. Rather, they are guided in their analysis by the underlying policies of the law and are given wide latitude in their interpretation of legal concepts. On the other hand, if an arbitrator manifestly disregards the law, an award may be vacated." Manual, p. 30.] The NASD offers no guideline to determine what "the underlying policies of the law" are or how and in what manner to recognize or interpret a "legal concept."

Arbitrators may not receive any help from the disputing parties to learn the applicable law as the NASD does not require Claimants to state the applicable law. ["The Statement of Claim shall specify the relevant facts, the remedies sought and whether a hearing is demanded. … The Statement of Claim shall specify the relevant facts and the remedies sought." NASD Code of Arbitration, Sections 10302, 10314.] The NASD only requires that the parties plead facts vis-à-vis applicable law.

The NASD will not advise arbitrators of the applicable law. ["Function of the Arbitration Staff. The Director will assign a staff member to every case. The responsibility of the staff is to advise the panel concerning arbitration procedures. The staff members are not advocates, nor do they research legal issues. Staff members are on

call and may be present to see that the sessions run smoothly and all rules are properly observed." Manual, p. 25.]

Many arbitrators lumber under the erroneous assumptions that they are forbidden from doing independent legal research and that they may not consider any legal authority unless it is presented by the parties. (See, Section III.E.4, below.) Arbitrators are only advised that they may read a rule referred to by a party. ["Before the hearing. … Arbitrators should not make independent factual investigations. Nothing, however, prohibits an arbitrator from reading the text of a rule referred to in a party's pleading (e.g., if the complaint charges a violation of a suitability rule, the arbitrator may read the rule)." Manual, p. 21.] Arbitrators are impliedly restricted from conducting independent legal research. In at least one instance, an NASD Regional Director reprimanded an arbitrator for trying to educate co-panelist and legal counsel as to applicable case law. (See, Section III.E.4, below.)

An arbitrator's quest for truth and justice should not be dependent upon the supposed competence of attorneys representing the parties. There is no assurance that attorneys for the parties know or would present arbitrators with an objective statement of applicable law or that arbitrators would accept briefs on what counsel believe to be the applicable law. ["Admissibility of Evidence. … Although most arbitration claims present questions of fact that the panel will be able to decide on the evidence, some parties may rely on a specific law or statute. Generally, the party who has raised a legal issue will offer the panel a brief setting forth the law or statute and how it applies to the facts of the case. The arbitrators may encourage such a party to cover the issues <u>orally</u>. <u>If</u> the brief is accepted, the other party should be afforded an opportunity to respond. The arbitrators may also request that the parties submit briefs on any issue when the arbitrators feel a brief will assist them in deciding the case." Manual, pps. 27-28.] (Emphasis added.) Attorneys for the parties, relying upon the erroneously assumed infinite wisdom of arbitrators, tend <u>not</u> to present any legal authority to support their positions. Some have applied irrelevant legal theories to their factual situations, while ignoring applicable law. Some misrepresent the applicable law.

3. Unresponsive to Requests for Arbitrator Training in Applicable Law

In 1992 through 1993, I attempted to encourage the NASD to cease the practice of frequent use of certain arbitrators and to educate arbitrators as to applicable law. The NASD, in substance, stonewalled both efforts. Details of my efforts are set for in my comments dated February 10, 2005 to SR-NASD-2004-164.

4. Unwritten Policy to Discourage Arbitrator Knowledge or Use of Applicable Law

NASD arbitrators have uniformly revealed their misunderstanding that they are forbidden to employ legal authority <u>not</u> cited by the parties in their decision making process. They gathered that information from their NASD introductory training sessions.

An NASD Regional Director recently attempted to dissuade an arbitrator, who is well-versed in law and experienced in securities litigation/arbitration, from informing co-panelists and attorneys for the parties of applicable case law. (The relevant legal opinion describes the decision making process/criteria without specifying whether the ultimate decision was in favor of the plaintiffs or defendants.) The arbitrator desired to learn the attorneys' opinions as to whether the case law was applicable to the matter and, if so, how it was applicable. The co-panelists refused to consider the law (as they believed that such would be a violation of some unspecified rule as the parties did not supply the legal authority) and/or allow its disclosure to the parties. The NASD Regional Director solicited a promise from the arbitrator not to employ that law in the decision making process. When the arbitrator refused to disregard the law, the NASD Regional Director suggested that the arbitrator invite and grant a party's motion for recusal based on grounds of bias. The NASD does not understand that knowledge of the law and requests for full disclosure demonstrate competence not bias.

On February 20, 2005, I wrote to Jean I. Feeney, Vice President & General Counsel, with a copy to Linda D. Feinberg, President, NASD Dispute Resolution, wherein I described the above situation and inquired as follows:

> That situation brings forth a few questions with respect to how and in what manner an NASD arbitrator is supposed to apply his/her knowledge of the law in conducting a hearing and deliberating with fellow arbitrators to render a just award.
>
> 1. What is the NASD's policy on the subject of arbitrators learning and employing the law in deciding cases? Are NASD arbitrators forbidden from independently researching the law and/or employing one's own knowledge of specific applicable cases? Does the NASD policy forbid arbitrators to employ any knowledge of the law not presented by the parties? Must the arbitrator accept the law as stated by legal counsel?
>
> 2. What should the arbitrator do if he/she is aware that the attorneys are incorrectly stating the law or, simply, not aware that it exists? Are NASD arbitrators forbidden from informing legal counsel of the parties and fellow panelists of apparently applicable law of which the arbitrator is aware and asking for counsels' versions of whether the law is applicable and, if so, how the law applies to the facts presented at the hearing?
>
> 3. If an arbitrator knows of specific applicable law, does the NASD forbid the arbitrator from employing it in the decision making process? Are NASD arbitrators who are aware of applicable law, which the arbitrator believes counsel are not aware, required to provide the parties with an opportunity to remove the arbitrator from the panel based upon grounds of bias?

On March 1, 2005, I supplemented that letter by stating, in part:

> My inquiry deals with requests for information that should be readily known to the NASD, e.g. "What is the NASD's policy on the subject of arbitrators learning and employing the law in deciding cases?" There is no request that the NASD create a policy if one does not currently exist. If one exists, the NASD should be able to set forth the policy. If one does not exist, the NASD could simply inform me that none exists.

The NASD has failed and, thus, refused, to provide an answer to any of the aforesaid questions. One may reasonably assume that the NASD procedures are totally devoid of any respect for the law and the NASD has no respect for those who are aware of and wish to employ the applicable law as, at least, a starting point in their decision making process.

F. NASD Has No Effective Means to Evaluate Arbitrator Competence

The NASD has no effective means to assess an arbitrator's competence. Until the mid-1990s, Staff would attend each arbitration hearing session. Thereafter, Staff has little contact with arbitrators and does not attend hearing sessions.

Presently, the NASD employs a "Peer Evaluation" questionnaire "as an essential part of the NASD Dispute Resolution's continuing effort to ensure that arbitrators are qualified." However, few people want to be and/or want to be considered as informants. The NASD does not inform specific complainants as to what occurs, if anything, to the perpetrator and does not publish information as to the supposed effectiveness of its Peer Evaluation process, e.g. number of questionnaires submitted and actions, if any, taken in response. Thus, the NASD has engendered a "why bother" attitude among its arbitrators.

The NASD provides no guideline as to whether an arbitrator should use the Peer Evaluation form to report very revealing specific comments or actions by co-panelists. Some examples of actual events are as follows: A Chairperson (attorney) stated that he is not paid enough to take the time to learn applicable law and do an analysis to apply it to the facts under consideration. A co-panelist stated that a customer knew the allegedly omitted fact, because the customer was so wealthy. A co-panelist stated that he would never award punitive damages, but during a prior arbitration, represented to the parties that he was not adverse to awarding punitive damages. Co-panelists (attorneys) repeatedly fraternized with counsel outside the presence of all others despite being advised that such conduct was improper. A Chairperson (attorney) stated, in substance, that he is unaware that a principal is legally responsible for the acts of its agent. A Chairperson's pre-hearing discovery rulings demonstrated incompetence. A Chairperson (attorney) tentatively ruled that numerous claimants be excluded from a hearing, as they might hear each other's testimony. ["(A)ll parties to the arbitration and their counsel shall be entitled to attend all hearings." NASD Code of Arbitration, Rule 10317.]

Chairperson (attorney) engaged in repeated acts of verbal abuse against co-panelist. Which, if any, of the above are reportable events?

The latest report on evaluations provided by parties to an arbitration stated, "[F]ew arbitration participants completed the surveys …. The evaluation response rate was only between 10% to 20%. … [T]hese responses may reflect selection bias problems … [I]t is … possible that individuals that … achieved favorable outcomes were more likely to complete the surveys." "Report To The Securities And Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements In NASD And NYSE Securities Arbitrations" (2002) at p. 34.

Thus, the NASD is essentially flying blind as to the quality and competence of its arbitrators.

IV. <u>NASD Does Not Desire Input on Proposed Rule from NASD Arbitrators</u>

The NASD professes that the "NASD believes that transparency should be a hallmark of securities arbitration…." (Testimony of Linda D. Fienberg, President, NASD Dispute Resolution Before the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises Committee on Financial Services, United States House of Representatives, March 17, 2005) ("Fienberg Testimony") The reality is otherwise.

The NASD gathers arbitrator email addresses and uses them, from time to time, for mass communications with its arbitrators. However, the NASD failed and, thus, effectively refused to inform its arbitrators of the opportunity to comment upon the above referenced proposed rule other than by posting it on an obscure section of its website.

V. <u>Analysis of Proposed Rule</u>

The underlying premise of the proposed rule change is to offer some assurance to public and securities industry employees that, as stated in the vernacular, even though the lights may be on, the question is whether someone is home. The sole stated justification for the proposed rule is "In order to increase investor confidence in the fairness of the NASD arbitration process." As presently drafted, it would <u>not</u> accomplish that purpose. The proposed rule that arbitrators provide an "explained decision" for arbitration awards is deficient, pre-mature and would result in a sham upon the investing public and "associated persons" of the securities industry.

The NASD has admitted that the investing public expects arbitrators to have judge-like quality. ["Arbitrators should realize that they are viewed by parties in an arbitration proceeding much as a judge would be viewed in a court of law." (Manual, p. 3.)] One could reasonable expect a judge to know the law and to ultilize that knowledge in rendering a decision. However, an "explained decision" could be written by someone who has <u>no</u> knowledge of applicable law, securities law or otherwise. There is a much better approach.

Proposed Rule 10330(j)(2) states, in pertinent part:

> An explained decision is a fact-based award stating the reason(s) each alleged cause of action was granted or denied. Inclusion of legal authorities and damage calculations is not required. (Emphasis added.)

A. Exclusion of Legal Authorities and Damage Calculations Is Unwarranted

The NASD bases its request for the proposed rule upon it desire "to increase investor confidence in the fairness of the NASD arbitration process" and its belief "that requiring only the fact-based reasons underlying an award in explained decisions will provide customers and associated persons with the information that they desire." (Emphasis added.) The NASD has not set forth any fact to support its conclusory statements. Did the NASD conduct truly independent surveys to support its position? Further, comparing the terms of the proposed rule to the stated objective and belief reveals that each was ill-founded.

1. The NASD's Justification Lacks Merit

The NASD justifies restrictions on content of "explained decisions" by stating:

> The inclusion of legal authorities or damage calculations, however, will not be required in an explained decision in order to limit the additional costs and processing time associated with explained decisions. Specifically, requiring the inclusion of legal authorities and damage calculations would significantly increase the processing time of awards because it would result in the drafting of complex and lengthy judicial-type decisions. (Emphasis added.)

This statement is simply an unsupported general supposition, which is a poor second cousin to generic fear "unintended consequences" argument. The NASD seems to assume that every arbitration case would be the same. If so, the NASD is capable of adopting boiler-plate language in word processors. The NASD does not state upon what facts, if any, it relies to support its statement that there would be "additional costs and processing time" or the amount of alleged "additional costs and processing time." The NASD does not state upon what facts, if any, it relies to state that the inclusion of legal authority or damage calculations would result in "complex and lengthy judicial-type decisions." It did not explain how complex is "complex" or how lengthy is "lengthy." The NASD did not state whether it has conducted any test to determine the real world validity of its hypothesis or, if it conducted such tests, the results. The NASD refers to "judicial-type" in a pejorative manner.

In a tacit admission that NASD arbitrators have questionable abilities in performing their duties, the NASD recently recognized the value of conducting test or

pilot programs and associated training. "NASD believes that transparency should be a hallmark of securities arbitration…. We are currently working on two additional initiatives to improve the discovery process. The first is the creation of a voluntary pilot program for the use of a special roster of trained Discovery Arbitrators, who would review and resolve discovery issues expeditiously." (Emphasis added.) (Fienberg Testimony)

Informing parties of the true nature of the arbitration decision making process would permit them to compare the quality of justice in arbitration forums to that available in the courts. Capitalism is based upon the basic premise that competition is good. Competition cannot exist without access to information.

a. NASD Currently Requires Some Citation of Legal Authority in Awards

The NASD current requires citation of legal authority in Awards. NASD Dispute Resolution Information And Forms For Arbitrators Conducting Arbitrations In The State of California (1/27/03), "Award Information Sheet," at pages 55-56, states:

> Award Information Sheet: To prepare an award, NASD Dispute Resolution needs certain information from the panel. After the panel has reached a decision, please provide the following information to the staff person assigned to the case. … 8. Award --- Use The Following Pages To Ensure That All Claims And Other Relief Requests Have Been Decided By The Panel. Initial Claim … b. Punitive or RICO damages awarded, if any? … • Authority for Punitive or RICO Damages (e.g., brief description of legal citation): … d. Attorney's Fees awarded, if any? … • Authority for Attorneys' Fees (e.g., statute, contract)…. (Emphasis added.)

Apparently, the requirement of the aforesaid legal authority in awards has not resulted in burdensome "additional costs and processing time" or "complex and lengthy judicial-type decisions."

2. Damage Calculations Are Very Informative

Damage calculations provide extremely valuable information as to the decision making process. It could assist one to determine whether arbitrators engage in "compromise verdicts." A jury verdict, based upon compromise, i.e., a compromise between liability and damages --- "We're not really sure on the liability issue, so we'll award something, but less than full recovery." --- where some jurors vote against their beliefs to break a deadlock, would be overturned. Informing parties of the true nature of the arbitration decision making process would permit them to compare the quality of justice in arbitration forums to that available in the courts.

3. Misplaced Fear of Providing Too Much Information

The NASD appears to fear that too much information is a bad thing. However, under current law in California and that of other jurisdictions, "a written explanation of the arbitration panel's decision" would have no impact on the finality of an arbitration award. Currently, in California, even manifest disregard of the law is not a ground to overturn an arbitration award. See, e.g., Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1, 11; 10 Cal.Rptr.2d 183; 832 P.2d 899, where the majority opinion held that "an arbitrator's decision cannot be reviewed for errors of fact or law." However, the dissenting opinion stated, "I will not agree to a decision inflicting upon this state's trial courts a duty to promote injustice by confirming arbitration awards they know to be manifestly wrong and substantially unjust. Nor can I accept the proposition, necessarily implied although never directly stated in the majority opinion, that the general policy in favor of arbitration is more important than the judiciary's solemn obligation to do justice."

B. Separate Payment Should Not Be Required

There should not be a requirement for additional payment. Such does not inspire confidence. It conveys a message of arrogance and greed.

Serving as an arbitrator is supposedly a form of public service. Arbitrators should be proud of the quality of their ability to decide questions of fact and apply those decisions to the law in the decision making process. Most attorneys would jump at the opportunity to have their erudite written opinion published.

The reality is that very few parties have an incentive to request a statement of decision if they must pay separately for it. The parties already pay substantial fees and charges, most of which is not paid to the arbitrators. An "explained decision" will cost so much and be of so little use to the parties that no one will pay for it. Thus, few, if any, will be issued.

NASD literature will ingenuously inform the investing public of the purported additional fairness benefits of "explained decisions," but the cost factor will be ignored. The NASD will claim the morale high ground by stating that a statement may be obtained. No statistic will be published as to how often they are requested.

C. No Enforcement Mechanism

The proposed rule does not provide for an enforcement mechanism. How can the parties enforce the proposed rule if the arbitrators are unable or unwilling to write an "explained decision"? In substance, the arbitrators are offered compensation IF they provide an "explained decision," but there is no enforcement mechanism if they fail or refuse to do so.

D. No Quality Control Mechanism

As set forth above, the NASD provides no assurance that its arbitrators have any knowledge of applicable law and/or the ability to write an "explained decision." The proposed rule does not provide for arbitrator training in writing "explained decisions." The NASD is more concerned with appearances than reality. The NASD provides a "two-hour … session… on … videotaped training on civility." (SR-NASD-2004-001) The NASD should provide for training in substance, e.g. "explained decision" writing, rather than just appearance.

The following sample of an "explained decision" would meet the requirements of the proposed rule.

> Claimant had the burden of proof on the issues. It was a 50/50 tie on credibility issues for each asserted claim. Thus, Claimant did not meet his/her burden of proof. Therefore, Claimant loses and Respondent wins. Remit $600.

Would the public customer or "associated person" feel that he/she received $300 of value for such a statement? Would such a statement "increase investor confidence in the fairness of the NASD arbitration process" or "provide customers and associated persons with the information that they desire"? The answers are obvious.

E. Suggested Alternative Form of "Explained Decision"

The GAO Report indicated that all parties are receptive to the idea of a check-the -box approach. ["Representatives of the securities industry and the investors we talked with generally supported federal legislation requiring arbitrators to … complete a checklist explaining the reasons for their decisions." GAO Report, p. 53.] (Emphasis added.)

The NASD, in conjunction with persons representing various interests, could design form(s) that would similar to state and federal court books of approved jury instructions with respect to the generally asserted causes of action, e.g., misrepresentation, breach of fiduciary duty. An arbitrator would simply be required to check the appropriate boxes. The benefit is that the arbitrators, like jurors, would be provided with a correct and complete statement of the law to use as a guideline in their decision making process.

The NASD currently utilizes a similar approach in resolving discovery disputes. See, e.g., NASD Discovery Guide ["Discovery disputes have become more numerous and time consuming. The same discovery issues repeatedly arise. To minimize discovery disruptions, NASD Dispute Resolution has developed … document production lists (Document Production Lists)."]

VI. Conclusion

The NASD has professed to Congress that the "NASD believes that transparency should be a hallmark of securities arbitration…." (Fienberg Testimony) However, the NASD's operational history and submission of the proposed rule, in its current form, indicates otherwise. Justice will not be served unless and until the NASD establishes and promulgates policies concerning applicable law and takes effective measures to educate and evaluate its arbitrators as to their knowledge of applicable law.

Parties to an arbitration proceeding may view arbitrators "much as a judge would be viewed in a court of law," but, without adequate knowledge of the applicable law, the proceedings are more like that of a jury that attempts to function without guidance from a judge or approved jury instructions. "Explained decisions," as proposed, will not cure that problem.

The NASD's desire to exclude citation of legal authorities and damage calculations from "explained decisions" is unwarranted. The NASD's forecasts of doom and gloom are not based upon fact.

Properly constructed check-the-box statements of decision would yield valuable information as to the quality of justice or lack thereof dispensed by the NASD in arbitrated disputes. Such full disclosure would help to determine whether the NASD's arbitration system truly dispenses justice and should engender public confidence.

Adoption of the proposed rule, in its current form, would result in a sham upon the investing public.

Please communicate with the undersigned should the SEC conduct a Roundtable or otherwise seek additional information on the aforesaid matters.

Very truly yours,

LES GREENBERG

LG:ms

cc: The Honorable Richard H. Baker
The Honorable Barney Frank
ec: Ms. Annette L. Nazareth, Director, Division of Market Regulation, SEC
Ms. Katherine England, Assistant Director, Division of Market Regulation, SEC