

Petition for Rulemaking (SEC File No. 4-502) was filed on May 13, 2005. A recent trade media article appeared in Alternatives – ADR Briefs (July/August 2005), published by the International Institute for Conflict Prevention & Resolution and John Wiley & Sons, Inc. Excerpts from that article are as follows:

SEEKING RULES: A CRITIC ASKS THE SEC FOR ARBITRATION REFORM

A California attorney, embracing a gadfly's role on arbitration, has asked the Securities and Exchange Commission to consider a variety of rules to reverse what he says is declining securities arbitration practice.

In a detailed—some say scattershot—24- page petition for rulemaking posted by the SEC at <http://www.sec.gov/rules/petitions.shtml>, Les Greenberg, of Culver City, Calif., has asked the nation's chief securities regulatory agency to write rules that require securities arbitrators to follow applicable law, and to get trained. He also wants a better arbitrator evaluation system. See File No. 4-502, "Request for rulemaking under the Securities Exchange Act of 1934 concerning arbitration sponsored by NASD Dispute Resolution (May 13, 2005) (available directly at <http://www.sec.gov/rules/petitions/petn4-502.pdf>. The target of the attorney-neutral's ire is the NASD Inc. The NASD is a self-regulatory organization that can set its own rules for the brokers under its jurisdiction, subject to the SEC's sign-off and oversight. Greenberg, a former New York Stock Exchange panelist, says he is semi-retired, and only remains on the NASD panel. He says that he is no longer familiar with practices at other self-regulatory organization.

But he also tells the SEC in his petition that his allegations of severe arbitration problems are backed by responses he receives to E-mails he sends out to more than 1,000 NASD arbitrators. He writes in his petition that based on his surveying, arbitrators are "impliedly" told by the NASD to "do justice," but the NASD "does not provide the tools to accomplish that goal."

Within three weeks of the petition's SEC posting, five comment letters had been posted, mostly brief, and largely supporting Greenberg.

Anyone can submit a petition, which the SEC forwards to the appropriate office for possible action.

Nancy Condon, an NASD public relations officer in Washington, D.C., says that the NASD wouldn't have a comment on Greenberg's petition.

Greenberg says that it doesn't matter if changes come gradually, because eventually, the NASD addresses systemic—or even small—issues. As an example, he cites the most recent edition of the NASD's newsletter, *The Neutral Corner*, which warns that the NASD doesn't authorize "unsolicited" E-mails, and isn't responsible for such mailings, presumably referring to Greenberg's missives. See *The Neutral Corner* (April 2005) (available at <http://www.nasd.com>).

The newsletter notes that the NASD didn't provide addresses to the E-mailer, which it doesn't name. It says that he hadn't been speaking on the NASD's behalf, and had refused to tell the NASD where he got the E-mail addresses.

Greenberg says that people have Emailed him based on his Internet writings urging them to do so. His site is at www.lgesquire.com. He said he guarantees anonymity when he uses E-mail comments in his newsletter, the archive for which can be found at http://www.lgesquire.com/LG_Links.html. Based on the April NASD item, Greenberg has added a disclaimer to his site and

his E-mails noting that he doesn't speak for the company, which oversees more than 5,100 brokerage firms.

In fact, Greenberg, a former broker associate general counsel and compliance director, has a history of pushing back at regulators. Three years ago, a group he formed filed another rulemaking petition that dealt with corporate governance issues. The group, the Committee of Concerned Shareholders, organized Internet protests that led to proxy contests.

Greenberg says he believes that securities arbitration is ready for a similar grassroots reform push. "I feel there has been a precipitous decline in the standards over the past 10 years," he says.

And in his sweeping approach, he tackles issues that are sure to resonate among securities ADR practitioners, even if the changes his petition seeks are debatable.

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Greenberg first asks the NASD to require arbitrators to make rulings based on applicable law. "If an arbitrator does not understand the applicable law, the arbitrator cannot determine which facts are relevant and which are not or their significance," writes Greenberg in his petition, adding, "Thus, justice is not served."

The April issue of *The Neutral Corner* discusses the NASD view of arbitrators' use of the law. In a question-and-answer column, it emphasizes in italics that arbitrators "are not to engage in any outside legal research, nor should they ask NASD staff to conduct legal research for the arbitrators. The panel must rely on the parties to provide the research in support of their respective positions."

Greenberg cites reports recommending more arbitrator training. He states that the recommendations haven't been implemented. He says that the NASD view is that securities industry arbitrators present "helpful and necessary" information, while arbitrators presenting legal authority are thought to be biased. He suggests that arbitrators act in secret to pass around information they think is relevant, and fail to give parties a chance to rebut.

He writes that the NASD, which provides extensive training opportunities (which can be found at the "Arbitration & Mediation" link www.nasd.com), nevertheless ignores training arbitrators in applicable law.

He even charges that NASD policy is to discourage arbitrators from using their legal knowledge in hearing and deciding cases. The charge includes an anonymous anecdote in which an NASD regional director actively discouraged an arbitrator's application of the law, and later solicited the arbitrator's eventual recusal.

After cataloging his inquiries on the subject, Greenberg writes that, the "NASD is stonewalling my efforts to learn specifics of its unpublished policies concerning the use of substantive law in the arbitration process."

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He cites a report that says the NASD needs to evaluate its arbitrators better. "The NASD is essentially flying blind as to the quality and competence of its arbitrators," the petition for rulemaking states, adding that panelists' peer reviews have been unsuccessful.

And while the principal target is the NASD's operations, Greenberg isn't happy with the SEC's oversight either. At the end of the petition, he briefly takes the agency to task for allowing allegedly lax NASD practices to proliferate.

“In its current form,” Greenberg concludes, “the NASD arbitration process and purported SEC oversight thereof constitutes a sham upon the investing public.”

In an interview, he says, “I’m not pro-industry. I’m not pro-customer. I’m pro-level playing field for both and all. . . . I want the process to be fair, and I see it declining.”

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