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RICHARD P. RYDER, PRESIDENT

November 17, 2004

Office of the Secretary
Securities and Exchange Commission
450 fifth Street, NW
Washington, DC 20549-0609

RE: NYSE Rule Filing – SR-NYSE-2004-29
Proposed Amendment, NYSE Rule 607

Dear Secretary:

The New York Stock Exchange has proposed making permanent an optional system for selecting Arbitrators, but, in doing so, wants to cut back significantly on that which it has offered arbitrating parties for the past four years. It makes this proposal on two contradictory premises: first, that nobody wants to use the pilot options anyway; and, secondly, that a cutback in party options will save valuable staff time. I respectfully submit that the proposed change should be disapproved, unless the Exchange can provide an analysis of the pilot program that supports its all but total abandonment. Party participation in the selection of arbitrators is important enough not to be discarded for the sake of minimal administrative conveniences.

Even though disapproval by the Commission of this proposed Rule could mean an end to the pilot program in January 2005 and a total return to a non-optional staff appointment system, the alternative -- placing the Commission's imprimatur on this proposed change -- simply gives grace to an arbitrator selection regime that is paternalistic and outdated. Since the proposed system, which presents an insincere choice, is only marginally better than a non-optional system, approval simply elevates the default choice: staff appointment. The Commission may not want to punish the Exchange by compelling it to maintain that which it adopted only as an experimental pilot, but it should recognize that approval of this proposal sets a path that makes the Exchange's arbitration program, which used to be the dominant securities arbitration program, even less attractive to investors and other non-members.

It may be said by some that the SEC should be encouraging experimentation and choice in today's arbitration landscape and that, in offering a selection system wholly different from what is available at other major securities arbitration forums (NASD & AAA), the NYSE is offering a competitive option that gives investors greater choice. First, the premise of competitive choices, while superficially appealing, runs counter to the twenty-plus years that the Commission has supported the efforts of the Securities Industry Conference on Arbitration (SICA) to establish and maintain the Uniform Code of Arbitration (UCA). Secondly, the assumption behind support for competitive alternatives, to the extent it anticipates forums that seek greater market share, is

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erroneously based. Thirdly, distancing oneself from the market with a "throwback" proposal cannot fairly be said to be a competitive maneuver. To the contrary, the "throwback" in this instance will have the effect of pushing "market share" to the other arbitration forums.

The current NYSE pilot program permits parties to mutually agree that they will use one of three alternatives (Parties' Own; Enhanced List Selection; Random List Selection) to the staff appointment method in order to select their Arbitrators. All of the available choices give the parties greater say in the selection process than does the staff appointment method in current Rule 607. Under the staff appointment method, the Arbitrators are announced to the parties without any consultation with or statements of preference from the parties. After the fact, parties get the opportunity to exercise a single peremptory challenge to the staff-appointed Panel.

The three pilot alternatives offer varying degrees of party involvement in the pre-selection process, while staff appointment affords no pre-selection input from the parties. The current proposal discards two of the three party-driven alternatives without a proffer or proper justification. Remember that the NYSE renewed this pilot for a second two-year period, explaining to the Commission that more time was needed to evaluate the program. Is it not arrogant to conclude from the failure of disputants in arbitration to reach ready agreement on an arbitrator selection method that they really want the Exchange staff to make the selections?

As to the remaining selection method, Random List Selection, the Exchange's proposal cuts back on the desirability and functionality of that single alternative to staff appointment. This seems more like a plan for atrophy than an attempt to benefit the process and make NYSE Arbitration more appealing as a forum. Rendering the Random List Selection process even less desirable only guarantees resort to the default: staff appointments.

From Uniformity to What?

With the Commission's imprimatur, SICA was formed to bring together the arbitration rules of ten participating SROs and establish a uniform standard in the industry for the resolution of investors' small claims. SICA's next mission extended to the full Code, when the Small Claims rules were in place and all major SROs incorporated into their rules the Uniform Code of Arbitration. Between 1987 and 1989, that feat was repeated when the Commission's staff called upon SICA to consider uniform and significant rule changes that overhauled the existing SRO arbitration codes.

The SEC proposals did not urge a change in the staff appointment system used by all of the SRO forums, but that did come later, with SICA leading the way. In the late 1990s, SICA modeled a rule change to the UCA that was designed after the list selection system used by the American Arbitration Association. That SICA amendment to the UCA is embodied in the Exchange's current Random List Selection alternative. The current NYSE move away from list selection as the default choice and towards staff appointments in more cases is not good for securities arbitration or investors' perception

of the process. Keeping a weakened Random List Selection alternative that can only be used when heated disputants manage to form agreement on that option simply disguises curtailed choice. The Exchange followed the SICA model in launching the pilot program. Why is the SICA model no longer workable? Why is it not appropriate to adopt list selection as the default and abandon a default method that only engenders suspicion and distrust?

The NYSE proposal comes at the same time as the NASD, which fully embraced list selection in the late 1990s, has moved to expand the options available to all parties through list selection by offering seven candidates per seat and a separate list for chairpersons (see proposed NASD Rule 12403, SR-NASD-2003-158). Neutral List Selection System (NLSS), NASD's computerized program, includes parties in the choice of arbitrators and is specifically designed to keep the staff out of the arbitrator selection process. The NLSS has been hugely successful. It is NASD's default system for all arbitrations before the forum and its success derives from the perception that it assures objectivity and invites consultation with arbitrating parties.

Competition Among SROs

The New York Stock Exchange was, until the early 1980s, the dominant forum for resolving securities arbitration disputes. It has slipped from that position gradually and steadily over the years to where, today, the NASD has ten times the number of case filings, decided cases, and staff. What happened? The NASD's markets certainly had an explosion in volume, but that volume was created and executed by NYSE member firms. The number of customers in the markets, directly and through intermediation, has multiplied, but NYSE member organizations continue to dominate retail volume. Arbitration at the NYSE and the NASD is not restricted by the type or nature of the securities involved in the dispute, but by whether the brokerage firms involved are members of the sponsoring forum.

If competition was what the Commission wanted, the race is over and the NASD "won." When one says that the clear trend is toward a single arbitration forum, that simply reflects the logical extension of what exists today. The NYSE is the only forum other than the NASD that handles even a modicum of volume. Whether this is what the Commission wants or whether it is politically or socially desirable is not the subject of this letter. My point simply is that the proposition that the current proposal offers a truly competitive alternative to selection methods used at other active forums is a non-starter.

The NYSE has not competed well for arbitration volume and, given its enormous resources and the headstart it had, the clearest conclusion is that it did not "win" because it did not care to win. The current proposal is not designed to be a competitive alternative; it is the result of retrenchment and an indifferent attitude to the arbitration "market." Competition is not feasible in that environment.

"Throwback" Proposal Not Competitive

People do not want staff appointments. Staff appointments create mistrust among those new to the process and most parties to arbitration, whether veterans or newcomers,

Random List Selection System, as currently configured, offers a superior system to the NASD's current NLSS, in terms of assuring that parties will make the choice as to "who" will be their Arbitrators. NLSS turns to staff appointment (albeit from computer-determined nominees) after one round, whereas Random List Selection at the NYSE offers a second list to the parties and limits the strikes to assure sufficient candidates will emerge without staff involvement.

The drawback at NYSE is that the parties must agree to use Random List Selection. In prior rule filings, NYSE has indicated that only about 15% of the arbitrations utilize one of the three pilot alternatives, because agreement between adversaries is difficult to achieve, even on matters of common benefit. At NASD the parties do not have to signal specific consent to the list selection process. NASD is attracting more and more of the case volume and NLSS is a major reason why. NYSE has also indicated in prior rule filings that among the parties agreeing to one of the alternatives, most (9 of 15) have chosen the Enhanced Selection method, one of the two alternatives NYSE now proposes to drop. That means that 6% or fewer of the arbitrations have utilized Random List Selection, where mutual agreement is mandatory. How likely is it that parties will opt now for a less desirable alternative to the current Random List Selection alternative?

As noted above, NASD is moving to enhance NLSS and give parties more candidates to choose from, while NYSE proposes to telescope its list selection alternative from two lists to one. Approval of this proposal offers a choice, but not a sincere one. It will surely induce sophisticated parties to select arbitration at the NASD more frequently and, for those using NYSE arbitration, it will corral parties into using the staff appointment method virtually all the time. Given an inferior choice and the continued need for mutual agreement, fewer parties than ever are likely to sense a clearly superior benefit to staff appointment and be willing to strive for the necessary consent to access the option.

Conclusion

I served as an Arbitration Director in the late 1970s, when staff appointment was the only method available to the arbitrating parties. Staff appointment allows staff attorneys, who know the qualifications of the available arbitrator candidates better than most parties or party representatives, to select panels that are suited to the particular dispute at hand and to provide for a blend of complementary skills and knowledge when forming a three-person Panel. I was a supporter of the staff appointment method then, but today arbitration is much different. Parties want to participate in the selection of their arbitrators. There is information on the Internet, a library of past Awards to review, and other ways in which to arrive at choices that suit the parties and make them feel that the people deciding their arbitration case are people they can trust.

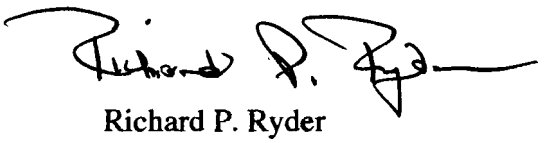
Moreover, the suspicion that surrounds staff appointments of the Panel is far more intense today and the idea that staff attorneys will make the best selections is discarded by most as rhetoric. The stakes are higher, the opportunity for corruption is greater, and the conflicts of interest that arbitrators and the SROs as institutions must weigh are more acute. The staff appointment method may be tolerated by the Commission, but it should not be sanctioned with the stamp of SEC approval on this rule change.

This proposal preserves a list selection alternative, but the real method preserved by the rule change will be the default process: staff appointments. This is dangerous. Choosing arbitrators is the most critical step in the arbitration process, just as choosing jurors is a critical stage in litigation. Litigants in court expend enormous amounts of money on jury consultants; they get to choose their jury from a pool of people; and the privilege of participation is highly valued. While certainly in a different category from a cost perspective, arbitration hinges even more focally on the quality and impartiality of one's arbitrators. Should the privilege of participation in the context of securities arbitration be deemed any less valuable than the right to examine and accept or reject jurors?

The Exchange's continued viability as an alternative to NASD Arbitration is in serious question already. This proposal effectively rejects a SICA-sanctioned default method that NASD has embraced and arbitrating parties clearly prefer. At the very least, approval of the current proposal should hinge upon a change: make the Claimant elect either Random List Selection or Staff Appointment early in the pleading process. Then, we will see which selection method parties really want. The current proposal only creates an illusion of choice where, in fact, there is neither choice nor input.

I am the editor and owner of a newsletter on securities arbitration. I have been involved in securities and commodities arbitration as an attorney, arbitrator, mediator, expert witness and commentator for about 30 years. Thank you for allowing me this opportunity to comment.

Respectfully submitted,



Richard P. Ryder