Alternatives to the Proposed Action: Alternatives to the proposed action include complete denial of the requested change in the construction permit. Such a denial would cause the construction permit CPEP-1 to expire, and all rights there under would be forfeited. The permit holder might find it necessary to submit a new application and repeat the process of securing a construction permit; this would delay the work further.

Extension of the latest completion date to a date earlier than November 3, 1989, might not provide sufficient time and thus might create the need for a second extension of the construction permit time period.

Agencies and Persons Consulted: None; in performing this assessment, staff utilized documents previously submitted by AlChemIE; the Environmental Report submitted November 17, 1987, and Revision 7 of the Security Plan dated January 1989.

Finding of No Significant Impact

On the basis of the above environmental assessment, the Commission has concluded that the environmental impacts created by the proposed change in the Construction Permit would not be significant and do not warrant the preparation of an Environmental Impact Statement. Accordingly, it has been determined that a Finding of No Significant Impact is appropriate. AlChemIE's letter of April 18, 1989, regarding the amendment is available for public inspection and copying in the Commission's Public Document Room at the Gelman Building, 2120 L Street NW., Washington, DC.

Dated at Rockville, Maryland, this 8th day of May, 1989.

For the Nuclear Regulatory Commission.

Leland C. Rouse,

Chief, Fuel Cycle Safety Branch, Division of Industrial and Medical Nuclear Safety, NMSS.

[FR Doc. 89-11683 Filed 5-15-89; 8:45 am]

BILLING CODE 7590-01-M

Correction to Biweekly Notice; Applications and Amendments to Operating Licenses Involving No Significant Hazards Considerations

The above notice was published on April 19, 1989 (54 FR 15820). A sentence was omitted in the following part of this notice: Page 15841, second column, heading entitled "Washington Public Power Supply System, Docket No. 50-397, Nuclear Project No. 2, Benton County, Washington." The subsection describing the request should read as follows:

Description of amendment request: License condition 2.C.(16), Attachment 2, Item 3(b), Wide Range Neutron Flux Monitor, requires the licensee to implement the requirements of Regulatory Guide 1.97, Rev. 2 for flux monitoring prior to startup following the fourth refueling outage. The requested amendment would defer the requirement for flux monitoring to the end of the fifth refueling outage.

Robert Samworth,

Project Manager, Project Directorate No. V, Division of Reactor Projects-III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 89-11684 Filed 5-15-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-361 and 50-362]

Southern California Edison Co., et al.; Consideration of Issuance of Amendments to Facility Operating Licenses and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. NPF-10 and NPF-15 issued to Southern California Edison Company (SCE), San Diego Gas and Electric Company, the City of Riverside, California and the City of Anaheim, California (the licensees), for operation of San Onofre Nuclear Generating Station, Units 2 and 3 located in San Diego County California. The request for amendments was submitted by letter dated April 7, 1989, and identified as Proposed Change PCN-291.

The proposed change would revise Technical Specification 3/4.4.10, "Reactor Coolant Gas Vent System." This specification requires operability of the Reactor Coolant Gas Vent System in Modes 1, 2, 3 and 4, which ensures that noncondensable gases which could inhibit natural circulation core cooling can be exhausted from the primary system following a design basis event. This specification also provides actions to be taken should the operability requirements not be met as well as surveillance requirements to periodically demonstrate operability of the system.

Surveillance Requirement 4.4.10 requires that each reactor coolant system vent path be demonstrated operable at least once per 18 months. The proposed change would revise the frequency of this surveillance to at least once per refueling interval.

Before issuance of the proposed license amendments, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

By June 15, 1989 the licensees may file a request for a hearing with respect to issuance of the amendments to the subject facility operating licenses, and any person whose interests may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for hearing and petition for leave to intervene. Requests for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel will rule on the request and/or petition, and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first pre-hearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first pre-hearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to

intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendments under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

A request for a hearing or a petition for leave to intervene shall be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 2120 L Street NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner or representative for the petitioner promptly inform the Commission by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to George W. Knighton: petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Mr. Charles R. Kocher, Esq., Southern California Edison Company, 2244 Walnut Grove Avenue, P.O. Box 800, Rosemead, California 91770 and Orrick, Herrington and Sutcliffe, Attention: David R. Pigott, Esq., 600 Montgomery Street, San Francisco, California 94111, attorneys for the licensees.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board, that the petition and/or request should be granted based upon a balancing of the factors specified in the 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

If a request for hearing is received, the Commission's staff may issue the amendment after it completes its technical review and prior to the completion of any required hearing if it publishes a further notice for public comment of its proposed finding of no significant hazardous consideration in accordance with 10 CFR 50.91 and 50.92.

For further details with respect ot this action, see the application for amendments which is available for public inspection at the Commission's public Document Room, 2120 L Street NW., Washington, DC, and at the General Library, University of California at Irvine, Irvine, California 92713.

Dated at Rockville, Maryland, this 3rd day of May, 1989.

For the Nuclear Regulatory Commission.

Robert B. Samworth,

Senior Project Manager, Project Directorate V, Division of Reactor Projects III, IV, V and Special Projects, Office of Nuclear Reactor Regulation.

[FR Doc. 89-11685 Filed 5-15-89; 8:45 am]

BILLING CODE 7590-01-M

[Docket No. 50-266 and 50-301]

Wisconsin Electric Power Co.; Issuance of Amendments to Facility Operating Licenses

The U.S. Nuclear Regulatory Commission (Commission) has issued Amendment No. 120 to Facility Operating License No. DPR-24 and Amendment No. 123 to Facility Operating License No. DPR-27, issued to Wisconsin Electric Power Company, which revised the Technical Specifications for operation of the Point Beach Nuclear Plant, Units 1 and 2, located in Manitowoc County, Wisconsin. The amendments were effective as of the date of issuance for Unit 1 and on November 1, 1989 for Unit 2.

The amendments modified the Technical Specifications relating to the design and operation of the Point Beach fuel cycle with upgraded core features and higher core power peaking factors (F_Q and F-delta H) than previously permitted by the plant Technical Specifications.

Specifically, the amendments incorporate higher core power peaking factors which allow the use of a low-low leakage loading pattern (L4P) fuel management strategy and will result in decreased neutron fluence to the reactor vessel. This fluence reduction will help address reactor vessel irradiation damage issues such as pressurized thermal shock, low upper shelf material toughness and pressure-temperature restrictions on heatup and cooldown. The higher core power peaking factors allow additional fluence reduction measures, such as the use of peripheral power suppression assemblies, to be pursued.

In addition to the increase in core power peaking factors, the changes and reanalysis supporting them permit the use of an upgraded fuel product features package. The upgraded fuel product features include: removable top nozzles, integral fuel burnable absorbers, axial blankets, extended burnup geometry, and inclusion of a debris filter bottom nozzle. The reactor core description was modified to reflect these changes. Further, these amendments allow the removal of the fuel assembly thimble plugging devices and the elimination of the third line segment of the K(z) curve.

The application for the amendments complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendments.

Notice of Consideration of Issuance of Amendments and Opportunity for Hearing in connection with this action was published in the **Federal Register** on December 6, 1988 (53 FR 49260) and February 6, 1989 (54 FR 5707). No request for a hearing or petition for leave to intervene was filed following this notice.

The Commission has prepared an Environmental Assessment related to the action and has determined not to prepare an environmental impact statement. Based upon the environmental assessment, the Commission has concluded that the issuance of these amendments will not have a significant effect on the quality of the human environment.

For further details with respect to the action see (1) the application for amendments dated August 26, 1988; as supplemented October 28, November 30, and December 23, 1988 and as modified January 17, 1988 (sic), (2) Amendment No. 120 to License No. DPR-24, (3) Amendment No. 123 to License No. DPR-27, and (4) the Commission's related Safety Evaluation and Environmental Assessment. All of these items are available for public inspection at the Commission's Public Document Room, Gelman Building, 2120 L Street NW., and at the Joseph P. Mann Library, 1516 Sixteenth Street, Two Rivers, Wisconsin. A copy of items (2), (3) and (4) may be obtained upon request

addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects III, IV, V and Special Projects.

Dated at Rockville, Maryland this 8th day of May 1989.

For the Nuclear Regulatory Commission.

Timothy G. Colburn,

Acting Director, Project Directorate III-3 Division of Reactor Projects III, IV, V and Special Projects Office of Nuclear Reactor Regulation.

[FR Doc. 89-11686 Filed 5-15-89; 8:45 am]

BILLING CODE 7590-01-M

OFFICE OF PERSONNEL MANAGEMENT

Request for Approval of Standard Form 3105 A-E Submitted to OMB for Clearance

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (title 44, U.S. Code, chapter 35), this notice announces a request to reinstate an information collection from the public. Standard Form 3105 A-E, Documentation in Support of Disability Retirement Application, is completed by a Federal employee participating in the Federal Employees Retirement System (FERS), the employee's personnel office, and the employee's physician to provide documentation necessary for OPM to determine if the individual meets the requirements of 5 U.S.C. 8451, for disability retirement under FERS. Standard Form 3105 includes five information collections; however, only one, SF 3105C, Physician's Statement, collects information from the public. This request applies only to SF 3105C. Approximately 1,450 forms are completed annually; each SF 3105C, Physician's Statement, requires approximately 1 hour to complete, for a total public burden of 1,450 hours. For copies of this proposal, call Larry Dambrose, on 632-0199.

DATES: Comments on this proposal should be received within 10 working days from the date of this publication.

ADDRESSES: Send or deliver comments to—

C. Ronald Trueworthy, Agency Clearance Officer, U.S. Office of Personnel Management, 1900 E Street NW., Room 6410, Washington, DC 20415, and

Joseph Lackey, OPM Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building NW., Room 3235, Washington, DC 20503

FOR FURTHER INFORMATION CONTACT: James L. Bryson, (202) 632-5472.

U.S. Office of Personnel Management.

Constance Horner,

Director.

[FR Doc. 89-11641 Filed 5-15-89; 8:45 am]

BILLING CODE 6325-01-M

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review

AGENCY: Railroad Retirement Board.

ACTION: In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Board has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

Summary of Proposal(s):

(1) *Collection title:* Application for Search of Census Records (For Railroad Retirement purposes only).

(2) *Form(s) submitted:* G-256.

(3) *OMB Number:* 3220-0106.

(4) *Expiration date of current OMB clearance:* Three years from date of OMB approval.

(5) *Type of request:* Extension of the expiration date of a currently approved collection without any change in the substance or in the method of collection.

(6) *Frequency of response:* On occasion.

(7) *Respondents:* Individuals or households.

(8) *Estimated annual number of respondents:* 250.

(9) *Total annual responses:* 250.

(10) *Average time per response:* .168 hours.

(11) *Total annual reporting hours:* 42.

(12) *Collection description:* Under the Railroad Retirement Act, an application for benefits based on age must be supported by proof of the age claimed. The application will obtain proof of an applicant's age from the Bureau of the Census when other evidence is unavailable.

Additional Information or Comments

Copies of the proposed forms and supporting documents can be obtained from Ronald Ritter, the agency clearance officer (312-751-4692). Comments regarding the informaton collection should be addressed to Ronald Ritter, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611 and the OMB reviewer, Justin Kopca (202-395-7316), Office of Management and Budget, Room 3002, New Executive Office Building, Washington, DC 20503.

Ronald Ritter,

Acting Director of Information Resources Management.

[FR Doc. 89-11672 Filed 5-15-89; 8:45 am]

BILLING CODE 7905-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-26805; File Nos. SR-NYSE-88-29; SR-NYSE-88-8; SR-NASD-88-29; SR-NASD-38-51; SR-NASD-89-19; SR-AMEX-88-29]

Self-Regulatory Organizations; Order Approving Proposed Rule Changes by the New York Stock Exchange, Inc., National Association of Securities Dealers, Inc., and the American Stock Exchange, Inc. Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses

I. Introduction and Background

The New York Stock Exchange, Inc. ("NYSE"), the National Association of Securities Dealers, Inc. ("NASD") and the American Stock Exchange, Inc. ("AMEX") have each submitted to the Securities and Exchange Commission ("Commission" or "SEC") [1] proposed rule changes pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [2] and Rule 19b-4 thereunder [3] to

[1] SR-NYSE-88-29 was submitted on October 14, 1988 and amended on January 6, 18 and 19, 1989 and April 28, 1989. SR-NYSE-88-8 was submitted on March 28, 1988 and amended on October 12, 1988 and January 16, 1989. SR-NASD-88-29 was submitted on July 1, 1988 and amended on September 19, 1988, October 7, 1988, April 18 and 19, 1989 and May 5, 1989. SR-NASD-88-51 was submitted on November 7, 1988 and amended on December 23, 1988, January 26, 1989 and April 18, 1989. SR-NASD-89-19 was submitted on March 27, 1989 and amended on April 17, 1989. SR-AMEX-88-29 was submitted on November 18, 1988 and amended on April 26, 1989 and May 3, 1989.

In addition, the Municipal Securities Rulemaking Board ("MSRB"), the Pacific Stock Exchange ("PSE") and the Midwest Stock Exchange ("MSE") have also submitted proposed changes to their arbitration rules. The MSRB submitted its filing, SR-MSRB-88-5 on November 23, 1988, and submitted amendments on March 13, 1989. The PSE submitted its filings, SR-PSE-88-7 on October 24, 1988 and SR-PSE-19 on November 8, 1988. The MSE submitted its filing on December 23, 1988. These filings are currently being reviewed and, accordingly, are not included in this approval order.

[2] 15 U.S.C. 78s(b)(1).

[3] 17 CFR 240.19b-4 (1987).

amend their current rules for administering arbitration proceedings.[4] The proposed amendments address many issues regarding the fairness and efficiency of the arbitration process administered by the SROS and also would institute new requirements applicable to the use by SRO members of predispute arbitration clauses in agreements with customers.

Notice of the proposed rule changes together with the terms of substance of the proposals was given by the issuance of Securities Exchange Act releases and by publication in the **Federal Register**.[5] Eight comment letters were received from six commenters regarding the proposals. All of the commenters expressed general support for the revisions to the SROs' rules relating to arbitration, but had specific comments on certain provisions in the proposals. The Commission has reviewed carefully the filings submitted by the SROs, as well as the comments received, and has determined that the proposed rule changes are consistent with the Act, including those requirements set forth in section 6(b) and 15A(b) of the Act.

II. Background

The SROs have worked together over the past twelve years to develop uniform arbitration rules through the auspices of the Securities Industry Conference on Arbitration ("SICA"). SICA was formed by the securities industry in 1977 at the Commission's invitation to review then existing arbitration procedures as an alternative to the implementation of the Commission's own proposals to establish a system for the resolution of disputes between broker-dealers and their customers.[6] SICA is comprised of a representative from each SRO that administers an arbitration program,[7] a representative of the securities industry, and four representatives of the public. In the years between the initial development of the Uniform Code of Arbitration ("Uniform Code") and September 1987, SICA met periodically to discuss issues that arose in the administration of the code, and to develop any necessary amendments.

On September 10, 1987, after a review of securities industry-sponsored arbitration, the Commission sent to SICA a letter that set out its views regarding the need for changes to the Uniform Code.[8] The Commission also sent letters to the SROs on July 8, 1988 requesting that the SROs review the issues raised by the current use of mandatory predispute arbitration agreements by their member firms.[9] Since September 1987, SICA and its subcommittees have met regularly to develop proposals in response to the Commission's letters.

The SROs have filed nearly identical rule proposals. For convenience, the discussion in the text of the proposals sometimes refers only to NYSE rule numbers. The corresponding rules of the NASD and AMEX are referenced in the footnotes, which also identify differences among the SROs' rules.

The majority of the proposals to amend the SROs' rules were based on changes in the Uniform Code made by SICA largely in response to the September 1987 and July 1988 Commission letters.[10] The other proposals included in this order were developed to meet concerns that have arisen through the administration of the arbitration programs.

III. Description of the Proposals, Summary of Comments and Analysis

A. Service of Pleadings

The SROs have proposed to modify the procedures for service of pleadings. Currently, the arbitration departments of the SROs serve all pleadings on the parties. As cases have increased, using the arbitration department as an intermediary for the service of pleadings has added unnecessarily to delays in processing cases and to the cost of operating the arbitration system. The SROs propose to serve only the initial pleading in a case, the "claim," and to require that parties serve all subsequent pleadings directly upon one another. This approach is intended to save administrative time and costs while continuing to ensure that respondents receive adequate notice of the institution of arbitration proceedings.

Under the proposal, parties also will be required to supply the department of arbitration with sufficient copies of the pleadings for the arbitration department staff and each of the arbitrators. The proposal specifies that service by first-class postage prepaid or by overnight mail service is considered to be made on the date of mailing and service by other means is considered to be made on the date of delivery.

This proposed rule change would apply both to arbitration proceedings conducted pursuant to the simplified procedures for small claims under NYSE Rule 601 and regular cases initiated pursuant to NYSE Rule 612.[11] No commenters specifically addressed this proposal. The Commission believes that this proposed rule change should improve the efficiency and speed of arbitration proceedings administered by the SROs.

B. Classification of Arbitrators

The arbitration panels at the SROs for cases involving public customers have historically been composed of a majority of "public arbitrators" and a minority of "industry arbitrators". All arbitrators,

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[4] Collectively these organizations are referred to below in the text as the self-regulatory organizations ("SROs").

[5] Noticed of SR-NYSE-88-29 was given in Securities Exchange Act Release Number 26474, (January 19, 1989) and in 54 FR 3883, (January 26, 1989). Notice of SR-NYSE-88-8 was given in Securities Exchange Act Release No. 26515, (February 2, 1989) and in 54 FR 6224, (February 8, 1989). Notice of SR-NASD-88-29 was given in Securities Exchange Act No. 26242, (November 2, 1988), in 53 FR 45640, (November 10, 1988). Notice of SR-NASD-88-51 was given in Securities Exchange Act Release No. 26584, (March 1, 1989) and in 54 FR 9955, (March 8, 1989). Notice of SR-NASD-89-19 was given in Securities Exchange Act Release Number 26719, (April 12, 1989), and in 54 FR 15860 (April 19, 1989). Notice of SR-AMEX-88-29 was given in Securities Exchange Act Release No. 26475, (January 19, 1989) and in 54 3878, (January 26, 1989).

[6] The resulting Uniform Code of Arbitration is also used for the resolution of intra-industry disputes, (*e.g.*, disputes between members of an SRO or between a member of an SRO and an associated person of a member, such as a registered representative.) Unless otherwise limited by the terms of the rules, the amendments included in this filing also pertain to intra-industry disputes.

[7] The SROs that administer an arbitration program are the NYSE, NASD, AMEX, MSRB, PSE, MSE, Boston Stock Exchange, Chicago Board Options Exchange, Cincinnati Stock Exchange and Philadelphia Stock Exchange.

[8] *See* letter frm Richard G. Ketchum, Director, Division of Market Regulation, SEC, to James E. Buck, Senior Vice President, NYSE, dated September 10, 1987 ("September 10, 1987 letter"). This letter was also addressed separately to each of the other members of SICA.

[9] *See* letter from David S. Ruder, Chairman, SEC, to John J. Phelan, Jr., Chairman, NYSE dated July 8, 1988 ("July 8, 1988 letter"). This letter was also addressed to the senior executive officers of all other SROs that administer arbitration facilities.

[10] The SRO rules developed in response to the Commission's letters are NYSE Rules 607, 608, 610, 619, 623, 627, 629(b) and 637; AMEX Rules 602, 603, 607, 614, 618, 620(b) and 427; and NASD Sections 19, 21, 23, 32, 37, 41 and 43(b) of the NASD Code of Arbitration Procedure and Section 21 of Article III of the NASD Rules of Fair Practice.

[11] AMEX Rules 606 and 621, and NASD Sections 13 and 25. In addition, the proposed rule change to the NASD's Section 25 provides that where both an NASD member firm and a person associated with the member firm are named parties to an arbitration proceeding, service on the associated person may be made either on the associated person, or on the member firm, which would then have the obligation to perfect service on the associated person. Proposed Section 25 also provides that if the firm does not undertake to represent the associated person, the member firm must serve the associated person, advise all parties and the director of arbitration that the firm is not representing the associated person, and must provide the associated person's current address. The NYSE and AMEX did not propose such a requirement.

both public and industry, are required to be neutral, and may have no affiliation or bias towards either party.[12] There have not been, however, clear requirements or specifications for who may serve as a public arbitrator. The SROs' proposals would specify who may not serve as a public arbitrator and who may serve as an industry arbitrator.

In its September 10, 1987 letter, the Commission endorsed the continued use of mixed public/industry panels. The Commission also stated, however, that "[t]he absence of clear guidelines for qualifying public arbitrators * * * and the inclusion in the pool of public arbitrators of persons with clear affiliations with the securities industry is a source of great concern." The Commission recommended that "arbitration panels include persons who are not so connected with the industry that it may hinder their ability to make independent judgments with respect to specific industry practices." The letter set out specific examples of types of persons who the Commission preliminarily believed should not serve as public arbitrators. In response to the SEC's request, SICA revised its definition of public and industry arbitrators. The proposals address the potential for real or apparent bias on the part of public arbitrators who may have some professional or personal association with the securities industry.

The Uniform Code defines as an industry arbitrator one who is associated with a member of an SRO, broker, dealer, government securities broker, government securities dealer, municipal securities dealer, or registered investment adviser. The SICA rule permits an individual who had been associated with one of these to become a public arbitrator after three years, if the individual has gone on to other work and is not retired from the securities industry. All industry retirees will no longer be permitted to serve as public arbitrators, but may continue to serve as industry arbitrators.

The rule also deals with the appropriate role in the arbitration system of professionals such as attorneys or accountants who provide services to securities industry clients. The rule would classify as industry arbitrators, rather than public arbitrators, attorneys, accountants and other professionals who devoted twenty percent or more of their professional work effort to securities industry clients within the last two years. In addition, the rule excludes from service as a public or industry arbitrator persons who are spouses or other members of the household of a person associated with a registered broker-dealer, municipal securities dealer, government securities dealer or investment adviser.

NYSE Rule 607 defines industry and public arbitrators differently in two respects from the rule developed by SICA and adopted by the other SROs. The NYSE has extended from three years to five years the time period during which one who had been employed in the securities industry may not serve as a public arbitrator. In addition, the NYSE has proposed to exclude anyone from its public arbitrator rolls who had spent a substantial part of his or her business career in the securities industry, notwithstanding the passage of five years. Accordingly, under the NYSE proposal, an individual who had worked in the securities industry for a substantial period of time and then left the profession for some other work would not, after five years, be assigned to its public arbitrator roster.[13]

The AMEX rule for the classification of arbitrators is Rule 602, and the NASD rule is Section 19. The AMEX and NASD rules do not include the two changes from the Uniform Code that have been proposed by the NYSE. Further, while the NYSE and AMEX have included persons associated with investment advisers within their industry arbitrator pools consistent with the Uniform Code, the NASD has concluded that investment advisers not associated with broker-dealers are more akin to investors and should be placed in the public arbitrator pool.

The SROs also proposed disclosure provisions designed to assist parties in assuring that the panel assigned to each case is appropriately balanced. Specifically, under the proposed SRO rules, the employment histories of the arbitrators for the past ten years as well as the information provided by arbitrators pursuant to a separate disclosure rule [14] will be disclosed.[15]

Four commenters, Public Citizen Litigation Group ("Public Citizen"), Plaintiff Employment Lawyers Association ("PELA"), Shearson Lehman Hutton ("Shearson") and the Securities Industry Association ("SIA") submitted comments regarding the selection of arbitrators.[16] Public Citizen stated that these proposals do not go far enough to address concerns of arbitrator bias.[17] It observed that the qualifications for public arbitrators are not strict enough. It believes that a three year period between securities industry employment and serving as a public arbitrator is too short, particularly in the case of one who has worked in the securities industry for a long time. In contrast, the SIA, which endorsed the proposals with respect to public and industry arbitrators, commented that it believed that the three year period established by SICA for permitting former securities industry personnel to serve as public arbitrators was preferable to the NYSE's five year rule. The SIA stated that it thought that the five year rule would make it too difficult to find public arbitrators, and commented that the Commission should suggest that the NYSE conform its rule to SICA's Uniform Code.

Also, Public Citizen objected to persons whose partners represent the securities industry being able to serve as public arbitrators. Public Citizen argued this to be inappropriate because the economic ties between partners give rise to an appearance of bias that should exclude such persons from the public arbitrator pool. Public Citizen suggested that at a minimum parties be allowed challenges for cause against such persons. Finally, Public Citizen commented that the provision allowing professionals such as lawyers and accountants who have received some

[12] This is different from tripartite arbitration where each party designates an arbitrator and the designated arbitrators then agree upon a third arbitrator. *Cf.*, Elkouri, Frank et al., *How Arbitration Works*, 4th ed. (1985), BNA, at page 136; and *Domke Comm. Arb.* § 27.01 (Rev. ed., Wilner) 1985–1988 Callahan & Co.

[13] The NYSE has also included in its filing guidelines for the classification of arbitrators to complement its classification rule. In the guidelines, the NYSE states that while it will continue to classify as public arbitrators lawyers and other professionals whose partners represent the securities industry, it will recognize challenges for cause against them.

[14] The disclosure rule is a proposed rule change discussed in Section C of this order. The rule would require arbitrators to make extensive disclosures to the parties.

[15] NYSE Rule 608, AMEX Rule 603 and NASD Section 23.

[16] *See* letters from Eric R. Glitzenstein, Esq. and Alan B. Morrison, Esq., Public Citizen, to Richard G. Ketchum, Director, Division of Market Regulation, SEC, and to Catherine McGuire, Special Assistant to the Director, Division of Market Regulation, SEC, dated July 15, 1988 and February 16, 1989, respectively; letter from Cliff Palefsky, Esq., PELA, to Robert Love, Special Counsel, SEC, dated December 28, 1988; letter from Robert C. Dinerstein, Executive Vice President and General Counsel, Shearson, to Jonathan G. Katz, Secretary, SEC, dated February 15, 1989; and letters from William Fitzpatrick, Senior Vice President and General Counsel, SIA, to Jonathan G. Katz, dated February 15 and 16, 1989.

[17] PELA commented that while the new rules were a significant improvement, the arbitrator pool needed to be broadened. While its comments did not address specifically the proposals before the Commission, PELA expressed its view that panels should include plaintiffs' lawyers as well as the defense lawyers that it believes now are on the panels, and that there are insufficient women and minorities on the panels.

income from securities industry clients (not exceeding 20% during over a two year period) to serve as public arbitrators is overly permissive. It commented that 20% could constitute an attorney's "single greatest and most consistent source of income." Public Citizen suggested a flat rule prohibiting public arbitrators from receiving any income from the securities industry.[18] Shearson supported the new definitions of public and industry arbitrators.

The changes proposed regarding the classification of arbitrators are very significant to the continued success of SRO arbitration. These proposals are designed to promote impartial and knowledgeable decisions in the arbitration of disputes between investors and broker-dealers. The reclassification of securities industry retirees to the industry arbitrator pool and the codification of past SRO practice by establishing a three year period before a former securities industry employee may serve as a public arbitrator should relieve doubts that investors have had regarding the impartiality of the public arbitrator pool. Similarly, the judgment to exclude from the public arbitrator pool lawyers, accountants and other professionals who regularly service the securities industry makes clearer the distinctions between the two arbitrator pools.[19]

The Commission believes that these proposals reflect a reasonable judgment in striking a necessary balance in obtaining impartial and qualified arbitrators, and take appropriate account of the need to avoid arbitrarily limiting the pool of knowledgeable public arbitrators. The three year time period proposed by the NASD and the AMEX, and five year period of time that has been proposed by the NYSE, before one who had been associated with the securities industry may serve as a public arbitrator, are both consistent with the Act. Three years should be a sufficient period of time, in the Commission's view, to develop the prospective arbitrator's independence from identification with the industry. Five years also achieves that goal and should not be overly burdensome to the administration of arbitration programs.

The disclosure of arbitrators' employment history and other information also furthers the goal of providing disinterested arbitrators for the panels. The disclosures will give parties a full understanding of their arbitrators' backgrounds, as well as the opportunity to use the disclosure information in connection with the exercise of their peremptory and, under the NYSE guidelines, cause challenges of arbitrators. For example, the requirement under the proposed rules[20] that a prospective arbitrator disclose whether his partners regularly represent the securities industry, coupled with the ability to challenge a prospective arbitrator, should be sufficient to address the concerns regarding the independence of arbitrators raised by Public Citizen.

C. Arbitrator Disclosure and Background Information to be Supplied to the Parties

The SROs have also proposed changes to their rules dealing with disclosures to be made by arbitrators, and with the provision of arbitrator disclosures to the parties. NYSE Rule 610(a) establishes the specific disclosure obligations of arbitrators by incorporating the disclosure provisions of the American Bar Association/American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes ("ABA/AAA Code").[21] The rule requires that arbitrators disclose any existing or past financial, business, professional, family or social relationships that are likely to affect impartiality or might reasonably create an appearance of partiality or bias. These disclosures extend to any relationships the arbitrators may have with any party, or its counsel, or with any individual whom they have been advised will be a witness. Under the provision, arbitrators are also to disclose any such relationship involving members of their families or their current employers, partners or business associates.

Rule 610(b) admonishes prospective arbitrators to make a reasonable effort to inform themselves of any interests or relationships described in paragraph (a). Rule 610(c) advises arbitrators that the duty to disclose under paragraph (a) of the rule is an ongoing duty, and that any person who serves as an arbitrator must disclose at any stage of the arbitration proceeding any such interests, relationships, or circumstances that arise, or that are recalled or discovered. Also, under Rule 610(d), the NYSE has clarified that prior to the first session, the director of arbitration may remove an arbitrator based on information disclosed pursuant to the rule. Parties are to be informed of any information disclosed pursuant to the rule if the arbitrator has not been removed.[22]

As discussed above, NYSE Rule 608[23] provides that parties will be informed of the names and business affiliations of the arbitrators for the past ten years, as well as any information disclosed pursuant to the disclosure rule at least eight days prior to the date fixed for the initial hearing session. Under the rule, parties may also make further inquiry through the department of arbitration concerning the arbitrators' background.

Under the current rules, parties have been provided only with the names and current business affiliations of the arbitrators proposed for their cases. Parties have had to request specifically any other information from the arbitration departments, within very short time frames. Although arbitrators were provided with the ABA/AAA Code, there were no clear guidelines to the arbitrators on the applicability of the code.

In the Commission's September 1987 letter, the Commission recommended

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[18] Public Citizen also expressed strong reservations concerning the use of industry arbitrators. In particular, Public Citizen noted that industry arbitrators may be called upon in a particular case to interpret anti-fraud provisions which are also applicable to their business conduct. Public Citizen's letter also stated that public arbitrators are both neutral and expert, and that therefore further industry expertise is unnecessary. However, securities industry sponsored arbitration traditionally relies upon the expertise of securities industry arbitrators, who have daily experience with the workings of the industry that persons unaffiliated with the industry do not. Industry arbitrators are required to be neutral, and as discussed in Section C of this order, must disclose any possible conflict they may have with industry parties. The Commission cannot conclude at the present time that the use of industry arbitrators is inappropriate or inconsistent with the Act. The Commission will, however, carefully monitor the operation of these proposed rule changes and will consider modifications if future developments warrant.

[19] There are differences of judgement among the SROs' proposals with respect to whether investment advisers ought to serve as industry or public arbitrators. The SICA draft, proposed by the NYSE and AMEX, excludes investment advisers from the public arbitrator pool in the hopes of addressing any possible perceptions of bias that may arise. The NASD has concluded that because investment advisers owe their duty to investors rather than the industry, they are properly classified as public arbitrators. It is not inconsistent with the Act to permit this divergence in approach among the SROs.

[20] NYSE Rule 610(a)(2), AMEX Rule 603(a)(2) and NASD Section 23(a)(2).

[21] AMEX Rule 603 and NASD Section 23 also incorporate the disclosure provisions of the ABA/AAA Code.

[22] Once the arbitration panel is sworn, it controls all of the procedural aspects of the hearing. Accordingly, under the Uniform Code, the director of arbitration may not remove an arbitrator after the hearings have begun. An arbitrator should be alert to the guidelines set out in the ABA/AAA Code and the applicable law with respect to arbitrator bias, and remove himself from the panel when conflicts arise after hearings have begun. *See* Canon II. E. (2) of the ABA/AAA Code.

[23] AMEX Rule 602 and NASD Section 21.

that SICA make the two changes proposed in these filings to the Uniform Code's arbitrator disclosure provisions. The Commission stated that incorporating the specific scope of disclosures for arbitrators contained in the ABA/AAA Code into the Uniform Code's disclosure rule "would provide the necessary guidance to arbitrators about the types of relationships that may create conflicts of interest."

The Commission also recommended that the Uniform Code be amended to provide to the parties all of the information disclosed by arbitrators pursuant to the disclosure provision at the time when the parties are first given the arbitrators' names. The Commission stated that "[f]ull disclosure of arbitrators' backgrounds to parties at the earliest possible stage in the process should avoid unnecessary postponements of hearings and promote knowledgeable use of challenges."

Investor confidence in the selection of arbitrators should be enhanced by these new disclosure rules. These provisions should guide arbitrators in their efforts to make appropriate disclosures, and will permit disclosures to be forwarded to the parties earlier to allow time for them to make decisions with respect to challenges.

D. Appointment of Replacement Arbitrators on a Panel

The SROs have also proposed two changes with respect to their ability to appoint a replacement arbitrator on a panel when a vacancy occurs. The first of these changes concerns the ability of the director of arbitration to replace an arbitrator who becomes unavailable to serve less than eight days prior to the first hearing session. Under the existing rules, a party may refuse to go forward on the date scheduled for the hearing if he was not given the eight days' notice of the replacement arbitrator's name and background required under existing rules. Because of the hardships that the SROs believe might occur if a long-scheduled arbitration hearing were delayed due to the inability of an arbitrator to serve as arranged, SICA developed a rule that permits the director of arbitration to replace an arbitrator within eight days of a scheduled hearing.[24]

Under the proposed amendment, if after appointment and prior to the first hearing session an arbitrator resigns, dies, withdraws, is disqualified or otherwise unable to perform as an arbitrator, the director of arbitration may appoint a replacement arbitrator. The rule permits the appointment of replacement arbitrators closer than eight days to the hearing. The rule also explicitly provides that parties are entitled to receive the same disclosure regarding the background of the replacement arbitrator as they received for the initial arbitrator(s), and have the same right to request more information, and to challenge the arbitrator as provided in the rules, although within a shorter time frame.

The second change with respect to the ability to appoint replacement arbitrators occurs in situations where an arbitrator resigns, dies, withdraws, is disqualified or otherwise unable to perform as an arbitrator after the commencement of the first hearing session. Under the existing rules, if a vacancy occurs after the hearings have begun, both parties must consent either to the appointment of a replacement arbitrator to hear the rest of the case, or to continuing with the remaining arbitrator(s). Otherwise, if that consent cannot be obtained, the case must be reheard from the beginning with a full panel.

The proposed amendment [25] permits the remaining arbitrators to continue with the hearing and determination of the controversy. However, under the proposal, if a party objects, a replacement arbitrator would be appointed by the director of arbitration under the same procedures as for the replacement of an arbitrator prior to the first hearing. The rule is designed to permit parties in particular cases to make the decision that makes the most sense for their case. For example, in cases where only peripheral issues have been dealt with and relatively little progress has been made, it may make sense for parties to request a replacement arbitrator. Conversely, where the hearings have progressed significantly, or are in fact substantially completed, it would make less sense for parties to request a replacement arbitrator, who then would have to learn all that had occurred in his absence.

In the event that parties do request a replacement arbitrator, it is clear that the arbitrators have the authority to require the rehearing of part or all of the case, or to withdraw from the case, effectively requiring the appointment of another panel, as is appropriate in their judgment. With this rule change, however, a party may no longer delay the resolution of the dispute by insisting on a rehearing whenever an arbitrator unexpectedly is unable to continue in his hearing of a case. These changes should promote increased efficiency in the administration of SRO arbitrations while at the same time preserving important safeguards that provide full disclosure of arbitrator backgrounds to the parties and permit parties to request more data and exercise challenges.

E. Availability of Small Claims Procedures and the Number of Arbitrators Required to Hear a Claim

The NYSE and NASD also proposed to increase to $10,000 from $5,000 the monetary claim limit for cases to be heard under the simplified procedures developed in the Uniform Code. Under these procedures, a single arbitrator decides a case based upon the papers submitted by the parties. No oral hearing is held unless requested by the investor, or ordered by the arbitrator. This change is designed to decrease the costs of arbitration.

The proposal also would change the number of arbitrators used for large cases from five to three.[26] The NYSE stated in a letter to the Commission's staff that this proposal is the result of the Exchange's difficulty in scheduling arbitrations with five arbitrators.[27]

The NASD and AMEX proposed a technical amendment, in NASD Section 13 and AMEX Rule 621, regarding the single arbitrators used in cases administered under the simplified procedures. The amendment codifies the existing practice of appointing a public arbitrator as the single arbitrator in the case. The NYSE has confirmed that it administers its existing rule to require the appointment of a public arbitrator. The NYSE staff has indicated that it will recommend that the NYSE clarify this point through amendments to its rules this year.

The NASD has also submitted a proposal, that has not been adopted by SICA, AMEX or the NYSE, that would permit the NASD to appoint a single

[24] NYSE Rule 608, AMEX Rule 602 and NASD Section 21.

[25] NYSE Rule 611, AMEX Rule 602 and NASD Section 24. The amendments to NASD Sections 21 and 24 relating to the replacement of arbitrators were approved by the Commission on September 19, 1988 in Securities Exchange Act Release No. 26093 and published in 53 FR 37381 (September 26, 1988).

[26] These changes were submitted earlier to the Commission by the AMEX, and were approved on November 28, 1988 in Securities Exchange Act Release No. 26315, and published in 53 FR 48995 (December 5, 1988).

The AMEX also proposes to amend its Rule 608(e) to clarify the fact that charges under the arbitration rules imposed for requesting adjournments do not apply to cases administered under the simplified procedures. This change conforms the AMEX rule to the Uniform Code and NYSE Rule 617(b) and NASD Section 30(b).

[27] *See* letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Sharon Lawson, Esq., Branch Chief, Division of Market Regulation, SEC, dated January 16, 1989.

arbitrator for cases administered under its regular procedures where the amount in controversy is $30,000 or less. Under proposed NASD Section 9(a), a party may, however, request in its initial filing that the NASD appoint a panel of three arbitrators. The NASD stated that its proposal was designed to reduce costs and delays in the administration of cases, while preserving the opportunity for parties to have their cases heard before a full three member panel. The Commission believes that these changes also promote efficiency in the administration of the process without reducing procedural protections for the parties.

F. Discovery

The Commission requested in the September 1987 letter that SICA adopt significant changes to the Uniform Code's discovery provisions. The Commission's letter pointed to the "need for the SROs to expand existing procedures in order to provide both for the resolution of discovery disputes by [an arbitrator] prior to the hearing and for prehearing conferences and preliminary hearings for cases that are sufficiently complex to warrant such procedures." The letter also called for the Uniform Code to provide parties the ability to seek the deposition of witnesses in appropriate cases.

Under the existing rules, parties have been enacted to exchange documents informally and voluntarily. Nevertheless, the Commission's letter points out, parties sometimes "refuse to turn over documents that are, in their view, privileged or irrelevant. Customer complaints and other documents evidencing supervision or lack of supervision of a registered representative, which are in the sole possession of the industry party and are often relevant to a complainant's case, should be turned over in a timely fashion." Parties may also request documents pursuant to subpoena under the existing rules, but these do not have to be produced until the day of the hearing.

The Commission's letter stated that it did not believe that existing rules provided sufficient time for a party to prepare for a hearing. The letter also pointed out that the risks to parties resisting production were inadequate to promote compliance with the rules. "The practical problem under the Uniform Code [has been] that the requestor does not know whether, on the day of the hearing, he is going to argue over discovery matters only or whether the arbitrators will proceed to resolve the case on the merits." The discovery rule proposed in these filings meets the concerns raised in our September 1987 letter.

The discovery rule developed by SICA expands party access to prehearing discovery and provides specific time frames for parties to request information from parties and for responding to such an information request. The rule also establishes a mechanism for prehearing conferences and for arbitrator involvement in prehearing matters where needed. The SROs also have explicitly recognized the appropriateness of depositions in particular circumstances. Under the proposed rule changes, arbitrators may order depositions when appropriate. More specifically, the rule states that an arbitrator in a prehearing conference may issue any "ruling which will expedite the arbitration proceeding or is necessary to permit any party to develop fully its case." [28]

Proposed NYSE Rule 619(a) [29] continues the policy established under existing rules for parties to cooperate to the fullest extent possible in the voluntary exchange of documents and information. In the event that voluntary exchanges are not sufficient, the rule establishes a clear framework for document production and information requests.

Proposed NYSE Rule 619(b) provides that a party may serve a written request for information or documents twenty days after service of the claim or upon the filing of the answer, whichever is earlier. All parties are to receive copies of the request, and parties are required to endeavor to work out disputes regarding the request between themselves before an objection to the request is filed. Unless the requesting party allows more time, information requests must either be satisfied or objected to within thirty calendar days from the date of service. The party who made an information request has ten days from receipt of the objection to respond to the objection.

Under the proposal, a party whose information request has not been satisfied may request in writing that the director of arbitration refer the matter to a prehearing conference. Parties may also find that there are other matters in addition to unresolved information requests that require the assistance of a prehearing conference. NYSE Rule 619(d) provides that the director of arbitration may appoint someone to preside over the prehearing conference. The prehearing conferences could be held either in person or by telephone conference call, and are designed to help the parties to reach agreement on such matters as the exchange of information, exchange or production of documents, identification of witnesses, identification and exchange of hearing documents, stipulations of fact, identification and briefing of contested issues, and any other matter which will expedite the arbitration proceedings.

When a prehearing conference is unable to resolve any of these issues, NYSE Rule 619(e) provides for the director of arbitration to appoint a single arbitrator to decide the issues outstanding. In its filing, the NYSE stated that the rule allows the arbitrator to issue subpoenas, direct appearances of witnesses, direct the production of documents and depositions, and set deadlines and issue any other ruling which will expedite the hearing and permit any party to develop fully its case. The AMEX and NASD have amended their filings to provide that the single arbitrator appointed to decide prehearing matters would be a public arbitrator in those cases where public customers have requested a majority of public arbitrators for their panel. Staff at the NYSE has confirmed that it will recommend that its governing board adopt this amendment to its rules this year.

Other amendments to the prehearing provisions require parties to serve on one another at least ten days prior to the first hearing copies of documents in their possession that they intend to present at the hearing and identify witnesses they intend to present at the hearing. Under proposed NYSE Rule 619(c), arbitrators may exclude from the arbitration, documents not exchanged or witnesses not identified at that time. The provision does not extend to documents or witnesses that parties may use for cross-examination or

[28] In its explanation of this provision of the discovery rule, the NYSE stated that the arbitrator appointed to resolve discovery disputes "may issue subpoenas, direct appearances of witnesses, direct the production of documents and *depositions*, and set deadlines and issue any other ruling which will expedite the hearing and permit any party to develop fully its case." (emphasis added) In addition, the training manual for arbitrators developed by the NASD, AMEX, NYSE and other members of SICA specifically contemplates, at page 8, the ability of arbitrators to order depositions. Accordingly, we understand the language in all of the SRO rule filings included within this approval order to be broad enough to encompass the ability of a single arbitrator or panel of arbitrators to exercise their discretion to order depositions. Since arbitrators' jurisdiction is limited, the ability to enforce arbitrators orders for depositions of non-parties or of persons not affiliated with a member of the sponsoring SRO may depend upon whether relevant arbitration law provides for depositions in aid of arbitration.

[29] AMEX Rule 607 and NASD Section 32 address the discovery issues addressed in NYSE Rule 619.

rebuttal.[30] In addition, the SROs are proposing to amend their rules regarding subpoenas. In NYSE Rule 619(f), the NYSE proposes to require parties to serve copies of all subpoenas on all parties.[31]

Public Citizen, PELA, and SIA, Shearson and Jeffrey Bauer, Esq. ("Bauer") [32] commented on the proposed amendments to the prehearing provisions. Public Citizen expressed support for the proposals but stated its view that the proposals do not go far enough to provide investors with adequate discovery.[33] Public Citizen and PELA commented that restrictive discovery favors the industry over investors in light of their view that broker-dealers are more likely to have documents and other information necessary to prove a case against the firm, and the fact that a claimant has the burden of proof.[34] PELA commented that parties should have a right to depositions. Public Citizen suggested that it would be reasonable for parties to be able to have one or two depositions in a case. In effect, Public Citizen called for parties to have access to depositions where "necessary to develop [one's] case, and [where one] cannot obtain equivalent information from documents alone * * *"

The SIA stated that it does not object to arbitrators ordering the depositions of non-party witnesses who are unable to attend the hearing. The SIA expressed concern that depositions not be used to delay the proceedings, but stated that the proposed rule is sufficiently flexible to permit arbitrators to order depositions to allow parties to develop fully their cases.[35] Shearson supported the "strengthening of the discovery process." Shearson stated that the proposed rules will "further enhance investor confidence in the system" and do not "attempt to incorporate excessive litigation procedures and inordinate delays into" the arbitration process.

The Commission believes that the SRO discovery rule proposals should increase the efficiency of arbitration proceedings and provide substantially greater protections for public participants. Provisions requiring parties to notify one another of subpoenas and of witness and document lists all move away from surprise at the hearings and towards the goal of reaching fair and accurate resolutions of disputes. We believe that the timetables imposed in these rules set necessary discipline to preserve the speedy nature of arbitration, properly provide impetus for the parties to make initial efforts to work out discovery disputes and, accordingly, are in the public interest.

The language in the rule providing for the ability of an arbitrator acting as a single arbitrator to issue any "ruling which will expedite the arbitration proceeding or is necessary to permit any party to develop fully its case" substantially meets the concerns expressed by Public Citizen regarding the ability of investors to obtain depositions. The NYSE's explicit recognition that this provision includes the ability of arbitrators to order depositions, the new training manual developed by SICA, and the comment of the SIA that the rule as now drafted permits the arbitrators the discretion to order a deposition where a party can demonstrate to the arbitrators that a deposition is necessary to develop a case all support this view.[36]

The concern over excessive use of depositions is not frivolous. This concern should not be permitted, however, to avoid the proper use of depositions. The Commission's approval of this portion of the discovery rule is based on our clear understanding that depositions will now be available as a matter of routine to parties in appropriate cases. This rule grants parties access to depositions to preserve the testimony of ill or dying witnesses, or of persons who are unable or unwilling to travel long distances for a hearing, as well as to expedite large or complex cases, and in other situations deemed appropriate by the arbitrators. These rules make an appropriate choice in our view, by leaving to the arbitrators' judgment the need for depositions and other discovery. SICA and the individual SROs can evaluate the implementation of these rules, and to the extent necessary, expand discovery available as of right or impose sanctions for the failure to comply with time frames established under the new procedures. In that connection, we expect the SROs to monitor the use of depositions in arbitrations administered under their auspices, and to track arbitrators' action on requests for depositions.

The Commission believes that the rule proposals promote the purposes of the Act in aiding investors to discover the documents and other information they need to prove their cases. If experience

[30] The NYSE proposes to delete the provisions of NYSE Rule 638, which paralleled this provision in certain respects.

[31] The AMEX and NASD have placed the provisions dealing with subpoenas and the power of arbitrators to direct appearances and production of documents in separate rules consistent with the Uniform Code. (AMEX Rules 610 and 611, and NASD Section 33) The NYSE proposal incorporates these provisions into its discovery rule. There is no substantive difference between the proposals.

[32] *See* letter from Jeffrey Bauer, Esq. to Howard Kramer, Assistant Director, SEC, dated February 10, 1989. Bauer is a securities and commodities attorney.

[33] Public Citizen also questioned whether the rules on discovery apply to small claims proceedings (up to $10,000) administered under simplified procedures, because such cases may be conducted without an oral hearing. NYSE Rule 601(1), AMEX Rule 621(1) and NASD Section 13(1) make it clear that unless otherwise provided, the general arbitration rules apply to all cases, under both the simplified and regular procedures, and, accordingly, the discovery rules apply to the simplified procedures, without regard as to whether there is an oral hearing or simply a hearing on the papers.

[34] Bauer expressed the concern that the discovery provisions (as well as other provisions that contain time frames, such as those dealing with the submission of pleadings) do not contain specific sanctions for failure to meet time frames. He commented that arbitrators ought to have the ability to assess fines or costs against parties who do not meet the time frames in the rules.

[35] The SIA also raises a question concerning the effect of the inclusion in NYSE Rule 619, entitled GENERAL PROVISION GOVERNING PRE-HEARING PROCEEDING, of the provision of former NYSE Rule 620 regarding the ability of arbitrators to direct the appearance of persons associated with a member or the production of records in the possession or control of such persons. The SIA exprssed concern that the repositioning of the rule might have the effect of granting the single arbitrator assigned to resolve prehearing issues the additional ability to require industry personnel to appear before the single arbitrator prior to the hearing. Arbitrators have that authority under both versions of the rule.

There is nothing in either the Uniform Code or the NYSE's rule that would preclude an arbitrator from ordering the appearance of an employee of an SRO member prior to the initial hearing on the merits. It is appropriate that arbitrators have this flexibility under the rules. Both the AMEX and the NASD retained their provisions regarding the ability of arbitrators to direct appearances of persons and documents in separate rules, as does the Uniform Code. In the Commission's view, neither placement affects the meaning of the provision, and the language of the balance of the prehearing provisons makes it clear that an arbitrator acting as a single arbitrator under the rule may direct appearances of witnesses and the production of documents. Likewise, the NYSE's placement of this provision does not restrict the ability of the full arbitration panel to order the appearance of witnesses or production of documents at the hearing, notwithstanding the caption for the rule.

[36] There are differences in the text of the NASD rule concerning the ability of a single arbitrator to issue orders before a hearing from the text of the NYSE and AMEX rules. The NASD has not yet amended its rule to include the language "or is necessary to permit any party to develop fully its case." In a letter from Frank J. Wilson, Executive Vice President and General Counsel, NASD, to Catherine McGuire, Special Assistant to the Director, SEC dated April 18, 1989, the NASD stated that before it can conform its rule to the NYSE and AMEX rules, this language must be considered and approved by the NASD National Arbitration Committee and Board of Governors. In the interim, there should be no negative inference from this omission in the NASD's rule. In a letter from Frank J. Wilson to Catherine McGuire, Special Assistant to the Director, SEC dated April 19, 1989, the NASD acknowledged that arbitrators have authority under various statutes to exercise the discretion to order depositions of persons who are unable or unwilling to attend hearings.

with these rules suggests that arbitrators need additional authority to manage these proceedings, we are confident that SICA and the SROs will move to adopt them.

G. Preservation of a Record

NYSE Rule 623 would codify a requirement that a verbatim record by stenographic reporter or tape recording be maintained.[37] The rule further provides that if a party to a proceeding elects to have the record transcribed, the cost of such transcription shall be borne by that party unless the arbitrator(s) direct otherwise. If a record is transcribed at the request of a party, the rule requires that a copy shall be provided to the arbitrators.

In its September 10, 1987 letter, the Commission requested that SRO arbitration departments amend their rules to assure that records of arbitration proceedings are made and preserved. These records are necessary for courts to use in conjunction with any review of the proceedings they may make. The September letter suggested that records be made either with high quality tape recordings, or by engaging a court reporter to record testimony, which can later be transcribed on request. The Commission believes that the SRO proposals would assure the preservation of a record of each arbitration proceeding and therefore facilitate an appropriate court review.

H. Content and Public Availability of Arbitration Awards

The SROs' proposed rule for arbitration awards expands both the content and public availability of arbitration awards. Proposed NYSE Rule 627 provides that awards shall contain the names of the parties, a summary of the issues in controversy, the damages and/or other relief requested, the damages and/or other relief awarded, a statement of any other issues resolved, the names of the arbitrators and the signatures of the arbitrators concurring in the award.[38] The awards, including any written opinion voluntarily prepared by the arbitrators, are to be made public, except that the names of customer parties to the arbitration will be excluded if the customer parties request in writing that their names not be included on the public version of the award.[39]

The Commission requested such a rule in its September 1987 letter. Prior to the proposals made in this filing, the only information available to the public regarding SRO arbitration cases was the percentage of investors that received some portion of the amount they claimed against their broker-dealer. No data has been available with respect to particular arbitrators' awards. The proposal developed by SICA affords substantially more public access to the results of this process of dispute resolution.

Six of the commenters, Public Citizen, PELA, the SIA, Shearson, Richard Ryder, Esq. ("Ryder") [40] and Bauer, commented on the proposals for arbitration awards. Public Citizen and PELA called for the awards to include written decisions that include the arbitrators' reasons for their awards. Public Citizen commented that the verbatim records of the hearings are insufficient for a court to apply the "manifest disregard" standard [41] in the review of an arbitration award, and that a court must know arbitrators' reason in order to apply the standard. In this respect, Public Citizen expressed its preference for the traditional, judicial adherence to precedent over the more *ad hoc* factual determinations it stated were contemplated in these arbitration proposals. Public Citizen also commented that reservations expressed by SICA in its response [42] to the Commission's September 10, 1987 letter with respect to the ability of arbitrators to capture in an opinion the consensus process of arbitrators, were strained, and in its opinion were directed at concerns that flaws in the decisionmaking process would be exposed to challenge in the courts if arbitrators' rationales were known.

PELA stated that legal issues are often dispositive in employment cases between broker-dealers and registered representatives, and that these issues differ from state to state. Therefore, PELA commented, written opinions would be necessary in order to make decisions about whether to appeal arbitral awards.[43]

After careful consideration of whether awards ought to include reasons for arbitrators' awards, as is advocated by Public Citizen and PELA in their comment letters, we have concluded that it would not be appropriate at this time to require the inclusion of written opinions in awards.

This rule change already represents a significant movement in the explication of the arbitral process. We believe that it would be in the public interest to allow the SROs and parties a period of time to adjust to this rule, and to await any independent development on the part of the arbitrators themselves to develop written opinions. In the labor area, arbitrators have voluntarily developed a practice of writing opinions in order to help themselves understand developments in the labor arena.[44] The opinions were not mandated and were not developed to enable courts to review arbitral decisions.[45]

We also believe that there is merit in the arguments proffered by SICA with respect to the process of consensus that often may precede the reaching of a decision. Arbitrators may ultimately reach agreement on an award, a dollar amount, without ever reaching agreement on the reasons for the award. Finally, the Commission is concerned that imposing a mandatory requirement

[37] AMEX Rule 614 and NASD Section 37.

[38] AMEX Rule 618 and NASD Section 41.

[39] In the NASD's version of the award rule, Section 41 of its Code of Arbitration procedure, investors do not have the option of excluding their names from the public version of the award. In addition, the NASD's proposal would exclude the arbitrators' names from the public version of the awards. Instead, the NASD proposes to make available upon request to parties in a particular arbitration matter, full copies of all awards rendered by the arbitrators chosen to decide their case. The NASD proposal also requires parties to request the proposed arbitrators' previous awards within three days of having been notified of the persons to serve on the panel.

[40] *See* letter from Richard Ryder, Esq. to Jonathan G. Katz, Secretary, SEC, dated February 14, 1989. Ryder is the publisher of a newsletter on securities and commodities arbitration.

[41] *See, Merrill Lynch, Pierce, Fenner & Smith* v. *Bobker*, 808 F.2d 930 (2d Cir. 1987).

[42] *See* letter from the Securities Industry Conference on Arbitration to Richard G. Ketchum, Director, Division of Market Regulation, SEC, dated December 14, 1987.

[43] PELA also commented that arbitration panels may have no lawyers or only defense lawyers and that "[i]n many cases, arbitration counsel (actually an employee of the NASD) told the arbitrators what the law is. This is unacceptable and fundamentally unfair." The letter further commented that legal advice by SRO staff, including training materials, should be on the record. It stated "[l]itigants simply have the right to know what the arbitrators are told by outsiders about the law that is to be applied." Although this comment does not directly address any of the rule proposals before the Commission, the conduct described by PELA, if it actually occurs, would be unfair, and unacceptable in SRO arbitration. The SROs have assured the Commission that SRO staff is not permitted to advise abritrators on the law. Further, all training materials are available to the public.

[44] *See, e.g.*, Jennings and Martin, The Role of Prior Arbitration Awards in Arbitral Decisions, Labor Law Journal (February 1978).

[45] Even if awards contained errors of law, it is important to recall that under applicable law, a mistake of law is not currently grounds for vacating an arbitration award.

The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principal but decides to pay no attention to it.

Bobker, at 933. The data already included in the awards under this proposal together with the pleadings and the verbatim record of the case ought to be sufficient in making determinations under the current manifest disregard standard.

for written opinions at this time could slow down the arbitration process and discourage many persons from participating as arbitrators. At present, we do not believe that the benefit obtained from requiring written decisions outweighs these concerns.[46]

The SIA, Ryder and Bauer expressed different concerns with respect to the SRO's proposals regarding awards and stated that various portions of the proposal are problematic, and may not be of much use to prospective parties. The SIA stated that it believes that knowledge of past awards may not be helpful to the parties in their evaluations either of particular cases or arbitrators. Because the arbitral awards are typically the product of a consensus of the views of arbitrators, the SIA argues that it is unlikely that an award for which an arbitrator voted would necessarily reflect the specific views of that arbitrator, but rather only the product of compromise between the members of the panel. The SIA further commented that these awards would be unlikely to be accurate indications of the voting records of arbitrators because cases tend to be fact intensive, and therefore each case unique. The SIA also expressed some concern over the summaries to be prepared of each case. It stated that summaries are likely to be subjective and would vary among the SROs. The SIA stated its opinion that SRO staffs would be likely to draft these, which could result in characterizations with which parties would not concur. The SIA suggested that claimants be required to supply the summaries. Shearson, in contrast, stated that the rules regarding the contents and public availability of arbitration awards will further enhance investor confidence in arbitration without excessively burdening the process.

Making awards publicly available is in our view very significant to promoting investor confidence in the arbitration system. Clearly, awards rendered by arbitrators in prior cases will not predict the vote or outcome of future cases. The awards will, however, provide greater public understanding of the arbitration process.[47] Moreover, while the Commission cannot evaluate the strategic value of information regarding past awards in which a particular arbitrator participated, we note that some of this historic information has been compiled by individual industry participants for their own cases. Investors, who are typically one time users of the arbitration system, do not have access to any such information. The Commission believes that it is preferable for information on past arbitrations to be equally available to all parties.

Ryder commented that arbitrators' names should not be available to the public. He stated that because the arbitrators are not professional arbitrators, but rather volunteers, they should not be exposed to public criticism for unpopular awards, such as, for example, a case where an industry arbitrator voted for punitive damages to be awarded against a broker-dealer or its employees. He also stated that publication of arbitrators names would be likely to encourage the media to contact arbitrators to discuss a particular case, in conflict with the general practice of arbitrators not to discuss cases on which they have served, and without the protection of arbitrators' immunity. This he believes would expose arbitrators to criticism and discourage them from serving. He further argues that this is weighed against limited insight to be gained from the review of the one or two arbitral awards typically rendered per year by an arbitrator, which may not be a probative sample. He commented that at a minimum, the Commission should approve only the NASD approach to awards, which would disclose arbitrators' names only to parties in specific cases.

The Commission believes that Ryder overemphasizes the pressure that may be brought to bear upon arbitrators whose names are made public, either by the press who seek to discuss an award or by members of the community with respect to unpopular awards. We expect that arbitrators are sufficiently competent and resolved to abide by their obligations not to discuss cases. Individual SROs have submitted different proposals regarding how widely they will disclose the names of arbitrators for particular cases. Both choices appear reasoned with proper consideration for the needs of the parties, the public and the arbitrators. As the SROs gain experience with these new procedures, one version or the other may develop as clearly preferable. We see no reason to disturb the discretion of the SROs on this point.

Ryder also questions the fairness under the rule proposals of the NYSE and AMEX of requiring the public disclosure of industry parties to an arbitration, but not of the investors' names. Resolution of disputes between investors and broker-dealers has a public as well as private purpose. It is important for the public to be aware of the number and nature of allegations against broker-dealers registered with the Commission and their employees. To the extent that individual investors choose to keep proceedings regarding their private finances shielded from public secrutiny, then the traditional notions of privacy in arbitration are not inappropriate, and should be preserved. The potential embarrassment to securities employees as a result of claims in arbitration proceedings of misconduct or error, however, is subservient to the public's need to know about these cases.

Ryder also suggests that the awards contain more information relating to the date of the arbitration filing; the city in which the hearings took place; the number and date of the hearings; the names of the attorneys who represented the parties, if any; the primary product or investment vehicle involved in the dispute; and the date the award was rendered. He stated that this information would be relatively simple to include and would better permit vendors of the information in arbitration awards to analyze the efficacy and speed of arbitral awards. He also suggests that the resulting data would be useful for case settlement, brokerage house compliance efforts, and regulatory oversight.

In response to these suggestions the SROs have amended their filings to include data he suggested, including the dates the claim was filed and the award rendered, the number and dates of hearing sessions and the location of the hearing(s). The type of investment vehicle involved is likely to be included already in the summary of the issues in controversy. The SROs have determined not to include at this time the names of the parties' counsel in the awards. The Commission does not believe that the disclosure of the parties' counsels' names would provide significant benefit to persons in the arbitration process. Accordingly, we believe that the SRO proposals in their amended form are consistent with the Act.

[46] We also anticipate, however, that SICA will soon renew its consideration of issues important to the successful administration of large and complex cases. It may be appropriate to provide for written opinions for such cases.

[47] We also disagree with the SIA's assumption that these summaries will likely be prepared by SRO staff and will become subject to criticism by the parties. Our understanding is that awards will be the responsibility of the arbitrators, and that they will represent the arbitrators' understanding of the issues in controversy. If draft awards are prepared by SRO staff, they are under the supervision of the arbitrators and subject to arbitrators' review and approval.

I. Arbitration Fees

The SROS have also clarified through these rule filings the potential fees to parties of pursuing a case through SRO arbitration. The arbitration fee proposals represent significant increases in the fees that may be assessed by the arbitrators for particular cases.

The definition of a "hearing session" has been clarified in the proposal. A hearing session under proposed NYSE Rule 629(b) [48] would be a meeting between the parties and arbitrators that lasts less than four hours. For the AMEX, which previously considered a hearing session to be a full day of hearings, the proposal increases the fees that may be assessed against a party. The NASD changed its practice with respect to the assessment of fees, from a full day to a half day, in June of 1987 resulting in a similar fee increase. This filing fulfills the NASD's obligation pursuant to Section 19(b) and Rule 19b–4 to file a rule change with the Commission in light of its change in policy.

Proposed NYSE Rule 629(d) also would raise to $200 from $100 the minimum deposit for cases where no money damages are claimed. Proposed NYSE Rule 629(h) and AMEX Rule 620(h) set a fee for prehearing sessions with an arbitrator of seventy-five percent of hearing session fees.[49] Further, proposed NYSE Rule 629(a) of the filing proposes that all parties who file claims, such as counterclaims, cross-claims and third party claims, now should be required to pay deposits. Under the existing rules, deposits are required only of original claimants. This significantly increases the potential fees that may be recovered by the SROs and assessed against a party since arbitrators may assess costs against a single party.

Proposed NYSE Rule 629(c) also clarifies that arbitrators may assess the costs of conducting a hearing against the parties as they deem appropriate. These costs include not only the fees for each session, but all other costs of conducting the hearing contemplated under the rules, such as the costs of transcribing a record, or producing witnesses or documents, and any other cost contemplated by the agreement between the parties or permitted by applicable law.

Two commenters, PELA and the SIA, wrote regarding the appropriateness of the fee increases in the proposals. PELA, without being specific, stated that the fees increases are an unfair barrier to dispute resolution. The SIA commented that the fees probably are appropriate, in light of the facts both that the SROs continue to subsidize the forum to a substantial extent and that the fees are, in its view, lower than for other arbitration forums.

The Commission believes that these arbitration fee increases are justified on the basis of the rule's deference to the ability of the arbitrators to allocate fees and forum costs fairly among the parties. None of these fees are automatically imposed on either party. The SROs also have advised the Commission that the fees collected in recent years are a relatively small portion of the cost of administering their programs.[50]

We intend to monitor the future administration of this rule closely. Costs to investors for SRO arbitration historically have been low, and must remain so. The application of these fees should not be permitted to operate in a manner that weighs too heavily on individual parties or serves as a disincentive to pursuing the redress of investors' grievances against broker-dealers or their associated persons.

We conclude that in light of the costs of administering the arbitration programs and the need for continued SRO subsidies, and the role of the arbitrators in allocating fees in each case, the fee increases appear to be reasonable and the procedure for allocating them provide for an equitable allocation consistent with Sections 6(b)(4) and 15A(b)(5).

J. Predispute Arbitration Clauses

The SROs, through the auspices of SICA, developed two rule changes designed to improve disclosure to customers in account opening agreements,[51] and to restrict the content of the arbitration clauses.[52]

The proposals would require broker-dealers that employ predispute arbitration clauses to place immediately before the clause introductory language that would inform customers that they are waiving their right to seek remedies in court, that arbitration is final, that discovery is generally more limited than in court proceedings, that the award is not required to contain factual findings and legal reasoning, and that the arbitration panel typically will include a minority of arbitrators associated with the securities industry.

The proposal requires that the disclosure language be highlighted four ways. First, large or otherwise distinguishable type must be used. Second, the disclosure language must be set out in outline form so as to be noticeable to readers. Third, a statement, also highlighted, that provides that the agreement contains a predispute arbitration clause, and where that clause is located in the contract, must be inserted into the agreement immediately preceding the signature line. Fourth, a copy of the agreement containing a predispute arbitration clause must be given to the customer, who is to acknowledge receipt of the agreement, either in the agreement itself or in a separate document.[53]

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[48] AMEX Rule 620 and NASD Section 43.

[49] The fee for prehearing sessions with an arbitrator under NASD Section 43 is the same as the fee for hearing sessions.

[50] For example, the NYSE has advised us that its costs for administering its arbitration program, excluding rent allocation, for the years 1987 and 1988 were $1,967,000 and $2,693,000, respectively. It recovered $790,000 in 1987 and $1,264,000 in 1988 through the arbitrators' assessment of fees. The NASD reported that its costs for fiscal year 1986–1987 were $4,968,072 and for fiscal year 1987–1988 were $7,086,344, while it recovered in fees $402,543 in fiscal year 1986–1987 and $1,342,414 in fiscal year 1987–1988. The AMEX reported that its costs, excluding rent allocation, for 1987 and 1988 were $183,500 and $187,100, respectively, while it recovered in fees $46,760 in 1987 and $48,360 in 1988.

[51] On July 8, 1988, the Commission sent to all SROs that administer arbitration programs a letter requesting that they examine issues surrounding their members' use of predispute arbitration clauses. The letter followed a study by the Commission staff of 65 broker-dealer firms that account for approximately 90% of all customer trading accounts in the United States. Ninety-six percent of the margin accounts, 95% of the options accounts and 39% of the cash accounts at those firms at the time of the study were subject to predispute arbitration clauses. At least five of the nation's largest broker-dealers, with offices around the country, currently do not require the signing of account agreements for individual cash accounts that do not otherwise require documentation in connection with other services provided in the account, such as individual retirement accounts or trustee controlled accounts. For example, Merrill Lynch, PaineWebber, A.G. Edwards, Dean Witter, and Kidder Peabody do not require an individual to sign on account agreement for such cash accounts.

[52] NYSE Rule 637, AMEX Rule 427 and Article III, Section 21 of the NASD's Rules of Fair Practice.

[53] The version of the rule as developed by SICA includes a provision that requires that customers initial the statement advising investors that the contract contains an arbitration clause. In comments received by SROs from their members before these filings were submitted to the Commission, SRO members argued against the initialling requirement, stating that the initialling proposal would create operational difficulties (where investors had not initialled) without providing any corresponding additional investor protection. These firms also expressed concern over the legal significance of the initialling provision. None of the SROs has included the initialling provision in its submission to the Commission.

The proposal also prohibits SRO members from having agreements with customers that limit or contradict the rules of any SRO or limit the ability of a party to file any claim in arbitration or limit the ability of the arbitrators to make any award.

Four commentators, Public Citizen, PELA, the SIA and Shearson, commented on the provisions relating to the use of predispute arbitration clauses. Public Citizen welcomed the improvement to the system for notifying investors about the existence and effect of arbitration clauses, but stated that the proposed rules are inadequate for the protection of investors. Public Citizen's preferred result would be a rule flatly prohibiting broker-dealers from limiting or conditioning access to brokerage services on the signing of a predispute arbitration agreement.[54] Accordingly, Public Citizen comments that, at a minimum, investors should receive notice when presented with a predispute arbitration clause that they are receiving nothing in return for signing the arbitration agreement. Public Citizen reasons that as public customers already have the right under SRO rules to demand that their broker-dealers and registered representatives arbitrate any dispute that may arise, the arbitration clause creates obligations only for the customers. Consequently, Public Citizen states that SICA's initialling provision [55] should be adopted by the SROs in order to assure "that [public customers] at least [are] aware of the fact that they are agreeing to such a one-sided arrangement, and expressly signal their approval of it." Public Citizen also adds that consideration, in the form of discounted commission rates, should accompany any agreement to arbitrate.

Both the SIA and Shearson endorsed the concept of disclosure regarding the arbitration clauses contained in the proposals. The SIA commented that a disclosure approach is appropriate with respect to the clauses, while additional choice would presume that there was something wrong with arbitration, counter to the Federal Arbitration Act.[56]

The disclosure provisions set out in the new rule address many of the concerns regarding customer notice and choice that have been considered over recent years in open Commission meetings, the courts, and in hearings before the House Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce. All new arbitration agreements will be required to contain clear and highlighted disclosures alerting investors to the meaning of the arbitration contracts they are signing. This, in turn, we anticipate should promote more knowledgeable acquiescence or rejection by customers of arbitration provisions. The combined effect of the newly mandated disclosures and the notice immediately prior to the signature line, advising investors of the existence and location of the arbitration clause, will sufficiently focus any reader of the customer agreement to the arbitration provisions.

In that connection, we are unable to conclude that the marginal benefits to investors of mandating that there be a separate initialling of the provision pointing to the existence of the arbitration clause, on top of the multiple disclosures already being mandated warrant overruling SRO judgment as to the costs and operational burdens on members of such a requirement.

The Commission believes that the new provision in the rule prohibiting firms from including in their agreements any condition which limits or contradicts the rule of any SRO [57] or limits the ability of a party to file any claim in arbitration or limits the ability of the arbitrators to make any award benefits investors. This provision makes clear that the use of arbitration for the resolution of investor/broker-dealer disputes represents solely a choice of arbitration as a means of dispute resolution. Agreements cannot be used to curtail any rights that a party may otherwise have had in a judicial forum. If punitive damages or attorneys fees would be available under applicable law, then the agreement cannot limit parties' rights to request them, nor arbitrators' rights to award them. The agreements may not be used to shorten applicable statutes of limitation, restrict the situs of an arbitration hearing contrary to SRO rules, nor to limit SRO forums otherwise available to parties.

The Commission has concluded that approval of this rule, which does not include provisions mandating customer choice with respect to the signing of arbitration clauses, is consistent with the Act. Under the circumstances presented, the Commission is reluctant to dictate the terms of a fully disclosed agreement between a broker-dealer and a customer. Investors currently have access to basic brokerage services without agreeing to pursue any future disputes through arbitration, rather than through the courts. This is so because a number of broker-dealers, including several large full-service broker-dealers in the country, do not require the signing of account agreements for cash accounts.[58] The Commission recognizes that investors do not have such access with respect to margin and options accounts, but observes that with respect to margin accounts, the firms' separate lending relationship with the customer may increase the desirability of agreeing in advance that disputes will be resolved through arbitration. Moreover, the Commission believes that the improved disclosure provided in the rules will effectively alert investors as to the consequences of signing predispute arbitration clauses. To the extent that a class of investors emerge who object to predispute arbitration agreements, the Commission is hopeful that competitive forces will result in some firms offering margin or options accounts without such agreements. Additionally, pricing strategies may arise that provide for different rates to be charged to customers who do not agree to predispute arbitration provisions. The Commission, however, will carefully

[54] PELA also called for a prohibition of mandatory arbitration. Its letter is principally directed at broker-dealer/employee cases and thus addresses issues different than those being considered by the Commission in these proposals. PELA considers the amendments represented in these filings, without greater employee/investor choice, and without procedures more like the courts, to be merely cosmetic.

[55] *See* footnote 53.

[56] Public Citizen also commented that the SROs should submit a rule establishing procedures for class action litigation and joinder provisions. Public Citizen suggests that such procedures would permit parties to resolve collectively "repeated patterns of statutory violations that simply are not worth individual investors time and resources to pursue." In testimony on July 12, 1988 before the House Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, SEC Chairman David Ruder addressed the need for the SROs to consider special procedures, or the declination of jurisdiction over class action litigation.

The SROs' arbitration rules already include provisions allowing for the joinder of claims. The SROs are improving the guidance provided to arbitrators with respect to their existing ability under the arbitration rules to refer certain cases back to the courts. The arbitration agreements of the parties include the obligation to abide by the arbitration rules, which provide that arbitrators may refer parties to their remedies at law, and that SROs may decline to accept jurisdiction over a particular case.

Although no SRO rule has been submitted, SICA is considering a policy whereby all SROs will decline jurisdiction over class action litigation unless the class certification and representation issues have first been resolved by a court of competent jurisdiction. At that time, under the SROs' existing rules, both the SROs and the arbitrators for a particular case may determine whether the facilities of the SRO are adequate to handle the litigation, or whether parties should be referred to their remedies at law.

[57] This part of the proposed rule change is a clear statement of existing law. *See generally*, sections 6(b), 15A(b), 19(g) and 29 of the Act, and NYSE Arbitration Rule 600(a), Article VIII, Sections 1 & 2 of the AMEX Constitution, and section 12(a) of the NASD's Code of Arbitration Procedure.

[58] *See* footnote 51 *supra*.

monitor the effectiveness of the SRO disclosure provisions as well as any increased usage of predispute arbitration agreements for cash account customers.

IV. Conclusion

The Commission welcomes the changes in SRO arbitration heralded by these proposals, and the cooperative effort that produced them. These rules represent several years of effort by SICA. They represent the promise of the SROs to maintain fair and efficient forums for the arbitration of disputes between members and investors. The Commission believes that the proposed rules appropriately balance the need to strengthen investor confidence in the arbitration systems at the SROs, both by improving the procedures for administering the arbitrations and by creating clear obligations regarding the use by SRO members of predispute arbitration clauses, with the need to maintain arbitration as a form of dispute resolution that provides for equitable and efficient administration of justice.[59]

In particular, the rule changes affecting the classification of arbitrators, arbitrator disclosure, discovery, the preservation of a record, the form and public availability of awards, and guidelines for the use of predispute arbitration clauses dynamically advance the public interest in SRO arbitration. Likewise, the SROs' initiatives with respect to the handling of pleadings, appointments of replacement arbitrators, the use of small claims procedures, and the number of arbitrators should improve the efficiency and speed of arbitration, maintaining those bargained for qualities of traditional arbitration. Because these rules will aid in the just resolution of disputes between investors and broker-dealers, we conclude that these rules are designed to prevent fraudulent and manipulative practices, promote just and equitable principles of trade and in general, protect investors and the public interest consistent with sections 6(b)(5) and 15A(b)(6). The fee increases represented by these changes appear to be reasonable and provide for an equitable allocation of fees among SRO members and investors using the arbitration facilities consistent with sections 6(b)(4) and 15A(b)(5).

Accordingly, the Commission finds that the proposals submitted by the NYSE, NASD and AMEX are consistent with the requirements of the Act, specifically sections 6(b) (4) and (5) and 15A(b) (5) and (6), which require that national securities exchanges and registered securities associations have rules designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, provide for an equitable allocation of fees, and, in general, protect investors and the public interest.[60]

It is therefore ordered, Pursuant to Section 19(b)(2) of the Act, that the above mentioned proposed rule changes be, and hereby are, approved.[61]

By the Commission.

Jonathan G. Katz,

Secretary.

Dated: May 10, 1989.

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[59] Public Citizen also suggested in its July 15, 1988 letter that the Commission should have used its authority uder section 19(c) of the Act [15 U.S.C. 78s(c)] to institute the changes to the SROs' arbitration rules, rather than by recommending changes as was done in our September 10, 1987 letter. The September 1987 letter was not, and should not be viewed as, a formal invocation of Commission rulemaking. As the Commission staff stated in its reply to Public Citizen, the letter was the result of the staff's review of SRO arbitration pursuant to the Commission's responsibilities under sections 17 and 19 of the Act [15 U.S.C. 78q and 78s]. (*See* letter from Catherine McGuire, Special Assistant to the Director, SEC, to Eric R. Glitzenstein and Alan B. Morrison, Public Citizen, dated January 27, 1989.) Moreover, the September 1987 letter identified areas where the Commission believed that improvements were needed, but did not itself make specific rule proposals.

Open and continuous dialogue with the SROs on all matters, including the need to consider regulatory changes, is essential to the working of the scheme of self-regulation established by Congress. This process has included significant public dialogue, and all commenters' views, including those expressed by Public Citizen, have been considered in the context of these rule filings pursuant to Rule 18b-4.

[60] The Commission finds that there is good cause to approve the proposed amendment to Article III, section 21 of the NASD's Rules of Fair Practice prior to the thirtieth day after the date of publication of notice of filing in the **Federal Register**. The NASD published a substantially similar draft of this rule for its members' comment on November 1, 1988. NASD members, in a vote concluding on April 3, 1989, voted 1,411 in favor of the proposed rule, and 237 for disapproval. In addition, the NYSE's and AMEX's versions of the same rule were published for public comment in the **Federal Register** on January 26, 1989, providing the public with ample opportunity to comment on the proposed rule change.

[61] The proposed rule changes to NYSE Rules 607, 608, 610, 611, 619, 623 and 627; AMEX Rules 602, 603, 607, 608, 610, 614, 618, 621 and 622; and NASD Sections 21, 23, 32, 37, 41 and 45 are effective upon approval. The proposed rule changes to NYSE Rules 601, 612 and 629; AMEX Rules 606 and 620; and NASD Sections 9, 13, 19, 25, and 43 are effective only for cases filed with the SROs after this approval. The proposed rule change to NYSE Rule 637, AMEX Rule 427 and Article III, Section 21 of the NASD's Rules of Fair Practice will become effective September 13, 1989.

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Pacific Stock Exchange, Incorporated

May 10, 1989.

The above named national securities exchange has filed applications with the Securities and Exchange Commission pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f-1 thereunder, for unlisted trading privileges in the following securities:

Environmental Systems Corporation
Common Stock, $.01 Par Value (File No. 7-4513)
Cooper Tire & Rubber Company
Common Stock, $1.00 Par Value (File No. 7-4514)
Windmere Corporation
Common Stock, $.10 Par Value (File No. 7-4515)
Service Master, L.P.
Units of Limited Partnership (File No. 7-4516)
Sun Electric Corporation
Common Stock, $1.00 Par Value (File No. 7-4517)
Incstar Corporation
Common Stock, $.01 Par Value (File No. 7-4518)
Dexter Corporation
Common Stock, $1.00 Par Value (File No. 7-4519)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before June 1, 1989, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection for investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

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