SEC Seeks Input on New Rules for NYSE Mediation Program

By ADRWorld.com Staff Reporters

(1.4.2007) The Securities and Exchange Commission is asking for public input on a plan by the New York Stock Exchange to formalize some key industry mediation practices, including a ban on neutrals serving as both mediator and arbitrator in the same case.

The proposed new rules, outlined in a notice from SEC late last month, also would codify the responsibility of disputing parties to negotiate and satisfy mediator fees, making official a number of procedures under NYSE Rule 638, which offers investors and brokerage firms the option to mediate disputes before or after an arbitration commences.

A key provision of the proposal would bar mediators from serving as an arbitrator or counsel for a party in a related matter. According to the new rule, a "mediator may not act as an arbitrator and may not represent any party in an arbitration relating to the matter mediated."

David White, an attorney with White & Associates in New York and an adjunct professor at Fordham Law School, questioned the value of that prohibition, saying the "A in ADR today stands for appropriate."

"To hamstring the neutral by barring continued service as an arbitrator denies the demonstrated efficacy of the med-arb process," he said. "There is a growing movement in the field that med-arb can be a valuable tool," he added.

According to White, "so long as the parties are fully educated regarding the process, there is little reason to believe that NYSE disputants would benefit less from this forward-thinking procedure than their non-SRO counterparts." He suggested that parties would need to include an explicit provision in their agreement to mediate authorizing the mediator to also serve as an arbitrator.

NYSE launched its mandatory mediation and administrative conference pilot programs in 1998 and settlement rates reached as high as 90 percent in 1999, but they dropped below 50 percent by 2002. According to the SEC notice, the mediation pilot project on which

the current mediation rules are based lead NYSE to believe that the process is most effective when the parties enter into it voluntarily. According to the notice, "experience with the pilot led to the conclusion that mediation is most successful when parties enter into it of their own accord."

The lack of a mandatory element to the NYSE mediation program has disappointed some in the industry. Stephen Hochman, an attorney with Friedman, Wittenstein & Hochman in New York, noted that in court and state programs around the country, settlement rates in mandatory mediation programs are high and parties benefit from the process.

Hochman said NYSE's experience with mandatory mediation is "contrary to the experience of other programs around the country."

Other key elements of the proposal include:

- A clarification that mediation may be initiated by the agreement of the parties before or during arbitration and that parties are free to withdraw from mediation at any time prior to the execution of a settlement agreement.
- New language clarifying that mediators are prohibited from testifying in other proceedings.
- A codification that mediation is confidential, and unless required by law, parties are prohibited from disclosing information from a mediation.

NYSE also said it would help parties with mediator lists, selection and appointment procedures, but the proposal establishes that mediator fees and costs must be agreed upon and paid by the parties. Disputants would have access to available NYSE facilities for mediations without charge.