Statement to Congressional Committee on Financial Services on March 17, 2005
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** I am appearing before this Committee in my individual capacity and have not received any Federal grants or contracts related to the subject upon which you have invited me to discuss.

** I have participated in the resolution of securities disputes for over 35 years as an arbitrator, mediator, arbitrator trainer, Public Member of the Securities Industry Conference on Arbitration (SICA) and an advisor to the Fordham Law School Arbitration Clinic.

** I couldn't begin to share all of my experiences in the 5 minutes allotted me, so I will save my opinions for my responses to questions from the panel.

** I would, however, like to tell you how I first got involved in this area.

** Before joining the Faculty at Fordham Law School over 40 years ago I was a full time litigator at a major Wall Street Law Firm. After a few years of teaching – and loving every minute of it – I realized that I also missed litigation. Thus, in 1967 I became a arbitrator at the NASD and (shortly thereafter) at the NSYE where I have served in many, many, many cases.

** In 1977, when SICA was first created I was selected as one of it's Public Members, where I have served ever since.

** In addition, about eight years ago – at the suggestion of then SEC Chairman Arthur Levitt – I helped establish a Securities Arbitration Clinic at Fordham to represent injured investors who couldn't obtain an attorney and thus would find it difficult to pursue their claims. I am proud to say it is the most popular clinic at Fordham, and is the first such clinic in the country to obtain punitive damages in an SRO arbitration. There are presently about a dozen such law schools clinics operating today; and, collectively they constitute a growing force in this area.

** Arbitration in the 60s was like the horse and buggy days. There was virtually no pre-

discovery or exchange of information. Not too many people complained, however, because basically the system was voluntary as far as the public was concerned.

** In the 70s, however, the SEC was not satisfied with the handling of small claims, and its Office of Consumer Affairs issued a Report recommending the creation of a non SRO entity for the handling of such claims.

** In response to this Report, SICA was created with an initial mandate to establish a procedure for the handling of small customer claims. Facilitating the processing of small claims, however, did not address the broader issue, namely: the basic *Balkanization* of the various SRO arbitration programs. In other words, each SRO had its own set of rules (some were written, some existed solely on the basis of custom and usage) all of which complicated the task of the practitioner in choosing a forum.

** Thus, SICA's next assignment was to establish a Uniform Code of Arbitration which was basically applicable to all SRO cases, large as well as small. Nevertheless, SRO arbitrations were still basically voluntary because of the then prevailing conventional wisdom that *34 Act* Federal Securities claims were not subject to pre-dispute arbitration agreements; thus, you could still go to court.

** As confidence grew in the new Code, SRO arbitrations more than tripled from 830 in 1980 to over 2,800 in 1986. Yet, SRO arbitration was still in its infancy until the *McMahon* case in 1987 which virtually transformed the process from a voluntary procedure to a mandatory one by holding that *34 Act* claims were arbitrable pursuant to pre-dispute arbitration agreements.

** After the *McMahon* case, the landscape changed overnight. Not only did the number of arbitrations more than double to over 6,000 in the year after *McMahon* than the year before; but, equally significant was the influx of the larger and more complex cases that previously were being filed in court.

** At this point, the task of insuring the fairness of SRO arbitrations largely fell upon SICA which, incidentally, had been favorably mentioned in the *McMahon* case as evidence of the changing landscape. SICA's independence was essential to the process, and that independence was insured at the outset because its Public Members were beholden to no one; and, thereafter the Public Members got to pick their own successors.

** Moreover, the SEC – with its oversight authority over the SROs and as gatekeeper of the 19b process – attends SICA meetings. Indeed, the efforts to insure a *Level Playing Field*

are outlined in SICA's Twelve Reports issued to the SEC over the years, which describe, with great transparency, the evolution in SRO arbitration, for example:

1) Expanded document discovery and more extensive exchange of pre-hearing information to prevent trial by ambush;

2) To facilitate the discovery process, it established lists of documents that must be presumptively produced;

3) Tightened the rules for the qualification of arbitrators and the avoidance of conflicts;

4) Changed the method of arbitrator selection from SRO appointment to list selection by the parties;

5) Held hearings throughout the country regarding the questionable practice of non-attorney representation of claimants;

6) Established a Pilot Program whereunder claimants could opt-out of SRO arbitration in favor of another forum;

7) Encouraged the creation of Law School clinics to represent claimants who could not obtain representation; and, the list goes on and on.

** Since the adoption of the Uniform Code, over 100,000 arbitrations have been filed at the various SROs. Has justice been achieved in *every one* of those 100,000 cases? Certainly not; but, I don't know of *any* dispute resolution system that has an unblemished record in this regard – and that includes our own court system.

** Admittedly, sometimes awards are excessive and sometimes they are inadequate, but that will be true no matter which resolution system we use.

** Are there improvements that can still be made to the SRO arbitration process? Of course there are, and the process is ongoing and never-ending as new problems and situations arise.

** In conclusion, I can express to you that since the mandate of *McMahon*, the system has, on balance, worked well.

THANK YOU.