

COMMENTS

SHOULD MANDATORY WRITTEN OPINIONS BE REQUIRED IN ALL SECURITIES ARBITRATIONS?: THE PRACTICAL AND LEGAL IMPLICATIONS TO THE SECURITIES INDUSTRY

LYNN KATZLER*

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* J.D. Candidate, *Washington College of Law, The American University*, May 1996; B.A., *University of Florida*, 1993. I wish to thank Professor Egon Guttman of the *Washington College of Law* for his helpful insight and guidance throughout the writing process.

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INTRODUCTION

Each year, millions of transactions involving the purchase and sale of securities take place. Occasionally, disagreements develop over these transactions. Many of these disputes are then resolved by

arbitration, the voluntary submission of a dispute to an impartial party for final and binding determination.¹

A controversy exists over the arbitrability of securities claims due to the conflicting policies² of the Federal Arbitration Act (Arbitration Act)³ passed in 1925, and the federal securities laws, passed in 1933 and 1934.⁴ Congress enacted the Securities Act of 1933 (Securities Act)⁵ and the Securities Exchange Act of 1934 (Exchange Act),⁶ in response to the rampant speculation, fraud, and deception in the securities industry that had culminated in the stock market crash of 1929.⁷ Although the Securities Act and the Exchange Act differ,⁸ they share common goals. The federal securities laws were created with two main purposes: (1) to protect investors by elevating their level of sophistication through the requirement of full disclosure regarding investments; and (2) to restore investor confidence in the securities markets by instilling trust in their efficient and honest operation.⁹

1. See generally INTERNATIONAL CTR. FOR DISPUTE RESOLUTION, AM. ARBITRATION ASSN, SECURITIES ARBITRATION RULES (1993) (defining arbitration agreements).

2. See Michael Durrer, *Enforcing Arbitration of Federal Securities Law Claims: The Effect of Dean Witter Reynolds v. Byrd*, 28 WM. & MARY L. REV. 335, 340 (1987) (explaining competing policies of efficient dispute resolution through arbitration and investor protection of securities laws); see also GEORGE FRIEDMAN, ARBITRATING YOUR CASE UNDER THE SECURITIES ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION 4 (1993) (discussing conflict between Securities Acts promise of private right of action in courts and predispute arbitration agreements in which participants waive right to proceed in court).

3. Arbitration Act of 1925, ch. 392, § 1, 61 Stat. 669 (codified as amended at 9 U.S.C. §§ 1-14 (1994)).

4. Securities Act of 1933, ch. 38, § 1, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a-77b (1994)); Securities Exchange Act of 1934, ch. 404, § 1, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a-78l (1994)).

5. Ch. 38, § 1, 48 Stat. 74 (codified as amended at 15 U.S.C. § 77a-77b (1994)).

6. Ch. 404, § 1, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a-78l (1994)). The Exchange Act was created primarily to protect investors from manipulation of stock prices on the exchanges and the over-the-counter markets. See Michael D. Hool, *Whos Protecting Investors?* Shearson/American Express v. McMahon, 107 S. Ct. 2332 (1987), *Compels Private Claims Under Section 10(b) of the Securities Exchange Act into Arbitration*, 19 ARIZ. ST. L.J. 793, 795 (1987). Congress provided for both civil and criminal remedies under the Exchange Act. *Id.*

7. See Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 251 (1987) (Blackmun, J., dissenting) (explaining historical development of securities laws).

8. See Durrer, *supra* note 2, at 336 n.6. The Exchange Act primarily regulates post-issuance securities trading that encompasses the majority of investor disputes. *Id.* The Securities Act, on the other hand, regulates the initial issuance of securities. *Id.* The majority of investors sue under the Exchange Act, although when a dispute arises during an initial public offering, the affected investors have a cause of action under the Securities Act. *Id.* Investors will also sue under § 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder, because it covers many fraudulent acts connected with investments. *Id.* Frequently, both Acts provide alternative remedies. See Herman & MacLean v. Huddleston, 459 U.S. 375, 387 (1983) (allowing parties to maintain § 10(b) action under Exchange Act even though they had express remedy under § 11 of the Securities Act).

9. See Herman & MacLean, 459 U.S. at 387 (articulating twin aims of federal securities laws).

The Arbitration Act, alternatively, created a method by which securities disputes could be settled quickly, fairly, and inexpensively.¹⁰ The Arbitration Act provides for the enforcement of agreements to arbitrate not just existing, but also future, disputes relating to transactions involving interstate commerce.¹¹ In this manner, arbitration agreements reached by parties, before and after a dispute arises, are enforceable. The Arbitration Act was intended to reverse centuries of judicial hostility toward arbitration agreements by providing for their enforcement to the same extent as other contracts.¹² Additionally, the Arbitration Act was created to reduce congestion in the courts by offering parties an equivalent substitute

10. 9 U.S.C. §§ 1-14 (1994). A typical arbitration suit arises after parties have been unable to resolve a dispute and one party files a Demand for Arbitration. AMERICAN ARBITRATION ASSN., A GUIDE FOR SECURITIES ARBITRATORS 9 (1993). A Demand for Arbitration functions like a court complaint by notifying the other party of the desire to arbitrate the dispute pursuant to a contractual agreement reached by the parties. *Id.* This agreement gives the arbitral forum authority over the suit. The responding party then has 20 days to assert an answer or counterclaim. NASD Rules § 13(d). An assigned case administrator will send a letter to the parties acknowledging receipt of the Demand and enclose a list of potential arbitrators from which the parties are to choose. FRIEDMAN, *supra* note 2, at 18. The arbitrators, once selected, will administer a limited discovery process prior to the presentation of any testimony or evidence. FRIEDMAN, *supra* note 2, at 16-17. At the hearing, arbitrators have control over the order and direction of the informal proceedings and are not bound by the Federal Rules of Evidence. NASD Rules § 34. The arbitration rules grant the arbitrators broad authority to deny the admission of evidence while allowing them immense subpoena power. FRIEDMAN, *supra* note 2, at 18. Arbitration procedures resemble court proceedings in several ways. FRIEDMAN, *supra* note 2, at 18. First, each side makes an opening statement, testimony is taken, witnesses are cross-examined, and the evidence is introduced. FRIEDMAN, *supra* note 2, at 18. Second, the rules give parties an absolute right to be represented by counsel, and require that a record be kept for all hearings. NASD Rules §§ 27, 37. The cost of transcription, however, is borne by the requesting party. *Id.*

After the hearing, the arbitrators move to deliberations. During this stage, they discuss their opinions on the issues while considering the legal and factual arguments made by the parties. FRIEDMAN, *supra* note 2, at 19. Arbitrators must render a decision within 30 days of the close of the hearings, unless the parties have agreed otherwise. NASD Rules § 41(d). The award granted is often merely a one-line award indicating the prevailing party and the costs incurred. Arbitrators have authority to grant any relief they deem "just and equitable under the circumstances" and are not required, nor encouraged, to include a written opinion justifying the award. *See generally* FRIEDMAN, *supra* note 2. The award ultimately granted is, nevertheless, final and binding on the parties. NASD Rules § 41(b). If, however, the losing party can prove some error or bias on the part of the arbitrators, a reviewing court has the power to vacate the award. *See infra* notes 126-56 and accompanying text (discussing grounds on which court can vacate arbitration awards). The courts ability to vacate arbitration awards is severely limited and often entirely restrained without a written opinion.

11. 9 U.S.C. § 2 (1994).

12. *Id.* This section of the Arbitration Act states that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract." *Id.*; *see also* *Arbitration Reform: Hearings Before the Subcomm. on Telecomm. and Finance of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 75 (1988) [hereinafter *Arbitration Reform Hearings*] (statement of Theodore Krebsbach) (suggesting that in passing Arbitration Act Congress intended to allow parties to contract for quick resolution of disputes and to reduce congestion of courts); Ranlet Sheldon Willingham, *Securities Arbitration: Issues After McMahon*, 24 WAKE FOREST L. REV. 409, 423-24 (1989) (arguing that Congress intended to enforce arbitration provisions in private contracts).

to the court system.¹³ The federal courts interpretation of the Arbitration Act created a federal policy favoring arbitration of securities disputes.¹⁴

If the Arbitration Acts policy favoring arbitration fails to advance the protection of investors, the Act will conflict with the goals of the federal securities laws, which seek to protect investors.¹⁵ The delicate balance between the Arbitration Act and the federal securities laws must be preserved. Arbitral procedures must be modified to further the goals identified by Congress in enacting the federal securities laws. Arbitration should not be converted to a full court hearing comprised of lengthy discovery, complex evidentiary rules, and legal opinions. Arbitration, however, should be modified to incorporate the needs of current investors.¹⁶ Otherwise, both the policy behind the federal securities laws and the Arbitration Act will become empty promises. This Comment argues that section 41 of the Rules of the National Association of Securities Dealers (NASD), which focuses on the content of the award statement, fails to adequately protect investors as Congress intended. The NASD is one of a number of Self-Regulatory Organizations (SROs) to which the Securities and Exchange Commission (SEC) delegated authority to sponsor arbitral forums.¹⁷ The other SROs have comparable rules

13. 9 U.S.C. § 1 (1994).

14. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974) (arguing that Arbitration Act intended to place arbitration contracts "on the same footing as other contracts" and thereby eliminate judicial hostility towards them). The Act created a federal policy favoring arbitration that courts battled to maintain. See *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (explaining that result of Arbitration Act is to create federal body of substantive law of arbitration, applicable to any arbitration agreement falling within Acts coverage).

15. Securities Exchange Act of 1934, ch. 404, § 1, 48 Stat. 891 (codified as amended at 15 U.S.C. § 78aa (1994)) (stating that goal of Exchange Act is investor protection).

16. Since industry developments may change over time and expand in ways not contemplated by the original drafters of an act, interpretation of a congressional act should adapt to incorporate the changing needs of protected parties. This is not to suggest the policy of the Arbitration Act needs review. The basic policy favoring arbitration and the enforcement of contractual agreements remains clear. See *Scherk*, 417 U.S. at 510-11. The arbitration process rules and procedures, however, must adapt to incorporate current concerns while still recognizing the original intent of the Arbitration Act, which was to create a fair and efficient alternative to the courts. *Id.*

17. See generally NATIONAL ASSN OF SECURITIES DEALERS, SECURITIES REGULATION IN THE UNITED STATES 30-31 (1992) (addressing basic aspects and issues confronted in securities arbitrations today). One of the most significant features of the Exchange Act was the formation of the SEC. The SEC delegates significant regulatory authority to a number of private, member-owned and operated organizations known as SROs. *Id.* at 9. These SROs include the NASD, the New York Stock Exchange (NYSE), the American Stock Exchange (AMEX), a number of regional exchanges, and five option exchanges. *Id.* In addition to SROs, there are independent forums provided by other associations, such as the American Arbitration Association (AAA), which allow for dispute resolution. *Id.* The responsibilities of the SROs include compliance with legal and ethical standards and the administration of arbitration forums for investors and

that also need reform.¹⁸ NASD section 41(e) states:

The award shall contain the names of the parties, the name of counsel, if any, a summary of the issues, including the type(s) of any security or product, in controversy, the damages and other relief requested, the damages and other relief awarded, a statement of any other issues resolved, the names of the arbitrators, the dates the claim was filed and the award rendered, the number and dates of hearing sessions, the location of the hearings, and the signatures of the arbitrators concurring in the award.¹⁹

Conspicuously absent from this list is a requirement that arbitrators write a statement of reasons in support of their decision. Arbitrators generally fill out a standard award form that merely identifies the prevailing party and the costs incurred.²⁰ Commentators who oppose a requirement that arbitrators include a statement of reasons argue that there is no evidence to suggest that arbitration will not afford parties their substantive rights.²¹ They contend that requiring a written opinion would compromise the efficiency of arbitration,²²

industry members to redress disputes. *Id.* All SRO rules and regulations must be approved by the SEC before they can take effect. *Id.* at 15. Together, the NASD and the NYSE process more than 90% of all arbitration claims received. *Id.* at 31.

18. See AAA Rules § 42; AMEX Rule 618; NYSE Rule 627. For simplicity this Comment only refers to NASD Rules.

19. NASD Rules § 41(e).

20. Interview with Egon Guttman, Professor, the American University, Washington College of Law and Arbitrator, the NYSE and NASD (October 20, 1994) [hereinafter Interview with Egon Guttman]; see also *Arbitration Reform Hearings*, *supra* note 12, at 99 (statement of Theodore A. Krebsbach) (discussing practice of delivering one-line awards). Contrast this with arbitration in the labor setting. In labor arbitration forums, written opinions, although not required, have become the norm. Some commentators justify this phenomenon by suggesting that labor arbitration, unlike commercial arbitration, is a mechanism through which content and meaning are given to the collective bargaining agreement. These commentators suggest that commercial arbitration, on the other hand, is transactional. By issuing opinions, labor arbitrators have developed an area of law to assist both unions and employers in administering labor agreements. *Id.*; see William B. Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the Steelworker Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464, 491-95 (1989) (arguing that written opinions are needed in labor disputes because of unique aspects of labor arbitration); G. Richard Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 509 (1990) (comparing ability of labor arbitration and commercial arbitration to adequately resolve statutory disputes). The issue of written opinions has also arisen in the court system. For a discussion of the implications of the practice of federal courts declining to issue written opinions, see Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 757-802 (1995). This Comment, however, focuses only on how the issue of written opinions impacts securities arbitration.

21. The Supreme Court has stated that arbitration is not an adequate forum to address parties rights. See *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 231 (1987) (citing *Wilko v. Swan*, 346 U.S. 427, 439 (1953) (Frankfurter J., dissenting)).

22. See *infra* notes 209-21 and accompanying text (discussing assertion that requiring written opinion would compromise arbitrations primary benefit of efficiency).

discourage qualified arbitrators from serving,²³ reduce the confidentiality generally associated with arbitration,²⁴ and result in few benefits because disputes typically involve simple issues.²⁵ Such critics fail to realize, however, that a statement of reasons will more effectively promote the policies behind the federal securities laws by reducing bias,²⁶ restoring the credibility of the securities markets,²⁷ promoting "meaningful review" of arbitration awards,²⁸ stimulating the development of consistent federal common law,²⁹ and enabling investors to make informed decisions that would promote the further economic development of the securities industry.³⁰ Consequently, NASD section 41 should be amended to require a statement of the underlying reasons for the award because, as currently written, the rule fails to protect investors as intended by Congress.

Parts I and II of this Comment note the historical background of arbitration and the current status of the law. Specifically, Part I traces the development of a federal policy favoring arbitration through court interpretation and notes the pertinent arbitration reform movements. Part II reviews the current case law and regulatory rules regarding whether a statement of reasons should accompany an arbitration award.

Parts III and IV analyze the possible effects and implications that failure to include a reasoned decision may have on investors and the securities industry. Specifically, Part III discusses the limited right to appeal arbitration awards and notes the impact that a lack of "meaningful review" has on the industry and its participants. Part IV discusses the implications and the effect of decisions that are made without the development of a predictable source of federal common law that can promote uniformity in future decisions.

23. See *infra* notes 237-39 and accompanying text (outlining argument that risk of lengthy disputes tarnishing arbitrators reputations will deter arbitrators from serving).

24. See *infra* notes 253-56 and accompanying text (explaining contention that published written opinions would reduce confidentiality of process, thus deterring parties from suing for fear of being blacklisted).

25. See *infra* notes 265-70 and accompanying text (noting allegation that arbitration disputes involve simple factual issues).

26. See *infra* notes 245-52 and accompanying text (discussing bias in arbitration).

27. See *infra* notes 283-94 and accompanying text (reiterating securities laws goal of investor protection).

28. See *infra* notes 126-56 and accompanying text (discussing benefits of statement of reasons on appeal).

29. See *infra* notes 169-75 and accompanying text (arguing that statement of reasons promotes judicial uniformity).

30. See *infra* notes 283-94 and accompanying text (discussing benefit of increased investor protection through written opinions).

Part V analyzes the arguments opposing a reasoned opinion requirement and suggests that failing to require a written opinion will sustain bias and reduce the credibility of the entire securities industry. In conclusion, this Comment provides recommendations for a possible construction and application of NASD Rule 41(e).

I. ENFORCEABILITY OF AGREEMENTS TO ARBITRATE DISPUTES: FROM
WILKO TO *McMAHON* AND *RODRIGUEZ*

The debate over the arbitrability of securities claims was confronted by the Supreme Court in 1953 when it decided *Wilko v. Swan*.³¹ In *Wilko*, the Supreme Court held that parties whose claims arose under section 12(2) of the Securities Act could not be compelled to go to arbitration through a predispute arbitration agreement.³² In this manner, the Court enforced the policy of investor protection in the Securities Act to allow parties recourse to the courts.³³ The Court held that certain disputes were exempt from the Arbitration Acts policy, which demanded enforcement of agreements to arbitrate, because parties could not be forced in advance to waive their right to proceed in court.³⁴ The Supreme Court found that courts provided investors with procedural rights that could not be substituted with abbreviated arbitration procedures.³⁵ Of significance to the Court was the fact that an award could be granted: (1) without an explanation of reasons; (2) absent a complete record; and (3) with an extremely limited ability to review and vacate.³⁶ Accordingly, the Court found that the plaintiff-investor could not be bound in advance to submit a federal securities law fraud claim to arbitration.³⁷

In addition to holding that predispute arbitration agreements were unenforceable, the *Wilko* decision also stands for the proposition that private contractual agreements should be respected. Although the contract in dispute in *Wilko* was held unenforceable, the Court clearly stated that the contract was merely overridden by a stronger congres-

31. 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

32. *Wilko v. Swan*, 346 U.S. 427, 438-39 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

33. Section 12(2) of the Securities Act creates a special right of action for misrepresentation that is enforceable in any federal or state court of competent jurisdiction. 15 U.S.C. § 77f (1994). Section 14 of the Act holds any provision waiving compliance with the Act void. *Id.* § 77n.

34. *Wilko*, 346 U.S. at 437.

35. *Id.* at 435; *see also* *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 228-29 (1987) (suggesting that Court in *Wilko* did not enforce predispute agreement because arbitration was inadequate to protect substantive rights of investors).

36. *Wilko*, 346 U.S. at 436.

37. *Id.* at 431.

sional command of investor protection.³⁸ In his concurring opinion, Justice Jackson added that private arbitration contracts were invalid only if they were made before the dispute arose.³⁹ According to Justice Jackson, if the agreement to arbitrate is reached after the dispute arises, the investor has made an informed waiver and, therefore, does not need protection from the Securities Act.⁴⁰ Hence, the private contract would be upheld.⁴¹

The *Wilko* doctrine, which encompasses the view that the Securities Acts goal of investor protection should override the clear policy for enforcement of arbitration agreements in the Arbitration Act, was extended in 1961 to domestic claims arising out of the Exchange Act in *Reader v. Hirsch & Co.*⁴² In 1977, the *Wilko* doctrine was further extended to disputes arising out of section 10(b) of the Exchange Act in *Allegaert v. Perot*.⁴³ The viability of the *Wilko* doctrine, however, slowly eroded. In 1974, twenty-one years after *Wilko*, the Supreme Court, in *Scherk v. Alberto-Culver Co.*,⁴⁴ held that an international dispute was subject to arbitration based on a preexisting arbitration agreement.⁴⁵ The Court was careful to distinguish the facts and law in *Scherk* from those applicable in *Wilko*.⁴⁶ The Court illustrated what it referred to as "crucial differences" between the disputed contract

38. *Id.* at 437.

39. *Id.* at 438-39 (Jackson, J., concurring). Jackson theorized that predispute agreements could not be enforced because "when the buyer, prior to any violation of the Securities Act, waives his right to sue in Courts, . . . he surrenders one of the advantages the Act gives him . . . at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary." *Id.* at 435.

40. *Id.* at 438-39 (Jackson, J., concurring).

41. *Id.*; see also *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 252-53 & n.9 (1987) (Blackmun, J., dissenting) (accepting distinction between private contracts reached before and after dispute arises).

42. 197 F. Supp. 111 (S.D.N.Y. 1961) (holding that investor protection overrides goal of enforcing arbitration rulings in domestic claims cases).

43. 548 F.2d 432 (2d Cir.) (extending overriding importance of investor protection in § 10(b) cases), *cert. denied*, 432 U.S. 910 (1977).

44. 417 U.S. 506 (1974).

45. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520-21 (1974). The Court questioned the applicability of *Wilko* to a claim arising out of § 10(b) of the Exchange Act, because the Exchange Act does not expressly create a private cause of action. *Id.* at 513-14. The decision in *Wilko*, however, was not yet overruled and continued to retain vitality among some of the federal circuits in 1989 by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). See, e.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823, 827-29 (10th Cir. 1978) (holding that investor remedies under federal securities laws were not waived as result of arbitration agreements); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831, 833-35 (7th Cir. 1977) (holding that, absent international concerns, arbitration agreements are unenforceable in Rule 10b-5 claims).

46. *Scherk*, 417 U.S. at 515; see also *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 229 (1987) (discussing holding in *Wilko* as based on inadequacy of arbitration and noting that Courts decision in *Scherk* is consistent with this view).

in *Wilko* and the contract at issue in *Scherk*.⁴⁷ First, the international character of the dispute in *Scherk* lessened the need for investor protection enunciated in *Wilko*.⁴⁸ Additionally, the Court stated that appearance before a specialized arbitral forum is necessary to promote predictability of international disputes and eliminate the dangers of disputes appearing before a judicial forum that is unfamiliar with the laws and issues of the dispute involved.⁴⁹ The case is also important, however, for its emphasis on enforcing the private contract reached by the parties.⁵⁰ The *Scherk* decision eroded the attitude underlying the *Wilko* doctrine because it recognized that certain predispute arbitration agreements are valid and must be enforced pursuant to the Arbitration Act.⁵¹

The Supreme Court continued with its endorsement of preexisting arbitration agreements in the cases of *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*⁵² and *Southland Corp. v. Keating*.⁵³ The slow destruction of the *Wilko* doctrine continued in *Dean Witter Reynolds, Inc. v. Byrd*,⁵⁴ decided in 1985. In *Dean Witter Reynolds*, the Supreme Court held that pendent state law claims joined with nonarbitrable federal securities law claims must be arbitrated pursuant to predispute arbitration agreements.⁵⁵ The Court declined a request by the parties, however, to resolve a dispute among the courts about whether or not *Wilko* applies to claims under section 10(b) of the Exchange Act or SEC Rule 10b-5.⁵⁶

A landmark decision came in 1987 when the Supreme Court, in *Shearson/American Express Inc. v. McMahon*,⁵⁷ challenged the existing body of case law that had begun with *Wilko*.⁵⁸ In *McMahon*, the Court held that securities fraud claims based on section 10(b) of the

47. *Scherk*, 417 U.S. at 515-16.

48. *Id.* at 515.

49. *Id.* at 516.

50. *Id.* at 516, 519 & n.15.

51. Compare *id.* at 519-20 (holding parties must arbitrate their international commercial dispute pursuant to Arbitration Act) with *Wilko*, 346 U.S. at 437 (holding parties could not be forced in advance to waive their right to proceed in court).

52. 460 U.S. 1, 29 (1983) (holding that Court of Appeals acted properly by enforcing prompt arbitration as intended by Congress).

53. 465 U.S. 1, 10 (1984) (recognizing Congress policy of favoring arbitration by enacting Arbitration Act).

54. 470 U.S. 213, 225 (1985) (holding that district court erred in refusing motion to compel arbitration of state claims).

55. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221-24 (1985).

56. *Id.* at 216 n.1.

57. 482 U.S. 220 (1987).

58. See David A. Lipton, *Mandatory Securities Industry Arbitration: The Problems and the Solution*, 48 MD. L. REV. 881, 881 (1989) (explaining that for over 30 years prior to *McMahon*, federal courts had followed *Wilko* and allowed investors to disregard predispute arbitration agreements where claims arose out of federal securities laws).

Exchange Act⁵⁹ and Racketeer Influenced and Corrupt Organizations Act (RICO)⁶⁰ were arbitrable.⁶¹ The Court did not expressly overrule *Wilko*, but asserted that the *Wilko* decision was based on presumptions that were no longer valid.⁶² Specifically, the Court stated that *Wilko* was based on the presumption that arbitration would not adequately protect investors substantive rights.⁶³ According to the *McMahon* decision, the Court in *Wilko* was justified in not enforcing the predispute arbitration agreement because, at the time, the Court had concluded that investors would not be protected in arbitration in the manner intended by the securities statutes.⁶⁴ The Court in *McMahon* noted that no evidence was presented to the Court in 1953, nor could be presented to it today, suggesting that the arbitral forums could not afford plaintiff-investors their substantive rights.⁶⁵ In *McMahon*, therefore, the Court held that the private contract was valid and enforceable.⁶⁶ A strong dissent by Justice Blackmun attacked the majority's interpretation of *Wilko*, arguing that *Wilko* was based on providing investor protection.⁶⁷ Justice Blackmun argued that the same problems that existed in 1953 exist today, notably, lack of a reasoned decision, lack of a complete and final record, and the limited right to appeal.⁶⁸

Despite the debate provoked by the *McMahon* decision concerning the vitality of the *Wilko* doctrine, in 1989 the Supreme Court expressly overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express, Inc.*⁶⁹ The Court essentially held that predispute arbitration agreements are binding on investors in Securities Act claims,⁷⁰ as such agreements had been held applicable in *McMahon* to Exchange Act claims. The *McMahon* and *Rodriguez* decisions made virtually all claims arising out of investor/broker disputes subject to arbitration pursuant

59. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 238 (1987).

60. 18 U.S.C. § 1961 (1994).

61. *McMahon*, 482 U.S. at 242.

62. *Id.* at 231-34 (discussing that no evidence suggests that plaintiffs substantive rights are jeopardized by arbitration).

63. *Id.*

64. *Id.*

65. *Id.* at 231. The Court suggested that the *Wilko* holding reflected a mistrust of the arbitral process—a mistrust virtually eliminated today in an age where the SEC has superb regulatory authority over the Self Regulatory Organizations (SROs) and supervisory power of approval over any proposed rules. *Id.* at 231-34; see also Lipton, *supra* note 58, at 882 (discussing history of investor ability to disregard arbitration when claims arose under federal securities laws).

66. *McMahon*, 482 U.S. at 242.

67. *Id.* at 243 (Blackmun, J., dissenting).

68. *Id.* at 249-57 (Blackmun, J., dissenting).

69. 490 U.S. 477 (1989).

70. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 485-86 (1989).

to a predispute arbitration agreement.⁷¹ Thus, the Supreme Court sanctioned the trend toward recognizing the Arbitration Acts policy of enforcing all private contractual agreements to arbitrate.⁷²

Accordingly, in the years following *McMahon* and *Rodriguez* tremendous efforts were exerted toward reforming arbitration procedures.⁷³ Questions about the adequacy of arbitration led to the formation of task forces to amend the arbitration rules.⁷⁴ The courts and "commentary of the time" brought attention to the potential problems the arbitration process might pose for the investing public and the legal community.⁷⁵ The problems posed by arbitration included: (1) limited ability to appeal;⁷⁶ (2) limited discovery procedures allowed in arbitration as compared to litigation;⁷⁷ (3) absence of a record;⁷⁸ (4) lack of explanation accompanying the

71. Lipton, *supra* note 58, at 882; *see also Arbitration Reform Hearings, supra* note 12, at 1 (statement of Hon. Edward J. Markey) (suggesting that two factors have increased number of cases being drawn to arbitration: (1) *McMahon* decision and (2) October 1987 market crash, in which individual investors suffered substantial losses).

72. The recent case of *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1219 (1995), decided by the Supreme Court in January, reiterates this notion. *See also supra* notes 11-14 and accompanying text (discussing policy of Arbitration Act).

73. *SEC Approves Arbitration Summaries, Other Revisions to Industry Programs*, 21 Sec. Reg. & L. Rep. (BNA) No. 19, at 683, 683 (May 12, 1989) [hereinafter *SEC Approves Arbitration Summaries*].

74. The SROs have worked together since 1977 to develop the uniform arbitration rules under the auspices of the Securities Industry Conference on Arbitration (SICA). *Securities Arbitration: How Investors Fare*, in *SECURITIES ARBITRATION* 1992, 19, 34 (PLI Corp. Law & Practice Course Handbook Series No. B4-7006, 1992) [hereinafter *How Investors Fare*]. SICA was formed in 1977 by the SEC to review the existing arbitration procedures. *Id.* at 34. SICA is composed of a representative from each SRO and the Securities Industry Association, and four individuals from the public. *Id.* In 1985, following *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), the SEC began an 18-month review of the fairness and efficiency of SRO arbitration programs, recognizing that it signalled the likely increase of arbitration of securities claims. *How Investors Fare, supra*, at 39. In 1987, after the *McMahon* decision, the SEC recommended changes to SICAs Uniform Code of Arbitration. After lengthy negotiations, the SEC approved proposed rules to govern the arbitration process. *Id.*

The AAA also responded to the pressure of reforming the arbitration procedures. *Id.* In October 1991, the AAA created the Securities Arbitration Task Force (SATF) made up of investors attorneys, representatives from various brokerage firms, and other knowledgeable persons. George H. Friedman, *The New Security Arbitration Rules of the American Arbitration Association*, in *SECURITIES ARBITRATION* 1993: PRODUCT, PROCEDURES, AND CAUSES OF ACTIONS 23, 39 (PLI Corp. Law & Practice Course Handbook Series No. B-819, 1993). The mission of the SATF was to improve the rules to make procedures more attractive to arbitration participants. *Id.* The Task Force met 11 times from November 1991, to February 1993, and the AAA rules were amended effective May 1, 1993. *Id.*

75. *See* Joseph L. Hood, Jr., *Arbitration and Litigation of Public Customers Claims Against Broker-Dealers After McMahon*, 19 ST. MARYS L.J. 541, 579-85 (1988) (arguing that as investors securities claims are referred massively to arbitration, many securities industry personnel may find "perceived advantages [of arbitration] are largely illusory"). *Id.* at 579.

76. Lipton, *supra* note 52, at 882; *see also Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 257-58 (1987) (Blackmun, J., dissenting).

77. Lipton, *supra* note 58, at 882.

78. Lipton, *supra* note 58, at 882; *see also McMahon*, 482 U.S. at 257-58 (Blackmun, J., dissenting).

decision;⁷⁹ and (5) absence of a rule of precedent or *stare decisis*.⁸⁰ As a result, the Securities Industry Conference on Arbitration (SICA) was created to represent all the arbitral forums in their evaluation of these and other concerns expressed about the effectiveness of arbitration.⁸¹

In a recent press release,⁸² the NASD announced the formation of its own Arbitration Policy Task force led by David S. Ruder, former SEC Chairman.⁸³ The NASD Task Forces authority, however, is limited to the NASD forum. SICA, however, represents all the SROs.⁸⁴ The Task Force is composed of nine members, including individuals with a lifelong commitment to public interest, SEC alumni, NASD Senior Executives, academicians, and arbitration practitioners.⁸⁵

The mission of the NASD Task Force is to ascertain "whether the arbitration process is meeting its goal of being an inexpensive, fast, and fair way to settle disputes."⁸⁶ The Task Force will study the evolution of the arbitration rules in terms of the stated goals of arbitration.⁸⁷ The Task Force will concentrate on the factors

79. Lipton, *supra* note 58, at 882; see also *McMahon*, 482 U.S. at 257-58 (Blackmun, J., dissenting) (arguing written opinions are needed for investor protection).

80. Lipton, *supra* note 58, at 882.

81. *How Investors Fare*, *supra* note 74, at 19.

82. *Former SEC Head to Chair NASD Task Force on Arbitration*, NATIONAL ASSN OF SECURITIES DEALERS PRESS RELEASE (NASD, Washington, D.C.) Sept. 9, 1994 [hereinafter *SEC Head to Chair Task Force*].

83. *Id.*

84. See *How Investors Fare*, *supra* note 74, at 34. SICAs duty is to evaluate arbitration procedures. See Lynnette Khalfani, *Two Securities-Industry Committees Vie for Right to Handle Arbitration Issues*, WALL ST. J., Sept. 2, 1994, at A5A. SICA members criticized the NASD Task Force for usurping SICAs historical role. *Id.* Members of the NASD defended the new Task Force by suggesting that SICAs role is limited and that the NASD, as the largest SRO forum, has unique and broader interests that the new Task Force will accommodate. *Id.*

85. The members are: David S. Ruder, Professor of Law, Northwestern University School of Law, and former Chairman of the SEC (1987-1989); J. Boyd Page, Partner at Page & Bacek and current President of Public Investors Arbitration Bar Association, member of the NASD National Arbitration Committee, member of the AAA Securities Advisory Committee, and member of the Board of Advisors of the *Securities Arbitration Commentator*; Francis O. Spalding, Adjunct Professor of Law at Golden Gate University School of Law, current Chairman of the NASD National Arbitration Committee, member of the AAA Securities Advisory Committee; Richard Speidel, the Beatrice Kuhn Professor of Law at Northwestern University School of Law and co-author of a five volume treatise entitled *Federal Arbitration Law: Agreements, Awards and Remedies Under the Federal Arbitration Act*; John Bachmann, Managing Partner of Edward D. Jones & Co.; John A. Wing, Chairman and Chief Executive Officer of The Chicago Corporation; Stephen L. Hammerman, Vice Chairman and General Counsel of Merrill Lynch & Co., Inc.; Stephen J. Friedman, former SEC Commissioner (1980-1981), former Executive Vice President and General Counsel for the Equitable Companies Incorporation and currently Senior Partner of Debevoise & Plimpton; and Linda D. Fienberg, Of Counsel with Covington & Burling and former Associate General Counsel and Executive Assistant to the Chairman of the SEC. *SEC Head to Chair NASD Task Force*, *supra* note 82.

86. Khalfani, *supra* note 84, at A5A (statement of Debora Masucci).

87. Khalfani, *supra* note 84, at A5A.

affecting the arbitration process that many contend have reduced its effectiveness and efficiency while increasing parties costs.⁸⁸ The Task Force will submit a final report with recommendations to the NASD in December of 1995.⁸⁹

Among the rules to be evaluated by the Task Force is NASD Rule 41, which describes the content of an award.⁹⁰ This Comment is designed to affect the Task Forces decision on whether to require arbitrators to state the reasons behind their awards or, in the alternative, to guide future evaluative teams.

II. ARBITRATORS ARE NOT REQUIRED TO STATE THE REASONS BEHIND THEIR DECISION

A. *Judicial Interpretation*

Case law undeniably establishes that arbitrators do not need to state the reasons behind their awards.⁹¹ Courts and commentators argue that requiring written opinions would undermine the policy behind arbitration, which is to provide a quick, efficient, and informal means of alternative dispute resolution.⁹² Courts generally feel it is not their role to interfere with the proper functioning of arbitration, especially given the express contractual agreement reached by the parties.⁹³

88. Khalfani, *supra* note 84, at A5A.

89. Khalfani, *supra* note 84, at A5A.

90. For similar rules promulgated by other arbitral forums regarding the content of arbitration awards, see *supra* note 18.

91. *E.g.*, *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *O.R. Sec., Inc. v. Professional Planning Assocs.*, 857 F.2d 742, 747 (11th Cir. 1988); *Kaiser Cement Corp. v. Fischbach & Moore, Inc.*, 793 F.2d 1100, 1102 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986).

92. See *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990) (arguing that requiring arbitrators to explain their reasons would defeat policy in favor of expedited procedures); *Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 750 (8th Cir.) (commenting that forcing arbitrators to explain awards would "subvert the proper functioning of the arbitral process") (citing *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1215 (2d Cir. 1972)), *cert. denied*, 476 U.S. 1141 (1986); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972) (noting that sacrifice in legal precision is necessary in order to preserve proper functioning of arbitration process); *Securities Arbitration Group Opposes Mandatory Written Opinions in All Cases*, 19 Sec. Reg. & L. Rep. (BNA) No. 51, at 1952, 1953 (Dec. 25, 1987) (arguing that requiring written opinion "could very well hinder, rather than enhance, the administration of arbitration proceedings in that it would be time consuming and burdensome and thus may discourage many qualified individuals from serving as an arbitrator"). See generally STEPHEN P. DOYLE & ROGER S. HAYDOCK, *WITHOUT THE PUNCHES, RESOLVING DISPUTES WITHOUT LITIGATION* 21-22 (1991).

93. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1218-19 (1995) (enforcing arbitration award of compensatory and punitive damages in securities dispute because parties' contract provided for both possibilities).

In *Sobel v. Hertz, Warner & Co.*,⁹⁴ the Second Circuit noted that public interest demands that arbitration remain an efficient and economical alternative.⁹⁵ The court held that requiring written opinions would be destructive to the system and would "diminish whatever efficiency the process now achieves."⁹⁶ Recently, in *Antwine v. Prudential-Bache Securities, Inc.*,⁹⁷ the Fifth Circuit acknowledged that arbitrators, pursuant to the arbitration rules, need not write a reasoned opinion.⁹⁸ The court held that American Arbitration Association (AAA) Rule 42, which requires an award to include a "statement" regarding the disposition of statutory claims, does not require the arbitration panel to provide a statement of reasons underlying the award.⁹⁹ The court in *Antwine* explicitly rejected the argument that the AAA had placed the need for comprehensive development of theory over notions of expediency and economy.¹⁰⁰

The SEC has agreed that written opinions would diminish the efficiency of arbitration.¹⁰¹ In a SEC report evaluating proposed rules submitted to the SEC by the New York Stock Exchange (NYSE), the American Stock Exchange (AMEX), and the NASD,¹⁰² the SEC stated that it did not believe it was in the public interest to require written opinions.¹⁰³

Courts continue to support the view that arbitrators need not provide a statement of reasons.¹⁰⁴ The justification is based primarily on a notion that private contracts between parties should be

94. 469 F.2d 1211 (2d Cir. 1972).

95. *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1215 (2d Cir. 1972).

96. *Id.*

97. 899 F.2d 410 (5th Cir. 1990).

98. *Antwine v. Prudential-Bache Sec., Inc.*, 899 F.2d 410, 413 (5th Cir. 1990).

99. *Id.* For other interpretations of the *Antwine* decision, see Frank E. Massengale & Marie Breaux Stroud, *Federal Securities Law, 5th Circuit Symposium*, 36 LOY. L. REV. 821, 823-25 (1990) (describing approval of unwritten decision as counter to concerns of investigating public); Jane E. Zangleir, *Securities Law, Fifth Circuit Survey*, 22 TEX. TECH. L. REV. 685, 693-95 (1991) (arguing that court's ruling is inconsistent with AAA's position on written opinions for statutory issues).

100. *Antwine*, 899 F.2d at 412 & n.2.

101. 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 Pre-dispute Arbitration Clauses, 54 Fed. Reg. 21,144, 21,151-52 (1989) [hereinafter SEC Order] (warning that it would be inappropriate to require written opinions because it "could slow the arbitration process and discourage many persons from participating as arbitrators").

102. *Id.* at 21,151.

103. *Id.*; see also *infra* notes 157-64 and accompanying text (discussing SEC's reasons for concluding that written arbitration would cause more harm than good). But see *infra* notes 224-36 and accompanying text (responding that written opinions are needed and would not be inefficient).

104. See generally *Antwine v. Prudential-Bache Securities Inc.*, 899 F.2d 410 (5th Cir. 1990); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 211 (2d Cir. 1972).

enforced under the terms specified in the contract.¹⁰⁵ Courts seem to be unwilling to interpret an additional provision for which the parties neither contemplated nor contracted. The development of a written opinion in arbitration decisions, therefore, ultimately must come from a different source.

B. Recent Regulatory Reforms to Arbitration Rules

A party appears before an SRO-sponsored arbitral forum through either a predispute arbitration agreement or an agreement reached after a dispute arises. In either case, parties contract to appear before the arbitral forum that they feel best represents their interests.¹⁰⁶ The rules and standards adopted by the SRO forum create the terms and give meaning to the contract between the parties. The SROs, therefore, periodically evaluate and reform their procedures to accommodate the needs expressed by parties.¹⁰⁷

Recent reforms to arbitration procedures indicate that the SROs are affirmatively responding to participants' desire to receive written opinions in certain circumstances.¹⁰⁸ The SROs are adding this to the contractual agreement reached by the parties. The first recent reform initiated by the SROs concerns "large and complex" disputes.¹⁰⁹ Before 1990, a party to an arbitration hearing had difficulty obtaining a written opinion. Under the arbitration rules, a party could obtain a written decision only if both parties and the arbitrator consented.¹¹⁰ The rules for large and complex cases, however, were amended in June 1990 to make it easier for parties to obtain written findings of fact and conclusions of law.¹¹¹ These amendments were approved by the NASD, NYSE, AMEX, and the AAA.¹¹² Under the new rules, only one party to a large and complex dispute needs to request a written decision.¹¹³ Also, if the arbitrators do not comply with the request, they will be replaced.¹¹⁴

105. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1218-19 (1995) (enforcing arbitration award of compensatory and punitive damages in securities dispute because contract provided for both options).

106. See *infra* note 257 and accompanying text (discussing ability of parties to choose among various arbitral forums pursuant to their arbitration clause).

107. See generally *Rules Changed to Make Written Findings Easier to Obtain in Larger Arbitrations*, 22 Sec. Reg. & L. Rep. (BNA) No. 22, at 816, 816 (June 1, 1990) [hereinafter *Rules Changed*].

108. See *id.* (discussing implementation of new rule requiring arbitrators to provide written findings of fact and conclusions of law in complex cases).

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

The types of cases qualifying for large and complex treatment will be determined by arbitrators on a case-by-case basis. Cases likely to qualify are class actions, cases involving multiple parties, cases dealing with a novel legal theory, and disputes involving potentially large sums of money.¹¹⁵ Commentators suggest that routine disputes, on the other hand, involve the simple application of commercial judgment for which a written opinion is unnecessary.¹¹⁶ In Part V, this Comment argues that the value of a written opinion extends much further than these commentators recognize.¹¹⁷

The second recent reform to the arbitration rules involves the printing of a one page summary award statement highlighting the results of arbitration proceedings.¹¹⁸ In May 1989, the SEC announced that the SROs will begin disseminating summary arbitration data outlining arbitrations conducted.¹¹⁹ The summary information will enable the investing public to review how arbitration cases are decided. The summary statements, however, cannot be used as precedent.¹²⁰ Although the summaries will not be published, they will be readily available to the public at individual SRO's public reference rooms.¹²¹ The summary award statement will include: (1) the name of the case; (2) a one paragraph summary of the dispute; (3)

115. See *Ruder Urges Rules to Allow Arbitrators to Refer Complex Cases to Court System*, 20 Sec. Reg. & L. Rep. (BNA) No. 28, at 1087, 1087 (July 15, 1988). In this report, Ruder commented that he expected the SROs to consider procedures to permit investor access to courts in certain situations. *Id.* He suggested these types of cases should be referred to the courts to permit the adherence of precedent to guide arbitrators and others on the interpretation of statutory provisions of the federal securities laws. *Id.* These types of complicated suits arguably would qualify for large and complex treatment as well. See also Perry E. Wallace, Jr., *Securities Arbitration After McMahon, Rodriguez and the New Rules: Can Investors Really be Protected?*, 43 VAND. L. REV. 1199, 1250 (1990) (arguing that arbitrators should consider referring class actions, cases challenging industry practices, and disputes involving extensive discovery to courts). The application of this rule is expected to be rare, but officials suggest its applicability "will be self-evident." *Rules Changed*, *supra* note 107, at 816.

116. See *Arbitration Reform Hearings*, *supra* note 12, at 99-100 (statement of Theodore Krebsbach) (arguing that vast majority of arbitrations involve only factual determinations of whether broker defrauded client through misrepresentation, churning or purchasing an unsuitable investment); see also Wallace, *supra* note 115, at 1249-50 & 1249 n.257 (suggesting that existing arbitration procedures are adequate for typical customer or broker complaints, but complex cases should be referred to courts); *infra* notes 265-70 and accompanying text (discussing this point in detail).

117. See *infra* notes 271-82 and accompanying text (suggesting that requirement of written opinions would promote policy behind securities laws).

118. See *SEC Staff Suggests Arbitration Group Adopt Use of One-Page Award Statement*, 20 Sec. Reg. & L. Rep. (BNA) No. 15, at 559, 560 (Apr. 15, 1988) [hereinafter *One-Page Award Statement*] (providing example of simplified public award statement).

119. See *SEC Approves Arbitration Summaries*, *supra* note 73, at 683 (noting that this change resulted from SEC meeting on rule changes proposed by NASD and others); NASD Rules § 41(f).

120. *One-Page Award Statement*, *supra* note 118, at 559.

121. See *SEC Approves Arbitration Summaries*, *supra* note 73, at 683.

damages or other relief requested; (4) damages or other relief awarded; and (5) a summary of other issues resolved, such as jurisdictional questions.¹²² The proposal for summary award statements was part of a package of proposals aimed at countering the public opinion that mandatory arbitration agreements were unfair to investors and that current disclosure was insufficient.¹²³ Here again, the SROs incorporated participants' concerns by adding new procedures that will be incorporated into the contractual agreement between the parties.

These recent developments suggest that the SROs are beginning to realize that a written decision, or at least a summary of factual issues, is desirable and necessary in certain situations. The SROs have taken an affirmative step by recognizing that the arbitration rules must adapt to incorporate current needs of parties. In this manner, the SROs are enabling parties to receive more freely written opinions by altering the rules that will ultimately create the terms of the pre-dispute arbitration contract. Written opinions should be required in all situations, however, because they enable all investors, not just those engaged in a large and complex dispute, to review past decisions and become better equipped to make sound investment decisions. Summary data, although a commendable step by the SROs, is limited in scope because the data only enables parties to evaluate sparse factual summaries. Routine opinions develop a coherent body of principles for arbitrators to follow when making decisions and, therefore, also enhance the ability to predict outcomes. Additionally, written opinions would enable parties to avoid wasting resources by allowing them to uncover potential predispositions of arbitrators.¹²⁴ Collectively, routine opinions would allow investors to be more informed, and to have confidence in the efficient operation of the securities markets.¹²⁵

122. SEC Approves Arbitration Summaries, *supra* note 73, at 683.

123. NYSE Proposes Highlighting Rights, Providing Summary Data on Arbitrations, 20 Sec. Reg. & L. Rep. (BNA) No. 46, at 1783, 1783 (Nov. 25, 1988) (detailing how changes are result of protracted discussion among several members of SICA).

124. Some commentators have warned that requiring arbitrators to submit written opinions would have detrimental effects. See *Arbitration Reform Hearings*, *supra* note 12, at 102 (statement of Theodore Krebsbach) (arguing that judging arbitrator's track record based on percentage of disputes decided for one side or another encourages "arbitrator shopping"); see also William C. Hermann, *Arbitration of Securities Disputes: Rodriguez and New Arbitration Rules Leave Investors Holding a Mixed Bag*, 65 IND. L.J. 697, 714 (1990) (suggesting that arbitrator shopping favors securities industry because it has best access to results of prior arbitration hearings generally not publicly available).

125. See *supra* notes 1-9 and accompanying text (discussing policy of Securities Act).

III. WRITTEN OPINIONS ACCOMPANYING ARBITRATION AWARDS WOULD ALLOW FOR "MEANINGFUL REVIEW"

A. *Vacatur of Arbitration Awards Is Limited*

A "meaningful review" of arbitration awards is essential in determining whether arbitration truly affords parties their substantive rights. Meaningful review entails an actual analysis by the court of the arbitrator's decision, instead of summary approval.¹²⁶ Without a written opinion, however, a court is unable to review meaningfully an arbitration decision, because it is difficult to uncover potential problems such as bias or mistake.¹²⁷

When investors decide to submit their claim to arbitration, they forgo the right to appeal because arbitration is a final decision that is binding on the parties.¹²⁸ If the party prevailing in arbitration has difficulty enforcing the arbitration decision, however, the Arbitration Act allows the party to ask the appropriate district court¹²⁹ to confirm the award.¹³⁰ Generally, the award must be summarily confirmed and "can only be denied if an award has been corrected, vacated, or modified in accordance with the Federal Arbitration Act."¹³¹ The losing party may also petition the court to vacate¹³² or modify¹³³ the arbitration decision, in which case the aforementioned standard must also be applied by the reviewing court.

The grounds upon which a court can vacate an arbitration award are, however, extremely limited.¹³⁴ Courts do not re-hear claims of

126. See *infra* notes 143-46 and accompanying text (explaining impossibility of judicial scrutiny of awards without written explanations by arbitrators).

127. See *infra* notes 134-56 and accompanying text (discussing grounds in which court can vacate arbitration awards).

128. See NASD Rules § 41(b) (stating that "all awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal").

129. 9 U.S.C. § 9 (1994). The appropriate district court is in the jurisdiction where the arbitration award was made. *Id.* Note that the parties have just one year from the date of the award to seek confirmation. *Id.*

130. *Id.*

131. *Ketchum v. Prudential-Bache Sec., Inc.*, 710 F. Supp. 300, 301 (D. Kan. 1989) (citing *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986)); see also *American Postal Workers Union v. United States Postal Serv.*, 682 F.2d 1280, 1285 (9th Cir. 1982) (stating that confirmation of arbitration award is required even in face of "erroneous findings of fact or misinterpretations of law"), *cert. denied*, 459 U.S. 1200 (1983).

132. 9 U.S.C. § 10 (1994).

133. *Id.* § 11.

134. See *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (stating that judicial review of arbitration award is even narrower than judicial review of trial proceedings), *overruled on other grounds by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Antwine v. Prudential-Bache Sec., Inc.*, 899 F.2d 410, 412 (5th Cir. 1990) (alluding to narrow scope of judicial review of arbitration awards). But see Jeffrey A. Winikoff & Maxine Streeter Bradford,

legal error committed by an arbitrator in the same manner as appellate courts review decisions of lower courts.¹³⁵ Instead, courts are bound to defer to the arbitration decision,¹³⁶ except under the statutory exceptions outlined in section 10 of the Arbitration Act.¹³⁷ The limited grounds on which a reviewing district court may vacate an arbitration award and direct a rehearing¹³⁸ occur when

(1) the arbitration award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators . . . ; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . , or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced; (4) the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.¹³⁹

Blue Sky Law: 1993 Survey of Florida Law, 18 NOVA L. REV. 45, 66-68 (1993) (suggesting that review may not be so limited because in *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067 (11th Cir.), *cert. denied*, 114 S. Ct. 600 (1993), court held that issue of res judicata should be left for court to decide). For discussion of res judicata as it applies to arbitration decisions, see *infra* notes 189-203 and accompanying text.

135. See *United Paperworks Int'l Union v. Misco Inc.*, 484 U.S. 29 (1987); see also *Forsythe Int'l v. Gibbs Oil Co.*, 915 F.2d 1017, 1020-22 (5th Cir. 1990) (stating that arbitration always contains legal and evidentiary shortcuts as compared to formal trials and reviewing court should resist correcting them without valid statutory basis for doing so); Hood, *supra* note 75, at 586 (discussing limited standard of review for arbitration award when compared to courts). Courts are bound by Rule 52(a) of Federal Rules of Civil Procedure to review trial courts findings of fact with "clearly erroneous" standard and conclusions of law "*de novo*," whereas courts may only vacate an arbitration award in narrow situations, pursuant to § 10 of Arbitration Act. *Id.*

136. See *McIlroy v. Paine Webber Inc.*, 989 F.2d 817, 820 (5th Cir. 1993) (noting that courts owe great degree of deference to ruling of arbitral bodies); see also *Anderson/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990) (commenting that congressional policy in promoting arbitration and efficiency requires that courts refrain from intruding into questions settled by arbitrators), *cert. denied*, 501 U.S. 1206 (1991).

137. 9 U.S.C. § 10 (1994).

138. *Id.* For an example of a court vacating an arbitration award, see *Tinaway v. Merrill Lynch & Co.*, 658 F. Supp. 576, 579 (S.D.N.Y. 1987) (holding that because arbitrator's reduction of award was so substantial it manifested "evident partiality" and thus fell within Code provision regarding vacation of arbitration awards).

139. 9 U.S.C. § 10 (1994). Case law applying 9 U.S.C. § 10 is plentiful. See, e.g., *McIlroy*, 989 F.2d at 820 (denying movant's attempt to vacate award on grounds that award was product of "gross mistake"); *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412-13 (11th Cir. 1990) (finding that judicial review of arbitration awards should be limited to statutory provision and not expanded to include "manifest disregard of law" standard); *O.R. Sec. v. Professional Planning Assocs.*, 857 F.2d 742, 747 (11th Cir. 1988) (stating that in order to vacate award on basis of arbitrator's manifest disregard of law, movants must show that arbitrators knew law and expressly disregarded it); *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 633-34 (10th Cir. 1988) (discussing view that courts should go beyond narrow scope of 9 U.S.C. § 10 to encompass "abuse of discretion" type standard when reviewing arbitral awards); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) (noting possibility that judicially created "manifest disregard of law" standard expands on reasons for vacating award enunciated in 9 U.S.C. § 10); *Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 749 (8th Cir.) (denying request to vacate award because no elements for judicial action under 9 U.S.C. § 10 were met), *cert. denied*, 476 U.S. 1141 (1986); *Ketchum v. Prudential-Bache Sec., Inc.*, 710 F.

In addition, some appellate courts have adopted the narrow "manifest disregard" of the law standard.¹⁴⁰ Manifest disregard of the law cannot be implemented without "meaningful review" because manifest disregard "means more than error or misunderstanding with respect to the law."¹⁴¹ "Manifest disregard must be made clearly to appear," and may be found "when arbitrators understand and *correctly state the law*, but proceed to disregard the same."¹⁴² Therefore, an inherent problem exists in applying the manifest disregard standard when arbitrators do not include a statement of reasons with the award. Without a written opinion, courts can neither analyze nor investigate the underlying rationale of the arbitration decision. Consequently, courts cannot engage in meaningful review. As a result the manifest disregard standard becomes hollow because courts are unable to ascertain whether or not arbitrators followed the law.¹⁴³ The court is left to assume that the arbitrator's decision was rational.¹⁴⁴ Consequently, arbitration awards are insulated from any

Supp. 300, 301 (D. Kan. 1989) (finding that arbitrator did not so imperfectly execute his powers so as to require vacating award).

140. See, e.g., *Jenkins*, 847 F.2d at 634 (defining manifest disregard standard as arbitral award that is contrary to essence of parties' contract); *Bobker*, 808 F.2d at 933 (holding that manifest disregard of law by arbitrators "clearly means more than error of misunderstanding with respect to the law"); *Stroh Container Co.*, 783 F.2d at 750 (cautioning that it is arbitrator's disregard of law, not interpretation of law, which is open to judicial review and must be overwhelmingly shown by appellant).

141. *Raiford*, 903 F.2d at 1412 (citing *Bobker*, 808 F.2d at 933). The *Raiford* court suggested that to prove that an arbitrator manifestly disregarded the law, a party must demonstrate that: (1) the error is so obvious that it would instantly be noticed by the arbitrator; (2) the arbitrator knew the law but proceeded to disregard it; and (3) the disregard must be apparent on the face of the record. *Id.* at 1412-13.

142. *Ketchum*, 710 F. Supp. at 303 (citing *Stroh Container Co.*, 783 F.2d at 750) (emphasis added).

143. *SEC Order*, *supra* note 101, at 21,151. In the SEC hearings, Public Citizen Litigation Group and Plaintiff Employment Lawyers Association advocated for written opinions by arguing that records of hearings were inadequate for a court to apply the "manifest disregard" standard. *SEC Order*, *supra* note 88, at 21,151; see also John L. Latham & Lynn Scott Magruder, *Securities Regulation, Annual Eleventh Circuit Survey*, 42 MERCER L. REV. 1519, 1540 (1991) (discussing *Raiford*, 903 F.2d at 1410, where court expressed doubt that manifest disregard standard could ever be met when arbitrators do not give their reasons); Massengale & Stroud, *supra* note 99, at 825 n.34 (arguing that without an opinion, there is nothing for courts to review). But see *Arbitration Reform Hearings*, *supra* note 12, at 100 (statement of Theodore Krebsbach) (arguing that there is no reason to suggest party cannot vacate award without written factual and legal conclusions because party can attach portion of arbitration transcript or relevant exhibits to support motion made to court).

144. *Valentine Sugars Inc. v. Donau Corp.*, 981 F.2d 210, 214 (5th Cir.) (stating that district court must affirm arbitration award, even without arbitrator's written statement of reasons, if award is "rationally inferable" from facts), *cert. denied*, 113 S. Ct. 3039 (1993); *Sobel v. Hertz, Warner & Co.*, 338 F. Supp. 287, 297 (S.D.N.Y. 1971), *rev'd*, 469 F.2d 1211, 1216 (2d Cir. 1972). Although the Second Circuit eventually reversed the district court's holding in *Sobel*, the district court, remanding the arbitration decision to the arbitrators for a statement of reasons, argued quite persuasively that without written opinions, courts would be left with a bare record and would have to assume that the arbitrators had correctly decided the dispute. *Id.*

reasonable judicial scrutiny.¹⁴⁵ Some courts have recognized this inherent conflict and have been unwilling to apply the manifest disregard standard.¹⁴⁶

Additionally, the useless application of the manifest disregard standard led some courts to recognize that, in particular situations, remand of the award to the arbitrator for clarification is proper.¹⁴⁷ For example, in *Sobel v. Hertz, Warner & Co.*,¹⁴⁸ the dispute involved an investor who appealed to the district court to vacate an unfavorable arbitration award. The district court remanded the proceeding to the arbitration panel to state the reasons for its decision.¹⁴⁹ The court noted that if arbitrators do not state the reasons behind an award, a court is unable to decide whether or not the arbitrators correctly applied the law.¹⁵⁰ On interlocutory appeal,¹⁵¹ however,

145. *Arbitration Reform Hearings*, *supra* note 12, at 53 (statement of Theodore G. Eppenstein) (suggesting that already limited right to appeal arbitration award, which is further diminished when arbitrators do not state reasons underlying award, eliminates any effective means of testing award's legal adequacy or remedial sufficiency). As one author noted, "[b]lanket approval of arbitration decisions rendered without an opinion . . . is currently chilling judicial review of arbitration decisions." Massengale, *supra* note 99, at 825 n.34 (commenting that, without written opinion, there is nothing for court to review and court becomes "rubber stamp" for arbitration decision).

146. *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990) ("This court has never adopted the manifest-disregard-of-the-law standard; indeed, we have expressed some doubt as to whether it should be adopted since the standard would likely never be met when the arbitrator provides no reasons for its award . . ."); *see also* *O.R. Secs., Inc. v. Professional Planning Assocs., Inc.*, 857 F.2d 742, 747 & n.4 (noting difficulty of showing that arbitrators expressly disregarded law supports argument against applying manifest disregard standard when vacating arbitration awards). *But see* *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 750 (8th Cir.) (refusing to vacate award by applying "manifest disregard" standard even though arbitrators failed to identify law applied or reasons used in reaching decision), *cert. denied*, 476 U.S. 1141 (1986).

147. *See, e.g.*, *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 894 (2d Cir. 1985) (stating that "remand for clarification . . . would not improperly require arbitrators to reveal their reasons, but would instead simply require them to fulfill their obligation" to justify award so that court can effectively review decision) (citing *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972)); *Olympia & York Fla. Equity Corp. v. Gould*, 776 F.2d 42, 45-46 (2d Cir. 1985) (recognizing that it is occasionally proper for courts to remand awards to arbitrators for better description of meaning or effect of award); *United Steel Workers of Am., Local 8249 v. Adbill Management Corp.*, 754 F.2d 138, 141 (3d Cir. 1985) (stating that "[a] remand for further arbitration is appropriate in only certain limited circumstances such as when an award is incomplete or ambiguous").

148. 338 F. Supp. 287 (S.D.N.Y. 1971), *rev'd*, 469 F.2d 1211 (2d Cir. 1972).

149. *Sobel v. Hertz, Warner & Co.*, 338 F. Supp. 287, 299 (S.D.N.Y. 1971), *rev'd*, 469 F.2d 1211 (2d Cir. 1972).

150. *Id.* at 293. In support of its position, the district court cited Justice Frankfurter's dissent in *Wilko v. Swan*, 346 U.S. 427, 440 (1953), *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), stating:

Arbitrators may not disregard the law But since their failure to observe the law "would . . . constitute grounds for vacating the award pursuant to . . . [the] Federal Arbitration Act" . . . appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however informal, whereby such compliance will appear, or want of it will upset the award.

Sobel, 338 F. Supp. at 293 n.18.

the appellate court reversed.¹⁵² The appellate court agreed both that the loss of legal precision is apparent and that consequently, a reviewing court is confronted with a dilemma absent a statement of reasons.¹⁵³ The court held, however, that remanding arbitration awards for clarification "would undermine the very purpose of arbitration which is to provide a relatively quick, efficient, and informal means of private dispute settlement."¹⁵⁴ Justifying the sacrifice of legal precision and the resulting loss of meaningful judicial review with only an "efficiency" argument¹⁵⁵ may no longer be sufficient because the costs and efficiency of arbitration are directly under attack.¹⁵⁶

B. The SEC Position

In the 1989 SEC Order of Proposed Rule Changes to the NYSE, the NASD, and the AMEX, the SEC concluded that arbitrators need not provide reasons for their awards.¹⁵⁷ The SEC concluded that the benefits of requiring a written opinion do not outweigh the concerns. First, the SEC suggested that the data to be included in the awards under the new proposals, together with the pleadings and record, should be sufficient for a court to apply the manifest disregard standard.¹⁵⁸ Second, the SEC commented that arbitrators may reach agreement on the dollar amount of an award without reaching a consensus regarding the reasons for the award.¹⁵⁹ Third, the SEC

151. See *Sobel*, 338 F. Supp. at 300 (noting that courts of appeal will tend to accept interlocutory appeal if question of law deals with unsettled issue) (citing *Goldlawr Inc. v. Heiman*, 273 F.2d 729, 731 (2d Cir. 1959)).

152. *Sobel*, 469 F.2d 1211, 1216 (2d Cir. 1972).

153. *Id.* at 1215.

154. *Id.* Other courts and commentators have agreed with this result. See *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 800 (9th Cir. 1961) ("[A]n award . . . which is one within the terms of the submission[] will not be set aside by a court for error in either law or fact Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. . . . A contrary course would be a substitution of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation" (quoting *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854))); see also *Lipton*, *supra* note 58, at 883 ("[I]t is reasonable to believe that if arbitration awards were appealable for the full range of reasons for which judicial decisions may be appealed, the efficiency of the arbitration mechanism would be reduced.").

155. See *infra* notes 209-36 and accompanying text (developing and responding to efficiency argument).

156. See *infra* notes 225-27 and accompanying text (discussing recent questions raised regarding costs and efficiency of arbitration).

157. SEC Order, *supra* note 101, at 21,151.

158. SEC Order, *supra* note 101, at 21,151 n.45. The SEC's leap is very optimistic and incorporates many assumptions without recognizing the strictness of the manifest disregard standard and the complexity a court faces when applying it. For a discussion of the standard, see *supra* notes 140-56 and accompanying text.

159. SEC Order, *supra* note 101, at 21,151.

advanced an efficiency argument by suggesting that requiring written opinions would slow down the process and discourage arbitrators from participating.¹⁶⁰ Finally, the SEC felt that the proposals had already changed the procedures significantly and it wanted to give both the SROs and potential parties time to adjust before implementing additional changes.¹⁶¹ The SEC suggested that this adjustment period would enable arbitrators to begin writing opinions independently if they saw the need.¹⁶²

The SEC's last proposition is overly optimistic and places too much faith in the honest initiative of arbitrators.¹⁶³ In reality, arbitrators are unlikely to expose themselves to judicial review by independently writing opinions.¹⁶⁴ For the sake of fairness and investor protection, the SEC should have required written opinions. It should not have delegated the responsibility to the good sense of arbitrators.¹⁶⁵

Written opinions and meaningful judicial review are needed because they reduce the likelihood that arbitrators will grant excessive awards that often are the result of arbitrators' propensity to become emotionally involved in the dispute.¹⁶⁶ Such a requirement would also reveal the legal standard on which the arbitrators based their decisions.¹⁶⁷ Without written opinions, the reviewing court is unable either to apply the limited grounds enumerated by Congress for vacatur of an arbitration award or to use the judicially created manifest disregard standard effectively.¹⁶⁸ As a result, arbitration awards are virtually insulated from judicial scrutiny.

This Comment does not suggest that arbitration should not be final and binding, nor does it advocate increasing avenues of judicial review. It does argue, however, that the limited basis for review that Congress outlined in Section 10 of the Arbitration Act should be

160. SEC Order, *supra* note 101, at 21,151-52.

161. SEC Order, *supra* note 101, at 21,151.

162. SEC Order, *supra* note 101, at 21,151. The SEC pointed to the developments in the labor area, where arbitrators voluntarily began writing opinions to better understand changes in the law. *Id.* For a brief discussion of labor arbitration, see *supra* note 20.

163. See Hermann, *supra* note 124, at 715 (stating that SEC's position puts great deal of faith in initiative of arbitrators).

164. Hermann, *supra* note 124, at 715; *Arbitration Reform Hearings*, *supra* note 12, at 53-59 (statement of Theodore G. Eppenstein).

165. See Hermann, *supra* note 124, at 715 (stating that arbitrators can use their complete discretion in choosing whether to write opinions).

166. Hermann, *supra* note 124, at 715. If arbitrators must justify the merits of a particular award through a written opinion, they would be less prone to emotional biases. Arbitrators would be careful to deliver an award that is warranted from the facts or applicable law.

167. Hermann, *supra* note 124, at 715.

168. Hermann, *supra* note 124, at 715.

applied effectively. Requiring written opinions would allow for such meaningful review of arbitration awards.

IV. LACK OF DEVELOPMENT OF FEDERAL COMMON LAW HAS IMPLICATIONS FOR THE SECURITIES INDUSTRY

A. *Unpredictability in Future Cases*

Arbitration does not create a uniform, consistent, and predictable body of federal common law because arbitrators need not state the reasons for their decision.¹⁶⁹ The limited right to appeal arbitration awards contributes to the lack of uniformity¹⁷⁰ because appellate courts rarely have the opportunity to verify an arbitrator's legal interpretation to facilitate the formation of appropriate decisionmaking standards.¹⁷¹ Such a process is incapable of meeting the basic objectives of the legal system because it fails to provide guidance for future decisions, produce jurisprudential cohesiveness, or provide grounds for judicial challenges.¹⁷² Moreover, written opinions enable litigators to prepare arguments properly and allow arbitrators to decide cases correctly and uniformly.¹⁷³

Although arbitration awards would not guarantee the outcome of a future dispute because they do not have precedential value,¹⁷⁴ collectively they would foster greater expectation and certainty by enabling investors to (1) become familiar with previous disputes involving similar issues, (2) learn the prevailing standards used for decisionmaking, and (3) acquire knowledge about the experience of and findings reached by particular arbitrators. Greater expectation and certainty would lead to better informed investors. Ultimately, better informed investors and greater predictability in decisionmaking would lead to more confidence in the arbitration system.¹⁷⁵

169. *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116, 123 (2d Cir. 1991) (Kearse, J., dissenting).

170. *Id.* at 124; Lipton, *supra* note 58, at 888; Wallace, *supra* note 115, at 1247-48.

171. Wallace, *supra* note 115, at 1248.

172. Wallace, *supra* note 115, at 1248.

173. See Lipton, *supra* note 58, at 888 (arguing that written decision accompanying prior arbitration is critical to assist arbitrators in decisionmaking process and to aid parties in preparation of future arbitration hearings); Wallace, *supra* note 115, at 1248 (suggesting that written opinions would develop body of federal common law that could help litigators prepare cases and arbitrators "render fair and consistent awards").

174. See *infra* note 177 (recognizing that arbitrators often are not constrained by law). Given this practice, an outcome can rarely be predicted on the basis of *stare decisis*.

175. SEC Order, *supra* note 101, at 21,152 (mentioning statement made by Shearson Lehman that investor confidence would grow if arbitration awards were made public).

B. Insufficient Assurance That the Federal Securities Laws Are Being Interpreted Properly

Since the landmark decision of *Shearson/American Express Inc. v. McMahon*, which held that predispute arbitration agreements arising under the Securities Act are enforceable, arbitrators have increasingly assumed the primary role in interpreting federal securities laws.¹⁷⁶ Their determinations, however, are not bound by any legal precedent.¹⁷⁷ Arbitrators' decisions are based on what makes sense under the circumstances, thereby rendering a sort of rough justice.¹⁷⁸ Requiring written opinions would not only promote greater accountability, but also would ensure that arbitrators properly interpret and apply federal securities statutes.¹⁷⁹

Furthermore, forcing arbitrators to justify their conclusions would promote accountability and accuracy in decisionmaking which, in turn, would allow courts to review arbitrators' legal interpretations, thereby resulting in more effective judicial review of arbitration decisions.¹⁸⁰ As the Supreme Court in *Wilko* warned, arbitrators

176. See Lipton, *supra* note 58, at 899 (concluding that securities customers have had little choice but to submit all claims to arbitration in wake of *McMahon* and *Rodriguez*). After *McMahon* and *Rodriguez*, predispute agreements, which tend to favor arbitration as the primary forum for these disputes, were routinely enforced. The likelihood of a court deciding a case arising under the federal securities laws subsequently decreased. See *id.* at 888 (arguing that wholesale movement toward arbitration impairs ability of court system to provide precedential guidance because there are fewer cases litigated).

177. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967) (Black, J., dissenting) (arguing that because arbitrators do not need to be lawyers, they are often unqualified to decide legal issues, and even if they happen to be qualified, they are never bound by precedent); see also *Arbitration Reform Hearings*, *supra* note 9, at 85-86 (statement of Theodore A. Krebsbach) (noting that arbitrators are not constrained by statutory elements, and may issue awards as equity requires); Wallace, *supra* note 115, at 1248 (stating that "arbitrators are most likely not to perform in-depth legal research: their basis for awards generally rest on what is 'fair,' 'just,' or 'sensible' under the circumstances"); G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 633 (1988) (concluding that arbitrators are not bound by law but instead are free to grant any award that they deem "just and equitable" under circumstances). For an interesting article discussing the standard that arbitrators use to reach their decisions see David A. Lipton, *The Standard on Which Arbitrators Base Their Decisions: The SRO's Must Decide*, 16 SEC. REG. L.J. 3 (1988).

178. *Arbitration Reform Hearings*, *supra* note 12, at 138 (statement of Theodore A. Krebsbach) (stating that arbitrators do not necessarily know who is being truthful after hearing all evidence, and as result they "do what makes sense under the circumstances").

179. See Massengale, *supra* note 99, at 825 (arguing that because arbitrators have assumed federal courts' role of interpreting federal securities laws, they must be accountable for their decisions so that courts can determine whether principles developed over 50 years of jurisprudence have been observed).

180. See Massengale, *supra* note 99, at 823-25 (discussing *Antwine v. Prudential-Bache Sec.*, 899 F.2d 410 (5th Cir. 1990), and suggesting that, contrary to court's decision, active judicial review is essential for development of accurate legal principles); see also *supra* notes 127-56 and accompanying text (analyzing need for written decision to promote meaningful review of arbitration decisions).

under the federal securities statutes are incapable of determining the legal meaning of such statutory terms as "burden of proof," "reasonable care," or "material fact."¹⁸¹ The Court feared that the district court was incapable of reviewing determinations made by the arbitrators without a statement of reasons and a record.¹⁸² Today, interpretations of the legal meaning and effect of the securities laws are just as complex as such statutory terms. Thus, without a statement of reasons, courts may experience the same concerns in arbitrators' abilities. Requiring a written opinion would ensure that the federal securities laws are interpreted properly, thereby protecting investors and industry participants by allowing them to pursue claims and assert defenses adequately.

C. Federal Laws Will Remain Static and Cause Uncertainty Among Investors

Federal securities laws are constantly evolving to accommodate the expanding industry. Whereas a judicial opinion permits public understanding of new developments and their place among the securities laws, new issues that arise in arbitration cannot be handled in a consistent and predictable manner without a statement of reasons. Because arbitrators must resolve disputes involving new areas like derivatives, a statement of reasons accompanying an arbitration award would foster common understanding, uniformity, and the development of new theory.¹⁸³ Likewise, as innovative lawyers introduce new claims that fit within the parameters of the Exchange Act, such developments do not spread throughout the industry because each arbitration is decided individually, without a statement of reasons to guide future decisions.¹⁸⁴ The lack of guidance from prior arbitral proceedings has a severe impact on the ability to deter future fraudulent conduct. In practice, if arbitrators fail to articulate reasons for their conclusions, the securities laws will not consistently handle new strains of criminality that do not fit neatly within the causes of action created by Congress in the securities laws. Such

181. *Wilko v. Swan*, 346 U.S. 427, 436 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

182. *Id.* at 436-37.

183. See Hool, *supra* note 4, at 815-16 (arguing that causes of action under Rule 10(b) are constantly evolving to include, for example, insider trading and other new issues of fraud, and without written opinions common law in this area would not continue to evolve); see also Lipton, *supra* note 52, at 889 (discussing arbitration's inability to resolve new legal questions because of loss of consistency and precedent resulting from universal use of predispute arbitration clauses).

184. See Hool, *supra* note 4, at 815-16 (arguing that written opinions, like those developed in judicial forum, establish valuable precedent necessary for § 10(b)'s evolution).

inconsistency in application may reduce the securities laws' deterrent effect.¹⁸⁵

If the lack of guidance provided by arbitration decisions continues, the credibility of the arbitration system will be jeopardized.¹⁸⁶ Complainants may begin to believe that an arbitrator's failure to give reasons for a decision indicates an unresolved decision or confusion about the application of the law.¹⁸⁷ Denying the arbitration system the means to develop standards with which to guide future decisions while giving it the important task of enforcing the federal securities laws, thwarts the very purpose for which arbitration was created.¹⁸⁸ Thus, arbitrators should be required to provide a statement of reasons with an arbitration award.

D. No Assurance That a Subsequent Suit Will Be Precluded

Without the development of common law via written decisions, there is no guarantee that doctrines such as *res judicata* (claim preclusion)¹⁸⁹ and collateral estoppel (issue preclusion)¹⁹⁰ will be

185. See Hool, *supra* note 4, at 816-17 (maintaining that published opinions are essential for § 10(b) to accomplish its deterrence function).

186. See Lipton, *supra* note 52, at 889 (suggesting that credibility problems develop in system without precedential guidance).

187. See *Sobel v. Hertz Warner & Co.*, 338 F. Supp. 287, 296-97 (S.D.N.Y. 1971) (stating that parties may interpret arbitrators' failure to give reasons as indecision), *rev'd*, 469 F.2d 1211 (2d Cir. 1972). Judge Pollack, the district court judge had argued "that parties who choose arbitration do not expect a 'legally perfect result'" but do expect a rational and judicious result. A dismissal without a stated rationale may undercut the legitimacy of the process. *Sobel*, 338 F. Supp. at 296-97. Although the Second Circuit reversed the district court's holding, the appellate court acknowledged the judge's opinion regarding the implications of a lack of written reasons. *Sobel*, 469 F.2d at 1214. The appellate court reversed, in part, based on efficiency and deference to the arbitration process. *Id.*; see also Hool, *supra* note 4, at 817 (stating that without dissemination that comes with fairness of having published opinions, market professionals hear investor claims may be questioned); *infra* notes 232-47 and accompanying text (discussing what long-term impact lack of confidence in arbitration process may have on securities industry).

188. The policy behind the federal securities laws cannot be fulfilled because parties are not protected and confidence is not created.

189. *Seagoing Uniform Corp. v. Texaco, Inc.*, 705 F. Supp. 918, 920-24 (S.D.N.Y. 1989). The test for the application of *res judicata* is:

(1) whether rights established in prior action would be destroyed or impaired by prosecution of second action,

(2) whether substantially the same evidence is presented in the second action,

(3) whether the two suits involved infringement of the same right, and

(4) whether the two suits arose out of the same facts.

Id.

190. *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985) (citing *Deweese v. Town of Palm Beach*, 688 F.2d 731, 733 (11th Cir. 1982)). Collateral estoppel is invoked when the

(1) issue at stake is identical to one in preceding litigation;

(2) issue was actually litigated in preceding litigation; and

(3) issue was critical and necessary to prior judgment.

Id.

applicable to subsequent arbitration suits.¹⁹¹ If an arbitration hearing is truly considered equal in its binding effect to a court's final decision, when an arbitration dispute is resolved between two parties, a subsequent court proceeding between the same parties concerning the same issues and facts should be barred through res judicata.

A similar principle would seem to apply when a private party, not involved in prior litigation between two other parties, later sues one of the parties to the initial action on an issue already resolved by the arbitrators. The question then is whether the party to the initial arbitration proceeding may use the arbitrator's findings to collaterally estop the subsequent party from relitigating the same issue in court. Until recently, courts generally afforded arbitration awards both res judicata and collateral estoppel effect.¹⁹² Although it remains established that a prior arbitration hearing may have res judicata effect on a subsequent dispute arising out of the same facts and same parties,¹⁹³ this is not always the case for collateral estoppel.¹⁹⁴

191. For discussions of the applicability of res judicata and collateral estoppel to prior securities arbitration awards, see SECURITIES ARBITRATION 1989, A PRACTITIONERS GUIDE TO SECURITIES ARBITRATION 241-46 (1989); Durrer, *supra* note 2, at 353-54 n.101; C. Edward Fletcher III, *Learning to Live With the Federal Arbitration Act, Securities Litigation in a Post-McMahon World*, 37 EMORY L.J. 99, 116-22 (1988); C. Edward Fletcher III, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393, 431-35 (1987); Shell, *supra* note 177, at 639-75; Willingham, *supra* note 12, at 427-32.

192. See *Maidman v. O'Brien*, 473 F. Supp. 25, 30-34 (S.D.N.Y. 1979) (holding that arbitrator's decision collaterally estopped court from hearing investor's allegations of violations of federal securities laws and libel); *James L. Saphier Agency v. Green*, 190 F. Supp. 713, 718-21 (S.D.N.Y.) (concluding that arbitrator's decision was res judicata and plaintiff was collaterally estopped from relitigating issues), *aff'd*, 293 F.2d 769, 774 (2d Cir. 1961). For a discussion of these and other issues, see *Privatizing Securities Disputes*, *supra* note 191, at 432.

193. See *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir. 1985) (stating that res judicata can apply to arbitration awards); Shell, *supra* note 177, at 641 & n.93 (stating that courts have long understood that arbitration decisions can have res judicata effect) (citing *New York Lumber & Wood-Working v. Schneider*, 24 N.E. 4 (1890) and *Brazil v. Isham*, 12 N.Y. 9 (1854)); see also RESTATEMENT (SECOND) OF JUDGMENTS § 84 (1982) providing that

(1) Except as stated in Subsections (2), (3), and (4), a valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.

(2) An award by arbitration with respect to a claim does not preclude relitigation of the same or a related claim based on the same transaction if a scheme of remedies permits assertion of the second claim notwithstanding the award regarding the first claim.

(3) A determination of an issue in arbitration does not preclude relitigation of that issue if:

(a) According preclusive effect to determination of the issue would be incompatible with a legal policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specially expeditious; or

(b) The procedure leading to the award lacked the elements of adjudicatory procedure prescribed in § 83(2).

The already uncertain preclusive effect of issues decided by arbitrators is exaggerated by the arbitrators' practice of granting only one-line awards.¹⁹⁵ The absence of collateral estoppel in arbitration may have several repercussions. First, arbitration findings may be duplicated thereby wasting both arbitration and court participants' time.¹⁹⁶ Second, the party being sued for the second time will be forced to waste resources by repeatedly defending its position.¹⁹⁷ Last, the finality of arbitration would be compromised.¹⁹⁸

(4) If the terms of an agreement to arbitrate limit the binding effect of the award in another adjudication or arbitration proceeding, the extent to which the award has conclusive effect is determined in accordance with that limitation.

194. RESTATEMENT (SECOND) OF JUDGMENTS § 84 (1982).

195. See *Tamari v. Bache & Co.*, 637 F. Supp. 1333, 1336-37 (N.D. Ill. 1986) (refusing to invoke collateral estoppel because one-line award did not reveal whether defendant or affiliated company, who was not party, had committed alleged wrongs); *Ufheil Constr. Co. v. Town of New Windsor*, 478 F. Supp. 766, 768-69 (S.D.N.Y. 1979) (refusing to apply collateral estoppel to any of alleged breaches of construction contract because court could not determine which provisions had formed basis for arbitration award because arbitrators did not state which provisions had been breached), *aff'd*, 636 F.2d 1204 (1980); see also *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222 (1985) (stating that "it is far from certain that arbitration proceedings will have any preclusive effect on the litigation of nonarbitrable federal claims"). The doubt regarding the preclusive effect of arbitration may require some reformulating in light of more recent Supreme Court cases. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481-82 (1989) (holding that because Arbitration Act favors arbitration, courts are required to "rigorously enforce" pre-dispute agreements); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227-38 (1987) (enforcing arbitration agreement under Securities Act and stating that courts are not required to resolve such claims). Collectively, these cases not only signaled the end of most judicial due process litigation of securities disputes but they also negated the arguments raised against res judicata and collateral estoppel in arbitration.

Much of the debate about res judicata and collateral estoppel in arbitration dealt with a bigger underlying issue—the denial of parties' right to redress their grievances in the court system. See *Wilko v. Swann*, 346 U.S. 427, 436 (1953) (holding parties could not be forced to waive their right to judicial proceeding prior to dispute), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The due process question was raised in *Wilko* because arbitration lacked many judicial safeguards. But now that the Supreme Court has held that arbitration is an adequate method of resolving securities disputes and demanded that all predispute arbitration agreements be enforced, see *Rodriguez de Quijas*, 490 U.S. at 485-86, almost every broker/dealer dispute will be handled in arbitration. See *supra* note 71 (arguing that the combination of *McMahon* and *Rodriguez* decisions will direct all claims arising out of predispute arbitration agreements to arbitration). Thus, the underlying arguments raised against applying res judicata and collateral estoppel to arbitration decisions seem to have lost weight. As a result, this change in attitude may cause arbitration awards to have greater preclusive effect.

196. It is wasteful for participants to adjudicate the same issue twice simply because it is in a different forum. For a discussion of collateral estoppel, see *supra* note 191.

197. Resources wasted include the litigants' and the taxpayers' money used to operate the courts. See generally National Ass'n of Securities Dealers, Securities Regulation in the United States (1992) (addressing costs included in arbitration).

198. One of the attractive features of arbitration is that time is saved without sacrificing finality. See NASD Rules § 41(b) (stating that "all awards ordered pursuant to this code shall be deemed final and not subject to review or appeal"). If arbitration is merely duplicated, the result would be an increase in time and money. Inevitably, arbitration without finality offers less advantages for participants.

Nevertheless, a court is unable to hold that arbitration awards are legally binding without a statement of reasons. For example, in *O'Neil v. Merrill Lynch, Pierce, Fenner & Smith*,¹⁹⁹ the court refused to invoke collateral estoppel of an arbitration award because, without a written opinion, the court could not determine whether the arbitrator had applied a preponderance of the evidence standard or a clear and convincing evidence standard.²⁰⁰ Other courts have used similar reasoning.²⁰¹ Requiring written opinions would reduce the inefficient, duplicative expenditure of resources by affording all arbitration awards final and binding effect. As one author stated, "The preclusive effect of arbitration will increase as better records of arbitration proceedings are kept and more detailed awards opinions are written."²⁰² Many courts simply refuse to infer which issues were and which were not decided by the arbitrators; requiring a statement of reasons to accompany an arbitration award would allow arbitration to be the binding tool it was created to be.²⁰³

V. POLICY REASONS FOR REQUIRING WRITTEN OPINIONS

A. *Requiring Written Opinions Would Not Cause the Problems Predicted*

Commentators who oppose a requirement that arbitrators include a written reasoned decision with arbitration awards have advanced numerous arguments in support of their position. Opponents contend that requiring a written opinion would compromise the efficiency of arbitration,²⁰⁴ discourage qualified individuals from serving as arbitrators,²⁰⁵ reduce the confidentiality associated with arbitration,²⁰⁶ and create unnecessary work because most disputes involve simple factual and legal issues.²⁰⁷ To the contrary, however, a statement of reasons would more effectively promote the policy

199. 654 F. Supp. 347 (N.D. Ill. 1987).

200. *O'Neil v. Merrill Lynch, Pierce, Fenner & Smith*, 654 F. Supp. 347, 352-53 (N.D. Ill. 1987).

201. See *supra* note 195 (discussing cases where courts refused to apply collateral estoppel when arbitrators had not issued written decisions).

202. Willingham, *supra* note 12, at 432.

203. See NASD Rules § 41(b) (stating that "all awards rendered pursuant to this code shall be deemed final and not subject to review or appeal").

204. See *supra* note 92 (arguing that efficiency will be reduced with statement of reasons).

205. See *infra* note 237 (discussing idea that written opinions will discourage arbitrators).

206. See *infra* note 255 (stating that confidentiality of arbitration may be compromised with written opinion).

207. See *supra* note 116 (suggesting that typical broker disputes involve simple factual issues for which written opinion is unnecessary).

underlying the federal securities laws both by reducing bias in the system and restoring the credibility of the securities markets.²⁰⁸

1. *Efficiency*

Commentators argue that requiring arbitrators to write opinions would compromise the efficiency of the arbitration process.²⁰⁹ This argument stems from arbitration's original purpose—to exist as an inexpensive and expeditious alternative to the courts.²¹⁰ The logic of the argument has two main parts. First, opponents suggest that written opinions would unnecessarily waste time, money, and effort.²¹¹ Second, opponents argue that written opinions would provide opportunities for the losing party to attack the outcome of the arbitration, thereby converting arbitration into “the commencement, not the end, of litigation.”²¹²

a. *Waste of time, effort, and money*

Commentators argue that, while arbitration lacks procedural safeguards present in court proceedings,²¹³ participants agree to arbitrate, fully appreciating the implications of their decision.²¹⁴ Commentators argue that parties resort to arbitration to receive a quick, efficient, and less costly, though less legally precise, settlement of their dispute.²¹⁵ They conclude that a written opinion as a

208. See *supra* notes 2-9 and accompanying text (discussing policy behind federal securities laws).

209. See *supra* note 92 (discussing proposition that efficiency of arbitration will suffer if statement of reasons is required).

210. See *supra* notes 11-13 and accompanying text (stating intent that arbitration be efficient alternative to courts).

211. See *supra* note 92 (discussing notion that money and time will be wasted if statement of reasons is required).

212. *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 800 (9th Cir. 1961) (citing *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854)); see also *Arbitration Reform Hearings*, *supra* note 12, at 100 (statement of Theodore A. Krebsbach) (arguing that unlimited appeals would allow parties to unilaterally extend proceedings).

213. See *In re Sobel*, 469 F.2d 1211, 1214 (2d Cir. 1972) (commenting on lack of legal precision inherent in arbitration); *Arbitration Reform Hearings*, *supra* note 12, at 53 (statement of Theodore G. Eppenstein) (arguing that arbitration benefits must be balanced against loss of constitutional rights to due process; trial by jury; finding of facts and conclusions of law; federal pleading, discovery, and evidentiary rules; risk of collateral estoppel; and appeal).

214. See Deborah B. Oliver, *Arbitration of Securities Claims: Policy Considerations for Keeping Investor-Broker Disputes Out of Court*, 1987 COLUM. BUS. L. REV. 527, 541-46 (1987) (discussing investors' vulnerability to brokers' overreaching). There is some evidence demonstrating that investors do not voluntarily choose to arbitrate but instead are compelled to arbitrate by predispute agreements, a reflection of the securities industry personnel's bargaining power. *Id.*

215. See *Arbitration Reform Hearings*, *supra* note 12, at 83-84 (statement of Theodore A. Krebsbach) (noting that arbitration's advantages over litigation include lower costs, speed, and efficient management of litigation's elements).

procedural safeguard is neither desirable nor necessary because investors voluntarily choose to sacrifice more specific procedures for greater efficiency.²¹⁶ According to this logic, requiring a written opinion would waste both time and resources, resulting in inefficient proceedings.

b. Revealing areas for attack by losing parties

Another efficiency argument that opponents raise posits that written opinions would enable losing parties to attack the decision and thereby convert arbitration into the first step in a long process of dispute resolution.²¹⁷ Commentators suggest that many arbitrators are neither lawyers nor trained legal experts.²¹⁸ Instead, they are arbitrators because of their sound business judgment.²¹⁹ If such non-lawyer arbitrators are required to write decisions, opponents argue, then the losing party, in its appeal to a court, could target less legally precise aspects of the opinion as proof of injustice.²²⁰ They contend that this would equate arbitration with the court process in terms of duration and ultimately reduce the advantages of arbitral forums.²²¹

2. Written opinions would not compromise the efficiency of arbitration

The efficiency arguments advanced by opponents fail to explain how a written opinion would significantly add to the time or cost of arbitration hearings. Their argument assumes the fact to be proven. The reality is that parties need written opinions and such opinions would neither waste time and money²²² nor convert arbitration into the first step in complex dispute resolution.²²³

216. This assumes that written opinions serve only as a procedural safeguard. See *infra* text accompanying notes 278-94 (discussing idea that written opinions promote policy behind securities laws).

217. *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 800 (9th Cir. 1961).

218. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967) (Black, J., dissenting); *Arbitration Reform Hearings*, *supra* note 12, at 99 (statement of Theodore A. Krebsbach); *Shell*, *supra* note 177, at 631.

219. *Wallace*, *supra* note 115, at 1248.

220. *Hermann*, *supra* note 124, at 715; *Arbitration Reform Hearings*, *supra* note 12, at 53-54 (statement of Theodore G. Eppenstein).

221. See Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 484-85 (1981) (arguing that requiring written opinions would result in loss of arbitration's advantages).

222. See *infra* notes 224-30 and accompanying text (arguing that written opinions would improve investor confidence without increasing time or money).

223. See *infra* notes 232-36 and accompanying text (arguing that finality of arbitration will not be altered with written opinion).

a. *Written opinions would not waste time, money, and resources*

A written opinion would not compromise the efficiency of arbitration by wasting time, money, or resources. Instead, such opinions would increase public confidence in the arbitration process and improve the overall integrity of the system. Many participants in arbitration do not knowingly forgo the procedural safeguards inherent in the court system for greater efficiency in arbitration.²²⁴ In fact, evidence suggests that some parties are dissatisfied with the arbitration process and believe that it does not adequately protect their rights.²²⁵ Such discontent with the arbitral process recently sparked the formation of the NASD Task Force to reevaluate arbitration procedures.²²⁶ Requiring arbitrators to provide a summary of reasons for their decisions is precisely the procedural safeguard needed to reform public opinion about the perceived fairness and costs of the failing arbitration system.²²⁷

Furthermore, a brief or informal statement of reasons accompanying an arbitration award would not significantly add to the costs or the time required for hearings. Neither costs nor time would increase because, during deliberations, arbitrators already openly discuss their opinions regarding issues and arguments raised by the parties.²²⁸ Given that deliberations typically involve a broad exchange of ideas

224. See *supra* note 214 (stating that some parties to arbitration are compelled to agree to arbitrate).

225. In *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986), Chief Judge Lay argued that despite the historical reputation of arbitration as a simple, inexpensive, and expeditious means of dispute resolution, parties resorting to arbitration are discovering not only that the process is complex, expensive, and time consuming, but that the results are much different than the "fairer" results achieved in court. *Id.* at 751 n.12. These "private and untrained 'judges,'" he argued, are unable to apply the law appropriately. *Id.* Justice Blackmun also recently questioned the efficiency of arbitration in his dissent in *McMahon*, arguing that arbitration's effectiveness has not improved since the days of *Wilko v. Swan*. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 259 (1987) (Blackmun, J., dissenting) (noting that as in the days of *Wilko*, written opinions and records are not required, arbitrators are not bound by precedent, and judicial review remains severely limited); see also Note, *Arbitrability of Claims Arising under the Securities Exchange Act of 1934*, 1986 DUKE L.J. 548, 552-54 (comparing arbitration's reduced evidentiary rules, substantive differences, lack of discovery rules, and limited judicial review with those of courts).

226. SEC Head to Chair Task Force, *supra* note 82; Khalfani, *supra* note 84, at A5A.

227. For a comparison of costs and time efficiency of arbitration and litigation, see Hermann, *supra* note 124, at 707 (discussing Delloitte, Haskins & Sells survey performed per NYSE's request). Although arbitration remains less costly than a full court hearing, it is hardly inexpensive. Essentially, the Delloitte survey revealed that the average arbitration costs \$8,000 as compared to \$20,000 for a court proceeding. *Id.* Additionally, the average arbitration takes 434 days as compared to 599 days for a court hearing. "While this data does show a pronounced difference, one would expect arbitration, for all its supposed 'speed,' to be even faster." *Id.*

228. See *supra* note 10 (discussing typical arbitration as it proceeds to award).

and conclusions,²²⁹ it is unlikely that a one to three paragraph written summary of reasons would add significantly to the costs and time needed for the hearing. While a complex legal opinion is not necessary, some written indication of why one party prevailed over the other would be a step toward procedural and substantive fairness without unnecessarily wasting time, money, or resources.

b. Written opinions would not reveal areas for attack by losing parties

Opponents of written opinions suggest that written opinions will convert arbitration into a series of legal proceedings by unveiling avenues for appeal.²³⁰ It can also be persuasively argued, however, that routine written opinions would not create new tactics for appeal. For example, requiring a written opinion would not change the finality of arbitration.²³¹ Specifically, arbitration will remain binding,²³² subject to being vacated only through the limited processes permitted by section 10 of the Arbitration Act.²³³ In all situations in which arbitration decisions can not be vacated, courts will still be forced to defer to arbitrators' judgment.²³⁴ Requiring written opinions, therefore, would not create new avenues for appeal. Written opinions instead would enable courts to properly apply the limited judicial review that Congress intended for arbitration.²³⁵

229. See Robert S. Clemente, *Securities Arbitrator Training: Managing the Arbitration Process* 17-20 (New York Stock Exchange, 1992-94). Clemente describes the deliberation procedure in his manual outlining the basic principles of the arbitrator training process. Deliberations begin immediately after the hearing is concluded. *Id.* at 18. Arbitrators are advised to speak openly about their opinions of the issues and to consistently consider the factual and legal arguments raised by the parties. *Id.* Once a decision is reached by a majority of arbitrators, the award is prepared. *Id.* at 19.

230. See *supra* note 212 and accompanying text (criticizing appellate procedures because of likelihood that proceeding would be extended).

231. See *supra* notes 134-37 and accompanying text (discussing courts' limited ability to review and vacate arbitrators' decisions).

232. NASD Rules § 41(b).

233. 9 U.S.C. § 10 (1994).

234. See *supra* note 136 and accompanying text (noting courts' deference to arbitration decisions).

235. See *supra* notes 127-56 and accompanying text (discussing need for meaningful review of arbitration decisions). Written opinions would enable courts to determine effectively whether arbitrators were biased or committed fraud, mistake, or other errors by having the relevant facts before them. *Id.*

3. *The services of qualified arbitrators*

a. *Qualified arbitrators would be discouraged from serving*

Opponents of written opinions argue that if courts target areas for appeal in arbitration decisions, many qualified arbitrators would be discouraged from serving.²³⁶ Commentators are concerned that arbitrators would fear becoming involved in lengthy legal disputes that may ultimately place blame on an arbitrator for bias or mistake.²³⁷ Such unfavorable attention, they assert, would irreparably taint the arbitrator's reputation in the business community.²³⁸ Thus, opponents contend that qualified individuals would be discouraged from serving as arbitrators.

b. *Qualified arbitrators would not be discouraged from serving*

The argument that qualified arbitrators would be deterred from service assumes that arbitrators' opinions can easily be attacked.²³⁹ The arbitral forum confers immense authority on arbitrators and courts struggle to uphold this authority.²⁴⁰ Moreover, arbitrators enjoy substantial immunity from liability. Therefore, fear of liability is not likely to deter individuals from serving as arbitrators.²⁴¹ Arbitrators are exempt, for example, from liability for failure to use care or skill.²⁴² They are not exempt, however, when their conduct constitutes fraud or other misconduct for which the law provides a penalty.²⁴³ Given arbitrators' broad immunity from liability, it is not

236. See Zanglier, *supra* note 99, at 696 (noting SEC's concern that requiring publication of reasons would "discourage potential arbitrators from serving" (quoting *Securities Arbitration: McMahon, Rodriguez, and Beyond*, 22 REV. SEC. & COMM. REG. (S&P) No. 20, at 218 (Nov. 22, 1989))); see also SEC Order, *supra* note 101, at 21,151-52 (arguing that benefits of requiring written opinions do not outweigh concerns about slowing down arbitration process and discouraging arbitrators from serving).

237. SEC Order, *supra* note 101, at 21,151-52.

238. SEC Order, *supra* note 101, at 21,151.

239. See *supra* notes 134-46 and accompanying text (discussing insulation of arbitration decisions from judicial scrutiny due to limited availability of vacatur and widespread deference by appellate courts).

240. See *supra* note 136 (citing cases that note high degree of judicial deference given to arbitration decisions).

241. SECURITIES INDUSTRY CONFERENCE ON ARBITRATION (SICA), ARBITRATOR'S MANUAL 32 (May 1992) [hereinafter SICA ARBITRATOR'S MANUAL].

242. SICA ARBITRATOR'S MANUAL, *supra* note 242.

243. SICA ARBITRATOR'S MANUAL, *supra* note 242. Bribery is an example of the type of misconduct for which arbitrators are held responsible. See SICA ARBITRATORS MANUAL, *supra* note 242.

arbitrators that may be deterred. Instead, private parties may be deterred from suing arbitrators as they must meet a difficult burden: proving that the arbitrator's conduct was fraudulent.

Moreover, the arbitration process may actually benefit if some arbitrators are discouraged from serving. As one author suggests, bias is often sustained in a system that does not require a statement of reasons to accompany an award.²⁴⁴ The author further contends that arbitrators may have bias because they are "judges" specifically *chosen* by and *paid* by the parties themselves to resolve their disputes.²⁴⁵ Instead of deciding between right and wrong, it is argued, arbitrators often render compromise awards to satisfy the parties with the hope they will be chosen to arbitrate subsequent suits.²⁴⁶

Economic reward is not the only plausible explanation for compromise awards.²⁴⁷ Other benefits, such as preserving a business relationship, may help explain the phenomenon.²⁴⁸ Additionally, compromise awards can be attributed to the failure of arbitrators to reach a unanimous conclusion regarding the reasons for allowing a particular party to prevail.²⁴⁹ In any event, requiring written opinions would decrease compromise awards because arbitrators would fear vacatur for bias or partiality.²⁵⁰ As a result, parties may retain arbitrators who are more honest, qualified, and less influenced by selfish temptations.²⁵¹ This result would not be destructive to the process, but instead would preserve the integrity of arbitration as an efficient alternative to the court process.

244. Shell, *supra* note 177, at 634.

245. Shell, *supra* note 177, at 634.

246. Shell, *supra* note 177, at 634. An example of a compromise award is one in which neither party wins. Instead, the award appeases both parties by affording each some sort of victory.

247. An arbitrator typically earns around \$150 per day, which is often only \$20 per hour. Interview with Egon Guttman, *supra* note 20.

248. See Shell, *supra* note 177, at 634 (suggesting that some arbitrators may render compromise awards in order to preserve outside business relationships). Since many arbitrators are themselves business people, they may not want to find against a party that they do business with. In such a situation, a compromise award may save the business relationship.

249. See SEC Order, *supra* note 101, at 21,151 (describing phenomenon of arbitrators reaching consensus regarding damage award before agreeing on grounds for award).

250. See *supra* notes 138-42 and accompanying text (discussing both grounds for which district court can vacate arbitration award under Arbitration Act and judicially created manifest disregard standard).

251. See Shell, *supra* note 177, at 634 (suggesting that arbitrators who render compromise awards may do so out of pecuniary interest).

4. Confidentiality

a. Decline in confidentiality

Other opponents of requiring written opinions²⁵² insist that the confidential nature of arbitration, which has historically been a private forum,²⁵³ would be sacrificed if arbitrators are forced to issue published, written opinions.²⁵⁴ The loss of privacy, opponents argue, may deter parties from suing due to a fear of being labeled by the investing community as a fickle, litigious investor.²⁵⁵

b. Confidentiality would not be compromised unless essential to preserve the proper functioning of the arbitration process

Commentators fail to address why confidentiality is a favored aspect of arbitration. The fact that arbitration proceedings have always been conducted privately is not dispositive. Even if confidentiality is a desired goal, there is no evidence that mandating written opinions would eliminate that end. First, each individual SRO would likely have its own practice; some may require the release of the parties' and arbitrators' names while others may not. In fact, a typical predispute arbitration clause enables the parties to choose among numerous arbitral forums.²⁵⁶ Individual parties could, therefore,

252. SEC Staff Suggests Arbitration Group Adopt Use of One-Page Award Statement, 20 Sec. Reg. & L. Rep. (BNA) No. 15, at 559, 559 (Apr. 15, 1988).

253. See SICA ARBITRATOR'S MANUAL, *supra* note 242, at 32-33 (detailing confidentiality of all aspects of arbitration).

254. SEC Staff Suggests Arbitration Group Adopt Use of One-Page Award Statement, *supra* note 252, at 559; see also *Arbitration Reform Hearings*, *supra* note 12, at 102 (statement of Theodore A. Krebsbach) (suggesting that both claimants and respondents may object to public disclosure); SEC Order, *supra* note 101, at 21,152 (reporting SEC's decision to preserve confidential nature of arbitration hearings).

255. Such investors may be blacklisted from the investment community because brokers may not want to open a new account for a client with a reputation for being a complaining, fickle investor.

256. See Wallace, *supra* note 115, at 1203 n.12. The following is an example of a typical predispute arbitration agreement:

The undersigned agrees, and by carrying an account for the undersigned you agree, that except as inconsistent with the foregoing sentence, *all controversies which may arise between us concerning any transaction or the construction, performance or breach of this or any other agreement between us, whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration* in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc., the Board of Governors of the New York Stock Exchange, Inc., or the Board of Governors of the American Stock Exchange, Inc., as you may elect. If you do not make such election by registered mail addressed to [the brokerage firm's legal and compliance department in New York City], within five days after demand by [the brokerage firm] that you make such election, then [the

contract for the right to arbitrate in a forum that protects their unique interests.

Moreover, recent changes to arbitration rules have already reduced arbitration's confidential nature.²⁵⁷ For example, recent amendments make it easier for parties in large and complex disputes to receive written findings and conclusions, and summary arbitration data is now required.²⁵⁸ These changes sacrifice some confidentiality for the greater goals of clarity and fairness.²⁵⁹ Evidence suggests that releasing the names of arbitrators would not only promote greater accountability in decisionmaking,²⁶⁰ but it would also decrease arbitrators' tendency to deliver excessive awards²⁶¹ by instilling fear that courts will vacate awards.²⁶² Additionally, it would enable parties to discover arbitrators' potential predispositions.²⁶³ Lastly, releasing claimants' names, in addition to those of arbitrators, may allow opposing parties and presiding arbitrators to expose frivolous suits by noticing trends of investor harassment.

5. *Simple issues*

a. *Typical disputes involve simple issues*

Finally, opponents argue that written opinions are unnecessary because typical disputes involve simple factual issues, not complex legal interpretations.²⁶⁴ This argument assumes that written opinions serve only to clarify decisions. In fact, clarification is only one

brokerage firm] may make such election. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

Id. (emphasis in original).

257. See *supra* Part II.B (discussing recent amendments to arbitration rules).

258. See *supra* Part II.B (discussing recent amendments to arbitration rules).

259. *Rules Changed*, *supra* note 107. For large and complex disputes, the documents and award statement would be made public. *Id.* Summary award statements will not be published but will be readily available in individual SRO reference rooms. *NYSE Proposes Highlighting Rights, Providing Summary Data on Arbitrations*, 20 Sec. Reg. & L. Rep. (BNA) No. 46, at 1783 (Nov. 25, 1988).

260. See Massengale, *supra* note 99, at 825 n.33 and accompanying text (asserting that greater accountability is needed for arbitrators and citing supporting journal articles).

261. See Hermann, *supra* note 124, at 715 (arguing that written opinions would deter "emotionally-driven equitable awards").

262. See 9 U.S.C. § 10 (1994); see also *supra* notes 138-42 and accompanying text (examining court's ability to vacate arbitration awards under manifest disregard standard).

263. See *supra* notes 140-42 and accompanying text (discussing manifest disregard standard and vacating awards).

264. See *Arbitration Reform Hearings*, *supra* note 12, at 99-100 (statement of Theodore A. Kresbach) (arguing that vast majority of arbitrations involve factual determinations of whether broker defrauded client).

benefit to be derived from written opinions.²⁶⁵ Opponents argue further that arbitrators do not make law, but only solve typical disputes between parties, which generally involve money or property rights.²⁶⁶ Thus, arbitrators are effective because they apply their sound commercial judgment.²⁶⁷ In fact, opponents offer evidence that under the circumstances involved in a typical dispute, arbitrators' failure to write opinions may actually benefit the complaining investor by reducing the formality of the proceeding.²⁶⁸ Requiring written opinions in simple disputes, commentators conclude, is unnecessary and would merely waste valuable time and money.²⁶⁹

b. Written opinions are needed and would promote the intent behind the securities laws

The logic that written opinions are unnecessary because arbitrated disputes ordinarily involve clear factual issues is flawed for two reasons. First, arbitrators are often called upon to render complex damage awards that incorporate punitive damages.²⁷⁰ Punitive damages punish the offender while concurrently deterring others who might subsequently engage in the harmful activity.²⁷¹ These damages supplement compensatory damages by redressing the reckless and oppressive nature of the act.²⁷² Written opinions are essential because if present and future offenders do not know why punitive damages have been awarded, they will be unable to correct their conduct.

Arbitrators' ability to award punitive damages, however, has historically been debated.²⁷³ In fact, until the 1995 decision of

265. See *infra* notes 283-94 and accompanying text (discussing additional benefits derived from requiring written opinions).

266. See *supra* note 116 and accompanying text (discussing simple, factual nature of most arbitrations).

267. Wallace, *supra* note 115, at 1248-49.

268. See Wallace, *supra* note 115, at 1248-49 (noting effects of fewer technical pleading requirements and more responsive approach to alleged broker misconduct); see also Hermann, *supra* note 124, at 707 (arguing that investors benefit from less formal nature of arbitration proceedings) (citing Hood, *supra* note 75, at 584). But see *infra* note 288 (suggesting that investors may prevail but not to extent they feel they are entitled to recover).

269. See *supra* note 116 and accompanying text (noting that most arbitrations involve simple factual situations); SEC Order, *supra* note 101, at 21,151-52 (arguing that requiring written opinions would slow down arbitration process).

270. Interview with Egon Guttman, *supra* note 20. See generally Margaret Pedrick Sullivan, Comment, *The Scope of Modern Arbitral Awards*, 62 TUL. L. REV. 1113 (1988).

271. RESTATEMENT (SECOND) OF TORTS § 908(1) (1965).

272. 22 AM. JUR. 2D *Damages* § 731 (1988).

273. See Sullivan, *supra* note 270, at 1130 (noting lack of uniformity among states regarding availability of punitive damages in arbitral forum). Compare *Garry v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (N.Y. 1976) (holding that arbitrator lacks authority to award punitive damages even

Mastrobuono v. Shearson Lehman Hutton, Inc.,²⁷⁴ the Supreme Court had not expressly authorized arbitrators to assign such awards.²⁷⁵ In *Mastrobuono*, the Court held that arbitrators may grant punitive damages, under New York law, when consistent with the terms of a contractual agreement, even though New York state law affords only courts this power.²⁷⁶ The *Mastrobuono* decision accentuates the need for written arbitration opinions because arbitrators consistently deliver substantial punitive damage awards. Accordingly, the arbitral forum's proper functioning demands mandatory written opinions.

Second, the argument that written opinions are unnecessary because most disputes involve simple issues fails to consider Congress' intent in formulating the federal securities laws.²⁷⁷ This argument seems to be based on the assumption that written opinions only serve to explain complex legal and factual issues, an assumption that is incorrect. Small investors, like large corporations involved in large and complex disputes,²⁷⁸ deserve an explanation of why arbitrators granted judgment for or against them. Congress' goal behind the securities laws of promoting investor protection and increasing confidence in the markets demands such an accounting.²⁷⁹

Congress passed the Securities Act and the Exchange Act to protect investors from securities industry abuse. These Acts sought to promote full and fair disclosure and restore confidence in the securities industry.²⁸⁰ Furthermore, via the Federal Arbitration Act, Congress sought to provide a fair tribunal for complainants to redress their rights.²⁸¹ An arbitration award that does not require a statement of reasons may fail to advance the policy of either the Securities Act or the Exchange Act. The securities laws may be thwarted because investor confidence may not be fostered. Similarly, the Federal Arbitration Act may be defeated because the arbitral forum may not be a fair and efficient alternative to the courts.

where agreed upon by parties) with *Lee v. Chica*, 983 F.2d 883 (8th Cir. 1993) (maintaining that arbitrators may award punitive damages under federal law).

274. 115 S. Ct. 1212 (1995).

275. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212, 1218 n.7 (1995).

276. *Id.* at 1219. For a discussion of the ability of arbitrators to award punitive damages under New York law prior to *Mastrobuono*, see Hood, *supra* note 75, at 579-81.

277. See *supra* notes 2-9 and accompanying text (discussing policy behind securities laws).

278. See *supra* notes 110-16 and accompanying text (discussing in detail innovation for large and complex disputes).

279. See *supra* notes 2-9 and accompanying text (discussing policy behind Securities Act and Exchange Act).

280. See *supra* notes 2-9 and accompanying text (discussing policy behind Securities Act and Exchange Act).

281. See *supra* notes 11-13 and accompanying text (discussing policy behind Arbitration Act).

B. Written Opinions Would Provide Better Protection for Investors

1. Present investors

A present investor who seeks to redress his or her rights through arbitration often feels "psychologically unsatisfied" without a statement of reasons accompanying the award.²⁸² The current rule destroys investors' perceptions of having had their fair day in court or, alternatively, their fair day in arbitration.²⁸³ For example, on a typical new account form,²⁸⁴ potential investors must identify their investment objectives. Investment objectives are ranked on a continuum from income to investment grade to growth to speculation, with income representing the lowest risk and speculation, the highest.²⁸⁵ Suppose that A, a typical investor, opens an account wanting a moderately risky investment. Accordingly, A chooses investment grade as the investment objective. Later, following a sudden increase in income, A changes the investment objective to speculation.

Throughout the entire investment period, A's investment declines and A suffers a total loss of \$10,000. A then alleges that security X was unsuitable for A and that broker B is liable for giving inappropriate advice which caused A ultimately to purchase a speculation security.²⁸⁶ A seeks \$10,000 in compensation for this unsuitable and

282. Interview with Egon Guttman, *supra* note 20.

283. The hypothetical was derived from a combination of conversations with Egon Guttman and case law involving claims of unsuitability. Interview with Egon Guttman, *supra* note 20; *see, e.g.,* Brown v. E.F. Hutton Group, Inc., 991 F.2d 1020, 131-33 (2d Cir. 1993) (holding that evidence could not support finding that limited partners have relied on Hutton's assurances of suitability); O'Connor v. R.F. Lafferty & Co., 965 F.2d 893, 900 (10th Cir. 1992) (holding unsuitability claim not proven because no basis to conclude broken intentionally or recklessly defrauded client); Franks v. Cavanaugh, 711 F. Supp. 1186 (S.D.N.Y. 1989) (holding investor failed to show that securities purchased were unsuitable).

284. *See* PaineWebber Incorporated Business Trust/New Account Form [hereinafter Business Trust/New Account Form] (on file with *The American University Law Review*). An investor must provide a broker with a variety of information upon opening a new account at a brokerage firm. Such information includes: general personal information, fiduciary information, trading history, power of attorney, investment objectives, and net worth. *Id.*

285. Business Trust/New Account Form, *supra* note 284.

286. *See* Clark v. John Lamula Investors, Inc., 583 F.2d 594, 600-01 (2d Cir. 1978). An investor has three ways to pursue a claim of unsuitability. *Id.* First, investors can allege a violation of § 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder. Second, investors can claim a breach of fiduciary duty. Third, investors can allege a violation of NYSE Rule 425, the "know your customer" rule. *Id.* Under any of these options, the plaintiff must prove: (1) that the security purchased was not suited to the buyer's investment objectives, (2) that the defendant knew or reasonably should have known that the security was unsuitable for the buyer, (3) that the defendant nevertheless recommended or purchased the unsuited security, (4) that the defendant acted with scienter, and (5) that the buyer reasonably relied on

inappropriately high risk investment. The suit proceeds to an arbitration hearing at which A is awarded only \$5,000 because the arbitrator discovered that A changed his investment objective to speculation during a period of the security's decline. During the period that A had an objective of investment grade, A lost only \$5,000 and, therefore, the arbitration award reflects only this amount.

Once A changed the objective to speculation, the initial investment advice rendered by the broker corresponded to A's desire for a moderately risky investment. Without a written explanation from the arbitrators who awarded A the money, A is left feeling cheated and psychologically unsatisfied.²⁸⁷ Investor A may not recall changing objectives or, alternatively, may fail to see the reasoning that the arbitrators used to reach their decision. As a result, A fails to understand why the award did not cover the full \$10,000 loss. A leaves the arbitration hearing feeling cheated. Ultimately, A may lose confidence in the "proper and fair" functioning of the securities market.²⁸⁸ Such a result directly contradicts Congress' and the Supreme Court's mandate.

2. *Future investors*

The protections afforded to future investors, as required by the securities laws, also are inadequate absent a statement of reasons accompanying arbitration awards. Recall that the original objective of the Securities Act was to remedy abuses that occurred during the 1929 market crash.²⁸⁹ This Act was specifically created to protect investors by promoting full and fair disclosure. Accordingly, in order to make informed decisions regarding whether to invest with a certain broker, brokerage firm, or in a certain bond fund, future buyers need full and fair disclosure of how arbitrators previously resolved certain issues. Investors are simply unable to make informed decisions without reviewing written opinions of prior arbitration hearings which affect the area they wish to pursue. Furthermore, investors may

defendant to its detriment. *Id.*

287. For another illustration of the results of this phenomenon, see *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 261 n.20 (1987) (Blackmun, J., dissenting) (suggesting that statistics showing that investors are favored in arbitration are misleading because of failure to account for damages received in relation to amount to which investors felt they were entitled).

288. See *Arbitration Reform Hearings*, *supra* note 12, at 64 (statement of Theodore G. Eppenstein) (suggesting that proposals to enhance arbitration's fairness should be seriously considered because public confidence in marketplace, along with American ideal that disputes should be fairly handled, are at stake).

289. Securities Act of 1933, ch. 38, § 1, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77bbbb (1994)).

question the securities industry's credibility if they attribute the arbitrators' failure to provide reasons for their awards to confusion and an inability to arrive at a valid decision.²⁹⁰ Ultimately, investors may conclude that the securities market is not a safe place to invest their money.

3. *Implications for the entire securities industry*

Over time, the fears of present and future investors may culminate in an overall decline in investments in the securities industry. Investor confidence is essential to the successful operation of the securities markets and "if we destroy the breadth of the marketplace by alienating individual participants, we may endanger the capital formation process so basic to our financial way of life."²⁹¹

Investors already have the overall impression that their claims are being heard in a forum composed of individuals sympathetic to the securities industry.²⁹² This belief, combined with the stereotype that the securities industry is composed of wealthy, greedy, and devious businesspersons, will likely cause investor confidence, which Congress sought to revive with the federal securities laws, to become obsolete. Eventually, current and potential securities buyers may invest in other financial markets that they believe to be more credible and dependable. An industry that neither inspires the confidence of investors nor offers guarantees of protection will lose a vital source of capital.²⁹³ To the extent that arbitration does not support the goals of the federal securities laws, the rules need to be reformed.

VI. RECOMMENDATIONS FOR THE NASD TASK FORCE

Arbitration is a valuable tool to facilitate the handling of securities disputes. Written opinions would not alter the unique and favored aspects of the forum. Instead, written opinions would enable arbitration to continue to be the efficient and economically conservative alternative that it was created to be. NASD Rules § 41, NYSE Rule 627, AMEX Rule 618, and AAA Rules § 42, which focus on the

290. See *supra* notes 186-87 and accompanying text (discussing potential loss of credibility in securities industry).

291. *Arbitration Reform Hearings*, *supra* note 12, at 1 (statement of Hon. Edward J. Markey). This remark referred primarily to the issuing of securities, not trading, which normally results in arbitration. *Id.* In the context of this article, however, the overall message seems to apply to trading securities as well.

292. *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 260-61 (1987) (Blackmun, J., dissenting).

293. See *Arbitration Reform Hearings*, *supra* note 12, at 1 (statement of Hon. Edward J. Markey) (voicing concern that alienating individual investors will result in loss of basic capital formation process necessary to U.S. economy).

content of the award statement, all should be amended to include the following:

I. Arbitrators shall be required, in all situations, to write a statement of reasons which will accompany their award except as provided in section I(a);

(a) When both parties to the arbitration shall consent, the arbitrator shall not be required to write a statement of reasons.

(b) Arbitrators shall use their sound business judgment to decide arbitration decisions and be required to include this business judgment in writing the opinion. If, in reaching their decisions, arbitrators relied on legal precedent, statute, or another legal authority, arbitrators shall be required to include the authority relied upon and how it served as precedent.

The proposed amendment to the aforementioned rules would establish a *per se* rule whereby arbitrators would be required to provide a written opinion with their decisions. Such an opinion, however, could be waived with the consent of both parties. By amending the rules in this manner, securities regulators could adequately protect both sophisticated and unsophisticated investors. Ordinary investors will be protected because they will know why they were victorious or why they were not. They will better understand the implications of investing and hopefully, via written decisions, become more knowledgeable about the markets. This result is entirely consistent with Congress' intent in enacting the securities laws. Additionally, institutional investors and securities industry personnel, who are typically more sophisticated, will realize that arbitration disputes frequently involve few complex legal issues. These sophisticated investors will get the result they desire from arbitration without excess time or money expended by arbitrators. This result is also consistent with the protection that Congress intended the federal securities laws to provide. Together, both unsophisticated and sophisticated investors would retain confidence in the securities industry by sensing that the arbitral forums have their unique interests in mind.²⁹⁴

While arbitrators should be required to write opinions, they should not be required to write complex legal opinions. Such a requirement would contradict the Arbitration Act's goals by equalizing the procedural aspects of arbitration and those of the courts.²⁹⁵ Arbitra-

294. See *supra* notes 287-94 and accompanying text (discussing need for confidence in order to maintain integrity of markets).

295. For a discussion of this issue, see generally Lipton, *supra* note 177 (arguing that SROs must decide whether arbitrators should use their legal or commercial judgment); Hermann, *supra* note 124, at 715-16 (discussing possibility of different standards employed by different

tors should be required, however, to write reasoned factual determinations which include any precedent relied on to reach the decision.

Requiring factual determinations would facilitate courts' meaningful review of awards to check for arbitrator bias or error,²⁹⁶ especially when a court is reviewing punitive damage awards.²⁹⁷ Factual opinions would also generate customs and practices in decisionmaking which would result in more uniformity and predictability among arbitration awards.²⁹⁸ Although arbitration awards would not have precedential value, the creation of a consistent body of factual and occasionally legal determinations would incorporate changing norms, standards, and practices for future generations to follow.²⁹⁹ For all of the aforementioned reasons, the SROs should incorporate written opinions into the rules governing their forums.

CONCLUSION

A written opinion requirement could be achieved in a number of ways. First, this Comment introduced a method that would allow individual SROs to reform the arbitration rules governing their forum. In fact, the innovations for large and complex disputes and the summary arbitration data suggest that the SROs are already moving in that direction by facilitating the exchange of information between arbitrators and parties.³⁰⁰ Second, reform could come from the judiciary. Courts could essentially read in a requirement for written opinions when interpreting arbitration rules in the context of cases adjudicated in the judicial forum. This is unlikely, however, given the emphasis that courts generally place on the sanctity of the contract negotiated between the parties.³⁰¹ Third, using its broad oversight authority, the SEC could promulgate a requirement that arbitrators write a statement of reasons. The SEC essentially has the power of

arbitrators, including business judgment and legal standards). Whether arbitrators should follow a legal or commercial judgment standard, however, is beyond the scope of this article.

296. See *supra* notes 127-56 and accompanying text (discussing concept of meaningful review).

297. See *supra* notes 275-76 and accompanying text (discussing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S. Ct. 1212 (1995), where Court held that arbitrators may grant punitive damages even when state law says otherwise).

298. See *supra* notes 169-75 and accompanying text (discussing need for uniformity and predictability in decisionmaking).

299. See *supra* notes 183-88 and accompanying text (arguing that published decisions are necessary for common, uniform understanding of securities laws). This would enable arbitrators to incorporate changes into the federal securities laws for the industry's benefit. *Id.*

300. See *supra* notes 110-23 and accompanying text (discussing various reforms to arbitration rules, including some which facilitate exchange of information).

301. See *supra* notes 31-72 and accompanying text (discussing courts' treatment of parties' contracts relating to arbitration agreements).

approval over any proposed rules, as well as the authority to mandate the adoption of any arbitration rules it deems necessary for the protection of parties' statutory rights.³⁰² Finally, Congress could enact legislation requiring arbitrators to include written opinions.

Irrespective of which entity ultimately mandates written opinions, the first step is to acknowledge the benefits that such a requirement would generate. Written opinions accompanying arbitration awards would offer many advantages for investors. Opponents of written opinions believe that the need to preserve efficiency, maintain qualified arbitrators, quickly resolve simple issues, and promote confidentiality, outweigh any benefits that investors and the securities markets would receive. But the benefits do outweigh the costs. Most importantly, a statement of reasons would effectuate Congress' intent behind the Securities Act and the Exchange Act, while recognizing the Federal Arbitration Act's special policy favoring arbitration. Moreover, a written opinion would promote meaningful review of arbitration awards; stimulate the development of federal common law that is uniform, consistent, and predictable; reduce bias among arbitrators; and contribute to the securities industry's future economic development.

302. See 15 U.S.C. § 78s(c) (1994) (authorizing SEC to "abrogate, add to, and delete from" SROs' rules); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987) (noting broad authority of SEC to oversee and regulate arbitration rules); Securities Regulation in the United States, NASD 8-9 (1992) (detailing statutory source of SEC's rulemaking power).

