Securities Industry Association

July 18, 2003

Barbara Z. Sweeney
NASD
Office of the Corporate Secretary
1735 K Street, NW
Washington, D.C. 20006-1500

Re: NASD Special Notice to Members 03-29 -- Comment on Proposed Chief Compliance Officer and Chief Executive /Officer Certification Requirement

Dear Ms. Sweeney:

The Securities Industry Association ("SIA")[1], the SIA Compliance & Legal Division[2] and The Bond Market Association[3] (collectively, the "Associations") appreciate the opportunity to provide comments in response to NASD Special Notice to Members 03-29 ("Notice"), which solicits input from interested parties on proposed amendments and related interpretative material to NASD Rule 3010. Specifically, NASD proposes to require each member firm's Chief Executive Officer ("CEO") and Chief Compliance Officer ("CCO") to certify jointly, on an annual basis, to the adequacy of the firm's compliance and supervisory policies and procedures. As stated in the Notice, the primary objective of the proposed certification is "to enhance investor protection by

[1] The Securities Industry Association, established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker's Association, brings together the shared interests of more than 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 700,000 individuals. Industry personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2002, the industry generated $222 billion in domestic revenue and $356 billion in global revenues. (More information about SIA is available on its home page: www.sia.com.)

[2] The Compliance and Legal Division's members are primarily compliance and legal personnel associated with Securities Industry Association member firms. Among its purposes are enhancement of the integrity and reputation of the securities industry through compliance and legal education and improved communication with industry regulatory bodies.

[3] The Bond Market Association represents securities firms and banks that underwrite, trade and sell debt securities, both domestically and internationally. More information about the Association is available on its Internet home page at http://www.bondmarkets.com.

encouraging senior management to focus increased attention to the member's compliance and supervisory systems and by fostering regular interaction between business and compliance officers."

I. Overview

The Associations applaud and echo NASD's sentiment that "comprehensive compliance and supervisory systems constitute the bedrock of effective securities industry self-regulation and the primary strata of investor protection." We have long held that senior management attention and commitment to internal controls and supervisory systems are essential to the overall integrity of our member firms, as well as the maintenance of the public's trust in our capital markets. We therefore welcome NASD's efforts to foster meaningful and joint consideration by senior Compliance and business professionals of supervisory and compliance programs, initiatives or issues. Not surprisingly, many firms already have embedded within their business models effective, customized processes that facilitate the type of regular and substantive interaction described in the Notice.

Accordingly, the Associations support a rule amendment that ensures all member firms embrace and advance the goals of the rule proposal. Unfortunately, we believe that the current form of the proposal may not achieve the intended results, and indeed is fraught with potential procedural difficulties and unintended consequences.

A far more effective approach, which we explore below in Part III of this letter, would be to mandate a regular communication forum, such as documented periodic meetings between the firm's senior management and appropriate Compliance professionals for purposes of assessing the firm's overall supervisory and compliance posture. Such meetings, along with an articulated framework of key topics of discussion for the meetings, will better realize the NASD's stated objectives in a substantive manner than the proposed certification. Accordingly, we respectfully request that NASD reconsider the current proposal and give serious consideration to the alternative solutions we offer below.

II. Summary of Proposed Rule Change

NASD proposes to amend NASD Rule 3010 and adopt accompanying interpretive material (IM-3010-1) to require each member firm to designate a CCO who, together with that firm's CEO, must sign a three-part Annual Compliance and Supervisory Certification that attests to the adequacy of the firm's supervisory and compliance systems. Specifically, the CCO and CEO must certify that the member firm has in place adequate compliance and supervisory procedures reasonably designed to comport with applicable NASD rules, MSRB rules and federal securities laws and rules. Although NASD explains that the certification extends only to the adequacy of the firm's supervisory and compliance systems -- and not generally to the implementation or operation of such systems -- NASD cautions that the certification carries an implicit representation that systems have been audited and tested for efficacy.

The CEO and CCO also must certify that they have consulted with or otherwise relied on those employees, officers, outside consultants, lawyers and accountants, as they consider appropriate, in order to attest to the statements made in the certification. Finally, the CEO and CCO must confirm that the firm has periodically reviewed its compliance and supervisory policies and procedures as necessary in light of the firm's business, changes in activities or the issuance of new or revised regulations. While this last representation seemingly applies to systems in place at the time of the CEO's and CCO's signed certification, NASD explains that firms have an ongoing obligation to periodically review the adequacy of those procedures in light of business and regulatory developments.

Notably, NASD states that signatories to the certification accrue no additional liability based solely on their certification if at the time of execution the signatories had a reasonable basis to certify *and* such certification is "consistent with high standards of commercial honor and just and equitable principles of trade."

III. Alternative Approaches

We reiterate our strong support for NASD's stated objectives. We too believe that the success of any compliance program rests with the support of senior management and its ability to cultivate a firm-wide commitment not only to the observance of sound practices, policies and procedures, but to a culture of compliance that comports with high standards of just and equitable principles of trade. The Associations, therefore, endorse NASD's efforts to develop a rule that achieves what is already adopted good business practice in many firms – namely, heightened awareness of firms' compliance and supervisory obligations through regular and productive communications with senior Compliance professionals. We respectfully submit, however, that the proposed rule is not the best or most direct method of realizing the intended result.

A better alternative is to simply compel the desired consultation and analysis through joint meetings, to occur no less frequently than semi-annually, between key senior executives. As explained below, this approach not only achieves the stated objectives, it accommodates the vastly differing structures of NASD member firms.

A. Mandatory Meetings With Senior Management To Discuss Substantive Issues Relating to Firm's Compliance Structure, Programs and Needs

Instead of a certification, the Associations recommend that NASD adopt a rule mandating regular meetings between firm-designated senior management and Compliance officers for the express purpose of assessing a broad range of issues relating to the structure and strength of the firms' compliance and supervisory systems, policies and procedures. To further facilitate a meaningful dialogue, we also recommend that NASD provide a framework of key topics of discussions, that could include, among other things:

- *Review of Overall Compliance Program* -- review of the firm's overall Compliance program, including: identification and analysis of significant compliance issues, initiatives, and plans for future systems or procedures; review of monitoring and surveillance activities performed by the Compliance Department; review of Compliance Department resources, and significant staffing changes (such as changes to reporting lines, and additions or departures of key Compliance personnel); and description of existing and prospective Compliance-related education and training programs.

- *Compliance and Supervisory Procedures* -- review of firm's compliance and supervisory procedures for each business area, e.g., antifraud and trading practices, research, investment banking, sales practices, books and records, including significant pending technology requests related to compliance or supervisory needs in these areas.

- *Material Examination Findings and Regulatory Inquiries* -- review of material regulatory inquiries, material findings resulting from Compliance reviews or regulatory examinations, and undertakings mandated in connection with regulatory settlements or disciplinary actions.

- *Significant Industry-Wide Regulatory Rules or Initiatives* -- review of any significant regulatory initiatives or new rules, as well as the status of firm's coordination or implementation of such initiatives.

- *Statistical Reporting* -- tabulation and analysis of customer complaints, relevant arbitrations and litigations for purposes of identifying a potential pattern or material issue of concern.

Because of the diversity of NASD membership, we recommend that NASD adopt the foregoing in the form of non-exclusive guidelines, and not a prescriptive checklist that applies across all firms. This will enable individual firms to target and cover areas most suitable to their individual needs and circumstances.

B. Flexibility in Application of the Rule

Similarly, the Associations suggest that NASD provide firms with flexibility to determine who should participate in the meetings in light of the firm's structure, business mix and reporting lines, as well as how often the meetings should occur with some limitation. Specifically, in as much as member firms have varying management structures and officer designations, our alternative contemplates that the appropriate most senior management executive within the firm meet with the senior firm officer charged with Compliance responsibility, among others.[4] This assures that individuals with the appropriate levels of responsibility and authority are involved in the collaborative process sought by the Notice.

[4] See later discussion for overview of Compliance functions and responsibilities at page 6.

This approach also allows firms to build and expand upon effective mechanisms already in place without need for creating additional, parallel procedures solely to meet the requirements of a new rule. For example, various firms currently utilize "risk management" or "compliance and control" committees that regularly meet to consider supervisory and compliance issues, adopt firm policies and approve the allocation of resources to infrastructure projects based on regulatory and firm priorities. A rule that accommodates differences in member firms therefore will provide maximum regulatory benefit.[5]

C. Evidence of Periodic Meetings with Compliance Officers

Finally, the Associations support an added measure that would require firms to evidence the joint meetings' occurrence. This could include, for example, documents reflecting meeting dates, participants, and agendas. Firms could make such documents available to regulators for review in the event an issue arose as to the firms' compliance with the a joint meeting requirement.

In sum, we believe that compelling the actual communications within the aforementioned framework goes much further in advancing NASD's stated objectives than a blanket certification.[6] We therefore respectfully request that NASD reconsider the current proposal, which we believe to be fraught with difficulties, and give serious consideration to the recommendations we make herein.

IV. Specific Concerns and Comments About the Proposed Joint Certification

Although clearly well intentioned, the Associations have several substantive and procedural concerns about the proposed joint certification, and seriously question whether such models will necessarily "empower compliance with sufficient leverage to oblige senior management to give meaningful consideration to the caliber of a member's compliance and supervisory systems."

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[5] We note that presently, there is no requirement for a holding company level CCO position. Since the structure and reach of Compliance Departments is currently a focus of the SEC, it might be prudent to await the outcome of that review before imposing such a requirement. *See*, Lori A. Richards, *The Culture of Compliance*, Address before Spring Compliance Conference: National Regulatory Services, Tucson, AZ (April 23, 2003) describing SEC examination program that is intended to systematically evaluate the ethical "culture of compliance" within registered broker-dealers. A copy of the speech may be found at www.sec.gov/news/speech/spch042303lar.htm.

[6] Our alternative also satisfies the equally compelling goal of SRO rule harmonization by lessening burdens to dual member firms that are subject to NYSE's annual compliance report requirement. Harmonization of needlessly duplicative and conflicting regulation across SROs benefits all segments of the industry. We therefore reiterate our support for implementation of formal mechanisms within the regulatory framework that systematically identify and harmonize regulatory inefficiencies caused by differences in rules across SROs. See GAO Report No. GAO-02-362, *Securities Markets: Competition and Multiple Regulators Heighten Concerns about Self-Regulation*, May 2002, located at www.gao.gov.

A. The Joint Certification Misperceives and Fails to Advance the Fundamentally Distinct Roles of Compliance and Supervision

The critical flaw with the proposed rule is that, as opposed to the recommended mandatory meetings, the certification model does not necessarily produce the intended substantive communication. Nor does it empower or support Compliance professionals in their traditional roles.[7] To fully appreciate this point, we first begin with the term "compliance" itself.

When speaking of the role of "Compliance" and "Compliance officers," this usually refers to the tasks and responsibilities of those persons employed specifically within a non-business line capacity within the firm. Though the precise role of a Compliance professional can vary dramatically from firm to firm, Compliance responsibility generally is advisory in nature and encompasses, among other things: recommending and assisting in the formulation of firm policies and procedures; developing and operating firm surveillance systems; providing interpretative advice; educating and training of firm personnel; designing and producing exception reports; investigating indications of irregular activity; and advising management of potential and actual issues as a result of its surveillance or reviews.[8]

By contrast, referring more broadly to the duty of "compliance" with applicable laws and regulations denotes the effect of appropriately carried-out *supervisory* activity, which remains within the province of management personnel throughout a securities firm. Management has line authority to direct firm activities, enforce firm policies and procedures, and impose sanctions for violations of firm rules when appropriate, up to and including suspension or termination of firm personnel. As such, this function naturally resides with branch managers, line supervisors, and other senior line officers that are registered principals of the firm. Therefore, when we speak of ensuring a culture of compliance within a firm, that authority ultimately rests with the CEO and not the CCO.

The proposed certification falls short in its attempt to realize indirectly the goals of communication and regular interaction. We respectfully submit that the alternative we propose in this comment letter better supports senior management and Compliance in the fulfillment of their traditional roles, and further strengthens Compliance's ability to have a meaningful interaction with firm management. [9] Moreover, in light of existing regulatory obligations and sanctions governing the duty to supervise, we think the

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[7] For comprehensive discussion of the role of Compliance professionals, see article by O. Ray Vass, *The Compliance Officer in Today's Regulatory Environment,* Practicing Law Institute: Corporate Law and Practice Course Handbook Series, Broker-Dealer Institute (November 12, 1987).

[8] Internal Audit, Legal or Operations professionals may perform any one or more of these responsibilities as well.

[9] Mutual certification also may dilute rather than reinforce the principle NASD is attempting to address – namely, that senior management and its designees satisfy themselves that the firm has in place appropriate compliance and supervisory structures, as well as an effective mechanism for their independent review.

certification adds little to senior management accountability for lapses in supervisory and compliance structures.[10]

B. The Certification Will Result in Increased CEO and CCO Exposure to Unjustified Actions

Notwithstanding NASD's assurances to the contrary, the Associations believe that potential liability stemming from the certification is real. NASD states that no greater liability attaches to the certification's signatories, provided they had "a reasonable basis" to certify to the "adequacy" of the compliance and supervisory systems at time of execution. The problem, however, is that these are amorphous standards that can easily devolve into hindsight criticism and disputes of what was "reasonable" or "adequate" at the time of the certification. Indeed, because of the great breadth and evolving nature of rules, regulations and enforcement priorities to which the certification applies, we think it unlikely that regulatory staff, during the course of a firm examination, will find a particular certification "reasonable" in the face of potential or actual lapses within the firms control systems that subsequently come to light.[11]

Our concerns are heightened further by the additional caveat that certifying officers make the attestation in conformity with "high standards of commercial honor and just and equitable principles of trade." Although existing SRO rules mandate that member firms and their associated persons observe such standards, this catch-all standard itself has not been defined with specificity and typically applies to certain business conduct, rather than within the context of a certification or attestation about the firm's supervisory and compliance systems, in which its meaning is particularly unclear.

No less important is the increased exposure to civil liability claims that undoubtedly will flow from the proposed certification. Certifications in hand, aggressive plaintiffs' counsel will commence baseless litigations and arbitrations against CEOs and CCOs, notwithstanding the general absence of a private right of action for violations of SRO rules. Particularly within the context of failure to supervise claims or issues relating to the adequacy of the firm's policies and procedures, the mere fact that the CEO and CCO made a written attestation about the firm's supervisory and compliance systems significantly increases the risk that such claims survive a motion to dismiss. Regardless of the ability or likelihood of ultimately prevailing on the merits, firms will be forced to

[10] The duty to supervise is a key aspect of the federal securities regulatory scheme. SRO rules, as well as the federal securities laws, require firms to develop a system of supervision to promote effective compliance with federal laws and SRO rules based on the nature of the firm's business. See NASD Rule 3010 and NYSE Rule 342. Moreover, the SROs and SEC oversee firms' compliance efforts and supervisory structure through the examination process and address potential shortcomings through deficiency letters and, in some cases, disciplinary actions. Additionally, the SEC is authorized to sanction firms whose supervision falls below a minimum standard of reasonableness. Section 15(b)(4)(E) of the Securities Exchange Act also provides for the imposition of a sanction against a broker-dealer who has failed reasonably to supervise another person who commits such a violation and is subject to the broker-dealer's supervision.

[11] Also see later discussion on auditing and testing of compliance systems at page 10.

settle streams of claims at substantial cost to avoid expensive and protracted discovery and/or the expected business distraction.

C. The Proposal's Analogy to Sarbanes-Oxley and Regulation AC is Flawed

The Associations also question NASD's comparison of its proposal to the recently enacted provisions of the Sarbanes-Oxley Act of 2002. In marked contrast to the expansive and seemingly open-ended application of the NASD's certification requirement, Sections 906 and 302 require an issuer's CEO and Chief Financial Officer ("CFO") to certify to the accuracy, completeness and "fair representation' of information contained in financial reports, as well as to the existence of controls designed to ensure the accuracy of that disclosure. Thus, the certification requirement under Sarbanes-Oxley is designed to improve financial disclosures by obligating the issuer's CEO and CFO to attest to -- and become personally liable for -- the truthfulness of financial statements contained within public reports as measured against GAAP and other quantifiable financial standards.

NASD's proposal, on the other hand, is considerably more expansive in that it covers an immense body of rules and regulation for which there are no clearly defined parameters. As proposed, the NASD's certification requires executives to opine about the broker-dealer's compliance with "all applicable NASD rules, MSRB rules and federal securities laws and rules." Vastly open-ended, such a requirement is more susceptible to interpretation than specific financial disclosure requirements. As such, compliance and supervisory systems based on "reasonableness" standards under current law may not be readily conducive to a Sarbanes-Oxley type certification.

For the same reasons, NASD's proffered analogy to Regulation AC misses the mark in that the latter merely requires the principal research analyst to affirm that the views expressed in the report reflect his or her true opinions. There is a striking difference between the breadth of the proposed NASD certification and the one required by Regulation AC, in that the latter may be based solely on the analyst's personal knowledge. In sum, Sarbanes-Oxley and Regulation AC may be analogous to each other, but neither is truly analogous to NASD's proposed certification requirement, which far exceeds the adequacy of required external disclosure in the context of public documents.

D. The Proposed Certification Model Overlooks Organizational Diversity and Complexities of NASD Member Firms

Equally problematic are the practical difficulties associated with the proposed certification regime. Seemingly straightforward in its application, implementation of the proposed certification nonetheless will necessitate cumbersome measures at many large member firms, designed solely to manage the certification process. As proposed, the certification requires its signatories to verify that they have consulted or otherwise relied on those firm employees, outside consultants, accountants, and lawyers they deem appropriate to make the necessary attestation as to the soundness of firm systems. Particularly within large member firms, we foresee long chains of sub-certifications that

undoubtedly will require a substantial amount of time and effort to administer. With the existing demands on Compliance resources, we question the efficacy of a certification process that diverts the attention and resources of Compliance professionals without necessarily adding to the firm's ability to detect and prevent violations of securities laws or failures of firm policies.

The proposed certification model also overlooks the widely varied organizational structures and reporting lines that exist in NASD member firms. Specifically, by placing the certification responsibility with the CEO and CCO, the proposal takes a narrow view of the complex and dynamic processes in place at some firms that already draw upon the collaborative knowledge and authority of key senior executives for purposes of assessing and ensuring the sufficiency of firm's controls policies and procedures.

E. Specific Comments on the Certification Language

In addition to the forgoing, the Associations also provide the following technical comments on the certification language that we raise for purposes of highlighting apparent ambiguity or inconsistency with existing industry standards.

- *Legal Standards* -- Under NASD's model certification, each CEO and CCO must jointly certify that the firm has in place *adequate* compliance and supervisory policies and procedures reasonably designed *to comport with* applicable regulations. This standard differs from current legal standards with which supervisory systems must currently comply. For example, NASD Rule 3010(a) states each member "shall establish and maintain a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations and with the Rules of this Association." Moreover, in defining supervisory standards, Section 15(b)(4)(E) of the Securities Exchange Act of 1934 provides that a broker-dealer will not be liable for a failure to supervise if, among other things, policies and procedures have been implemented, "which would reasonably be expected to prevent and detect, insofar as practicable" the subject violation. Absent clarity and consistency in the aforementioned standards, it is unclear whether the current formulation creates new legal obligations for member firms.

We also note that the proposed certification makes no reference to a materiality standard, which is a centerpiece of the federal securities laws.[12] The fact of the matter is

[12] Cf. Basic Inc. v. Levinson, 485 U.S. 224, 231-232 (1988), citing TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976):

> "[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." Acknowledging that certain information concerning corporate developments could well be of "dubious significance," the Court was careful not to set too low a standard of materiality; it was concerned that a minimal standard might bring an overabundance of information within its reach, and lead management "simply to bury the shareholders in an avalanche of trivial information - a result that is hardly conducive to informed decision making." It further explained that to fulfill the materiality requirement "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the `total mix' of

no system of internal controls is perfect. All firms, even with the best of supervisory and compliance systems, policies and procedures, experience isolated lapses or failures as a result of human error or system's glitches. Without an express materiality standard, the CEO and CCO run the risk of being in violation of the certification requirement for any omission or failing, no matter how trivial. Regulatory requirements therefore should encourage broker-dealers to focus their compliance resources on matters that warrant the most careful supervision based on size, structure and business profile, prioritizing accordingly.

- *Auditing and Testing of Compliance and Supervisory Systems* -- In describing the scope of the proposed certification, both the Notice and proposed interpretive material state that the certification is limited to the adequacy of the firm's compliance and supervisory system and not to the implementation or execution of such system. NASD qualifies this statement, however, by cautioning that the certification "carries an implicit representation that implementation of the system has at least been audited and tested for efficacy."[13] The concern here is that signatories to the certification could be viewed in hindsight as attesting (under penalties for making false statements) to the actual enforcement of the policies and systems. This is substantiated further by the NASD's statement that signatories only "generally" are not certifying to the implementation or execution of compliance and supervisory policies and procedures.[14] It is therefore unclear to what extent signatories to the certification will be held personally accountable for deficiencies in the actual implementation and execution of firm's systems.

- *Certification to Firm's Financial Condition* -- The certification's application to rules governing the firm's financial condition is also vague. Given the broad language of the certification, which extends to the firm's systems and controls designed to comport with all applicable SRO and federal rules and laws, it is unclear whether policies and procedures governing the firm's financial controls fall within the scope of the certification. This would include, among other things, internal control and supervisory systems covering compliance with the Net Capital Rule, tax compliance efforts, and the firm's financial statements and application of GAAP. As a matter of industry practice, compliance and oversight of these types of internal controls fall outside the realm of the Compliance function and reside instead with the broker-dealer's Controller, CFO or Treasurer. Absent clarification that these types of activities fall squarely outside the certification, NASD member firms may be forced to significantly restructure the way in which they currently manage their business.

- *Waiver of Attorney-Client Privilege* -- The certification requires the CEO and CCO to attest to the fact that they have consulted with or sought the advice of others,

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information made available." We now expressly adopt the TSC Industries standard of materiality for the 10(b) and Rule 10b-5 context. (Citations omitted).

[13] Notice at 285 and 287.

[14] The CEO and CCO "only must certify to the adequacy of the compliance and supervisory systems – but not *generally* to the implementation or execution of that system." (Emphasis added). Notice at 285.

including lawyers, in making the certification. Legal professionals question the potential implications for the firm's attorney-client privilege and whether the certification constitutes a waiver of that privilege.[15] Specifically, there is concern that, if challenged, the certification's reference to advice of counsel could constitute a waiver of the attorney-client privilege as to the subject matter of the certification -- which is enormously broad. Absent exclusion of consulting attorneys from the certification language, the full ramifications of the certification are uncertain.

V. Conclusion

Over the last year, the public's trust and confidence weakened amid the markets' sharp decline, regulatory investigations, including the global settlement, and negative media portrayals of corporate America. The regulators and the industry responded with tough regulations and reforms in securities firms' supervisory systems and business practices, where appropriate, to enhance the quality and integrity of internal controls and supervisory systems.

While these recent regulatory failures are greatly disturbing to all of us, the proposed certification is not the solution. Rather, the answer lies in mandatory meetings during which there is joint and meaningful consideration of specific compliance issues and programs by senior management and Compliance professionals. We therefore urge the NASD to reconsider the current rule proposal and give serious consideration to the alternatives presented herein.

We thank you for your consideration and would welcome the opportunity to meet with the NASD staff to discuss the issues raised in this letter. If you have any question, please feel free to contact any of the undersigned or SIA Vice President and Associate General Counsel, Amal Aly at (212) 618-0568.

Sincerely,

Stuart J. Kaswell
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Securities Industry Association

[15] John F. X. Peloso and Ben A. Indek, *National Association of Securities Dealers' Certification Proposal*, June 27, 2003, New York Law Journal, at 3.

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