Public Investors Arbitration Bar Association

August 10, 2009

Via E-Mail & First Class Mail

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Proposed Rule Change Petition Submitted by the Public Investors Arbitration Bar Association on June 11, 2009

Dear Ms. Murphy:

This will respond on behalf of the Public Investors Arbitration Bar Association (PIABA) to FINRA's August 3, 2009 letter which seeks to delay consideration of PIABA's petition for a rule eliminating the mandatory industry arbitrator.

The issue at hand is whether investors should be required to arbitrate claims before panels which must include an arbitrator who is affiliated with the very industry they are suing. The premise behind FINRA's argument for delay is that FINRA will conduct a study that might show that industry arbitrators are, in some manner, "better" for investors. FINRA does not begin to suggest how this could be proven on the basis of data from a voluntary pilot program in which members were not required to participate. Thus, firms which had the most to fear from all public panels may not have participated in the pilot. Neither does FINRA indicate what metrics could be used to assess "success," particularly when most cases settle for undisclosed sums.

In its letter, FINRA notes that some investors are not choosing to participate in the Pilot, and that even among those who do, about half are not striking all industry arbitrators.[1] This only proves that given a choice, some

[1] FINRA stretches the bounds of logic by suggesting that PIABA's rule petition limits investor choice because it "would mandate the Pilot rules for all investor cases rather than providing investors with a choice in panel composition." In the first place, as noted, firms had to volunteer to be put in the Pilot and even then they only opted in for a limited number of cases. PIABA's petition would extend the right to eliminate industry arbitrators to all parties in all FINRA customer arbitrations. Secondly, under the proposed rule, investors would only lose the ability to retain an industry panelist if the brokerage chose to strike all industry names

investors will choose industry panelist and some will not. That argues in favor of allowing the decision to put an industry member on the panel to be made on a case-by-case basis, rather than by FINRA mandate.

FINRA's response fails to address the developments in the securities industry which suggest that public customers are increasingly being harmed by the antiquated requirement of the mandatory industry arbitrator. The proliferation of very similar "defective product" cases against virtually all of the major firms in the industry and the sudden and dramatic occurrence of industry-wide consolidation are developments that are bound to impact the neutrality of many industry arbitrators. Failing to reckon with these developments at once disserves investors.

According to FINRA's website, 3875 arbitration cases were filed during the first six months of 2009. Yet only 233 cases have made their way into FINRA's Pilot Program since October 6, 2008. Thus, the overwhelming majority of cases continue to be subject to the mandatory industry arbitrator requirement.

We are very troubled by the prospect of further delay in the process of eliminating the mandatory industry arbitrator. As we noted in our Petition, there have already been studies that disclose serious problems in securities arbitration. Awaiting the resolution of all cases in the two year Pilot (which has yet to generate a single award), designing and assessing a study, and submitting a proposal to the SEC would probably consume at least three to four years. This delay in eliminating systemic bias in favor of the securities industry is simply unjustifiable.

Unlike FINRA, the SEC's policy is not established by a Board of Governors that includes a substantial number (10) of representatives of the securities industry. Thus, the SEC, and not FINRA, should determine what is truly in the best interests of clients who are required to arbitrate claims against the broker-dealers who are members of FINRA. This is in keeping with the commission's mandate to adopt arbitration rules that adequately protect investors.

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from the list. While FINRA reported in its letter that 50% of all customers in the pilot struck all industry members, it provided no comparable data for respondents. We would certainly be interested to learn how many times, if ever, brokerage firms struck all industry arbitrators.

Sincerely,

PUBLIC INVESTORS ARBITRATION
BAR ASSOCIATION

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