

# Public Investors Arbitration Bar Association

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June 14, 2010

[rule-comments@sec.gov](mailto:rule-comments@sec.gov)

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

**Re: SR-FINRA-2010-022; Changes to List Selection**

Dear Ms. Murphy:

On behalf of the Public Investors Arbitration Bar Association (PIABA), I thank the Commission for the opportunity to comment on the above-referenced proposed changes to the list selection procedures contained in §§ 12403 and 12404 of the FINRA Customer Code of Arbitration Procedure and §§ 13403 and 13404 of the Industry Code of Arbitration Procedure. PIABA applauds FINRA's rule change and supports the proposal.

PIABA is a national, not-for-profit bar association comprised of more than 460 attorneys, including law school professors and former regulators, who devote a significant portion of their practice to the representation of public investors in securities arbitrations. Accordingly, our members and their clients have a strong interest in FINRA rules relating to arbitration, particularly those that impact the selection and appointment of arbitrators.

## **The Proposed Change Should Be Approved Because It Will Likely Decrease The Incidence of Appointment of "Extended List" Arbitrators**

PIABA believes that because the proposed rule change would increase the number of arbitrators available for selection from eight to ten, while retaining the number of available strikes at four per party, the rule change is likely to decrease the incidence of appointments of arbitrators that the parties have not approved via administrative, so-called "extended list" appointments. This is so because under the proposed change even if the parties each exercise their maximum of four preemptory strikes in a given case, and if there is no duplication of preemptory strikes, there will in all instances be at least two arbitrators remaining on each list after the exercise of preemptory strikes. Further, in most instances there will in all likelihood be more than two arbitrators remaining after the exercise of the parties' preemptory strikes.

Under the current rules, it is not unusual for only one or two, or even zero, arbitrators to remain eligible for service in a given case after the exercise of peremptory strikes by the parties. If no remaining arbitrator is eligible to serve, FINRA then appoints an arbitrator without input from the parties. As a result of the proposed change, the number of cases in which no arbitrator remaining after the exercise of peremptory strikes is willing or able to serve will almost certainly be reduced. As such, under the proposed rule, it is more likely that all three arbitrators ultimately appointed to the panel will have been reviewed and vetted by the parties and will, at a minimum, not have been one of the four most objectionable arbitrators in the view of any party.

In PIABA's view, this rule change is important because it will reduce the number of instances in which an arbitrator is appointed with no input from or approval by the parties. Instances in which so-called "extended list" appointments result in appointment of an arbitrator who has, for example, repeatedly ruled against public customers, leave the public customer with limited recourse in seeking recusal or removal of the arbitrator and give rise to the perception that the FINRA arbitration process is not fair to public customers. Further, such appointments can obviously have an outcome-determinative effect that may be unjust in a given case. Put simply, it is fairer and more consistent with Anglo-American traditions that the trier of fact be selected with the full and informed input of the parties to the extent practicable.

#### Conclusion

For the above reasons, PIABA respectfully requests that FINRA approve the proposed changes to the Code of Arbitration Procedure as soon as possible. If this rule change does not completely eliminate the problem of off-list appointments, we have ideas for additional changes, which we will share with you at your request. Thank you for your consideration.

Respectfully,

PUBLIC INVESTORS ARBITRATION  
BAR ASSOCIATION

/s/

Scott R. Shewan, President

Mr. Shewan's Contact Information

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