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August 22, 2016

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington DC 205552

Re: Docket No. CFPB-2016-0020 or RIN 3170-AA51

Dear Ms. Jackson:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, such as arbitration of claims against brokers and broker-dealers through FINRA Dispute Resolution, while also advocating for public education regarding investment fraud and industry misconduct.

While PIABA's focus is primarily on advocating for investor protection in the securities industry, PIABA also has an interest in rules which impact forced arbitration. PIABA applauds the Consumer Financial Protection Bureau's (CFPB) goals of enhancing consumer protection by assuring the ability of consumers to participate in class action litigation. PIABA has long recognized the importance of class action litigation to provide economic relief to wronged investors, to correct the inherit power imbalances between an individual and the industry, to have access to the legal protections of a transparent, public court system and the constitutional right to a jury trial to adjudicate disputes, and to deter unlawful industry conduct.

PIABA generally supports the CFPB's proposal to ban class action waivers in mandatory pre-dispute arbitration agreements in consumer financial contracts. PIABA is also supportive of the CFPB's efforts to increase transparency in the consumer financial dispute resolution arena by requiring that industry participants submit certain records to the CFPB. As the CFPB has pointed out, class action waivers have been prohibited in securities arbitrations by FINRA for several decades. Additionally, several of the records the CFPB proposes to have industry participants disclose have been disclosed in the

securities arbitration forum for many years. The CFPB's proposal actually would require *more* types of records be disclosed with respect to consumer financial disputes than the present rules for securities arbitrations. PIABA would welcome the additional disclosures in securities disputes as well, because, as discussed below, greater public disclosure of arbitration pleadings can help curtail abusive conduct by industry respondents.

The CFPB Should Not Exempt Investment Advisors or CFTC Regulated Entities.

The CFPB has specifically exempted brokerage firms from the coverage of its proposed rule precisely because brokerage firms are already prohibited from including class action waivers in their mandatory pre-dispute arbitration clauses under FINRA rules. The CFPB seeks comment on whether it should include an exemption for other SEC regulated entities, such investment advisers, who may at some point be covered by similar rules. A conditional exemption, ensuring that the entity is covered by a rule which similarly bans such waivers, would be appropriate. However, at this time, the SEC has not given any indication that it plans to take any action with respect to the authority it has been granted under Dodd-Frank section 921 to review arbitration agreements in the securities context. Presently, no such rules exist which governs the conduct of SEC-registered investment advisers. Accordingly, investment advisers should be covered by the CFPB's proposed rule to the extent they are offering products and services subject to CFPB oversight.

The CFPB also seeks comment on whether it would be appropriate to include entities which may be regulated by the CFTC. While the CFTC does require that pre-dispute arbitration agreements be voluntary, presently there are no rules governing class action waivers. A conditional exemption for CFTC regulated entities would be appropriate so long as it requires that the entity be covered by a rule which bans such waivers, similar to the conditional exemption for SEC regulated entities. If the CFTC chooses to adopt such a rule, there would be no need for the CFPB to regulate these entities under this rule making. However, CFTC regulated entities should otherwise be covered by the CFPB's proposed rule to the extent they are offering products and services subject to CFPB oversight.

Notice Language Should Be Clear and Simple.

The CFPB's proposed language would notify consumers in plain English that an arbitration agreement would not stop a consumer from being part of a class action in court. The CFPB has succeeded here in conveying the consumer's rights in easy to comprehend language. The language the CFPB proposes is much simpler than that required by FINRA with respect to the prohibition of class action waivers in securities pre-dispute arbitration contracts. *See* FINRA Rule 2268(f). PIABA supports language of the utmost clarity so a consumer is clear that they may still participate in class action litigation.

PIABA suggests that the CFPB require that the language be included as a part of *all* pre-dispute arbitration clauses, and a separate notice clearly containing this language be sent to consumers with existing covered agreements. PIABA further suggests that the CFPB require that such language by conspicuously placed, and not in a smaller font or in any way diminished in importance. Additionally, covered firms should be required to include such provisions on their websites.

Additional Arbitration Record Disclosures Benefit The Public At Large.

With respect to the second portion of the CFPB's proposal, PIABA supports the required disclosure of arbitration records and the subsequent publication of such records. There is a significant lack of transparency within the alternative dispute resolution process, with respect to both securities and consumer arbitrations.

It is important to understand the claims and defenses raised within an arbitration process. In the securities arbitration context, pleadings are not made public, although they are submitted to FINRA (who is both the regulator and the operator of the dispute resolution forum). In April, 2015, PIABA reviewed a number of Answers filed by brokerage firms in FINRA arbitrations. Overwhelmingly, firms deny that they have any fiduciary obligations to clients, notwithstanding state common law, the relationship between the customer and the firm, or the public position taken by the firm that they are to be viewed as a customer's trusted adviser. *See* Peiffer & Lazaro, "Major Investor Losses Due to Conflicted Advice: Brokerage Industry Advertising Creates the Illusion of a Fiduciary Duty; Misleading Ads Fuel Confusion, Underscore Need for Fiduciary Standard," available at https://piaba.org/system/files/pdfs/PIABA%20Conflicted%20Advice%20Report.pdf. PIABA was able to obtain these Answer documents from its members; they were never made available publicly. It is possible the firms would have been more reluctant to plead defenses, sometimes improperly, which were so contrary to their public images if they knew their pleadings would have been publicly available. Likewise, if the firms so rely on the legal defense that their registered brokers have no fiduciary obligations to their clients, publication may help stop misleading marketing campaigns when public scrutiny reveals the contradictory messaging.

It may be helpful for the CFPB to collect other documents as well. For example, FINRA has just proposed a rule which would require that the arbitration parties submit discovery requests and objections to such requests to it. *See* SR-FINRA-2016-029 (Proposed Rule Relating to use of the Dispute Resolution Party Portal in Arbitration and Mediation). PIABA members have often seen cases where brokerage firms take advantage of the private nature of the forum and file objections to presumptively discoverable and standard discovery requests in bad faith. These delays prejudice investor claimants, who must then use time and resources to take additional steps to try to compel production of those documents, or unfairly lose the benefit of seeing documents that could be critical to their case. Greater forum oversight of discovery requests and objections should help prevent firms from exploiting the process to their advantage.

In addition to collecting and making public final awards in consumer financial arbitrations, it may also be helpful for the CFPB to collect information on whether firms have complied with awards and disclose this information. In February, 2016, PIABA studied the issue of unpaid awards in FINRA arbitrations, as this information is not made publicly available. *See* Berkson, "Unpaid Arbitration Awards: A Problem the Industry Created – A Problem the Industry Must Fix," available at https://piaba.org/system/files/pdfs/Unpaid%20Arbitration%20Awards%20-%20A%20Problem%20The%20Industry%20Created%20-%20A%20Problem%20The%20Industry%20Must%20Fix%20(February%2025,%202016).pdf. PIABA found that one out of three awards issued was not paid in 2013, or awards totaling $62.1 million. As an

award is only meaningful if it is actually paid, PIABA suggest the CFPB collect information on the payment of awards in consumer financial arbitration as well. If the CFPB finds a systematic problem with unpaid awards such as PIABA discovered through its study of FINRA awards, PIABA encourages the CFPB to consider enforcement measures or other alternatives to ensure consumers who have won an award or settlement get paid in full.

Generally, the disclosure proposal is a step in the right direction. PIABA is hopeful that FINRA and the SEC will make similar changes with respect to securities arbitration.

PIABA is disappointed that the CFPB does not believe there is sufficient evidence to take any other action with respect to the mandatory nature of pre-dispute arbitration agreements. The CFPB study provides ample evidence that consumers do not understand that they are subject to arbitration agreements, nor do they understand the import of such agreements even when they do know they are subject to one. Mandatory pre-dispute arbitration agreements deprive consumers of substantial legal rights. Consumers should be given the option of agreeing to arbitration after a dispute arises. This would afford consumers the greatest protection of choosing between litigating in court with full rights preserved, or a potentially lower-cost and faster resolution through an arbitration forum. PIABA encourages the CFPB to revisit this issue, and promulgate rulemaking which would provide consumers with their choice of forum to resolve disputes.

Sincerely,

Marnie Lambert, PIABA
Executive Vice-President/President-Elect