Public Investors Arbitration Bar Association

August 6, 2008

VIA E-MAIL TO RULE-COMMENTS@SEC.GOV

Florence E. Harmon
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. SR-FINRA-2008-031
Proposed Rule Change Regarding Uniform Submission Agreements

Dear Ms. Harmon:

Thank you for the opportunity to comment on the above-referenced rule proposal to rename and amend the submission agreements to be filed by claimants and respondents in FINRA arbitration proceedings. I write on behalf of the Public Investors Arbitration Bar Association ("PIABA") to request that the Commission require further changes before approving this proposed rule change.

PIABA is a 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.

We ask that the Commission return this proposed rule to FINRA and request a rule which treats FINRA member firm respondents in the same manner as public customer claimants. As presently administered by FINRA, filing a submission agreement is optional for member firms and registered persons. FINRA has trained its arbitrators that a submission agreement from respondents is not necessary because they are already bound to submit to arbitration, and therefore claimants suffer no disadvantage. Under both federal and state law, this position is false. This practice should not be allowed to continue.

PIABA also has serious concerns about the insertion and deletion of certain language in the proposed new submission agreement, as detailed below. On the positive side, the proposed submission agreement deletes the requirement that public customers certify that they have read, and presumably understand, the procedures and rules of FINRA. Few, if any, investors read or understand the rules in the increasingly complex practice that FINRA Dispute Resolution has become. PIABA therefore believes this is a change that is long overdue.

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Rules Concerning Initiating and Responding to Claims

Customer Code Rule 12303(a) requires respondents to file and serve other parties with a signed and dated submission agreement. However, the rule imposes no penalty for non-compliance. Indeed, FINRA routinely sends out arbitrator lists and accepts rankings from respondents who have failed to sign and file a submission agreement. Many cases actually proceed to final award with respondents never having filed a submission agreement. There is simply no incentive for respondents to comply with Rule 12303. As a result, member firms and registered persons often decline to file a submission agreement.

This scenario stands in stark contrast to Rule 12307(a), Deficient Claims, which provides that FINRA will refuse to serve a claim where the claimant has failed to file a submission agreement or to sign a submission agreement (or even where the claimant failed to date the agreement, or failed to provide FINRA with enough copies). If FINRA sends the claimant a deficiency notice, the claimant has 30 days to cure the submission agreement problem or face dismissal and forfeiture of the entire filing fee. Rule 12307(b). In short, claimants who fail to comply with the rules relating to submission agreements are subject to the most serious possible consequences. In contrast, the Customer Code provides no consequences to a respondent who fails to sign and file a submission agreement. It is important to bear in mind that this double standard is imposed on investors by a regulator claiming its objective is investor protection.

FINRA takes the position that an industry respondent's failure to file a submission agreement is harmless because members are required to submit to arbitration under Section 12200 of the Customer Code. This is a misstatement of the law. There are legally compelling reasons that a claimant needs a signed submission agreement at the outset in every case. For example:

1) The Federal Arbitration Act, 9 U.S.C. § 2, mandates a "written" arbitration agreement as a condition of proceeding under the Act. Section 13 of the Act requires a party moving for an order confirming, modifying, or correcting an award to file a copy of the arbitration agreement. Absent respondents' signed submission agreement, claimants seeking confirmation of an award cannot comply with this statutory requirement. Of course, respondents pursuing confirmation suffer no such impediment since they have a submission agreement signed by a claimant in hand. Thus**,** the claimant may be forced to go to court to enforce an award without the written agreement required by statute and, as a result, may face dismissal. This could prove fatal to a claimant's recovery.

2) In addition, without a submission agreement, a claimant may not be able to gain personal jurisdiction over a firm or registered representative in order to confirm, modify or correct an award. This may typically occur in cases of control person liability or officer and director liability under state Blue Sky statutes. These individuals may be required to arbitrate, but they may not be located or registered in the state where claimant resides. The submission agreement provides consent for jurisdiction to any court of competent jurisdiction where the customer resides or a hearing is held. Without a submission agreement signed by respondents, defrauded customers may be forced to chase elusive respondents through courts in distant states just to confirm the award. Particularly in smaller cases, hiring out-of-state counsel at additional expense may prove prohibitive. Claimants should not be forced to spend time and money in court and even potentially give up their claims because FINRA is unwilling to require its members to follow the same rules imposed on investors.

3) The submission agreement may be the only place that members and registered persons agree to be bound by the Code of Arbitration Procedure. Arbitration agreements often do not incorporate the FINRA Code of Arbitration Procedure. Rather, the Code incorporates itself, which is circular reasoning if one has not previously agreed to abide by the Code.[1] Having never signed a submission agreement, there may be no legal basis to require respondents to abide by the Code. They are arguably free to ignore the rules, including discovery requirements. The Code becomes a buffet from which industry respondents may pick and choose those provisions which they find advantageous; an all-too-frequent strategy. FINRA's advice to arbitrators to simply recite in the award that industry participants were required to submit to arbitration by the rules or by some other agreement, somewhere, which neither the panel nor Dispute Resolution has ever seen, is simply not tenable if challenged.

4) A related problem is that FINRA members may submit modified submission agreements adding provisions that seek to limit their liability, include choice of law provisions, or provide other legal advantage. It becomes the customer's responsibility to find the changes and ask the arbitrators for relief. The random Notice to Members warning that FINRA may someday take some unspecified action is ineffective. Advising arbitrators that they may sanction the member is also ineffective. The arbitrators have been trained that a member's submission agreement is irrelevant. If the problem is not addressed by the Commission in the context of rulemaking, nothing will change.

[1] Customer Code section 12200 and IM-12000 of the Code require a member firm to submit customer disputes to arbitration under the Code. However, this is meaningless if there is no corresponding Conduct Rule.

Simply stated, the Commission should direct FINRA to treat both claimants and respondents by the same standard. Failure of respondents to submit the submission agreement with the answer should mean that the answer cannot be accepted for filing. Failure to provide the submission agreement within 30 days after receiving a deficiency notice from FINRA should mean that all claims are deemed admitted. Without mandated sanctions for respondents' failure to file a submission agreement, FINRA members and registered persons have little incentive to abide by any provision in the Code.

FINRA's double standard for filing submission agreements is particularly difficult to accept in view of FINRA's so often repeated mantra of investor protection. It seems clear FINRA is balancing its regulatory function between investors on the one hand and its membership on the other, and when it comes to signing and filing submission agreements, the investors lose.

FINRA's Proposed Revisions to Submission Agreement

As previously stated, PIABA supports the revision to paragraph "2" that allows customers to certify that their representative has read the rules for them and that the parties agree to be bound by these procedures conditioned on all parties being required to sign a submission agreement in every case in order to participate. The revisions in paragraph "4" are also acceptable if all parties are required to sign the agreement.

PIABA strongly objects to the modification of paragraph "3" deleting the requirement that the arbitration must be conducted in accordance with the Constitution, By-laws, Rules, and Regulations of FINRA or any other organization, and limiting the reference to the FINRA Code of Arbitration Procedure. This may effectively remove the arbitration from the purview of FINRA Conduct Rules. Certainly, respondents may be expected to make this argument. This could have the following ramifications:

1) It would mean a member could not be sanctioned for violation of just and equitable principles of trade under FINRA Rule 2110 for conduct related to arbitration.

2) The same principle is applicable to member and associated person conduct during the arbitration process. Refusal to follow the Code, destruction of documents and other common industry defense tactics would be punishable only by the arbitrators because the FINRA rules, other than the Code of Arbitration Procedure, have been effectively rescinded in arbitration. In addition, if FINRA

rules other than the Code of Arbitration Procedure do not apply to arbitration, then FINRA may have no further role in enforcement or collection. It becomes a serious legal problem for the claimant.

Conclusion

PIABA urges the Commission to return this rule proposal to FINRA for further revision. Having a rule requiring submission agreements is futile if there is no procedure in place to enforce the rule. Currently there is such a mechanism for enforcing the rules against investor claimants, but not against industry respondents. This disparity must be rectified.

Thank you for your consideration of these comments.

Respectfully,

PUBLIC INVESTORS ARBITRATION
BAR ASSOCIATION

s/Laurence S. Schultz
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President, 2007-2008

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