Public Investors Arbitration Bar Association

October 11, 2010

Via E-Mail To: rule-comments@sec.gov

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: File No. SR-FINRA-2010-0036 – Proposed Rules Regarding an Arbitrator's Mid-Case Referral to the Director of Arbitration and Resulting Procedures Including Removal of Entire Panel Upon Request

Dear Ms. Murphy**:**

Thank you for the opportunity to comment on the above-referenced rule proposal filed by the
Financial Industry Regulatory Authority ("FINRA"). The proposed rules seek to amend FINRA
Rule 12104 of the Code of Arbitration Procedure for Customer Disputes ("Customer Code") and to create new Rule 12902(e) regarding the assessment of hearing session fees, costs, and expenses if any arbitrator makes a referral during a case that results in panel withdrawal. Corresponding rules are proposed within the Industry Code, which PIABA does not address.

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA")[1] to voice objections to the proposed rules. PIABA objects to proposed rules 12104(c) and (d) as they would create unnecessary, unfair burdens on public investors. . For instance, proposed Rules 12104(c) and (d) would create absolute rights of a party to demand a new panel when even a single arbitrator makes a disciplinary referral, and would establish procedures for 'starting over' in the arbitration forum. In our view the proposal appears to be a solution without a problem, the implementation of which would pose potentially devastating penalties on customers who have been harmed by the conduct of FINRA members. FINRA should not require public investors who are forced into the

[1] PIABA is an international bar association, consisting of more than 460 members, dedicated to the protection of investors' rights in securities arbitration proceedings.

arbitration forum to thereafter bear the brunt of FINRA's own enforcement and regulatory obligations to detect fraud. The 'starting over' procedures in FINRA's current proposals are inconsistent with the provisions of Section 15A (b)(6) of the Act[2] and should be rejected.

There Is No Demonstrated Problem for This Solution

FINRA states no reason to impose an additional burden on already defrauded customers. It provides only a vague reference to "recent well publicized frauds that resulted in harm to investors" as a justification.[3] It fails to identify those frauds or to state how a mid-arbitration referral by an arbitrator might have protected investors. FINRA should be required to provide substantial justification, not vague generalizations to place substantial new burdens on customers.

FINRA's assessment that mid-case referrals would "strengthen FINRA's regulatory structure" is unfair to investors who have already suffered harm at the hands of their broker. In neither the mandatory arbitration agreement nor the uniform submission agreement are investors told they will be required to assist FINRA Enforcement at great prejudice to themselves. Indeed, FINRA regulators are provided with a copy of every statement of claim filed in arbitration by an investor. Enforcement personnel have every opportunity to investigate and charge the brokers and firms named in these claims. Little would be added by permitting mid-case disciplinary referrals. Yet the harm to the investor claimant will be significant.

Starting Over Will Unjustly Cause Customers Substantial Harm

The most disturbing aspect of the rule proposal is that a single arbitrator, by making a mid-case referral, can cause the arbitration proceeding to start over with an entirely new panel. This can result in months of delay, and a significant increase in cost to the parties to the proceeding. It is not hard to envision a situation where this unfairly penalizes an investor. Consider the situation where an investor's attorney conducts a two-day examination of the broker, and clearly establishes the broker's wrongdoing to the point where a panel member decides that an immediate referral must be made. Even though the case may be completed within days, the arbitrator's referral will require the panel to be disbanded, and the investor will be required to start all over with a new panel. During the interim, the broker's attorneys will have learned from the broker's examination, and will prepare the broker better for the second go-round. The investor will be required to wait months for redress, during which time the broker or firm could go out of business or have its assets wiped out by another investor claimant. Therefore, this rule proposal would have a tendency to penalize the most diligent of investor claimants.

In response to this valid concern, FINRA speculates that the industry respondent subject to the referral "would attempt to settle, rather than risk continuing the case." It is equally likely that the Respondent will begin to secrete assets, or simply go out of business. Moreover, it is unlikely that any such settlement would be as advantageous to the claimant as the award which would

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[2] 15 U.S.C. 78o-3(b)(6).

[3] FINRA fails to identify specific examples where such disasters could have been alleviated through arbitrator referrals. Moreover, FINRA could and should already urge any person with information suggesting such horrific scandals to contact FINRA's ombudsman or other authority immediately, on an anonymous basis if needed.

have been issued by the offended panel. The prospect of a settlement simply does not adequately address investors' concerns in this regard.

The Proposed Rule Would Not Work

Even if one embraces the idea of arbitrators as enforcement officers, the proposed rule is unworkable. What happens if the second panel comes upon the same information and makes the same referral? Does Claimant have to start over yet a third time? Is there any limit? Wouldn't the fact that the second panel can review the record (though not executive sessions) result in the new panel also indentifying the scandalous facts and be subject to removal as was the first panel? Will the new arbitrators know the previous panel was removed because it saw a major fraud? What will FINRA tell the new panel?

Moreover, the rule is unlikely to have any positive effect. Suppose that a referral is made a week, or two weeks, earlier than would have occurred under the new rule. What is the likelihood that FINRA Enforcement will act any faster? How often does FINRA's disciplinary force seek an immediate injunction? Will any public investors really be protected, or will the investor who pursued an arbitration claim be the only person affected?

In short, the rule proposal raises more questions than answers. It will simply be unworkable in the real world.

Customer Costs Will Be Substantial

FINRA states that a customer "could" incur additional costs if required to start over. It seeks to partially mitigate those costs by not double charging them. The truth is that a customer will invariably incur additional costs and they could be substantial. The lawyers in many cases charge by the hour and FINRA should not interfere with the parties' choice of counsel or even ability to continue with counsel.

Similarly, the proposed rule stating that prior panel decisions could remain in force is unhelpful. Respondents will file a motion to reconsider every disputed ruling on the basis that the prior panel was removed for bias. The customer will be required to argue each issue a second time and be charged for each hearing. During this entire time, investors entitled to recovery would in some instances be wrongfully deprived of property they need immediately.

FINRA ignores attendant litigation costs, beyond just hearing session costs, which would be incurred under the proposed rule. What if the customers have to fly their expert in for a second hearing date? What if the expert is not available for the next hearing date? Will the customer be expected to bear the cost of hiring a new expert who will have to review the previous record? Who is going to pay to transcribe the "record" of the hearings of the prior panel? In short, the additional costs in both time and money would be substantial and would unfairly penalize the investor who was subjected to the worst broker behavior.

Investors already have difficulty locating competent counsel to handle their claims, especially smaller ones. Increasing the risk of having to try a case twice, with all the attendant time and expense, simply makes it less likely that an investor will be able to retain a competent representative.

The Current Rule Should Not Be Changed

Currently, Rule 12104 requires a panel to wait until after they have issued an award before making a disciplinary referral. We are unaware of any situation where the public was harmed by waiting until the hearing is concluded. The current rule is not in need to revision, and should be left intact.[4]

We thank you again for the opportunity to comment upon this rule proposal, and we urge the SEC to reject this misguided effort.

Respectfully,

/s/
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President

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[4] If FINRA insists that it perceives a need to enlist arbitrators as enforcement officers, there is a more workable solution. Arbitrators could be permitted to make anonymous referrals. FINRA Enforcement could then investigate the arbitrator referral and determine whether violations are occurring. However, FINRA Enforcement should not be confused with FINRA Dispute Resolutions. These are two separate functions, both of which are necessary to protect the investing public. They should not be combined to the benefit of the arbitrating member firm and the detriment of the arbitrating customer. Anonymous referrals would provide the desired benefit without the unacceptable collateral damage.