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September 29, 2022

Via Electronic Mail @ Rule-comments@sec.gov
Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F St. NE
Washington, DC 20549-1090

RE: SEC's Draft Strategic Plan 2022-2026

Dear Ms. Countryman:

I write on behalf of the Public Investors Advocate Bar Association ("PIABA"), an international, not-for-profit bar association comprised of attorneys who represent public investors in disputes with the securities industry. Since its formation in 1990, PIABA's mission has been to promote the interests of the investor by, among other things, protecting investors from securities industry misconduct and abuses in all securities and commodities arbitration forums, as well as advocating for public education related to investment fraud and industry misconduct. Our members and their clients have a fundamental interest in the SEC's oversight of the financial industry and the rules promulgated by the SEC that relate to investor protection and the practices of Registered Investment Advisers.

We appreciate the opportunity to comment on the SEC's Strategic Plan for Fiscal Years 2022-2026. In reviewing the Strategic Plan, we noted the SEC did not address the issue of dispute resolution for investors, particularly those involving Registered Investment Advisers ("RIAs"). Our members are seeing RIAs take advantage of the lack of oversight and impose oppressive pre-dispute arbitration clauses that prevent their clients from seeking redress. Since the SEC is tasked with protecting the investing public and overseeing more than 14,000 SEC-registered RIAs, the Strategic Plan should call for the SEC to make efforts to control RIAs' use of pre-dispute clauses and require, among other things, standardized pre-dispute clauses, shifting of the majority of arbitration fees to the RIAs using such clauses, increased transparency of the scope and implications of the dispute process, as well as the mandatory disclosure of information regarding an RIA's dispute history so the SEC and investing public may be better informed.

Over the past five years, there has been a mass migration of firms, investment professionals, customers, and assets from FINRA-registered broker-dealers to SEC- and state-registered RIAs. Following the lead of the brokerage industry, RIAs now regularly include forced pre-dispute arbitration clauses in their account agreements. Unlike brokerage firms that, pursuant to FINRA rules, must include FINRA Dispute

Resolution Services as an available forum, RIAs are not subject to any similar requirements. Often, RIAs designate private commercial dispute resolution forums in their arbitration clauses, such as the American Arbitration Association (AAA) or JAMS. These forums allow arbitrators to set their own billing rates and as a result, they charge investors massive arbitration forum fees, effectively prohibiting many investors from seeking redress due to cost. For small claims, the forum fees often exceed the amount at issue in the dispute. For example, it is not uncommon for a single arbitrator in JAMS[1] to charge $8,000 or more for a single day's work. The arbitrator's fees alone can exceed $64,000 for five days of hearings and three days of pre-hearing and post-hearing work, with a requirement all the fees be paid in advance of the hearing taking place. These exorbitant expenses, generally assessed equally between the disputants, are often far too much for investors who have already lost much of their savings. Moreover, and most troubling, the forum can refuse to proceed with the arbitration if the RIA fails to pay its share of the fees, and there is no regulatory mechanism to force the RIA to pay the fees or force the arbitration to go forward. By intentionally designating an expensive private dispute resolution provider in an arbitration agreement, RIAs shield themselves from many customer disputes and put their interests ahead of their customers: a clear breach of their fiduciary duty. Worse, there is no disclosure in the arbitration clauses about how much an arbitration claim may cost to pursue. A harsh economic reality is concealed behind the bland boilerplate used by RIAs. At a minimum, a true fiduciary would disclose the economic consequence of bringing an arbitration claim through an arbitration provider of the RIA's choice. Of course, a true fiduciary would not impose any forced arbitration obligation and would instead let its customer make their own choice of forum, whether court or arbitration.

Along with using expensive arbitration providers, our members are seeing RIAs use venue selection clauses to designate a hearing location that is far from an investor's residence to make arbitration inconvenient; use forbidden hedge clauses to make investors believe they do not have viable claims;[2] and use choice-of-law provisions to select the law most favorable to the RIA without regard to the customer's state of residence to make arbitration as one-sided as possible. In totality, RIAs are using these oppressive clauses to discourage claims from being filed.

Additionally, the forced arbitration agreements conceal fundamental information about the arbitration process for an investor to make an informed decision to pursue an arbitration claim. In order to assess the impact of an arbitration clause on an investor's ability to pursue a claim, one must know 1) the likely fees to prosecute the claim, 2) whether the arbitration provider will set the hearing location near the customer's place of residence despite a venue selection clause, 3) the SEC's express prohibition against using a hedge clause to limit a disputant's ability to assert claims or seek damages, and 4) state law prohibitions against the use of choice-of-law clauses denying investors the ability to seek redress under state securities laws. Further, based on the forum and rules selected, investors need to know up front about any limitations on the dispute resolution process such as limits to discovery and the length of a hearing. Despite being fiduciaries with a duty to disclose such information, RIAs are not disclosing *any* of this information in their arbitration

[1] JAMS arbitrators set their own fees, and these fees are in addition to what the forum charges for its administrative fees. AAA arbitrators also set their own fees under the AAA Commercial Arbitration and Mediation Rules in addition to the AAA's administrative fees charged to disputants.

[2] The inclusion of hedge clauses in customer-RIA advisory agreements still continues despite *In re: Comprehensive Capital Management, Inc.*, Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 203(e) and 203(k) of the Investment Advisers Act of 1940, Making Findings and Imposing Remedial Sanctions, and a Cease-and-Desist Order in Release No. 5943, Administrative Proceeding File No. 3-20700 (Jan. 11, 2022).

clauses. Of course, the underlying issue remains that a true fiduciary should never use such one-sided terms in a customer agreement.

As a result of this misconduct, many RIAs have created an access to justice issue. They are denying clients with viable and compensable claims for RIA misconduct from seeking, much less obtaining redress. These ongoing abuses require regulatory intervention to protect the rights of investors.

There is a black hole of information about RIA arbitration claims which harms an investor's ability to learn about an RIA's history. No one, not even the SEC, knows the number of investor complaints and arbitration claims filed, the RIAs named in the claims, the outcome of each claim, and whether arbitration awards are being paid by RIAs. In fact, there is no securities regulator in the United States that knows how many arbitration claims have been filed in a given time period against RIAs in general, or individual RIAs in particular. This lack of public information makes it virtually impossible to know how many investor complaints have been made against an RIA, whether the complaint resulted in an arbitration, and the outcome of the arbitration including whether any arbitration award has been paid. As a result, prospective investors looking for a trustworthy RIA are left in the dark as to whether an RIA is a repeat offender with a history of misconduct. The SEC is also left in the dark as to how its regulated entities are handling customer disputes and the types of issues the investing public is facing in this burgeoning area. The informational black hole will continue to exist as long as the SEC gives RIA's the discretion whether to disclose the existence of an arbitration claim on its Form ADV. Mandatory disclosure is a solution to this problem.

Currently, FINRA's Dispute Resolution arbitration program is the only securities industry-sponsored forum. FINRA rules mandate that FINRA-registered firms use the forum if requested by the investor, regardless of other forum selection language in an investor account agreement. FINRA rules also provide certain protections and prohibitions regarding dispute resolution, including the mandate that member firms must provide clear, prominent disclosures about the presence and terms of the arbitration clause.[3] FINRA, through the CRD, also tracks the number of investor complaints, whether the complaint was brought to arbitration and whether the arbitration resulted in an award, vital information for an investor who is considering engaging a member firm to manage their hard-earned savings. Further, FINRA member firms subsidize the bulk of FINRA arbitration forum fees, and while additional forum fees may be assessed against the investor at the end of a FINRA hearing, investors can proceed with their FINRA arbitration claim by paying only the initial filing fee, ranging between $50 to $2,300: sums that are significantly less than the fees charged by private forums. The Director of FINRA Dispute Resolution may also waive the initial filing fee for investors. Even if the FINRA member firm or associated person does not timely pay their share of forum fees, FINRA allows the case to proceed. This is a significant difference from private arbitration forums. By comparison to what RIAs are imposing through forced arbitration clauses, FINRA's rules and regulations relating to the arbitration of customer disputes with broker-dealers provide a more accessible forum with superior investor protections. While PIABA does not believe forcing customers into arbitration for securities disputes is ever appropriate, at a minimum, there needs to be sufficient protections at the levels FINRA provides in its arbitration forum so investors with RIAs are not doubly abused.

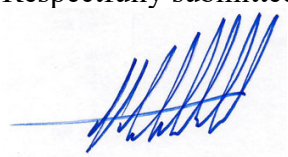
The SEC can and should increase its oversight of RIAs to include standardization of transparent pre-dispute clauses to ensure all investors have access to justice, shift the majority of costs of arbitration to the

[3] FINRA reminded its members about its prohibitions related to hedge clauses, choice-of-law clauses and hearing location clauses in FINRA RN 21-16 (Apr. 21, 2021).

RIAs using forced arbitration clauses, and commence gathering information related to an RIA's dispute resolution practices and disclosures so securities regulators and the investing public may be better informed.

PIABA appreciates the opportunity to submit these comments and urges the SEC to consider addressing RIAs' pre-dispute resolution usage as detailed above as part of its Strategic Plan for Fiscal Years 2022-2026.

Respectfully submitted,



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