PIABA
PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION

piaba.org
888-621-7484
1300 McGee Dr, Ste 112, Norman, OK 73072

February 28, 2025

Via Email Only @ ConsumerRules@Adr.org

Bridget M. McCormack
President & CEO
American Arbitration Association
120 Broadway, Floor 21
New York, NY 10271

RE: Comment Letter Regarding Proposed Amendments to the AAA's Arbitration Rules under the Consumer Arbitration Rules

Dear President McCormack:

We write on behalf of the Public Investors Advocate Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in disputes with the securities industry. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and financial industry misconduct. Our members and their clients have a strong interest in rules promulgated by arbitration forums such as AAA. As such, PIABA frequently comments upon proposed rule changes and retrospective rule reviews to protect the rights and fair treatment of the consumers who are forced to submit their disputes to arbitration.

Background

Our members have collectively represented thousands of clients in AAA Arbitrations, primarily retail investors and other consumers. Our members handle securities and investment fraud claims as well as cryptocurrency related litigation, and even general consumer protection cases such as claims involving cell phone carriers. Consumers and investors who are forced into arbitration with sophisticated corporations or professionals must have confidence in the integrity and the fairness of the arbitration process and procedure. Arbitration is often presented as efficient and cost-effective compared to court litigation. However, there are systemic shortcomings in arbitration forums, including base-level access to justice issues such as high costs and other procedural safeguards such as access to reasonable discovery, transparency, and ensuring arbitrators are fair and unbiased.

The AAA Consumer Rules must be improved to provide basic minimum procedural safeguards for consumers.

We understand AAA is proposing to amend various rules under the AAA Consumer Arbitration Rules. We support certain of these rule changes, have recommendations for improvements, and oppose certain items as described herein. We provide discussion of the more significant proposed rule changes below. We believe all of our suggestions and recommendations would enhance the principles of fairness, efficiency and accessibility, transparency, and ethics that AAA has stated as its goals.

Discussion/Position

New Rule R-1 – Applicable Rules of Arbitration.

PIABA's members represent individual customers in claims for wrongful conduct against their financial and investment advisors and firms, and one of our missions is to ensure that mandatory dispute resolution forums are fair and affordable for our clients to bring their claims. In many instances, our clients have lost large amounts of their life savings due to their advisors' misconduct, and they therefore have limited resources to spend in any attempt to recover their losses. When these investors are required to arbitrate their claims against financial and investment advisors and firms in the AAA, the financial implications between the AAA's Consumer versus Commercial Rules are critical for customers to achieve a fair and affordable resolution. PIABA remains extremely concerned about forum costs creating very real barriers for retail investor consumers to get access to justice. PIABA strongly believes that until investment advisory cases have their own rule set, that all investment advisory cases should be administered under the consumer rules of AAA because it is the only way to ensure investors have access to justice.

The fees for filing a case in court typically cost an investor-plaintiff approximately $400. Any forum that provides mandatory alternatives to court should not be more expensive to the consumer than court. Courts have properly held it is "unconscionable to condition that process [arbitration] on the consumer posting fees he or she cannot pay. It is self-evident that such a provision is unduly harsh and one-sided, defeating the expectations of the non-drafting party, and shocks the conscience. While arbitration may be within the reasonable expectations of consumers, a process that builds prohibitively expensive fees into the arbitration process is not . . . To state it simply: it is substantively unconscionable to require a consumer to give up the right to utilize the judicial system, while imposing arbitral forum fees that are prohibitively high. Whatever preference for arbitration might exist, it is not served by an adhesive agreement that effectively blocks every forum for the redress of disputes, including arbitration itself." *See Gutierrez v. Autowest, Inc.*, 114 Cal. App. 4th 77, 90, 7 Cal. Rptr. 3d 267, 277 (2003), as modified on denial of reh'g (Jan. 8, 2004) (emphasis added) (citations omitted).

Our members have experienced forced AAA Commercial Arbitration for consumer customers' claims against Registered Investment Advisors and similar firms, and the mandatory deposits and fees have prevented customers from even seeking a just resolution

of their claims. In some instances, the AAA Commercial fees, inclusive of arbitrator fees, can exceed the damages sought by the investor. In many cases, if the AAA Commercial Rules are applied, the AAA Forum and Arbitrator expenses will completely outweigh any potential recovery. This risk effectively shuts off access to justice for thousands of consumers. For these reasons, we believe it is crucial for the AAA to require that consumer customer claims against financial and investment advisors be heard in accordance with the AAA Consumer Arbitration rules rather than its more expensive Commercial Rules, until a new set of rules is approved for investment advisory claims.

PIABA appreciates the AAA's efforts to revise its Consumer Rules, including R-1, to clarify the definition of "consumer agreements" to encompass all consumer transactions. We have serious concerns regarding the language used in R-1 defining consumer agreements that would be required to be arbitrated under the Consumer Rules. These rules need to be clear that consumer claims are subject to the AAA's consumer rules. The former R-1 gave specific examples of contracts that fell under the Consumer Rules. However, financial and investment advisor contracts were not listed in either category. The new revised R-1 does not – but should - include these examples; it keeps the same language defining a "consumer agreement" in new section R-1(b).

First, the use of the term "standardized" in relation to the consumer services may be used by investment advisors to attempt to argue that their relationship with customers is not consumer in nature. Investment advisors are fiduciaries who are required to act in their customers' best interest and provide customer-specific advice and services. The AAA definition of consumer services should make clear that the "standardized" requirement relates to the contract itself, not the consumer investment services provided to each customer.

Retail customer contracts with financial and investment advisors certainly meet the definition's description of non-negotiable "standardized, systematic" arbitration clauses and contracts, and the provision of consumer services. However, the terms "consumable goods or services" are not defined and are unclear.

Does the term "consumable" modify the term "services"? Is the provision of investment advice to a customer a "consumable service"? We believe it should be and is, but we also believe that the AAA should include language that would make clear that a contract for such financial advice and services in an investment advisory contract for a customer would fall under the definition of consumer services. Alternatively, we believe that R-1(b) should read: "… where the terms and conditions of the payment for services or the purchase of consumable goods are non-negotiable…"

The proposed revised rule R-1(d) would further allow an investment advisor who is in a Consumer Arbitration to object to the applicability of the Consumer Rules to the appointed arbitrator, and to request a change to the Commercial Rules. This should not be allowed in instances where the AAA has already decided that the Consumer Rules apply. The Arbitrator would have a potential conflict-of-interest because they may be paid a higher fee

in a Commercial Arbitration; such a change would be highly prejudicial (and unduly expensive) to consumer customers.

Accordingly, while we welcome attempts to clarify and broaden the definitions of "consumer" agreements subject to the Consumer Rules, we believe that the current definition should make clearer that the contractual relationship between financial and investment advisors and their consumer customers fall under the Consumer Rules.

New Rule R-4 – Filing Requirements and Procedures

PIABA generally supports new Rule 4, but has reservations about subsection (e), which in PIABA's view is unclear and has the potential to create confusion. PIABA also believes that it is imperative that a forum designed to replace courts in the resolution of disputes cannot be fair if it reserves to itself the unilateral power to reframe or rewrite the claimant's statement of the claimant's own claim in any way. Indeed, allowing that to happen would mean that what was resolved would not even be the claimant's dispute as the claimant conceptualized and pleaded it. Instead, it would be a version of the dispute made up by the forum that the Claimant's opponent had hand-picked and written into the arbitration form. The consumer must be the master of the consumer's own claim.

New Rule R-10/56 Declining or Ceasing Administration/Remedies for Non-Payment

PIABA is concerned about Respondents that fail to pay arbitrator fees, which effectively stays and potentially ends a AAA arbitration proceeding. AAA should address this problem in either Rule 10 or 56. After an arbitration begins, a respondent should not be able to stop the arbitration by failing to pay required fees. Claimants are then forced to either 1) go to a court of law to compel a Respondent to pay the required fees; or 2) dismiss the arbitration claim and refile the claim in court after months or even years in arbitration. If a Respondent fails to pay required administrative or arbitrator fees, then the AAA must have the discretionary authority to inform the arbitrator to issue a default award. Once a default award is issued, then Claimant can take that default award to an appropriate court of law to convert it to a judgment and begin judgment adjudication proceedings. AAA needs to write a rule that makes it clear that if a party does not pay its fees a default award may be issued.

New Rule R-11. Mediation

PIABA opposes new Rule 11 to the extent it requires parties to mediate. Forcing parties to mediation is regularly used in court litigation by judges and in PIABA's experience, often does not work when the parties are not ready and willing to engage in the process, and results in undue delays and costs. PIABA believes mediation is a useful tool for resolving disputes, but only when the parties agree to mediate on their own and are *willing* participants.

Most attorneys in these cases have extensive experience and can determine when mediation may be beneficial. Compelling the parties to mediate when the expectations of the parties are not aligned can be a waste of time and resources for claimants, respondents, and

AAA itself. PIABA also opposes new Rule 11 to the extent it imposes additional compulsory costs on the consumers. Businesses, not consumers, should bear the costs of any compulsory mediation.

For the foregoing reasons, PIABA opposes specifically the first sentence of Rule 11, which reads: "During the AAA's administration of the arbitration or at any time while the arbitration is pending, the AAA may refer the parties to mediation, or the parties may request mediation." PIABA recommends the rule strike "the AAA may refer parties to mediation" so that mediation is entirely voluntary.

In addition, it is our experience that voluntary mediation can be effective only after a fair degree of discovery has been accomplished by both sides. Thus, to the extent the AAA retains any mediation referral, PIABA suggests that the mediation referral only takes place after parties are granted the right to full and fair discovery and exchange of documents and information.

New Rule R-12 "Business Notification and Publicly Accessible Consumer Clause Registry"

PIABA generally agrees with the purpose and intent of the proposed Rule. Notwithstanding, there are some changes to the proposed Rule that would further its purpose of providing for a fair and equitable dispute resolution forum for consumers.

First, the use of the word "should" in subsection (a) is permissive and implies best practices. However, the filing of a consumer arbitration clause with AAA for publication in the AAA Consumer Clause Registry ("CCR") should be mandatory. PIABA recommends that the word "must" be used in place of "should", making the final rule read "…(as defined in Rule R-1(b)) must register its consumer arbitration clause…" This will ensure that all consumer clauses are both properly filed and publicly available. PIABA also encourages AAA to include all older and updated versions of the consumer arbitration clauses used by each business on the CCR to ensure full transparency.

Second, in conjunction with AAA's due process standards review discussed in subsection (b), PIABA suggests that AAA publish on the CCR the following information related to each clause that does not pass the due diligence review: 1) the name of the business; 2) the full text of the clause; and 3) the reason for denial. This will provide an important element of transparency that will be beneficial to both businesses seeking to use AAA arbitration clauses and consumers, alike.

New Rule R-14 "Fixing of Locale"

Of course, the (a) portion of the proposed rule explaining that the parties may mutually agree on the locale of the arbitration makes good sense. However, PIABA does not support the (b) portion of the proposed rule, which provides that AAA selects the locale. While the rule does indicate that the filing party may select a locale among more than one option specified in the parties' arbitration agreement, this is a very narrow circumstance that

will not apply to most arbitration agreements. Rather, most consumer arbitration agreements – written by the business involved and not subject to negotiation by the consumer – likely specify just one locale: the one most favorable or convenient for the business. To fulfill the AAA Consumer Rules and Consumer Due Process Protocol purposes of ensuring that all parties are treated fairly and equitably and providing "evenhandedness in the administration of consumer-disputes resolution," any deference to a unilateral locale favoring the business is not appropriate. PIABA firmly believes the better rule would be to make the locale closest to the consumer the default locale in all cases. *See, e.g.*, FINRA Rule 12213 (providing that the hearing location closes to the customer's residence is the default for customer disputes administered by FINRA Dispute Resolution).

PIABA also notes that the caveats in the proposed rule allowing the arbitrator to "make a final determination on the locale" does not make the proposed rule fairer. Indeed, the appointed arbitrator is most likely to be located in the locale selected by AAA prior to appointment and therefore is unlikely to approve of any different locale, which would be less convenient for the arbitrator.

New Rule R-16 (Appointment of Arbitrator)

PIABA generally agrees with Rule 16 but proposes that AAA add additional provisions setting forth the process for parties to object to AAA about arbitrator appointments. One such way[1] to ensure a more uniform process for the objection of an arbitrator is to require parties to submit a written motion or by agreement by the parties to remove an arbitrator. By requiring a motion, the parties will have a clearer expectation of the timing of any responses, which affords a fairer process for addressing concerns about arbitrators.

PIABA also believes that the unilateral appointment of an arbitrator to a case is simply unfair to both parties. Without the ability to rank and strike prospective arbitrators based on their disclosures and award histories put blinders on both parties. That is patently unfair. PIABA would support an amendment to this rule requiring 1) that arbitrators be selected from a list of ten proposed arbitrators with a ranking/striking process like that used by FINRA; or 2) the right to at least one preemptive strike of an appointed arbitrator without cause, for both sides.

New Rule R-18 (Arbitrator Vacancy)

PIABA disagrees with this proposed rule change as written. Specifically, we believe that the rule should state that the arbitrator vacancy is filled by AAA unless the parties otherwise agree. Consider, for instance, FINRA Rules 12402 and 12403, which sets forth their process for the replacement of an arbitrator in cases involving 1 and 3 arbitrators, respectively. The Rules read, in relevant part, as follows:

[1] Consider also the reasons and processes for arbitrator challenges and objections under FINRA Rules at https://www.finra.org/arbitration-mediation/about/arbitration-process/arbitrator-selection#:~:text=In%20addition%20to%20allowing%20parties,arbitrator%20from%20the%20ranking%20list..

(g) Replacement of Arbitrators
(1) If an arbitrator is removed, or becomes otherwise unable or unwilling to serve, the Director will appoint a replacement arbitrator in accordance with this rule.
(2) The Director will appoint as a replacement arbitrator the arbitrator who is the most highly ranked available arbitrator remaining on the combined list.
(3) If there are no available arbitrators on the combined list, the Director will appoint an arbitrator from the chairperson roster to complete the panel from names generated by the list selection algorithm. The Director will provide the parties information about the arbitrator as provided in Rule 12402(c) and the parties shall have the right to object to the arbitrator as provided in Rule 12407.
…
(f) Replacement of Public Arbitrators
(1) If a public arbitrator is removed, or becomes otherwise unable or unwilling to serve, the Director will appoint a replacement arbitrator in accordance with this rule, unless the parties agree in writing to proceed with only the remaining arbitrators.
(2) The Director will appoint as a replacement arbitrator the public arbitrator who is the most highly ranked available public arbitrator remaining on the combined public list.
(3) If the next highest ranked available public arbitrator from the combined list is unable or unwilling to serve for any reason, the Director will return to the initial public list and appoint the next highest ranked available arbitrator to complete the three member panel.
(4) If all remaining arbitrators on the public list are unable or unwilling to serve for any reason, the Director will appoint a public arbitrator to complete the panel from names generated randomly by the list selection algorithm.
(5) The Director will provide the parties information about the arbitrator as provided in Rule 12403(b) and the parties shall have the right to object to the arbitrator as provided in Rule 12407.

As evidenced in these Rules, FINRA's default position is that it will appoint and replace an arbitrator if there is a vacancy. Parties should not give up their right to a full and fair hearing in the event that an arbitrator is unable to perform his or her duties and continue serving on a Panel, so we believe AAA's rules, including through Rule 18, should likewise further that goal.

Rule 19 (Preliminary Hearing)

PIABA believes that Rule 19 needs to expressly state that the arbitrator(s) and the parties will cover discovery topics. For instance, consider FINRA Rule 12500, which details the initial prehearing conference. – which includes setting discovery related deadlines and briefing schedules. Discovery is often the most important part of the case for arbitrations,

and forcing the parties and arbitrator to set deadlines, confer on discovery issues, etc. early in the process will facilitate an expedient resolution.

New Rule R-20 – Discovery / Exchange of Information

PIABA believes this proposed rule represents an improvement over the current AAA Discovery Rule for Consumer cases, but PIABA does not believe the changes go nearly far enough. Under the AAA's current consumer rules, many consumers are prevented from obtaining key evidence to prove their claims, denying them a fundamentally fair hearing process. To be a fundamentally fair process, consumers must be entitled to the relevant evidence that will ensure a fair hearing is held. Discovery is a vital process in the search for truth. Many consumer cases involve disputes over hundreds of thousands of dollars of consumer's life savings. Under the current rules, and even under the new proposed rules, businesses will likely be able to withhold directly relevant evidence, admissions, and the veritable "smoking guns" that are often produced in the adversarial litigation process.

Document discovery is of the utmost importance in arbitration proceedings. PIABA acknowledges that certain discovery procedures in Arbitration are somewhat more limited than the procedures in court, with no guarantee of depositions, interrogatories, or requests for admissions and certain limitations on the use of subpoenas. Without full and fair disclosure of relevant documents, consumers are subject to "trial by ambush" in claims against sophisticated businesses who can control the information available to the consumer and are motivated to avoid producing any incriminating. PIABA appreciates that AAA makes it clear that, unlike the previous Exchange of Information Rule which left the decision of what materials to voluntarily exchange almost entirely to the parties, that the new rule does recognize that exchange of information must "safeguard[] each party's opportunity to fairly present its claims and defenses."

In court, parties are required to produce relevant documents and discovery materials without requests. *See, e.g.*, Fed R. Civ. P. 26 (requiring parties to affirmatively identify the relevant witnesses and produce documents upon which they may rely to support their claims/defenses). The Federal Rules ensure that parties are allowed to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case" without regard to whether the discovery would be admissible at trial. In many consumer arbitrations, the need for discovery and production of materials is significant. Indeed, in the FINRA Arbitration Forum, there is a "presumptively discoverable" Discovery Guide that lists a wide variety of materials that must be exchanged by the parties, absent exceptional circumstances. FINRA, DISCOVERY GUIDE (2013), https://www.finra.org/sites/default/files/ArbMed/p394527.pdf; FINRA Rule 12506; Steven Caruso and Ellen Slipp, Discovery in FINRA Arbitration, FINRA's THE NEUTRAL CORNER (Vol. 2 – 2015). For investor claims in AAA Arbitration in particular, these same types of materials, at minimum, should be available for production. Other claims our members have filed to represent investors, including cryptocurrency related claims and other security-based claims including against phone carriers also necessitate the production of internal materials to establish and prove the claims asserted by the consumers, such as inadequate security processes, reviews, compliance, and procedures on behalf of the business. The AAA's

rule does not provide clear enough guidance to the arbitrators on a party's right to access to discovery materials, and PIABA is concerned that at least some AAA arbitrators may be inclined to not permit consumers access to important relevant materials to which the consumer should be entitled.

In short, while the AAA's proposed rules are clearly an improvement over the current system, AAA's rules should more clearly acknowledge consumers' rights to access relevant discovery that helps prove and establish the consumers' claims. Access to fair discovery and document production in AAA Arbitration is essential for a fundamentally fair arbitration process.

New Rule R-22 "Date, Time, Place and Method of Hearing"

The proposed rule contains several portions that make good sense, such as the notice requirement at least 10 days in advance of a hearing date and requiring that the parties respond to requests for hearing dates in a timely and cooperative manner. However, PIABA does not support virtual hearings as the default method of hearing. Particularly since the Covid-19 pandemic disrupted arbitrations in various forums, studies have "revealed a 'remote penalty' imposed on claimants – a lower chance of prevailing in an arbitration when the hearing proceeds on videoconference as opposed to in person." Jill I. Gross, *Post Pandemic FINRA Arbitration: To Zoom or Not to Zoom?*, 52 Stetson L. Rev. 363, 365 (2023) (citing studies of arbitration outcomes in AAA, FINRA, JAMS, Kaiser, and Canadian forums). Accordingly, in PIABA's view, and to fulfill the AAA Consumer Rules and Consumer Due Process Protocol purposes of ensuring that all parties are treated fairly and equitably, and providing "evenhandedness in the administration of consumer-disputes resolution," it is important for in-person hearings to be the default rule. Parties could of course still stipulate to the use of virtual hearings. However, consumers should have the presumption of entitlement to a final hearing in-person, particularly where they bear the burden of proof.

New Rule R-24-Representation Under the Consumer Rules

PIABA fought for over a decade to prevent "non-attorney representatives" from representing parties in FINRA Arbitration, and FINRA adopted a rule prohibiting this blatant unauthorized practice of law except under specific circumstances where a law school legal clinic is representing a party. PIABA believes that the AAA should similarly bar "non-attorney representatives". Section (a) should therefore be amended to explicitly state that a party's representative must be an attorney licensed with at least one state bar unless the representative is from an authorized legal aid or law school clinic. "Non-Attorney Representatives" must be banned expressly.

PIABA also believes that arbitration is contractual by nature between the parties, not their counsel. As such, arbitrators lack jurisdiction to interfere with or hinder an attorney from withdrawing from a case. Arbitration is not a court of law where the attorneys are officers of the court that has jurisdiction over their conduct. Arbitrators lack that authority and the AAA should not have a rule that interferes with the relationship between party and counsel or makes the arbitrator the decider of ethical issues including requirements under

applicable bar rules. FINRA expressly notes that it lacks jurisdiction, in the context of sanctions, to "sanction a party's attorney for conduct or noncompliance because FINRA does not have jurisdiction over attorneys."[2] Therefore, AAA should remove subsection (c) of this rule.

New Rule R-31 Dispositive Motions

PIABA does not have a problem with section (a) of Rule 31. However, it believes dispositive motion sections (b) and (c) of the Rule do not go far enough for consumer protection.

In AAA Consumer Arbitration, discovery is limited and based upon the arbitrators' discretion. Accordingly, the only way for consumers to fully and fairly present their cases to arbitrators is through a full and fair evidentiary hearing. Dispositive motions strip consumers of such an opportunity and, therefore, should be discouraged in AAA Consumer Arbitration.

Current AAA Consumer Rule 33 (Dispositive Motions) allows for dispositive motions *only if* the arbitrator determines the moving party has shown "substantial cause" that the motion is likely to succeed and dispose of or narrow the issues in the case. Proposed AAA Consumer Rule 31 allows for dispositive motions where the arbitrator determines the moving party has shown the motion is "likely to succeed" and to dispose of or narrow the issues in the case." "Substantial cause" (in the current rule) is a much higher bar than "likely to succeed" (in the proposed rule) and should be kept in the revised rule. Otherwise, consumers will face more dispositive motions and risk losing their opportunity for a full and fair evidentiary hearing before they've had a chance to present their cases, or even receive relevant discovery.

In addition, for consumers to have a chance to successfully defend against dispositive motions, they will need to attach and refer to relevant documents and information to support their claims. Accordingly, the rule should also require discovery to be complete prior to any party being permitted to file a dispositive motion.

Finally, to ensure consumers have every opportunity to present the facts and arguments that support their cases and defend against dispositive motions, the rule should require the arbitrators to allow oral arguments *unless all parties waive them*.

New Rules R-36 (and R-1). Increase of paper case limits to $50,000.00.

The revised Rules increase the requested damage cutoff for required paper cases from $25,000.00 to $50,000.00. While this increase may appear to save consumers time and costs for cases between $25,000.00 and $50,000.00, it would be extremely prejudicial to some consumers in cases for which discovery or a hearing is necessary to be able to adequately present their case.

[2] https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf at 60.

For this reason, we believe that in cases between $25,000.00 and $50,000.00, the consumer should have the ability to choose whether the case would proceed on the papers or with a hearing. Such a provision is used in arbitrations administered by FINRA Dispute Resolution (Rule 12800), which requires claims for under $50,000.00 to be decided on the papers unless the customer requests a hearing. This change would further the goal of providing a fair and just forum for the resolution of consumer disputes.

New Rule R-41 (Communications)

PIABA takes issue with the purpose and scope of Rule 41(d), which states that AAA may initiate administrative communications with the parties or their representatives either jointly or individually. The term "administrative" communications must be defined, as our concern relates to how the parties may interpret that term to leverage AAA to improperly communicate with or relay information to arbitrators. Further, we believe that the Rule should also include the provision that no party, or anyone acting on behalf of a party, may send or give any written motion, request, submission or other materials directly to any arbitrator, unless the arbitrators and the parties agree. *See, e.g.*, FINRA Rule 12210 (Ex Parte Communications).

New Rule R-42 – Confidentiality

PIABA generally supports New Rule R-42 which appropriately limits the scope of confidentiality. PIABA supports the publishing of awards, but PIABA believes the names of the businesses should *not* be removed from the awards. The arbitration process will greatly benefit from increased transparency, including in providing full and fair disclosure of arbitrators' past service or patterns of decisions in favor of certain businesses.

The AAA's proposed rule properly acknowledges confidentiality orders could cover "trade secrets and confidential information." Confidentiality agreements in arbitration are increasingly sought by businesses in an inappropriate manner that would declare all documents as automatically confidential. "Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification." *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000). This is particularly poignant for a private arbitration process – one that businesses force customers into. Simply put, we believe that sunlight is the best disinfectant, and processes that seek to shroud the entirety of the arbitration process in confidentiality or opaque protections runs contrary to a fair arbitration process.

Of course, if confidentiality orders are made by the arbitrator, it should be recognized that parties claiming confidentiality of documents bear the burden of establishing the document's confidentiality and merely should comply with the recognized legal procedures

and only properly cover documents *that are actually confidential or legally protected* and not seek to shift the burden of establishing confidentiality to the non-producing party.[3]

Many of the claims filed in AAA are similar cases or fact patterns arising from a failed product, system, or event, *e.g.*, investment products or strategies, crypto platform issues such as those involving Coinbase's security and compliance system, cell phone service security breach matters, etc. Those cases often involve production of the same exact documents in dozens, and often hundreds, of cases. AAA's guidance should more clearly acknowledge confidentiality orders should consider the nature of cases and provide for efficient production of confidential materials in multiple cases to reduce the burden on all parties. The Manual for Complex Litigation has multiple sections which discuss using discovery material from one case in other related cases.[4] Confidentiality orders that protect actually confidential documents while recognizing benefits of global production are *routinely* entered in state and federal courts around the country.[5] Confidentiality orders requiring production of documents for use in any related actions are also routine in complex litigation, including mass tort and MDL litigation.[6] The AAA Arbitration process, particularly where there are mass action claims or product based claims could significantly reduce burden and expense for the parties by acknowledging and expressly permitting for use of the documents in numerous cases, subject to compliance with the confidentiality provisions, in other or future related cases.

New Rule R-57 (and R-21) – Sanctions and Enforcement Powers of the Arbitrator

---

[3] *See, e.g.*, *Foltz v. State Farm Mut. Auto. Ins. Co.* 331 F.3d 1122, 1130 (9th Cir. 2003) ("Under the federal rules, "A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted."); *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981) (""Blanket" protective orders require particularly "heavy burden," requiring a showing that disclosure will work a "clearly defined and very serious injury.").

[4] Manual for Complex Litigation, Fourth §§11.423, 20.14, 40.27 (Same Confidentiality Order provides: "any discovery material produced in this litigation may be used in all actions encompassed by this [insert product or other litigation name] litigation and in any other action brought by or on behalf of any other [insert product name] user who agrees to be bound by the terms of this order.")

[5] *Rogers v. Brindle*, No. 12108807, 2013 WL 12226948, *1 (Ga. Super. Jan. 31, 2013) (Trial Order) ("Any discovery material produced in this litigation may be used in all actions encompassed by this action **and** *in any other action brought by or on behalf of any party regarding the allegations alleged in this lawsuit*."); *Sunrise Partners Ltd. v. Team Health Holdings, Inc.*, Nos. 2017-0154-TMR, et al., 2017 WL 2268995, *2 (Del.Ch. May 23, 2017) (Trial Order) ("Subject to the terms of a confidentiality order substantially similar to that entered in this Consolidated Action, **counsel and petitioners bringing any Related Action shall have access to all discovery**.")

[6] *In re Roundup Products Liability Litigation*, No. 3:16-md-02741-VC, *4 (N.D. Cal. Dec. 9, 2016) (Protective and Confidentiality Order).(allowing for confidential material to be used "for any other action brought by or on behalf of a former user of Monsanto glyphosate-containing products alleging injuries or other damages therefrom" subject to agreement to confidentiality provisions); *In re Xarelto (Rivaroxaban) Products Liability Litigation*, MDL No. 2592, *9 (E.D. La. May 4, 2015) (Pre-Trial Order No. 12) (permitting use of confidential documents by ""Any attorney of record for plaintiffs in other pending U.S. litigation alleging personal injury or economic loss arising from the alleged use, purchase, or payment of Xarelto for use in such other Xarelto action, provided that the proposed recipient is: (a) already operating under a Protective or Confidentiality Order in another jurisdiction where the Xarelto action is pending; or (b) agrees to be bound by this Order…").

PIABA supports the AAA adding rules expressly providing Arbitrators with the authority to issue sanctions to parties who engage in abusive conduct and ignore orders. Proposed Rule 21 is like both the AAA Commercial Rules and the authority provided to arbitrators under the FINRA Code of Arbitration Procedure. PIABA is concerned, however, that the rule may go too far in subsection (e) because it is vague, too broad, and susceptible to misapplication and abuse. PIABA recommends that the AAA remove subsection (e) of the new proposed Rule 21.

With respect to new Rule 57 – Sanctions – PIABA supports providing arbitrators with authority to issue sanctions. However, the proposed rule, which is the same as that under the Commercial Rules, is not specific enough to give guidance to parties about available sanctions. FINRA rule 12212 – Sanctions – specifically sets forth what sanctions are available, including:

- Assessing monetary penalties payable to one or more parties;
- Precluding a party from presenting evidence;
- Making an adverse inference against a party;
- Assessing postponement and/or forum fees; and
- Assessing attorney's fees, costs and expenses.
- Dismissal of a claim, defense, or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.

Likewise, in FINRA Rule 12511 FINRA specifically advises parties and arbitrators that specific sanctions can be ordered for discovery abuse. Providing the parties and the arbitrators with clear guidance on what sort of sanctions could be ordered is critical to ensuring a fair and disclosure-based system. PIABA requests that the AAA include these specific examples of what sanctions arbitrators can order under the appropriate circumstances.

New Rule R-58 "Appeals"

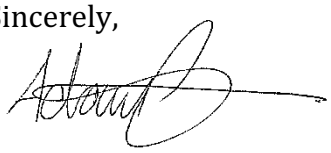
This Rule should not be enacted, as AAA consumer arbitration decisions should not be appealable through a separate arbitration procedure. Some of the most consistently touted benefits of arbitration are the supposed expedience, finality, and cost-effectiveness. This Rule would greatly diminish each of those three benefits. First, the appeals process would deprive the parties of the expeditious resolution of their disputes, as the appeal process can take a substantial amount of time to complete. Second, an appeal would obviously compromise the finality of any decision rendered by the arbitration panel, given that it could be overturned on appeal. It would also create another basis for the losing party to challenge the arbitration decision in court via a petition to vacate. Thus, if arbitration appeals were to become commonplace, it would likely spur an increase in related litigation. Of course, these subsequent court actions would further increase the amount of time the parties are involved in the dispute before its conclusion.

Appeals under the present rules also have the potential to lead to compromised results, where appeals panels make determinations based upon law or facts not in the record of the original arbitration hearing. *See, Hamilton v. Navient Solutions, LLC.,* No. 18 Civ. 5432 (PAC) (S.D.N.Y. February 14, 2019) (appeals panel partially overturned underlying arbitration decision based upon change in the law which arose after the close of the record). Given the inability to remand the case for a new trial, situations such as *Hamilton* present a serious issue that compromise the fairness of an appealed award that does not exist in court. In Hamilton, the parties presented their case in a manner that comported with the then-prevailing law, only to have that changed (along with the ultimate outcome of the case) without the ability to re-try the case and present new evidence.

//

PIABA appreciates the opportunity to comment on these proposed changes, and PIABA would like to contribute to improvements to the AAA Rule sets to ensure that consumers and investors are offered an affordable and fair arbitration forum.

Sincerely,



Adam Gana, President

Michael Bixby, EVP/President Elect

Joe Wojciechowski, Vice President