Public Investors Arbitration Bar Association

April 18, 2008

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: File No. SR-FINRA-2008-005
Procedures for Submissions to Arbitrators
After Case Is Closed

Dear Ms. Morris:

I write on behalf of the Public Investors Arbitration Bar Association (PIABA) to comment in opposition to FINRA's proposal to adopt Rule 12905 of the Code of Arbitration Procedure for Customer Disputes.[1] PIABA is an national bar association dedicated to the protection of the rights and interests of public investors in securities and commodities arbitration. Our members and the investors we represent have a strong interest in the rules that govern the arbitration process at FINRA. Our concern as to FINRA rule proposals is even greater now that FINRA has combined with the New York Stock Exchange to establish a monopoly over the investor arbitration process.

PIABA opposes this rule change because it does not provide investor protection and will actually harm investors. We believe that FINRA intended by this rule to resolve an administrative issue. However, in its application, the rule is likely to do more harm than good, which apparently FINRA did not foresee.

The Proposed Rule Would Increase Motion Practice and Attorney Fees

Contrary to the stated purpose of reducing attorney fees, this rule would likely extend the ever-increasing motion practice in arbitration to the post-award period. It would result in either increased attorney fees for customers or, in some cases, generate additional arbitrator orders after *ex parte* proceedings without customer representation. Public customers who have already been denied relief at the cost of thousands of dollars of forum fees would be justifiably unwilling to incur the expense of responding to post-award motion practice.

[1] The amendment also proposes adoption of Rule 13905 for Industry Disputes, but PIABA is primarily interested in the potential harm this proposal poses to the investing public.

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While FINRA's intent was to reduce the attorney fees incurred by both sides, an examination of the rule shows that this will rarely be the result. To begin with, the very existence of a procedure in the Code of Arbitration Procedure for post-award submissions will encourage an increase in these proceedings. When such a motion is made, there will be the necessity for a response. In the end, the proposed FINRA procedures will result in more attorney fees than under the current system.

The Proposed Rule Is Potentially Harmful to Investors

The most noteworthy ground for post-award review in proposed Rule 12905(a) is: "(2) at the request of any party . . . for ministerial matters." This provides the opportunity for a great deal of mischief. In support of its proposal, FINRA states that parties currently file post-award motions "to obtain expungement relief that a party failed to request during the life of the case, to correct what a party perceives to be a mistake in the award, or to request that forum fee allocations be changed." What is unclear is whether these requests will be considered "ministerial" under the proposed rule. It is hard to imagine how a post-award request for expungement and additional fees could be considered simply ministerial, or how it could be of any benefit to public investors. Rather, it is easy to see how it could be abusive.

At present, customers lose 63% of FINRA arbitrations, receiving no award, usually with forum fees assessed against them, and it is likely that most post-award proceedings would be commenced by prevailing brokerage firms against losing investors. For example, a member firm could go back to the panel and argue that its own attorney and forum fees be awarded against the investor because the panel ruled the customer's claim is without merit. In this instance, the investor would be forced to pay additional attorney and forum fees just to defend the member firm's requests before a demonstrably unfriendly arbitration panel that had already ruled against the customer. The brokerage firm may even be encouraged to negotiate dismissal of such post-award claims in exchange for an agreement for expungement.

And under the proposed rule, prevailing brokerage firms would be encouraged to take a second bite by seeking additional relief, including expungement, which had not been previously raised, briefed, or argued. In such a situation, investors who had already suffered significant investment losses, had all claims denied by a FINRA panel, and had been assessed large

forum fees likely will decline to pay additional forum and attorney fees to oppose expungement before a panel already proven unsympathetic. In such cases, the record of the arbitration claim may ultimately be expunged from the CRD triggered by post-hearing motions presented to the panel *ex parte*. In the event such a post-award expungement motion is granted and the expungement is ultimately successful, the public disclosure of individual broker records would become a further sham. We recognize that FINRA is already concerned with the expungement procedure and that there is another proposed rule pending which is intended to address expungement. In our view, however, inserting a rule which codifies and encourages expungement post-award motion practice would only add to the problem.

Even winning customers could be subject to post-award motions. Given the inclusion of "miscalculation of damages" in the definition of "ministerial," we are concerned that firms may use this 30-day post-award filing window to attack the damage award itself. Post-award motions relating to attorney fees and forum fees will provide a further basis to wrongfully attack awards. Moreover, it is unclear from the rule how the filing of a post-award motion would affect the firm's obligation to timely pay an adverse award.

The Rule Should Be Rejected

As FINRA and SICA have acknowledged, the law generally provides that the arbitrators' authority ends when the arbitrators render their decision. It would be improper for FINRA to now preempt a generally accepted state and federal legal principle by adopting this new rule.

FINRA has not demonstrated a real need for this proposed rule. According to the FINRA proposal, the problem is "several requests each year from parties" in cases that have been closed for long periods of time. Moreover, FINRA tells us that, in nearly all cases, the panels refuse to reopen the proceedings to grant the requested relief.

These are not compelling arguments to allow a post-award motion practice which will burden the arbitration proceedings, particularly where investors will be negatively affected.

We respectfully request that this proposed rule be rejected. Thank you for the opportunity to comment on this proposed rule change.

Respectfully,

PUBLIC INVESTORS ARBITRATION
BAR ASSOCIATION

Laurence S. Schultz
President, 2007-2008

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