

# Public Investors Arbitration Bar Association

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June 26, 2014

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

Re: Response to the Order Instituting Proceedings Relating to Broadening Arbitrators' Authority to Make Referrals During an Arbitration Proceeding as Modified by Partial Amendment No. 1, (Release No. 34-72196; File No. SR-FINRA-2014-005)

Dear Ms. Murphy:

On behalf of the Public Investors Arbitration Bar Association ("PIABA"), I thank the Commission for the opportunity to provide further comments. PIABA is a national, not-for-profit bar association comprised of attorneys, including law professors and regulators, both former and current. PIABA members who are practicing attorneys devote a significant portion of their work time representing public investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in securities and arbitration forums and has advocated for investor education and investor rights. Our members and their clients have a strong interest in rules promulgated by FINRA relating to both investor protection and disclosure.

PIABA commends the Commission for instituting proceedings related to this proposed rule change. PIABA contends that the rule relating to mid-hearing referrals has serious adverse due process implications to claimants in FINRA arbitration hearings.

PIABA incorporates by reference three comment letters that it previously submitted in connection with the rule proposal and amendments.<sup>1</sup> PIABA does not intend to reiterate the points raised in its previous letters. PIABA would like to reemphasize the point that FINRA arbitration proceedings can be very expensive for individual investors. Forum and expert fees routinely run into the range of tens of thousands of dollars. The monetary figure does not take into account the time and legal resources that are put into proving a claim. An investor claimant should not be expected to incur these costs due to an arbitrator's recusal resulting from a mid-case referral, and such a recusal would undermine the principles of §15A(b)(6).

<sup>1</sup> See, Jason Doss, President, PIABA, dated February 26, 2014 ("PIABA"); Peter Mougey President, PIABA, dated August 18, 2011; Scott Shewan, President, PIABA, dated October 11, 2010.

PIABA also wishes to reiterate that FINRA regulators are provided with a copy of every statement of claim filed in arbitration by investors and have every opportunity to investigate and charge the brokers and firms named in these claims at any time during a pending arbitration proceeding. Therefore, FINRA regulators will not be prevented from effectively carrying out their regulatory duties if this proposed rule change is denied.

The Commission posed a number of questions in the request for comments:

- Would the proposal adversely affect retail investors? If so, how?

PIABA believes that the prior letters submitted taken together with some of the other comment letters adequately detail how a retail investor claimant engaged in arbitration before FINRA-DR would be severely prejudiced through a mid-case referral.

- Should FINRA propose a different standard for referral? If so, what standard(s) would be appropriate?

PIABA contends that a different standard would not ameliorate the problems associated with recusals and motions to vacate resulting from mid hearing-referrals. In order to protect due process, the Commission must give deference to the rights to the individual litigant over the standard of conduct of the member or associated person. No matter what standard is proposed, a claimant would face the same consequences as the result of the referral under the proposed rule change and amendments.

- Does Partial Amendment No. 1 ameliorate commenters' concerns that notifying parties of a mid-case referral could lead to adverse consequences to the claimant, including requests for recusal and challenges to an award? If not, should FINRA amend the proposal to preclude the Director, or anyone else, from notifying the parties of a referral?

Limiting a party/respondent to requesting a recusal within three days of notification of a mid-hearing referral will not minimize the negative consequences of the proposed rule. In the event that a respondent inadvertently or purposefully fails to file the recusal request within three days, it would almost certainly serve as the basis for a subsequent motion in court to vacate the award.

Thank you for your kind consideration in protecting the due process rights of individual investors engaged in arbitration before FINRA-DR.

Sincerely,



Jason Doss  
PIABA President