Public Investors Arbitration Bar Association

February 26, 2014

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number SR-FINRA-2014-005

Dear Ms. Murphy:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in securities arbitrations. 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 industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority ("FINRA") relating to both investor protection and disclosure.

On behalf of PIABA, I thank you for the opportunity to comment on SR-FINRA-2014-005. The currently proposed rule is identical in to SR-FINRA-2010-036 – Amendment No. 1. This Amendment was filed in July 2011 in response to comments submitted to the original rule proposal in July 2010. Having effectively ignored comments in response to Amendment 1, including PIABA's comment letter dated August 18, 2011, FINRA has resubmitted the same proposed amendments to FINRA Rule 12104 and 13104. PIABA's comment is specific to the proposed amendment to Customer Code Rule 12104, specifically "Arbitrator Referral During or at Conclusion of Case."

PIABA commends FINRA's efforts to address investor protection concerns in the wake of numerous Ponzi schemes and other preventable frauds that impacted so many investors in the aftermath of the 2008 Financial Crisis. PIABA also notes the improvements to the original rule proposal made by FINRA in response to PIABA's comments to the original 2010 proposal. In PIABA's August 18, 2011 comment letter in response to Amendment 1, PIABA identified concerns specific to Proposed Rule 12104(c), namely the fact that the Proposed Rule allows for the costs associated with arbitrator recusal, including the potential postponement fees associated thereto, to be born at least in part by the investor. Almost three years later, this issue remains. FINRA has done nothing to Proposed Rule 12104(c) that would require costs and fees associated with recusal to be born exclusively by the moving party. PIABA firmly stands for the proposition that requiring investors to pay the costs of arbitrator recusals made because an arbitrator believes a "serious threat…likely to harm investors" exists, is patently unfair, inequitable, and inconsistent with the provisions of Section 15A(b)(6) of

the Securities Exchange Act. Proposed Rule 12104(b) should therefore be rejected and replaced with a Proposed Rule mandating that all costs associated with an arbitrator's compliance with Proposed Rule 12104(a) be borne by either the Industry (Respondent) or FINRA as an advancement of its mandate to detect fraud.

Much like FINRA's previous proposals to amend Rule 12104, it provides no definitive statistical or empirical data to suggest this proposed rule is actually necessary to further investor protection. In fact, FINRA's entire proposal is based on the assumption that mid-case arbitrator referrals would have a net positive effect on investor protection versus post-case referrals. As noted in PIABA's August 18, 2011 comment, there were no arbitration cases pending against Bernie Madoff or any of his firms at the time of his arrest. This, of course, does not diminish the importance of any person with information relevant to an ongoing massive securities fraud to act as quickly as possible.

According to FINRA, it provides copies of all statements of claim and other pleadings in cases involving promissory notes to the Central Review Group ("CRG"), which is part of the Office of Fraud Detection and Market Intelligence. This department then analyzes these pleadings, and if it determines possible securities violations have occurred, then CRG may alert Enforcement for further review. Although pleadings are not typically affirmatively pled in FINRA Arbitration, FINRA clearly deems it worthwhile to review at least some statements of claim and other associated pleadings. Instead of burdening investors who are in an arbitration hearing with possible delays, additional costs, and the specter of court-filed motions to vacate, FINRA should simply expand the CRG's review of statements of claims and pleadings, and mandate referral to FINRA Enforcement when appropriate.

It has been three years since FINRA's last attempt to amend this Rule, and yet it has provided no new data or information to address the potentially disastrous impact on claimants of this Proposed rule. Presumably, arbitrators would only exercise the discretion to report a respondent mid-hearing under the worst circumstances. Thus, when initiated, the claimants victimized by the worst fraudsters and wrongdoers in the industry will suffer the most from the implementation of this Proposed Rule. The irony of this inequitable and unjust result should not be lost on FINRA, who openly admitted in its filing that sacrificing a few investors or claimants for the common good of all investors is necessary and just. Such a proclamation is ridiculous when FINRA fails to point to one circumstance when the existence of this Proposed Rule (instead of simply relying on the existing rule which allows for post-case referrals) would have saved investors. Until such time as FINRA publicizes the results of a study justifying the disparate impact this Proposed Rule would have on a select few victims of fraud, this proposal should not be approved.

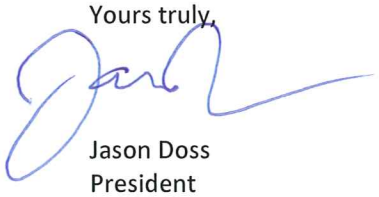
The Proposal will result in an increase in motions to vacate arbitration awards and will likely result in substantial delays for claimants in cases where a mid-case referral has been made. FINRA's Proposed Rule provides industry members with another reason to file a motion to vacate adverse arbitration awards. Recent history has provided a lesson that certain industry members tend to ignore case law and file motions to vacate when they feel like it for strategic purposes. Filings of motions to vacate arbitration awards have increased markedly over the previous decade, mostly as a result of the litigious nature of a few industry member firms. FINRA cites to various cases standing for the

proposition that panelists who refuse to recuse themselves after a mid-case referral would not necessarily result in vacatur. FINRA's argument misses the mark. the issue is not whether a particular award would ultimately be vacated but instead if the Proposed Rule would increase the likelihood of motions to vacate arbitration awards that would unduly burden public investors.

The standards for vacating an arbitration award are high indeed. The costs to the claimants involved in such proceedings is higher still. This is not a reference to only legal costs of representation. These motions can take years to reach a final resolution. In many instances, individual claimants may have lost a substantial part of their assets, and must have confidence that the FINRA arbitral forum will provide a streamlined resolution to their claims. Implementation of this Proposed Rule will result in more motions to vacate, given the partiality concerns a mid-hearing referral could raise.

In instances where a panelist makes a mid-case referral and then does recuse him or herself, the parties are then left in a difficult place. They can either start the hearing over with a new arbitrator or continue with two arbitrators, something neither party bargained for. Further, any replacement arbitrator would likely not be a ranked panelist. Instead, FINRA would appoint the arbitrator –known in the industry as a "cram-down." Ultimately, the public investor that was forced to bring an arbitration claim to enforce her rights would be unduly burdened. FINRA needs to reexamine the case-to-case impact this Proposed Rule may have on both parties. In sum, PIABA does not support this proposed Rule. Instead, Rule 12104 should remain the same and continue to allow arbitrators to make post-hearing disciplinary referrals. PIABA also believes FINRA should increase its review of filed pleadings in all cases to determine whether referrals need to be made earlier in the arbitration process. A review of possible scenarios reveals that mid-hearing arbitrator disciplinary referrals does neither party any good and will have a disparate impact on a select few investor-claimants without any established benefit. The Proposed Rule should not be implemented.

Sincerely,
Yours truly,



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