



PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

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March 9, 2015

Mr. Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

Re: SR-FINRA-2015-003 – Proposed rule change to amend the Codes of Arbitration to increase the late cancellation fee

Dear Mr. Fields:

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 arbitration forums, while also advocating for public education about investment fraud and industry misconduct. Our members and their clients have a strong interest in rules promulgated by the Financial Industry Regulatory Authority (“FINRA”). I write to comment on the proposed cancellation fee rule.

FINRA has filed with the Securities and Exchange Commission (“SEC” or “Commission”), a proposed rule change to amend FINRA Rules 12214 (Payment of Arbitrators) and 12601 (Postponement of Hearings) of the Code of Arbitration Procedure for Customer Disputes (“Customer Code”), as well as FINRA Rules 13214 (Payment of Arbitrators) and 13601 (Postponement of Hearings) of the Code of Arbitration Procedure for Industry Disputes (“Industry Code”). The overall effects of the proposed rule change would be to: (1) require parties to postpone or adjourn a final hearing session one week earlier than the current three day notice necessary to avoid being assessed a per-arbitrator postponement fee; and (2) require parties to pay \$500 dollars more than the current amount of \$100, per-arbitrator, when such postponement fee is assessed

Despite our concerns about the effects of the fees on the parties, PIABA generally supports the aims of the proposed rule changes. PIABA supports increasing the length of time before a final hearing session that a party must seek postponement or adjournment to avoid the “per-arbitrator” postponement fee (also referred to in the SEC’s Notice as a “late cancellation” honorarium).

Similarly, PIABA supports the proposed changes increasing the “per-arbitrator” late cancellation fee. These changes may more effectively compensate FINRA arbitrators that typically set aside time for final hearing sessions months in advance of those hearing sessions. More specifically, these changes would address what PIABA understands to be a significant concern of FINRA arbitrators – having late cancellations results in a loss of income because they had to forgo other opportunities while holding the dates. PIABA is committed to improving the quality and quantity of arbitrators that FINRA is able to attract and these changes may support those efforts.

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Despite our general support, PIABA remains concerned about the current rule and the proposed rule changes. In particular, we are concerned about applying fees inequitably to all postponements without any distinction for the reason provided for the postponement request. There are primarily two types of postponements: (1) those necessary due to party, witness or attorney availability or a lack of preparedness by at least one party; and (2) those necessary to accommodate a mediation (or other settlement efforts) or because a case has been settled.

PIABA believes that the proposed rule changes should only be applied to the first type of postponement and, even then, they should be accompanied by a reminder to arbitrators that the rules involved specifically acknowledge that there can be "extraordinary circumstances" that can excuse a late cancellation such that it would not be appropriate to penalize a party by charging a late cancellation fee. In order to further reinforce the need for arbitrators to give appropriate consideration of parties' requests for a waiver of late cancellation fees in extraordinary circumstances, and given the requirement of "verification" of the extraordinary circumstances, PIABA suggests that FINRA provide additional arbitrator training on what types of extraordinary circumstances and verification would be appropriate.

At the least, given the fact that the parties are typically innocent in situations where true extraordinary circumstances arise, PIABA believes that FINRA should also modify the rules to state that FINRA will bear the financial responsibility for the late cancellation honoraria in those limited situations where it is appropriate for the arbitrators to waive the honorarium.¹ In that way, arbitrators are still being fairly compensated for, but the innocent parties are not responsible for the payment. PIABA fears that without FINRA guaranteeing the honoraria to the arbitrators, the proposed changes would create a conflict of interest—the arbitrators would lose their honoraria if they granted a waiver motion. This conflict-generating proposed rule could significantly impair arbitrator judgment and cause them to deny relief. Parties should not fear losing motions for relief on account of an arbitrator's personal, financial conflict of interest.

PIABA is also concerned that, given the significant size of the per-arbitrator late cancellation fee increase, there will likely be pro se claimants that are unaware of the existence of the rule calling for late cancellation fees, the circumstances in which it would apply, and the amount it may mean they would have to pay for an unexcused late cancellation. PIABA suggests that FINRA provide additional education to pro se claimants so that they can make informed decisions about postponing final hearing sessions.

Finally, PIABA believes that FINRA should modify the proposed rule changes with respect to the second type of postponement (*i.e.*, to accommodate mediation/settlement efforts or because a case has been settled) so that there is no additional cost to claimants. These types of postponements are always the result of agreement of the parties, but it is not fair to make them equally bear the financial burden for two reasons. First, the financial impact of the increase in the amount of the per-arbitrator fee in the proposed rule change, as between a typical individual claimant and a large broker dealer, is too disparate to claimants, who will "feel" the impact of the fee much more than broker dealers will. Second, claimants have no effective control over whether or when respondents seriously

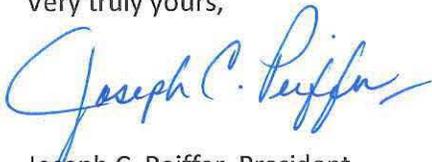
¹ PIABA does not believe that the extraordinary circumstances calling for waiver of postponement/cancellation fees will occur with anything near the regularity of the "extraordinary relief" FINRA arbitrators regularly grant to Respondents seeking to expunge complaints about wrongdoing from their records. See Jean Eaglesham & Rob Barry, *Stockbroker Requests To Scrub Complaints Are Often Granted*, WALL STREET JOURNAL (Oct. 16, 2013), available: <http://www.wsj.com/articles/SB10001424052702303680404579139520100083360>

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consider settlement. Since it is respondents that get to keep their dollars in their pockets until a given claimant's case is over (by settlement or award), it is respondents that need incentives to "address issues earlier in their cases." Claimants should not have to rely on respondents' good will concerning the allocation of late cancellation fees caused by a late settlement.

PIABA asks that FINRA reconsider its proposed rule changes and modify them in the manner set forth above. We thank you and the Commission for giving PIABA the opportunity to comment on these important proposed rule changes.

Very truly yours,



Joseph C. Peiffer, President
Public Investors Arbitration Bar Association