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September 23, 2016

Mr. Robert W. Errett, Deputy Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549–1090

Re: **SR-FINRA-2016-033; Proposed Rule Change Relating to Broadening Chairperson Eligibility in Arbitration** - (Proposed Rule Change to Amend Rule 12400 of the Code of Arbitration for Customer Disputes and Rule 13400 of the Code of Arbitration for Industry Disputes)

Dear Mr. Errett,

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. Our members and their clients have a strong interest in FINRA rules relating to both investor protection and disclosure. As such, PIABA frequently comments upon proposed rule changes in order to protect the rights and fair treatment of the investing public.

PIABA submits this comment because, while the bar association believes the proposed rule is certainly a positive step in regards to increasing the number of arbitrators in proposed chair pools, PIABA does not want to see the quality of the pools watered down or have an increase in "traveling arbitrators" to attain a greater number of chair-qualified arbitrators. Also, PIABA feels the formation of a chairperson mentor program would help address shortages of chair-qualified arbitrators. Lastly, PIABA believes the rule should go farther in terms of education, background and overall arbitrator background transparency.

Background

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("ACT"), Financial Industry Regulatory Authority, Inc. ("FINRA") is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change to amend Rule 12400 of the Code of Arbitration Procedure for Customer Disputes ("Customer Code") and Rule 13400 of the Code of Arbitration Procedure for Industry Disputes ("Industry

Code") (together "Codes") to provide that an attorney arbitrator would be eligible for the chairperson roster if he or she completes chairperson training and serves as an arbitrator through award on at least one arbitration, instead of two arbitrations (as the rules currently require), administered by a self-regulatory organization ("SRO") in which hearings were held.

The text of FINRA rules require chairpersons, who play a vital role in the administration of arbitration cases, to have arbitrator experience and training to ensure the quality and efficiency of arbitrations. FINRA Rules 12400 and 13400 address the Neutral List Selection System ("NLSS")[1] and arbitrator rosters and provide, among other matters, that an arbitrator is eligible for the chairperson roster if he or she has completed chairperson training provided by FINRA and:

> *Has a law degree and is a member of a bar of at least one jurisdiction and has served as an arbitrator through award on at least two arbitrations administered by an SRO in which hearings were held (an "attorney arbitrator"); or
> *Has served as an arbitrator through award on at least three arbitrations administered by an SRO in which hearings were held.[2]

FINRA's Office of Dispute Resolution ("ODR") offers 71 hearing locations, including at least one in each state of the United States, one in San Juan, Puerto Rico, and one in London, UK. ODR maintains a roster of approximately 6,750 arbitrators, of which approximately 3,060 are currently classified as public. Approximately 1,000 of the 3,060 are chair qualified. Despite the size of the public chairperson roster, forum users have raised concerns of a diminished public chairperson roster resulting from amendments to the "public arbitrator" definition.[3] FINRA reclassified approximately 13.8 percent (487 out of 3,512) of its public arbitrator roster as non-public, and approximately 2.6 percent (93 out of 3,512) of its public arbitrator roster were temporarily disqualified and made ineligible for service.[4] Many of the arbitrators who were reclassified or disqualified were chair-qualified.

Currently the public chairperson roster in each hearing location ranges from fewer than 40 to over 200. Forum users recognize the risk that when the caseload increases, the ratio of cases to qualified public chairpersons is higher, and FINRA may not have a sufficient number of public chairpersons on its roster. To expand the roster of public chairpersons in locations where the ratio of cases to qualified public chairperson is higher, FINRA asks many public chairpersons to service in multiple hearing locations. FINRA reimburses these chairpersons for their travel, lodging and meals.

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[1] The NLSS is a computer system that generates, on a random basis, lists of arbitrators from FINRA's rosters of arbitrators for the selected hearing location for each proceeding. FINRA maintains a roster of non-public arbitrators (as defined in FINRA Rules 12100(p) and 13100 (p), a roster of public arbitrators (as defined in FINRA Rules 12100(u) and 13100(u), and a roster of arbitrators who are eligible to serve as chairperson of a panel.

[2] See proposed change to Rule 12400 and Rule 13400 of the Code of Arbitration Procedure.

[3] See Securities Exchange Act Release No. 74383 (February 26, 2015), 80 FR 11695 (Order Approving Filing No. SR-FINRA-2014-028) (in part narrowing the public arbitrator definition by adding disqualifications relating to, among other things, affiliations with the securities industry concerning an arbitrator's family member or place of employment.

[4] There were an estimated 2,932 public arbitrators after the amended public arbitrator definition became effective. Arbitrator recruitment since July 2015 added approximately 128 to the public arbitrator roster, there reaching approximately 3,060 public arbitrators as of this rule filing.

However, party representatives have told FINRA staff that it is inconvenient to schedule hearings with out-of-town arbitrators. Moreover, during inclement weather, arbitrators may not be able to travel to the hearing location, which would then require parties to reschedule and incur additional costs. In addition, some forum users suggest that these arbitrators may also need instruction on the state laws, procedures, and customs for the hearing venue.

FINRA has had limited success in enrolling new public chairpersons. One reason is that for the last few years, FINRA arbitration caseload has remained low, and public arbitrators were not serving on a sufficient number of cases through award to meet the case experience requirements for attorney arbitrators outlined above. In 2015, only 24% of cases closed by award. However, thus far in 2016, there has been an increase in case filings (up 20% compared to the same period in 2015). If this trend persists, the need for more public chairpersons could outpace the qualification pipeline under the current eligibility criteria.

FINRA is proposing to amend Rules 12400(c) and 13400(c) to provide that an attorney arbitrator would be eligible for the chairperson roster if he or she completes chairperson training and serves as an arbitrator through award on at least on arbitration, instead of two arbitrations, administered by an SRO in which hearings were held. Reducing the case experience requirement from two arbitrations to one arbitration could add more than 270 attorney arbitrators across 59 of the 71 hearing locations, resulting in a nearly 30 percent increase in the number of arbitrators who might be eligible to serve as public chairpersons once they take chairperson training.

Comments

In general, PIABA supports the proposed rule because the bar association feels strongly that public investors would generally benefit from a larger pool of qualified public chairpersons. However, PIABA does not want to see the chairperson pool increased in quantity at the expense of quality. PIABA feels strongly that quality pools are paramount to a fair and equitable arbitration proceeding, as well as the public investors' confidence in the overall arbitration process. Lastly, to the extent possible, the traveling arbitrator needs to be eliminated and the size of regional pools needs to be increased, in particular for those areas with higher rates of out-of-state arbitrator names appearing on public and chair-qualified ranking lists. PIABA's membership sees the same out-of-state arbitrators appearing too often in the ranking lists.

Forum users from small and mid-size cities are seeing the particular problem of traveling arbitrators. The scheduling issues referenced above can delay the process, which costs more time and money for everyone involved. Likewise, out-of-state arbitrators may not be as familiar with the hearing state's laws and procedures, which decrease the arbitrator's chances to fairly and adequately adjudicate over the arbitration.

Additionally, PIABA's members have experienced a trend whereby the foreign arbitrators have what appear to be histories of awards that substantially favor the industry, compared to the local arbitrators' records that tend to be more investor-friendly. Combined with the fact that out-of-state arbitrators may not be familiar with the hearing state's laws, investors are too often being denied rights afforded to them by their state legislatures.

PIABA members' concern about the effect of importing so many arbitrators is well founded. Since Rule 12100 and the definition of "public" arbitrators were amended (effective June 26, 2015), the percentage of awards in which customers were awarded damages decreased from 47% in 2015 to 38% in 2016 in cases with three "public" arbitrators. *See* FINRA Arbitration Statistics Through June (https://www.finra.org/arbitration-andmediation/dispute-resolution-statistics#arbitrationstats, last visited July 27, 2016).

PIABA is concerned that the increase of proposed arbitrators to the public arbitrator selection list, without other necessary modifications to list generation and arbitrator selection, will only serve to further exacerbate the alarming increase of out-of-state arbitrators appearing on ranking lists. This is particularly a significant problem for locations in the country that have limited available chair-qualified and public arbitrators *(i.e.*, areas with "shallow" arbitrator pools).

PIABA also strongly believes there should be greater transparency in arbitrator background and qualifications, as well as the selection process. The present system, while providing education, employment history and potential conflict disclosure, has not always succeeded in eliminating the appearance of possible impropriety and bias. The investing public should feel confident the panel that is seated to hear their case has been fully vetted and free from any potential conflict or innate bias. Only then will the system work, free from second guessing and overall cynicism with the process.

PIABA also believes a Chairperson Mentor program would be helpful to increase both the quality and quantity of chair-qualified arbitrators. There are hundreds of public arbitrators with the requisite background that would surely benefit from the experience and guidance of a chair mentor. Also, from a more practical standpoint, the arbitrator application process should be simplified. The current process is very burdensome and intimidating and surely drives away many potential arbitrators which further weakens the number and quality of arbitrators available in the FINRA system.

Conclusion

In summary, PIABA supports FINRA's proposed rule amendment to the extent it will increase the number of chair-qualified arbitrators, as long as quality and experience does not suffer as a result. Transparency in arbitrator qualifications and background, as well as the overall selection process, is paramount. As such, PIABA believes the amended chairperson qualification rules, while a positive step, do not go far enough in addressing the current shortcomings outlined above. PIABA thanks FINRA for the opportunity to comment on this proposal.

Sincerely,

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Public Investors Arbitration Bar Association

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