



PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

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December 18, 2017

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506
pubcom@finra.org

RE: FINRA Regulatory Notice 17-33: Requests for Comment on Potential Amendments to Code of Arbitration Procedure for Customer Disputes to Expand the Options Available to Customers if a Firm or Associated Person Is or Becomes Inactive

Dear Ms. Asquith:

I write on behalf of the Public Investors Arbitration Bar Association (“PIABA”), an international bar association composed of attorneys who represent investors in securities arbitration proceedings. 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 investor protection.

PIABA supports the amendments contemplated in RN 17-33 (hereinafter “the Notice”) that expand options for customers in pursuing and attempting to collect money awarded to them against industry respondents in arbitration proceedings. This letter specifically addresses some of the finer points of the proposed amendments.

A. The Proposed Amendments May Help in Limited Circumstances, But Does Not Solve the Overall Problem of Unpaid Arbitration Awards.

At the outset, PIABA notes that FINRA recognizes these proposed amendments are not a solution to the pandemic of industry respondents failing to pay arbitration awards in customer-initiated FINRA arbitrations. In the Notice, FINRA states: “In general, however, the use of the [proposed] options in a limited number of circumstances suggests that the magnitude of the benefits and costs of the proposal are likely to be small,” and “FINRA believes that few customers would withdraw claims from arbitration in the presence of the proposed rules.” RN 17-33, pages 8, 9.

FINRA claims, without providing statistics, that member firms and associated persons who are no longer in business either prior to a claim being filed or at the time of an arbitration award are “responsible for most unpaid

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awards.”¹ FINRA also states that a total of 21% of customer cases closed by hearing, by papers, or by stipulated awards from 2014-2016 were cases where a firm or associated person “would have been identified as inactive under the proposed amendments, either before or during a pending arbitration.”²

PIABA’s 2016 study of unpaid arbitration awards put a spotlight on the fact that, based on PIABA’s analysis of the awards issued to customers in year 2013 alone, one in three awards or nearly \$1 of every \$4 awarded to investors after an arbitration hearing, totaling approximately \$62.1 million dollars, went unpaid.³ It is easy to see how this failure of the industry’s self-regulatory system—with its underfunded, uninsured members—erodes public confidence in the securities industry and the retirement savings of Main Street investors. PIABA researched and considered nearly two decades of analysis, including information from the U.S. Government Accounting Office, in an effort to find potential solutions to the problem. Its conclusion was that a national investor recovery pool maintained and administered by FINRA would be the best, most equitable, and most logical solution.⁴ PIABA urges FINRA to establish a national investor recovery pool. Anything less is a temporary bandage on the deep financial wounds suffered by public investors and the U.S. economy on a daily basis.

B. Proposed Amendments – Specific Comments

While a national recovery pool for unpaid awards is the best solution, PIABA supports interim efforts by FINRA to expand options available to customers when choosing how to pursue claims against FINRA members and associated persons whose licenses have been terminated, suspended, cancelled, revoked, or that have otherwise been expelled.

The proposed amendments to the Code of Arbitration Procedure for Customer Disputes would require FINRA to provide notice to a claimant when a member or associated person becomes inactive during a pending arbitration. FINRA would then allow a claimant 60 days to review a situation and, at the customer’s option, withdraw the claims with or without prejudice within 60 days. The amendments would also provide that a customer’s claims against an inactive associated person would be ineligible for arbitration, unless the customer agrees in writing to arbitrate after the claim arises. Effectively, these proposed changes would allow a customer to withdraw filed claims without prejudice (or in the case if inactive associated persons, never submit the claim to FINRA Arbitration in the first place), and file a claim in court, regardless of whether the customer signed a pre-dispute arbitration agreement.

PIABA supports the above said proposals. In particular, in some cases, it may be more expeditious and cost effective for a customer to pursue default proceedings in state or federal courts when the named respondents are no longer FINRA members.

The proposed amendments would also allow, within 60 days of notification that a named respondent firm or associated person has become inactive, the claimant to unilaterally amend the pleadings, including the adding of new parties, without requesting permission from the arbitration panel. PIABA supports this important change to FINRA Rule 12309. Control persons and the associated person(s) are often not initially named as respondents in

¹ FINRA Regulatory Notice 17-33, p. 2. PIABA requests that FINRA release this, and other statistical information tracking the frequency, amounts, and other data regarding unpaid FINRA arbitration awards.

² *Id.*, p. 7. PIABA requests that FINRA release the data underlying its findings referenced here by FINRA staff. Footnotes 16, 17, and 18 of the RN 17-33 provide some additional detail so it should be no burden for FINRA to provide the complete data gathered in its review.

³ “Unpaid Arbitration Awards, A Problem the Industry Created - A Problem the Industry Must Fix,” by Hugh D. Berkson, Public Investors Arbitration Bar Association Report, February, 2016. Access the report: <https://piaba.org/piaba-newsroom/piaba-press-release-one-out-three-investor-awards-finra-arbitration-go-unpaid-nationa>

⁴ *Id.*, pp. 21- 37.

the interest of simplifying a case. But when there are concerns about collection, a claimants' best chance at recovery may be to amend and name additional parties. We are concerned, however, that newly-named respondents may demand extended delays and postponements of scheduled hearing dates, which may be to the unfair detriment of claimants, especially in cases designated expedited due to the claimant's age or illness. PIABA urges FINRA to consider adopting arbitrator training and guidelines that urge the arbitrators to carefully balance the interests of all the parties to the arbitration when considering newly-added respondent requests to extend deadlines or hearings.

The proposed amendments would allow a claimant to unilaterally postpone a hearing, with no postponement fee charged by FINRA, if the claimant receives such notice within 60 days of the scheduled FINRA hearing and the customer elects to postpone. The proposed change also provides that the arbitrators would be paid their late-postponement honoraria by FINRA (not the claimant), and the customer would be refunded his or her filing fee, if such a postponement is within 10 days of a scheduled hearing. PIABA applauds FINRA for offering to compensate the arbitrators' honoraria and refund the claimant filing fee under these circumstances.

Finally, the proposed amendments would change the default proceeding rules under Rule 12801 to clarify that a customer may request default proceedings against an associated person *regardless* of how long the person has been terminated. PIABA approves of this clarification. This clarification is important because, under the other rule amendments discussed herein, an associated person must be terminated for a minimum of 365 days to be considered "inactive."

C. 365-Day Window

PIABA is concerned with the long, 365-day period proposed by FINRA for a terminated associated person to be considered "inactive," thereby providing the customer the extended options contemplated by the RN. The 365-day period conflicts with FINRA's goals of an efficient dispute resolution forum and it should be reduced to a 60-day window.

FINRA staff found that out of 1,328 customer cases reviewed for the period of 2014-2016, 84 cases contained instances of the associated person leaving the industry fewer than 365 days prior to the close of the arbitration and as such, the customer would not have been able to utilize the expanded options contemplated by this Regulatory Notice.⁵ The number of such cases decreased to 42 cases when a 180-day window was used for "inactive" status, and again to 20 cases when a 90-day window was used.⁶ We note that Footnote 17 addresses the number of associated persons returning to the industry within 365 days, but is conspicuously devoid of a disclosure of how long it actually took those people to return to the industry.

A shorter window simply provides the customer with *more options* regarding amendment and/or withdrawal of the claims without prejudice. PIABA believes that a 60-day window to determine "inactive" status is more than sufficient to determine "inactive" status for a terminated associated person.⁷ Granting the customer more *options* does not necessarily mean the option will always be used. Customers may still elect to pursue claims against the inactive associated person in FINRA arbitration.

⁵ FINRA Regulatory Notice 17-33, Footnote 17.

⁶ *Id.*

⁷ In contrast, FINRA's analysis shows that the greater likelihood is that, if an associated person leaves the industry, he or she returns to the industry in time period shorter than 365 days. See Footnote 18 to RN 17-33, citing 51 cases during 2014-2016 during which an associated person returned to the industry within 90 days, and for the same time period only 6 more cases within 180 days, and only 10 more cases within 365 days.

D. Conclusion

PIABA supports interim measures by FINRA to expand customer options to amend claims and withdraw claims without prejudice, and without postponement fees, within a proposed 60-days after notification from FINRA that a respondent is no longer FINRA-licensed. The more choices provided to harmed investors improves claimant experience and public perception of the FINRA dispute resolution process. The proposed interim measures may help some claimants, in particular by making it easier to add new respondents that might have the resources to pay an award

While PIABA supports every measure taken to address the serious unpaid award problem, we reiterate our concern that FINRA's current proposal will not address in a meaningful way the millions and millions of dollars of outstanding unpaid awards. It is *critical* that FINRA stop delaying and institute a real cure to the problem: a national investor recovery pool.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew Stoltmann". The signature is fluid and somewhat stylized, with several overlapping loops and a long horizontal stroke at the end.

Andrew Stoltmann, President
Public Investors Arbitration Bar Association