Richard Sacks
Telephone: 415-987-3256
Email: richardatirs@yahoo.com

December 15, 2017

VIA E-mail: Submission to PUBCOM@finra.org

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

Re: NTM 17-34 Efficacy of NARs

Dear Ms. Asquith:

FINRA's concerns about NARs, as detailed in NTM 17-34, namely their "efficacy" are baseless. Efficacy, as defined in Webster's dictionary is "the power to produce an effect" and there is absolutely no evidence, because no one has ever performed an analysis on this subject, that suggests NARs obtain lesser awards or settlements for their clients than attorneys do.

Without an appropriate investigation / study comparing the two, FINRA is simply relying on opinion rather than fact. Isn't that precisely the opposite of what FINRA's most fundamental rule is concerning the handling of customer accounts? Namely that FINRA members, and their registered personnel must always have a reasonable basis behind their recommendations. As further explained below, such is not the case and couldn't be farther from the truth. NARs perform as well, if not better for their clients than their attorney counterparts do at FINRA DR. If FINRA has any evidence to the contrary, they have not put it forth in NTM 17-34. It doesn't exist.

At this time there is no evidence, other than anecdotal stories, by mostly PIABA members (Public Investors Arbitration Bar Association), that NARs don't perform as well as attorneys on behalf of their customers, and they are more likely to take advantage of their clients because, well, they are not regulated. Sounds good perhaps, but that is really all it is, just sound.

Further, I believe that the change to Rule 13208, below, can offer a good solution on how FINRA can address their "efficacy" concerns of while not depriving the public of free choice. I believe the "facts" hold up well that the majority of NARs, over the past 25 years, have performed extremely well while acting on behalf of their clients' best

interests.

Before most NARs became NARs, many were successful, knowledgeable and trustworthy FINRA associated persons. Why FINRA and its predecessor NASD believe it necessary every 10 years or so to question the efficacy of NARs is probably a more relevant question.

Absent a showing from FINRA that there is currently a genuine basis for concern about NARs, then this current exercise is perhaps another attempt to take what has been good and destroy it in pursuit of the perfect. Or, perhaps it's just another attempt by PIABA to exclude competitors from the marketplace. Regardless, making FINRA arbitration even more legalistic by excluding non-attorneys I believe threatens FINRA's often-stated mandate of providing a "fast, fair and relatively inexpensive" dispute resolution mechanism.

I say that because I believe that FINRA arbitration, although not perfect (what system of justice is always fair and never fails, in our own minds of course), has worked quite well on behalf of the public over the past 30 years. And NARs have been a large part of the FINRA arbitration process. We are not a sideshow. And, by constantly casting NARs to appear to be just a tiny portion of the marketplace, i.e., helping customers with such small losses that no attorney can afford to take them on, FINRA does an injustice to the public.

Having ignorant law school students drafting simplified complaints (no evidentiary hearing required), for that portion of the public that needs representation the most, is a genuine disservice. I ought to know as for a couple of semesters I trained University of San Francisco law school students on this subject, for the Investor Justice Clinic. They are often bright and eager to learn but ignorant of the industry, ignorant of life and their published results show that.

In my experience a "strong claim", even if only for $50,000 in losses, which requires an evidentiary hearing, will yield the highest percentage recovery of any type of claim filed with FINRA, if for no other reason than the legal costs securities firms will have to pay to defend against it. But, from the attorney perspective, who wants to take on a claim where the greatest amount they are likely to obtain is $50,000 at best. Then measure that against the work they have to put in to move the claim along.

Review the case with the client, prepare and file a statement of claim, review the answer with your client, issue discovery requests above and beyond that which is required to be produced by each party, participate in pre-hearing telephone conferences, file motions, rank arbitrators, prepare for hearing, including the preparation of exhibit books, then actually go to hearing and try the case. All for at best a $15-20,000 fee, assuming $50,000 is awarded. But, for someone with a large office staff to handle the paperwork, and the ability to essentially try this type of case in their sleep, it places the brokerage firms in a very bad place.

It is much better for respondent brokerage firms to pay the client more than they believe they should in order to settle, because the only other option is to pay a defense attorney about as much as they would have to pay to settle the case, or more. Simplified arbitration, generally speaking, does not yield as good results for the public as going to an evidentiary hearing.

But, FINRA has ended up sending many abused public customers that could obtain significant awards by going to a full evidentiary hearing, to these law school clinics instead of referring them to NARs, who have the ability and the desire to help these types of customers. FINRA should look into the "efficacy" of these law school clinics.

The above statements are made by someone that has filed over 1300 claims with NASD/ FINRA from 1991-2014 and tried more than 225 of those to an award. In many cases we were referred our clients by attorneys because they believed we would do a better job for their clients than they could. We had many clients that were also attorneys. During that time period there has been no evidence ever put forth by anyone that suggests that NARs are not effective, nor evidence that suggests attorneys obtain better awards for their clients than NARs do. Most importantly, there is no evidence that NARs represent any danger to the public as compared to attorneys, or say stockbrokers.

Yet, if one reads the published comments concerning NTM 17-34, one might think otherwise. And, of course, that's the entire point. To scare people into thinking something must be wrong with non-attorneys appearing as representatives in FINRA arbitrations.

As I understand by this notice, FINRA would like to make certain, as if that were truly possible, that public customers that were ripped off by their brokerage firms, obtain the very best representation possible, and thereby receive the very best awards/settlements possible, by being represented by an attorney, as opposed to someone that isn't an attorney, in their FINRA arbitration proceedings. That is certainly something that deserves further investigation because in my humble opinion the notion that FINRA would like to see the public obtain the largest awards or settlements possible against its member firms just doesn't pass the smell test.

Anecdotal stories, emanating primarily from PIABA members about certain NARs alleged misbehavior, is tiny compared to the extraordinary horror stories about attorneys taking people's money, making promises and then failing to perform. Once it becomes obvious that the subject firm refuses to settle, and the attorney must prepare for hearing, then the attorney typically advises his client(s), "you better take whatever we can get, otherwise you could get stuck with arbitrator fees, expert witness fees, and maybe even the other side's attorney fees". Many attorneys do that frequently because many, if not most, struggle to earn a living. Many clients came to us because their attorneys essentially "lost interest" in pursuing their claims, once it became evident that they would have to actually "work" for it.

If you ask most attorneys why they took a certain client on, if they are being brutally honest they will tell you "because they paid me". It's not about whether or not the case is really worth pursuing, it's much more about whether or not the attorney will be able to pay his office rent and salaries. Once the tidy up front retainer is had, then the attorney will figure out what to do next. That is precisely why most people are afraid of attorneys "are they telling me the truth, or do they just want my money".

When arbitration began at NASD the industry wanted their branch managers (or compliance personnel) to be able to represent the broker's or firm's actions, to avoid attorney fees, but also to allow attorneys not licensed in all states, to appear in any state their employer firm had offices, without the need and expense to associate in local counsel. All for the primary NASD stated purpose of keeping arbitration at FINRA "fair, quick and inexpensive". I believe not allowing NARs will have the opposite effect.

The primary reasons why NARs emerged at NASD DR was because most attorneys in the late 80's: 1) were not price competitive; 2) lacked actual hands on knowledge of the securities industry; 3) lacked the financial resources to maintain a sufficient staff to handle the enormous paperwork load, both incoming and outgoing; 4) lacked strong negotiating skills; 5) lacked marketing skills; and 6) lacked the ambition to succeed and 7), didn't believe the public could get a fair shake in arbitration at FINRA. Rest assured the only reason NARs are active at FINRA is because there was a need, and NARs saw that need and acted on it.

What is also glaring to me about NTM 17-34 is FINRA's utter failure to point out that there have been no formal complaints made against NAR's at either the NASD, FINRA or the SEC from at least 1991-2010. I would think a simple fact like that might be important enough to include in NTM 17-34, in order to place the subject of NAR representation under a fair light.

Imagine that for just a moment, over a 20 year time frame, involving far more than 100,000 securities arbitration/litigation claims, more than during any other time period in NASD/FINRA history, not a single formal complaint about the services NARs provided to the public were received by either NASD/FINRA/SEC! But, it appears that some PIABA members believe otherwise. Of course, they are entitled to believe whatever they want but beliefs are not the same as facts.

I came to learn of this unique fact in or around 2009 via litigation (Sacks v. SEC Case No. 07-74647) that neither FINRA nor the SEC could produce any evidence suggesting NARs represented any danger to the public. Albeit, in all honesty I would have suspected something in their files to suggest somewhere, at some time, some NAR did something they should not have done. But, the SEC's cupboard was empty.

Just to be clear, that also translates to NASD/FINRA being unable to provide a lick of evidence to the SEC that NARs were a threat to the public, even NARs with a disciplinary history. I wonder how many complaints the SEC or FINRA received about attorneys appearing in their forum during this same timeframe. Perhaps someday

FINRA will open up on this subject, and they will actually do an analysis of attorney vs. non-attorney results based on facts, not innuendo. That would definitely be in the public's best interests. And, with today's computers, that analysis should be a piece of cake. Why hasn't FINRA actually performed such an analysis is the question, which would provide solid answers, based on facts, about NARs' efficacy.

And without such an analysis, otherwise referred to as "due diligence" one can positively make the following statement "**there is no evidence to suggest NARs perform any worse or any better than attorneys on behalf of their clients, because no one at FINRA has bothered to perform such an investigation**". Nevertheless, FINRA is contemplating preventing the public from retaining a NAR, while having no reasonable basis to do so. Isn't that precisely what customers allege in their complaints as wrongdoing, most of the time, ie, "lacking a reasonable basis".

Therefore, I must assume that something happened over the last few years to have brought the subject of NARs up again. Or perhaps, as I suspect, this is either about attorneys looking to eliminate their competition, particularly in light of the extremely low number of customer complaints filed at FINRA over the past few years. Or, this is about member firms looking to protect themselves against the more knowledgeable NAR vs. an ignorant attorney.

As you may surmise or know I am a (retired) NAR. From 1991-2014 my firm, Investors Recovery Service, filed over 1300 separate claims, the majority involving public customers, along with a smaller percentage representing industry clients. My many years as both a salesperson and a supervisor made it easy for me to both understand and empathize with abused brokers, along with abused customers.

Our claims averaged well under $200,000 in losses in the early 90's, but by 2009 our claims averaged over $1,000,000. That means many of our clients had losses well over $1 million. One might ask, with losses so large why would individual investors choose a NAR over an attorney. That is simple.

If a prospective client spoke with us for 10 minutes, they knew that we knew far more than most any attorney they may have spoken to. In fact, I preferred and often told prospective clients, call an attorney first, and then call us. As you probably know, there is no shortage of attorneys that specialize in securities arbitration readily accessible online, or the FINRA web page.

Before becoming a NAR I was a branch manager and a principal in my own firm, first licensed in 1974. It is also a fact that former branch managers are some of the most important participants in the FINRA arbitration process. That is because they understand the customary rules and practices of the securities industry, and how they are actually applied, in the real world. That is why NASD/FINRA wants and is justified in having an industry arbitrator, rather than all non-industry arbitrator panels. But, that is a choice and in my opinion, a correct industry arbitrator, meaning not conflicted, is the better

choice. That is because we speak the same language.

Who better to understand, and explain to other arbitrators, what really happened between a customer and a broker, than a former branch manager, with 10 -20 years experience, or more in the industry, including the managing of registered reps. That individual is the one most responsible for ensuring their employee brokers are not acting contrary to the customary rules and practices, as well as their employers rules. That individual is often the one that speaks with upset customers or certainly the broker, to get at the truth. And, that individual is generally the one that "failed to properly supervise" as often alleged in customer complaints, so they have much at stake.

Therefore, my suggestion on how to best deal with the question of NAR efficacy raised by NTM 17-34 would be to add the following to FINRA rule 13208, item c,

Representation by others, to add the following fourth bullet:

> "Individuals that are not attorneys and actively represent parties in the FINRA forum must possess a minimum of 10 years employment history within the securities industry, with no less than 5 years experience as a branch manager or higher."

By doing so, FINRA will have done all it can reasonably do, or should do, to protect the public from unscrupulous NARs who might take advantage of their clients, or at least that is the image FINRA is projecting by the publication of this Notice. Any individual that has served in a supervisory capacity for at least five years has already proven their trustworthiness and knowledge of the securities industry in the FINRA arena. Why should anyone assume that if one is not an attorney, they must by definition be untrustworthy and incapable of doing a credible job. That's a fairly huge leap of faith to take. But, that is exactly what is going on if this Notice results in the baring of NARs.

Also, the majority of the most sought after expert witnesses, retained by both claimants and respondents, are former branch managers. That is because the testimony of these experts at evidentiary hearings is often highly relied upon by FINRA arbitrators. These experts are best suited to explain to arbitrators how the "customary industry practices" apply to any particular claim/set of circumstances, because they are essentially lifelong industry employees, with extensive supervisory experience. That is the background I brought with me as a NAR. That is a background I believe all NARs should have, if they are going to represent parties at FINRA.

Therefore, why wouldn't these same individuals make excellent advocates at a FINRA Dispute Resolution hearing? While there are a few attorneys whose knowledge of the securities industry is quite high, not a one, unless they worked in the industry in a supervisory capacity can truly understand the day-to-day realities of working within the securities industry as well as an experienced branch manager. And, because of their specialized knowledge of the industry, it is not at all uncommon for arbitrators at

evidentiary hearings to rely on what I/they had to say. For the most part, defense attorneys didn't like that one bit.

That was the premise behind opening Investors Recovery Service, namely to offer our clients superior knowledge of the securities industry, in most cases greater than, but certainly rarely, if ever less, than any attorney, even one with substantial securities industry knowledge / experience. When legal questions arose from time to time, there was no shortage of legal advice at our disposal, at no cost to our clients.

Legal knowledge is fungible, meaning one can obtain such knowledge from most any competent attorney. But industry knowledge can only be obtained from experienced industry professionals. That is why most attorneys almost always will retain an industry expert in some capacity in order to explain to them what they need to know about their case and about their client. Most attorneys are not qualified to represent parties at FINRA, unless they have associated in an industry expert. That may not apply to all PIABA attorneys, but to most. Last time I heard, one only needed to have completed one claim at FINRA to be admitted into PIABA. That is hardly an exclusive club,. It is also misleading the public into believing that if they retain a PIABA attorney, they are retaining someone with extensive FINRA DR experience.

As best as I can recall over the past 26 years, every NAR I knew of in California had been a former branch manager, or higher (i.e. Regional Manager). In my opinion it is this "inside knowledge" that only former branch managers possess that can make them highly effective advocates. No wonder our respondent firms fought us for years in the courts. It wasn't because we weren't doing an "effective" job for our clients. It was quite the opposite. And, for those attorneys out there that clearly don't know or understand the law, non-attorney representation in a FINRA arbitration is legal in California.

So, when the question of NAR efficacy comes up, which it seems to do every 10 years or so at FINRA, along with it's predecessor NASD, someone such as myself will always wonder, what's really up. Are they out to get me? Again? I retired in 2014, and I strongly believe NAR's with a supervisory background provide a valuable service, not only for the public, but for industry personnel as well.

NARs have also created a highly competitive environment that caused securities attorneys to re-invent their business practices.

For example, PIABA attorneys are trained on how to obtain up front money from their potential clients. Stuart Goldberg, the founder of PIABA, wrote the book on this subject almost 30 years ago, and believed that an attorney should always obtain an up front retainer because it: 1) bound the client to the attorney; and 2) assured the client was being truthful with them. Sounds good, but like many times, that's all it is, just sound, not substance.

NARs with a supervisory background have a fairly good idea just how strong or weak a potential claim may be. They don't need to retain an expert to advise them of the merits

of any particular claim. They know how to research and analyze a claim, because this is precisely what they frequently did as branch managers. They know how to determine losses, they understand loss causation, because they come from an industry background. And, they understand what is important to arbitrators, because they essentially speak the same language. They know exactly what questions to ask, and documents for them to produce, in order to determine if their potential client is being entirely truthful.

And, because they usually don't ask for up front retainers, other than to cover filing fees etc., the potential client feels much more comfortable, because they appreciate the fact that someone is going to work hard on their behalf, with the only expectation of being paid for their hard work, by obtaining a satisfactory settlement or arbitration award.

Eliminate NARs and I believe the very first thing PIABA attorneys will do, en masse, is require up front money, because much of the attorney's competitors are out of business. That certainly won't be good for the public and will result in fewer claims filed. After all, most clients who sustained substantial investment losses are justified in believing "am I just throwing good money away after bad".

That is a huge subject on someone's mind, and NARs exploited that by offering " no recovery, no fee" arrangements. In fact before NARs came along in the late 80's, the likelihood of obtaining experienced competent legal representation at NASD arbitration on a straight contingency fee basis was highly unlikely, if not outright impossible.

I also find it ironic that while some PIABA members have commented negatively about NARs, in response to NTM 17-34, last month PIABA has simultaneously taken the very public position that the public cannot trust FINRA because its board of governors is too aligned with the securities industry, even its so-called public members.

FINRA on the other hand believes, and has for as long as I can remember, that having the experience of former securities industry persons on their board is beneficial for the markets, the investors, and the industry. PIABA apparently does not believe so.

But ironically, isn't that similar to what NARs, who have a strong supervisory background within the securities industry, that come before its arbitration panels, provide to public investors? The similar experience, the knowledge and the wisdom gained from working many years within the industry, the same as FINRA's board members possess. Why would that be a bad thing for the public?

I am hopeful that those who read this letter will actually begin to understand the subject and benefits of non-attorney representation by former branch managers (could be expanded to include compliance directors etc.) and come to a conclusion that these types of NARs are hardly a danger to the public. To the contrary, they should be perceived as a threat to the securities industry, just because of what they know about it. Few PIABA attorneys possess a knowledge of the industry, like true industry professionals have. That's also not an opinion, just a fact. And, maybe that is the motivation behind NTM 17-34.

So far, at least from 1991-the present no one has actually demonstrated the courage to state the truth about these types of NARs. They know more about the securities industry than most any attorney in the country. Certainly far more than most PIABA members, whose knowledge of the industry comes mostly, if not entirely from experts they have spoken with, not from their own actual experience working within the securities industry. And, the securities firms know this as well. Their defense attorneys would much prefer going against an attorney, particularly one with little real knowledge of the industry than a former industry professional.

For all the above I believe that NARs provide the public with a valuable alternative to attorneys. They can provide a knowledge of the securities industry that few attorneys possess, and an understanding of the issues in dispute, without the need to retain an expert to advise them, which is most often performed at the public customer's expense. Moreover, they are far less likely to file "frivolous" claims, precisely because of their knowledge. What exactly is the point of filing a frivolous claim when working on a contingency fee basis.

And, because of their past experience working within the securities industry, an ability to quickly recognize who is being truthful, and who isn't. That is perhaps the most important point because public customers, generally speaking, don't sue brokers simply because they lost money. They sue because they were lied to. And that is pretty much what arbitrators look for, namely who is being truthful and who isn't, when testifying before them.

I very much look forward to FINRA performing an appropriate analysis on this topic because of its great importance. The last thing FINRA would want to do is bar a certain type of representative from its forum that actually obtains better/higher settlements or awards than attorneys. Anyone with half a brain can understand that without such an investigation, FINRA would lack a reasonable basis to bar NARs. And, in doing so, actually harm the public, although it would benefit "securities attorneys" and the industry, ie the less money firms have to pay out in awards or settlements, the better it is for the industry.

In order for FINRA to accurately, or even remotely determine the efficacy of NARs an analysis between complaints about attorneys obtained by NARs vs. attorneys must be performed. And of course, who is making the complaint. It should be the customer, almost by definition. How problematic is it for the public client of a NAR if an attorney defending his clients at FINRA files a complaint about a NAR? Attorneys always have the ability to file a formal complaint in court if anyone, including a NAR were to violate the law or cause harm to their client(s).

As regards FINRA's concerns as expressed in NTM 17-34, because these type of NARs, before they became NARs were demonstrably successful, knowledgeable and trustworthy experienced FINRA associated persons, in good standing, with substantial supervisory experience I believe they provide FINRA with a "reasonable basis" to not be

anymore concerned about their conduct at FINRA DR than their counterpart attorney.

They have personally handled and or supervised the investing of many millions of public investor dollars, without a serious problem. That alone should certainly be enough to reassure FINRA that this type of non-attorney representative is hardly problematic for the public, and far more problematic for the respondent brokers and brokerage firms they go after.

NTM 17-34 is precisely about whether or not NARs obtain "better or worse awards" than attorneys do for their clients. Efficacy "the power to produce an effect". That can only mean that FINRA, by publishing this Notice, would like to make certain that the public obtains the best awards or settlements possible when going to arbitration

FINRA, by publication of NTM 17-34, has clearly aligned itself with the public on this issue of non-attorney representation. They want to have a high confidence factor that when a customer of a securities firm goes before its arbitrators, they will be suitably represented by someone that both knows what they are doing, and has the moral character to act appropriately with the public customers they represent. And by their representative's efficacy, will therefore have the best chance possible of receiving the most amount of money possible, either through settlement or arbitration.

I believe the facts, once ascertained from the many thousands of claims filed by NARs at FINRA DR over the last 30 years, not just a few, will show that the "efficacy" of NAR's to be no less than that of attorneys.

Yours truly,

Richard Sacks