



PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

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June 19, 2017

Via Email Only

Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506
pubcom@finra.org

Re: *Special Notice Dated March 21, 2017 – Engagement Initiative
Comment on Potential Enhancements to Certain Engagement Programs*

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"), an international bar association comprised 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") that govern the conduct of securities firms and their representatives. In particular, our members and their clients have a powerful interest in FINRA rules relating to the information provided to investors.

We want to thank you for the opportunity to comment on FINRA's Special Notice dated March 21, 2017, regarding potential enhancements to certain engagement programs. PIABA would like to comment on the following issues identified in the Special Notice: 1. Engagement in Committees; 2. The Rulemaking Process; 3. Regulatory Guidance; 4. Investor Education; and 5. Enforcement and Awards Databases.

I. Engagement in Committees

Page 10 of the Special Notice has numerous questions about engagement in committees. PIABA has a particular interest in the Investor Issues Committee. Most of the investing public and many PIABA members were unaware that such a Committee even existed. Upon further research, it appears that the Investor Issues Committee was created in December 2013 and its formation was announced in a December 17, 2013, press release by FINRA.

While PIABA appreciates that this Committee was formed, there are a number of concerns related to its purpose, membership, and transparency. Initially, we believe that FINRA should disclose the identities of the Committee members (as well as those of other FINRA committees) on the FINRA website. We also believe that FINRA should disclose the goals or objectives for this Committee, the process for qualifying Committee members,

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the member nomination and selection process, the length of member terms, and disclosure of when member positions become available. Further, the Committee's meeting minutes should be recorded and made public, so that the investing public knows what the Committee is doing on its behalf.

PIABA is also concerned about the current composition of the Investor Issues Committee, based on the contents of the December 2013 Committee disclosure. The December 2013 press release disclosed the names of 13 members of the Committee, including:

- a) Brandon Becker - Chief Legal Officer of TIAA-CREF;
- b) Roger Ganser – Chairman of BetterInvesting and Managing Director of Venture Investors LLC (a venture capital firm);
- c) Catherine Heron - Senior Counsel for Capital Research and Management Company (“CRMC”);
- d) Paul Roye - Senior Vice President for CRMC.

If FINRA is looking for diverse perspectives on this Committee, then why are there two senior officers from the same firm, which happens to be a privately-owned investment company? Moreover, some of the other Committee members, such as Lawrence Greenberg (the Chief Legal Officer for Motley Fool) have strong industry ties. PIABA believes that such a Committee should have more investor advocates on the Committee and fewer with industry ties—especially when one considers the title of the Committee. Who better to discuss “investor issues” than individuals that defend investor rights? At a minimum, a PIABA member should be invited to serve on this Committee.

PIABA would like to see more public or investor advocates on the Investor Issues Committee as well as on all of FINRA's committees, including the FINRA Board of Governors. While the FINRA Board of Governors has its purported “public” governors, it would appear from their backgrounds and/or current positions that most of them are not what PIABA would consider to be investor advocates:

- a) Carol Anthony (John) Davidson – former executive for Tyco International; Dell, Inc.; and Eastman Kodak;
- b) Shelly Lazarus – executive at Ogilvy & Mather, the advertising agency which created the FINRA BrokerCheck ads;¹
- c) Joshua Levine – former executive at E-Trade, Morgan Stanley, and DeutschBank who now works for ESP Technologies Corp., who provides clearing and technology services for mutual funds, hedge funds, and other financial companies;
- d) Eileen Murray – CEO of Bridgewater Associates, an investment management firm;
- e) Randal K. Quarles – an executive with Cynosure Group, a company that manages private equity investments.

These purported “public” governors are not in a good position to advocate for the investing public since they are not in touch with the real issues that confront the typical retail investor.² In order to truly make the Board of Governors more “public” and, thus, put FINRA's Board in the best position to work towards balanced financial markets, the FINRA Board should incorporate more investor advocates such as attorneys that represent claimants,

¹ See “FINRA Launches National Ad Campaign Promoting BrokerCheck” (June 1, 2015) available at <http://www.finra.org/newsroom/2015/finra-launches-national-ad-campaign-promoting-brokercheck>.

² Indeed, it does not appear that Mr. Levine, Ms. Murray or Mr. Quarles would even qualify to be “public arbitrators” under FINRA Rule 12100 so PIABA questions why it is appropriate for them to serve as “public” governors on FINRA's Board of Governors.

academics, and consumer protection professionals. Likewise, FINRA should disclose its process for selecting new Board members including, but not limited to, what qualifications they must have to even be considered, how they are nominated/selected, how long their terms are, how many terms they may serve, how often Board positions become available, and how/if interested parties can apply to be considered for a seat on the Board of Governors.

PIABA is also concerned about the significant crossover between and among Board members and service on committees. For example, Elisse Walter, Luis Viciara, and Brigitte Madrian are all currently on the FINRA Board of Governors, and they are also listed as members of the Investors Issues Committee as of December 2013. In order to properly diversify the committees, FINRA should add investor-friendly members even if that means limiting the number of FINRA Governors on any given committee (or limiting how many committees a Governor may serve on). It is through the integration of pro-investor points of view into existing committees, and FINRA governance generally, that FINRA can promote diversity of opinion and ideas.

In the Special Notice, FINRA also asked questions about advisory and *ad hoc* committees. PIABA supports FINRA's commitment to the National Arbitration and Mediation Committee ("NAMC"), which has made significant improvements to the FINRA arbitration and mediation processes, although everyone should agree that further improvements are needed.³ This is one committee where PIABA does have representation, along with a number of FINRA member firms, and the combination of both perspectives has resulted in well-vetted and reasonable recommendations being made to the FINRA Board that truly take into account FINRA's stated goal of "investor protection." We would encourage FINRA to discuss the success of the NAMC with Rick Berry as a potential model for other committee membership within FINRA, especially committees that specifically address investor issues.

There have been numerous task forces in the past related to important issues in FINRA arbitration, such as the Discovery and Arbitrator Training Manual, and most recently the Dispute Resolution Task Force. We believe that good practice dictates that, to the extent these committees or task forces are implemented, the composition and existence of such should be disclosed on the FINRA website. FINRA already identifies members of the NAMC on its websites and PIABA does not see any reason why FINRA could not follow the same practice for *all* committees and task forces.

PIABA hopes that FINRA will re-visit the participation of industry versus non-industry members on its various boards, committees and task forces. Non-industry "public" investor representatives bring an essential, and too often missing, viewpoint to FINRA, an organization with one clear mission – "to provide investor protection and market integrity." Similarly, FINRA should continue to strive for demographic and geographic diversity on its boards, committees and task forces.

II. Rulemaking Process

FINRA has requested comments on its rule making process, primarily related to transparency and creating additional participation from interested parties. FINRA's proposed rules often garner significant feedback from parties, such as PIABA, who regularly monitor rule proposals and provide substantive comments and feedback. Repeat commenters stay abreast of potential rule changes by reviewing proposed rule filings, regulatory notices, various FINRA board agendas and news releases that relate to rulemaking priorities and considerations.

³ The names and affiliations of NAMC members, currently 13 with 7 "public" and 6 industry members, are disclosed on FINRA's website at <https://www.finra.org/arbitration-and-mediation/national-arbitration-and-mediation-committee-namc>. FINRA Rules 12102, 13102, and 14102 provide that "At least 50 percent of the NAMC shall be Non-Industry members."

PIABA generally supports measures that make FINRA rulemaking more transparent and assessable to those affected. In this regard, PIABA feels that FINRA should publish FINRA's response to rule comments with the Regulatory Notice announcing SEC approval of the corresponding rule. Commenters put substantial amounts of time into the preparation of written comments and understanding why FINRA did or did not incorporate comments into the rule is helpful in promoting transparency. Further, this process may also assist commenters in further understanding FINRA's rationale used in evaluating comments, which could prove beneficial for commenters' use in the future.

PIABA supports extending the time to comment on Regulatory Notices from the typical 45 days to 60 days. Commenters spend substantial time preparing their comments. Interested parties may be late alerted to a new Request for Comment if they are not regularly monitoring new publications. Further, many comments are submitted on behalf of organizations, such as PIABA or SIPC, for which multiple individuals and committees render input prior to the submission of the final comment letter to FINRA. As such, PIABA feels that extending the comment period may ease the burden on comments from interested parties, which could lead to more in-depth feedback.

As FINRA is beginning to evaluate whether a rule change should be made at the committee or board level, it may wish to provide an informal mechanism for early feedback from stakeholders. Informal feedback at the rule consideration and early drafting stages would provide FINRA with more voices at the most meaningful phase of rule consideration, affording time and flexibility in rule drafting.

Finally, PIABA believes that it might be helpful for FINRA to consolidate its postings of proposed rules and regulatory notices. For parties who are less familiar with the rulemaking process, creating one web page that could host all notices in a central location could be beneficial.

III. Regulatory Guidance

FINRA requests comment regarding regulatory guidance, including such topics as whether more interpretive guidance related to its rules is warranted, and if so, in what form such regulatory guidance should be. FINRA also seeks feedback regarding possible comments on proposed rule guidance, prior to its finalization.

PIABA appreciates FINRA making guidance available upon request. However, PIABA is concerned that guidance could also have unintended consequences that may detrimentally impact FINRA arbitration proceedings and/or the application of FINRA rules. To address such concerns, PIABA requests that FINRA make public its intention to interpret/address a particular rule or issue, and request comments *before* making a final decision to issue the potential guidance. Such a process would help to ensure that only necessary guidance is provided by FINRA and that such guidance reflects not just the interest of the financial industry, but also its customers. It would serve to help reduce, or avoid, the likelihood and magnitude of any unintended consequences. Notice of proposed regulatory guidance should be published in a similar manner as proposed FINRA rules, with a corresponding comment period.

IV. Investor Education.

FINRA is also seeking input regarding its various investor education tools and resources. PIABA believes that investor education is a cornerstone to protecting the public. Most investors begin their financial education process when they encounter individuals employed in the financial industry. Unbiased educational tools that are accessible and broadly marketed to the public are critical.

The financial industry prospers by generating fees from customers. As a result, there is a tension between the revenue generating goal of the financial industry and the preservation and growth of capital of the public investor. Most investors have been told, and therefore believe, that their financial advisor is acting as their fiduciary. But those same customers are often unaware of the high fees charged for 'investment advice' and financial products. The availability of better tools and resources would go a long way towards thwarting investment misconduct and assisting investors in maximizing returns through the avoidance of excessive fees and unsuitable investments.

PIABA commends FINRA on the expansion of investor education tools available on its website. The section of the website dedicated to investors represents a vast improvement from what existed in the past. PIABA feels that supplements and modifications to the website, as well as additional marketing, could assist investors in making sound financial decisions. FINRA has required firms to prominently display links and references to BrokerCheck on their websites and materials. FINRA could add a prominent link on its main BrokerCheck page to the main "Investor" page, for increased awareness of the available tools and resources.

a. Fee Charged by Advisors

One of PIABA's major concerns related to education is making sure that customers understand how they are being charged for investment services and the impact fees have on their portfolios. The FINRA website should include a section devoted to investment fees and expenses incurred by investors and the long-term impact fees have on an investment portfolio. FINRA should also adopt rules and regulations requiring financial institutions to make prominent disclosure of fees and expenses paid by investors.

With the advancement of technology, the financial industry generates impressive account statements detailing the investment holdings of their customers. Oftentimes, the account statements contain graphs showing the account holdings together with information regarding unrealized gains/losses. Invariably, one piece of information that is not contained on the account statements: the total dollar amounts paid to the financial institutions and advisors in fees and costs.

PIABA members routinely examine account statements in evaluating potential investor claims. Even with a trained eye, it is difficult to locate or calculate the fees charged to a customer's account or deducted from a customer's investment. Oftentimes, it takes a forensic review by an expert to determine the amount of fees actually paid by an investor. Most investors do not have the ability to readily ascertain how much a financial institution is charging to hold assets, and even if the amount is disclosed, the ultimate impact of those fees on the investor's account. However, due to truth in lending regulations, these same investors can quickly look at their monthly credit card bills to find out the exact rate of interest and the amounts being charged and the impact of that rate if the "minimum" amount is paid each month. No such disclosure requirements exist for the benefit of customers of securities firms.

The FINRA website does not currently have a section dedicated to fees and expenses charged to investors. A strong component of investor education requires an understanding of these costs and how these costs impact investor's accounts and goals. As part of the engagement initiative, FINRA needs to determine how to educate the public concerning investment fees and commissions. FINRA should consider adopting additional rules requiring investment institutions to prominently display the dollar amount of fees charged on the first page of their monthly statements. Likewise, financial institutions should be required to set forth the annual percentage fee charged with respect to both the net asset value of accounts and as a percentage of the net gains/losses achieved on account as well as the long-term impact of such fees. Armed with information as to how fees impact an account and the amounts paid with respect to actual returns, individual investors will have better insight as to how fees affect both the short and long-term performance of their investment accounts.

b. Fiduciary Rule

PIABA has been very active in supporting the Department of Labor Conflict of Interest ('Fiduciary Duty') Rule and is critical of rules that create or foster conflicts of interests between customers and advisors. As such, PIABA believes that the FINRA website should include a section detailing the relationship between financial advisors and their customers.

The Fiduciary Rule is critical. Traditionally, registered investment advisers have been held to a fiduciary standard whereas broker-dealers have argued that the lesser suitability standard applies to their business. Investors with claims against financial institutions are often surprised to learn that their investment professional argues that no fiduciary duty exists. It is common for a financial institution with advertisement campaigns touting how it acts in the best interests of its customers to suddenly adopt the position that it is a mere order taker with no fiduciary responsibility when faced with a legal claim in a securities arbitration.⁴

The FINRA website should contain a section that specifically addresses the inherent conflict of interests between financial institutions and their investing customers and the different roles and standards of care that advisors can assume.

c. Access to Attorneys

PIABA also believes that the FINRA website should include a recommendation that investors seek legal advice from a qualified lawyer if they have questions about the way their accounts were handled. The FINRA website contains several sections detailing steps an aggrieved investor can take with respect to complaints. The section details the arbitration process and making complaints to FINRA. However, the website currently lacks prominent directions as to how to locate an attorney.

FINRA does have a webpage devoted to finding an attorney:

<http://www.finra.org/arbitration-and-mediation/how-find-attorney>

However, this web page is not easily accessible from the FINRA navigation tree. It is very difficult to find the page if one begins, like many investors, at the main landing page <http://www.finra.org>. At a minimum, the reference and link to this page should also be added to the existing "Have a Problem" navigation menu and subpages. In particular, investors should be advised that they may want to seek private legal counsel *before* FINRA's existing advice to "1. Contact the firm.... complain in writing."

FINRA should also include prominent language on the "for investor" pages indicating that it acts as an industry sponsored self-regulating authority. The name "Financial Industry Regulation Authority" is deceiving to investors. Most investors reasonably believe that FINRA is a governmental agency. Investors should be advised that FINRA is, in fact, a self-regulatory organization. Investors should also be advised that other options exist for making complaints about a broker or brokerage firm including, but not limited to, state securities regulators, the SEC, state and federal law enforcement and state attorneys general. They should also be reminded that they can hire a private attorney to pursue recovery on their behalf.

⁴ See PIABA's March 25, 2015 report, "Major Investor Losses Due to Conflicted Advice: Brokerage Industry Advertising Creates the Illusion of a Fiduciary Duty," available for download at:
<https://piaba.org/system/files/pdfs/PIABA%20Conflicted%20Advice%20Report.pdf>

FINRA should make a pragmatic disclaimer that it cannot protect all investors from all misconduct. Unfortunately, too many aggrieved investors who make complaints to FINRA believe that FINRA will not only process the complaint, but also seek to recover money on the investors' behalf. Obviously, FINRA's role is different and it is incumbent on the organization promoting "Investor Protection" to make clear its capabilities and limitations.

There are a limited number of organizations whose primary function is investor education. PIABA established The PIABA Foundation with the express purpose of investor education (<http://piabafoundation.org>). The significance of The PIABA Foundation as an educational tool is expanding. Last year, The PIABA Foundation held its first public symposium in California and plans to expand its public symposiums.

The materials generated by The PIABA Foundation and other investor advocacy groups would be helpful to investors seeking a broader understanding of investment issues and we therefore suggest that links to such groups be included on the FINRA website as part of investor education tools. Similarly, links to other entities that serve a similar purpose, such as the North American Securities Administrators Association ("NASAA"), should be added for the benefit of investors looking for additional resources.

d. BrokerCheck

One of FINRA's primary educational tools is BrokerCheck. It appears that substantial amounts of marketing are devoted to the system, and it has recently received a substantial overhaul in appearance and functionality. While there have been notable improvements to the FINRA BrokerCheck system and regulatory reporting, there is still much to be desired from an investor and practitioner standpoint.

BrokerCheck generally fails to provide an exact duplication of a broker's actual legacy CRD report. Often times, complaints and settlements are omitted from BrokerCheck that appear on the CRD, for no apparent reason.

The search function within the database is very cumbersome and provides results that are often totally unrelated to the search query, or worse, incomplete or incorrect. For example, if a broker is searched and his *former* employing firm is included in the search, the search will result in nothing being found due to the fact that the broker no longer works at his/her former firm. This undermines the whole point when an investor (who may be unaware of the broker's current affiliation) is frustrated and stops searching.

Further, once the user locates the broker, it is important that they find the "Detailed Report" (and not just rely on the broker landing web page). The "Detailed Report" link has become very small and is placed in a location where it is not as easy to find as it once was. It is essentially hidden from an inexperienced user. The detailed report contains information that users may not be able to locate on the broker landing page (which may only show misleading descriptions provided by the broker), and it presents disclosures in an organized manner that is easier to understand compared to the interactive landing page.

Another issue from the recent BrokerCheck formatting changes has been to remove the "report as of date" when accessing a detailed report. This used to be printed on the first page of the detailed report. By not having it, users are unable to tell when a report was generated, which can be very important in tracking changes to disclosure information. PIABA urges FINRA to immediately reinstate the access date.

V. Enforcement and Awards Databases

PIABA's objectives and concerns regarding industry enforcement are focused on transparency, including providing investors and their advocates the most accurate and timely disciplinary and decision information possible.

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The enforcement database requires a near perfect search parameter for a query to generate a proper result, often resulting in no result at all. The ease of use and corresponding utility of the current database search function is therefore of concern. In addition to broader parameter searches, the function should allow for categorization. For example, category searches by subject matter, by firm, by branch and by registered representative/licensee. This would allow the user to focus on specific issues, individuals or firms to determine how pervasive a problem or improper conduct may be.

The FINRA award database is also found wanting in ease of use and search function utility. Much like the disciplinary action search function, the award database is cumbersome and brings up results often out of chronological sequence with no relation to the query made. Organizing the search terms by category (*e.g.* Claimant, Respondent or Claimants Representative and Respondent Representative) would likely reduce the number of unrelated search results. The lack of case context for the awards is another issue, as awards typically are not explained decisions, and have very little framing of the facts and basis for the determination. Making the related pleadings (Statement of Claim and Answer at minimum) publicly available as part of the award record would help in resolving some of the current shortcomings. Placing the award database link on the <http://www.finra.org> home page would also be helpful to those not familiar with the site, or that an award database even exists. Similarly, FINRA should consider improved scanning and OCR of older awards in the database so that they are captured (and readable) in the search results.

Conclusion

As you can see, PIABA feels that there are still more FINRA engagement programs that could be improved upon, but PIABA commends FINRA's efforts to create such programs as well as to enhance them over time. For example, PIABA feels that the "Senior Helpline" has been an effective education tool that has proven beneficial to the investing public in general. PIABA feels that outreach and feedback requests, such as that requested in this Special Notice Dated March 21, 2017, will help to make sure all FINRA engagement programs continue to improve and serve their intended purpose. Accordingly, I want to thank you for the opportunity to comment.

Very truly yours,



Marnie C. Lambert
PIABA President