



Margo Hassan  
Associate Chief Counsel

August 30, 2017

Mr. Brent J. Fields  
Secretary  
U.S. Securities and Exchange Commission

100 F Street, N.E.  
Washington, D.C. 20549-1090

Re: File No. SR-FINRA-2017-025 – Proposed Rule Change Relating to Definition of Non-Public Arbitrator; Response to Comments

Dear Mr. Fields:

This letter responds to comments submitted to the Securities and Exchange Commission (“Commission”) regarding the above-referenced filing. In this filing, FINRA is proposing to amend FINRA Rule 12100 of the Code of Arbitration Procedure for Customer Disputes and FINRA Rule 13100 of the Code of Arbitration Procedure for Industry Disputes (together, the “Codes”), to define a non-public arbitrator to mean a person who is otherwise qualified to serve as an arbitrator, and is disqualified from service as a public arbitrator under the Codes.

The Commission received four comment letters in response to the proposed rule change.<sup>1</sup> All commenters supported the proposed rule change, although some commenters supported it with suggestions or other qualifications. Caruso stated that “the proposed amendments, which would . . . provide greater choice for parties during the panel selection process, would be a fair, equitable and reasonable approach that would facilitate the fairness and efficiency of the participant experience in the FINRA arbitration forum . . .” Gitomer stated that “the proposed amendment will expand the pool of available arbitrators and provide a more diverse pool of non-public arbitrators for parties to choose from.” Pace stated that the proposed rule change “increases parties perceptions of the fairness of the forum.” PIABA stated that “having as many qualified, fair, and neutral arbitrators as possible will help advance the integrity of the arbitration process.” Pace and PIABA raised concerns about the proposed rule change. FINRA addresses these concerns below.

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<sup>1</sup> See Letter from Steven B. Caruso, Maddox Hargett & Caruso, P.C., dated July 24, 2017 (“Caruso”); Letter from Glenn S. Gitomer, McCausland Keen + Buckman, dated August 14, 2017 (“Gitomer”); Letter from Elissa Germaine, Supervising Attorney, Adjunct Professor of Law and Director, and Jill Gross, Professor of Law and Former Director, Elisabeth Haub School of Law, Pace University, dated August 17, 2017 (“Pace”); and Letter from Marnie C. Lambert, President, Public Investors Arbitration Bar Association, dated August 18, 2017 (“PIABA”).

## Use of Out-of-Town Arbitrators and Recruitment Initiatives

PIABA raised concerns about FINRA's use of out-of-town arbitrators, stating that "PIABA hopes that FINRA will continue its efforts to recruit new arbitrators to expand 'public' pools, especially in small and mid-size cities, and decrease the occurrence of travelling arbitrators." FINRA agrees that it should increase its public arbitrator pool and has been actively recruiting new arbitrators, paying particular attention to locations with the greatest need. FINRA uses arbitrators in neighboring hearing locations to ensure an effective ratio of available arbitrators to open cases in each location, as stated on the FINRA website.<sup>2</sup>

FINRA continues its focused arbitrator recruitment campaign to add more public arbitrators to smaller locations, although this effort will take time. There were an estimated 2,711 public arbitrators after the amended public arbitrator definition became effective on June 26, 2015. Recruitment efforts since July 2015 added approximately 596 arbitrators to the public arbitrator roster, thereby reaching approximately 3,307 public arbitrators to date. From the beginning of this year through August 22, FINRA has received 499 arbitrator applications, and anticipates that it will receive 800 applications by the end of 2017. FINRA's latest arbitrator demographic survey, which was conducted by an external consulting firm, showed that FINRA had particular success in adding women and African-Americans to the roster. In 2016, 33 percent of the arbitrators added were women and 14 percent were African-American. This represents an important improvement from the 2015 survey results which showed that 26 percent of arbitrators added were women and four percent were African-American.<sup>3</sup>

Ongoing recruitment initiatives thus far have included more than 100 women and minority organizations nationwide to source and recruit all types of people through on-site events, targeted recruiting advertisement and direct marketing campaigns. In 2017, FINRA focused recruitment on smaller locations where public arbitrators are most needed: Birmingham, AL; Phoenix, AZ; Orlando, FL; Las Vegas, NV; Portland, OR; Philadelphia, PA; and Dallas, TX. In addition to targeting recruitment activities in impacted hearing locations, FINRA staff will travel to 15 recruitment events with diversity-based organizations by the end of 2017.

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<sup>2</sup> See <http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics>. The website states that FINRA will expand arbitrator pools in select hearing locations as case demand requires. For example, in order to provide parties with a roster of arbitrators from which to choose in the large number of San Juan, Puerto Rico cases involving the sale of Puerto Rico bond funds, FINRA asked every arbitrator from hearing locations in the Southeast region and two hearing locations in Texas (Dallas and Houston) to serve in Puerto Rico. Separately, and as an interim measure, FINRA took steps to bolster the pool of arbitrators in smaller hearing locations that were impacted by the amended public arbitrator definition by asking public chairs from larger hearing locations that are geographically proximate if they would be willing to serve, at FINRA's expense, in these impacted locations.

<sup>3</sup> FINRA uses an independent consulting firm to conduct annual demographic surveys of arbitrators and mediators to evaluate the success of its effort to recruit diverse neutrals for the forum. For the period between October 2015 and October 2016, 33 percent of neutrals joining the roster who responded to the survey identified themselves as women and 14 percent identified themselves as African-American. The response rate for the survey was 64 percent. For the period between October 2014 and October 2015, 26 percent of neutrals joining the roster who responded to the survey identified themselves as women and four percent identified themselves as African-American. The response rate for the survey was 72 percent. Neutral responses for both surveys were completely voluntary, confidential and anonymous.

To help maximize resources and opportunities further, FINRA started a new Arbitrator Ambassador program in which FINRA arbitrators actively participate in the recruitment process. FINRA also hired an additional full-time national recruiter in 2015 as well as leveraged staff talent in the regions to assist with recruitment efforts, particularly in reaching women-focused groups, LGBTQ communities and other diverse organizations. FINRA also released its first formal recruitment video on several social media platforms and revised the recruitment materials on its website to ensure a message of inclusiveness.<sup>4</sup> The materials now target a broader range of industries from which FINRA welcomes arbitrator applicants.

On January 9, 2017, FINRA implemented a rule change to revise the chairperson eligibility requirements. Specifically, an attorney arbitrator is now 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) administered by a self-regulatory organization in which hearings were held. In December 2016, FINRA had a pool of 985 public arbitrators who were qualified to serve on the chairperson roster. As of August 22, 2017, FINRA has 1,145 public arbitrators on the chairperson roster. In addition, FINRA will hold two recruitment events focused on chairpersons in Portland, OR and Indianapolis, IN by the end of 2017. Nationally, FINRA has made progress in expanding the overall public chairperson roster and has increased the number of public chairpersons in many of the smaller locations.

In 2018, FINRA plans to continue its efforts to recruit chairpersons in smaller locations where public chairpersons are most needed: Birmingham, AL; Hartford, CT; New Orleans, LA; St. Louis, MO; Las Vegas, NV; Buffalo, NY; Salt Lake City, UT; and Milwaukee, WI. FINRA has also been focused on reducing time frames for application processing and arbitrator training.

### **Modifying the Education Requirement of Arbitrator Applicants**

PIABA stated that it would welcome efforts to lower or eliminate FINRA's requirement that an arbitrator have at least two years of college-level credits to apply for the roster. As stated on the FINRA website, since March 2013, FINRA may waive at its discretion the requirements relating to an arbitrator applicant's years of professional experience and education.<sup>5</sup> In the instances when FINRA has used its discretion to waive the education requirement, FINRA staff considered the number of years the candidate had been employed, the field of employment, and the positions held by the candidate. The staff also advised the Neutral Roster Subcommittee of the National Arbitration and Mediation Committee reviewing the arbitrator application of its recommendation to waive the education requirement and sought feedback from the Subcommittee.

### **Revisiting the "Public Arbitrator" Definition**

Pace stated that FINRA should revisit the amendments to the public arbitrator definition because "the definition of a public arbitrator is also too complicated." As noted above, the amended public arbitrator definition became effective on June 26, 2015. FINRA revisited the amendments to the arbitrator definitions in 2016 and determined not to change the public arbitrator definition. It is important to forum users' perceptions of fairness that public arbitrators

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<sup>4</sup> The video is available for viewing through the following link: <http://www.finra.org/arbitration-and-mediation/information-for-arbitrators>.

<sup>5</sup> See <http://www.finra.org/arbitration-and-mediation/apply-now>.

Mr. Brent J. Fields  
August 30, 2017  
Page 4 of 4

have no significant affiliation to the financial industry. However, FINRA believes it should close the gap that exists between the public and non-public arbitrator definitions which is currently excluding otherwise qualified individuals from service as arbitrators at the forum.

### **Conclusion**

FINRA believes that the foregoing responds to the issues raised by the commenters to the rule filing and that the proposed rule change should be approved as filed. If you have any questions, please contact me at (212) 858-4481, email: [margo.hassan@finra.org](mailto:margo.hassan@finra.org).

Sincerely,

/s/ Margo A. Hassan

Margo A. Hassan  
Associate Chief Counsel