



NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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Submitted electronically to pubcom@finra.org.

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

RE: FINRA Regulatory Notice 17-33 – Arbitration – Amendments to the 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:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I hereby submit the following comments in response to FINRA Regulatory Notice 17-33, issued on October 18, 2017 (“the Proposal”).² NASAA members regulate FINRA-registered broker-dealers and agents, contributing to the longstanding and multifaceted collaborative regulatory relationship between NASAA and FINRA. NASAA and its members are committed to a well-regulated securities industry, including the implementation and availability of robust investor protection rules. Improving investors’ ability to collect damages owed by broker-dealers contributes to investor protection. Currently, however, unpaid arbitration awards remain an unresolved and well-documented investor protection concern. In failing to pay arbitration awards, broker-dealers fail to comply with their legal, regulatory, and ethical obligations. The Proposal is a necessary first step in resolving this well-established concern, but falls short in its scope.

The issue of unpaid arbitration awards is well-known. The Government Accountability Office (“GAO”) identified issues with customers failing to collect on arbitration awards in 2000.³ The GAO identified continued concerns related to unpaid arbitration awards in the securities

¹ NASAA is the association of the 67 state, provincial, and territorial securities regulatory agencies of the United States, Canada, and Mexico. NASAA serves as a forum for these regulators to work with each other to protect investors at the grassroots level and promote fair and open capital markets.

² FINRA Regulatory Notice 17-33, *Arbitration – Amendments to the Code of Arbitration Procedure for Customer Disputes to Expand the Options Available to Customers if a Firm or Associated Person Is or Becomes Inactive* (Oct. 18, 2017), available at <http://www.finra.org/sites/default/files/Regulatory-Notice-17-33.pdf>.

³ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *SECURITIES ARBITRATION ACTIONS NEED TO ADDRESS UNPAID AWARDS* (Jun. 15, 2000) available at <https://www.gao.gov/assets/160/156962.pdf>.

industry in a follow-up report in 2003.⁴ More recently, the Public Investors Arbitration Bar Association (“PIABA”) issued a report on the issue in 2016.⁵ FINRA and FINRA Dispute Resolution (“FINRA DR”) have directly acknowledged the issue of unpaid arbitration awards and the challenges this presents to investors who are unable to collect monetary damages awarded to them after going through the mandatory FINRA DR arbitration process, and they have offered the proposed amendments in an attempt to address the problem.⁶

NASAA supports the Proposal’s increase in customers’ options when a firm or associated person becomes “inactive,” including withdrawing the claim, amending the pleadings, postponing hearings and receiving a refund of filing fees. However, the Proposal is insufficient to solve the underlying issue. If adopted, the proposed amendments would provide investors additional options and flexibility to, as described in the Proposal, “alter their litigation strategy.” However, the Proposal does little to address the core issue of unpaid arbitration awards: when awards go unpaid broker-dealers and/or their associated persons are not held responsible for their misconduct, leaving investors holding the bag. Such a result damages the reputation of the broker-dealer industry, which has consistently messaged the care and responsibility of the entire industry to their retail investors.

Further, NASAA notes that the proposed amendment that permits a customer to withdraw a claim when a member or associated person becomes inactive may pose a reporting issue when FINRA DR publishes statistics on customer claim withdrawals. According to the proposed text, an “inactive member” means a member whose membership was terminated, suspended, cancelled, revoked, expelled or is otherwise defunct, and an “inactive associated person” means a person whose registration has been revoked, suspended or terminated. NASAA believes that when reporting arbitration statistics, it is important for FINRA to categorize customer claim withdrawals in a way that references the reason the customer withdrew his or her claim. One way to accomplish this would be to reference the appropriate subcategory (e.g. terminated, suspended, canceled, etc.) from the list of statuses in the proposed text that led to a customer withdrawing his or her claim. Without the appropriate subcategory reference, FINRA DR’s reporting statistics concerning customer claim withdrawals will not be fully transparent and may even be misleading. For example, a “withdrawal” statistic without further detail may lead investors and regulators to believe that a customer withdrew a claim because it lacked merit, rather than because of the potential for an unpaid arbitration award arising from a FINRA member or associated person’s becoming inactive.

In addition to clarifying how withdrawn claims are reported, NASAA suggests that FINRA create a separate reporting mechanism to capture the members and associated persons who become

⁴ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, FOLLOW-UP REPORT ON MATTERS RELATING TO SECURITIES ARBITRATION (Apr. 11, 2013) *available at* <https://www.gao.gov/assets/100/91805.pdf>.

⁵ HUGH D. BERKSON, PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION, UNPAID ARBITRATION AWARDS: A PROBLEM THE INDUSTRY CREATED – A PROBLEM THE INDUSTRY MUST FIX (Feb. 2016), *available at* [https://piaba.org/system/files/pdfs/Unpaid%20Arbitration%20Awards%20-%20A%20Problem%20The%20Industry%20Created%20-%20A%20Problem%20The%20Industry%20Must%20Fix%20\(February%2025,%202016\).pdf](https://piaba.org/system/files/pdfs/Unpaid%20Arbitration%20Awards%20-%20A%20Problem%20The%20Industry%20Created%20-%20A%20Problem%20The%20Industry%20Must%20Fix%20(February%2025,%202016).pdf).

⁶ See Reg. Notice 17-33, *supra* note 2, at endnote 3.

inactive due to unpaid arbitrations or judgments in favor of customers. This report should be updated and made available to the public whenever firms or associated persons become inactive. A new reporting statistic providing transparency on industry participants that are forced from the industry due to investor complaints would provide investors with additional information when making a decision about whether to work with a specific FINRA member or associated person. A broker-dealer customer relationship is inherently one where an investor entrusts their money, and therefore should rest on as much information as possible.

Solving the issue of unpaid arbitration awards remains a priority for NASAA; several NASAA committees and members continue to examine potential solutions. While NASAA supports the proposed amendments, they only partially address the issues related to unpaid arbitration awards. The proposed amendments are far from a solution to the FINRA arbitration award problem, and significantly more work is needed to remedy this issue. FINRA plays a role in supporting these protections in its role as an SRO and in providing the arbitration forum in which nearly all investors' disputes with their brokers are heard. FINRA's unique role makes it an integral stakeholder in working to address issues related to its members—or former members—failing to pay arbitration awards. As an integral stakeholder, FINRA must consider solutions that address the underlying problem of unpaid awards.

In summary, while the net effect of these proposed amendments may be helpful, they do not address the core of the unpaid arbitration award scourge or boost investor confidence in the FINRA arbitration process. NASAA welcomes an opportunity to work more closely with FINRA on this critical investor protection issue. If you have any questions about these comments, please contact NASAA's General Counsel, A. Valerie Mirko, at vm@nasaa.org or (202) 737-0900.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Borg', with a stylized flourish at the end.

Joseph Borg
NASAA President
Alabama Securities Commissioner