

# Public Investors Arbitration Bar Association

November 21, 2008

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100 F Street, NE  
Washington, DC 20549-1090

**RE: Release No. 34-58862**  
**File No. SR-FINRA-2008-051**  
**Reasoned Awards Rule**

Dear Ms. Harmon:

I write on behalf of the Public Investors Arbitration Bar Association ("PIABA"). We welcome the opportunity to comment upon the above-referenced rule proposal that would require arbitrators in FINRA arbitration proceedings to provide an explained decision upon the *joint request* of the parties [hereinafter referred to as the "Reasoned Award Rule"]. We oppose the proposed rule in its current form and believe that the investor alone should be able to make the election without agreement of other parties. The rule should not require a joint request.

PIABA is a national association of attorneys who represent public investors in securities arbitration proceedings. Since its formation in 1990, PIABA has pursued its mission of promoting and protecting the interests of public investors in all securities and commodities arbitration forums. Our members and the investors we represent have a strong interest in the rules that govern the arbitration process at FINRA.

The proposed Reasoned Award Rule is unfair in requiring that all parties join in the request for the arbitration panel to provide an explanation of the basis for their award. Investors sometimes wish to obtain a reason for the award in order to provide a basis to vacate an arbitration award that has been rendered contrary to established law. It is difficult to obtain *vacatur* of an arbitration award when there is no reason provided for the award. In fact, courts generally defer to arbitrators absent a compelling reason to vacate an award. Without a reasoned decision, it is nearly impossible to demonstrate a basis for vacating an arbitration award in many cases.

Currently, investors have a strong perception that FINRA arbitration is unfair for a variety of reasons. As noted in FINRA's comments regarding the current proposed rule, the SICA "Perception of Fairness" arbitration survey suggested that over 55% of customers indicated that they would "be 'more satisfied if they had an explanation in the award.'" One problem with the perception of

unfairness in the arbitration process is the usual imbalance of resources between the investor and the FINRA member firm. While no rule could adequately address such imbalance, it would serve to benefit FINRA member firms to be able to challenge arbitration awards by way of a motion to vacate in any case in which a reasoned award is provided. Filing a motion to vacate, with the specter of a possible lengthy appeal from a denial of such motion, may be sufficient for member firms to force investors who win their arbitrations to settle for less than they are awarded. Member firms are more likely to have the resources to mount such motions to vacate, and may be more likely to file motions to vacate if they are permitted to make the election for explained awards on their own.

The United States Supreme Court approved mandatory SRO arbitration in *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987) under the express condition that investors' rights under the law would not be diminished in arbitration, as was feared at the time. In *McMahon*, the SEC submitted an Amicus Brief to the United States Supreme Court in favor of permitting customer securities cases to be decided by SRO arbitration. The SEC addressed the fear that investors might lose rights under the law, in part, by reference to the ability of courts to review the awards: "Arbitrators may not disregard the law... On this we are all agreed. [F]ailure to observe this law would constitute grounds for vacating the award." (1986 WL 727882, at page 20) (quoting *Wilko v. Swan*, 346 U.S. 427, 440 (1953) (J. Frankfurter, dissenting)). In *McMahon*, the United States Supreme Court expressly adopted the SEC's rationale on this point in stating: "Finally, we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the [law]." 482 U.S. at 232. Without obtaining an explanation of the reasons underlying an arbitration award, it is nearly impossible to determine whether arbitrators have, in fact, followed the law. Reasoned awards also enhance the ability of the SEC and FINRA to discharge properly their independent duties of ensuring that investors' rights are protected in SRO arbitration. Because court review of arbitration awards was specifically rationalized as a means of providing additional protection for investors in SRO arbitration, it also follows that an investor should be permitted the choice of lessening the efficacy of such review by choosing to forgo a reasoned award, should the investor elect the benefits of this less formal process as articulated above.

The proposal that the request be jointly made by all parties essentially defeats the purpose of enacting the rule. FINRA already purports to foster a policy of accommodating joint requests of the parties. Thus, changing the proposed rule to require a joint request eliminates the need for any rule at all. Whether to request a reasoned award is often a strategic decision for an individual party. It is an unusual case where all parties would agree upon the same strategy. Requiring that the request be made jointly is tantamount to having no rule.

FINRA previously proposed a rule in 2005 that permitted investors to make the election for a reasoned award<sup>1</sup>. PIABA supported the prior version of the rule, with the *caveat* that it be made clear that the investor could request a reasoned

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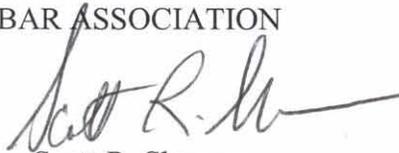
<sup>1</sup> File No. SR-2005-032.

award.<sup>2</sup> FINRA fails to provide any adequate rationale for changing the Reasoned Award Rule proposal to require the agreement of all parties.

Ultimately, there are far more important issues that could help level the playing field in investor arbitration. First and foremost is the elimination of the industry arbitrator. Making FINRA arbitration available at the election of the investor is another way to make the process more palatable to consumers. We would endorse a rule change allowing the investor to choose a reasoned award, but not the FINRA member firm. We discourage approval of the rule in its current proposed form requiring a joint request of the parties.

Respectfully,

PUBLIC INVESTORS ARBITRATION  
BAR ASSOCIATION



Scott R. Shewan  
Vice-President, 2008-2009

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<sup>2</sup> Letter of Rosemary J. Shockman, President of PIABA, to Jonathan G. Katz, SEC Secretary, dated July 15, 2005. PIABA's comment letters appear on PIABA's website under the PIABA Newsroom link. See [piaba.org](http://piaba.org).