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June 20, 2009

VIA EMAIL: rule-comments@sec.gov

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090.

Re: Elimination of FINRA-DR Mandatory Industry Arbitrator
Petition for Rulemaking (SEC File No. 5-586)

Dear Ms. Morris:

For the reasons set forth in my Petition for Rulemaking (SEC File No. 4-502)("Petition 4-502"), I wholeheartedly support Petition for Rulemaking (SEC File No. 5-586)("Petition 4-586") of the Public Investors Arbitration Bar Association ("PIABA") to eliminate the requirement that an arbitrator affiliated with the securities industry sit on all public investor cases arbitrated before Financial Industry Regulatory Authority ("FINRA") in which the amount in controversy exceeds $100,000. However, if recent history is any guide, Petition 4-586 will eventually end in a trash heap of the Securities and Exchange Commission ("SEC") and PIABA's efforts will be for naught.

The SEC has consistently failed, and, thus, refused, to accept recommendations from other than a Self Regulation Organization ("SRO"), *e.g.*, New York Stock Exchange, National Association of Securities Dealers, Inc. ("NASD"), to change the securities arbitration process. Of course, SROs have no incentive to suggest improvements desired by the investing public as those changes would negatively impact their securities brokerage firm members.

The following examples depict the standard operating procedure employed by the SEC to assure that it will never grant a Petition for Rulemaking dealing with the securities arbitration process.

Petition for Rulemaking (SEC File No. 4-403)

On or about October 2, 1997, PIABA filed Petition for Rulemaking (SEC File No. 4-403) ("Petition 4-403") with the SEC. It raises similar issues as those presented in Petition 4-586. In the section entitled, "Proposed Panel Composition And Arbitration Selection Rules," PIABA states:

> Historically arbitration panels have been comprised according to two basic formats: neutral, or representational. A neutral panel is one where all the arbitrators are neutral to all parties. A representational panel is one in which each of the two parties appoints an arbitrator and these two agree upon and select a third arbitrator who hopefully is neutral. Securities arbitration today is the only known form of arbitration on a significant scale in which one of the parties is entitled to a representative arbitrator, with the remaining two arbitrators being neutral. In order to remedy this obviously unfair bias against the customer, the below rule is being proposed. ... Three-member securities arbitration panels will under the proposed rule be designated as either public or Experienced. A Public panel will be composed of three Public arbitrators.

On October 16, 1997, PIABA presented Petition 4-403 at a meeting of the Securities Industry Conference on Arbitration ("SICA"), a non-transparent securities industry dominated advisory committee to the SEC. Four members of the SEC Staff attended the meeting. SICA Meeting Minutes[1] state, in part:

> Mr. Stipanowich inquired of Ms. Shockman what role she (and PIABA) want SICA to take on this issue. Ms. Shockman responded that PIABA's first goal is to have SICA support the rule change, and to the extent there is no support, to forestall negative comments from SICA.
>
> ...
>
> This concluded the presentation by PIABA.
>
> ...
>
> Mr. Stipanowich suggested that the motion would better come from SICA as a whole, rather than from the SIA. The Conference indicated general agreement with that statement. By general agreement, SICA as a whole moved to request PIABA to withdraw its 19(c) petition without prejudice pending completion of the subcommittee's study.

[1] I obtained a copy of documents mentioned in this comment from the SEC pursuant to Freedom of Information Act requests and related federal court litigation.

On November 5, 1997, SICA wrote to the SEC Staff, stating, in part:

> [W]e respectfully request that the SEC postpone consideration of the Petition submitted by PIABA regarding a 19(c) proceeding to amend the NASD arbitration rules.

On March 4, 1998, PIABA wrote to the SEC Staff, stating, in part:

> PIABA has now had an opportunity to discuss your request that it withdraw from consideration its three proposed rule changes. This is the first time PIABA has availed itself of the opportunity to try to proactively address serious problems in the arbitration process by filing proposed rule changes. Based upon our discussions, it is apparent that this is not the customary way in which rule changes are promulgated. Nevertheless, the system should be able to accommodate such suggestions and filings from both industry organizations, as well as consumer groups.

On April 28, 1998, the SEC Staff responded to PIABA by stating, in part:

> [T]his process is a lengthy and rarely used method of imposing rules on SROs.
>
> The Commission has not sought, except in rare circumstances, to require specific SRO rules to be implemented by adopting a Commission rule under Section 19(c) mandating that SROs adopt rules as the Commission directs. Rather, SROs are generally first given the opportunity to review their rules and propose amendments as they deem necessary. Indeed, SROs regularly file amendments to their own rules under Section 19(b) of the Exchange Act, and the Commission reviews those rule filings.

On April 28, 1998, the SEC Staff, in discussing Petition 4-403 with NASD - Dispute Resolution, stated, in part:

> The Commission has historically used its Section 19(c) authority when there has been no other mechanism in place to effectively instigate uniform SRO rules. The staff believes that the rule amendments advocated by PIABA should in the first instance be considered by the SROs for possible SRO rulemaking, rather than Commission rulemaking.

On June 30, 1998, the NASD-DR informed the SEC, in part:

> Professor Thomas Stipanowich, a member of SlCA and Chair of the SlCA subcommittee, will write to you separately to describe SICA's work on this proposal.

Two years later, the SICA Meeting Minutes (January 18, 2000, with three SEC Staff members attending) reflect:

> SICA further determined to renew its request that PIABA withdraw its SEC Rule 19(c) rulemaking petition....

Responses to Freedom of Information Act requests that I propounded upon the SEC, related federal court litigation and my inquiry directed to PIABA yielded no additional information as to the status of Petition 4-403.

Petition for Rulemaking (SEC File No. 4-502)

On or about May 13, 2005, I filed Petition 4-502 with the Securities and Exchange Commission. The Petition states, in part:

> The petitioner requests the creation of rules designed to:
> ...
> (2) abolish the requirement that a securities industry arbitrator be assigned to each three person panel hearing customer disputes or, in the alternative, require that information presented to a panel of arbitrators by a securities industry arbitrator be revealed to the parties during open hearing....

The existence and nature of Petition 4-502 was well known to those interested in securities arbitration matters. The *Securities Arbitration Commentator*, published on or about September 19, 2005, states, in part:

> PANEL COMPOSITION: PROPOSALS FOR CHANGE
> ...
> Actually, those opposing the "mandatory" Non-Public Arbitrator slot do have a path to follow. They might support one Arbitrator's efforts to attract SEC rulemaking on the subject. California Arbitrator Herbert Leslie ("Les") Greenberg, who has a long history of service as a SRO Arbitrator (more than 40 Awards — including one dissent), has been engaging other arbitrators in e-mail chats about arbitration and circulating the contents of that discourse to other arbitrators (SAA 2005-10 & -18). In his most recent installment, Mr. Greenberg

> reports the filing of a petition under SEC Rule 192 to seek rulemaking to "abolish the requirement that a securities industry arbitrator be assigned to each three-person panel hearing customer disputes or, in the alternative, require that information presented to a panel of arbitrators by a securities industry arbitrator be revealed to the parties during open hearing." The Petition may be reviewed at http://www.sec.gov/rules/petitions/petn4-502.pdf and comments, citing Petition 4-502, may be directed to comments@sec.gov.

On or about August 30, 2005, when I learned that the SEC Staff had referred Petition 4-502 to SICA, I complained to the SEC Staff, by stating, in part:

> Referring the Petition to the Securities Industry Conference on Arbitration ("SICA"), a group composed of representatives of various SROs, the Securities Industry Association ("SIA") and "public" members, does not provide confidence that the severe problems described in the Petition would be effectively addressed. One of the SROs is the subject of the complaints set forth in the Petition. In a letter to the SEC dated August 2, 2005, the SIA described itself as follows: "The Securities Industry Association brings together the shared interests of nearly 600 securities firms to accomplish common goals." Essentially, the Petition would not receive a fair hearing before the SICA as it sets forth complaints against most of the SICA's members' vested interests.

On December 12, 2006, after the SEC Staff ignored my written requests to cause the Commissioners to act upon Petition 4-502, I filed a federal court action based upon the Administrative Procedure Act and allegations of the SEC's unreasonable delay. On January 29, 2008, after the court overruled the SEC's motion to dismiss that cause of action, the judge ordered, in part:

> With respect to Plaintiff's Administrative Procedure Act ("APA") claim, we hereby stay discovery with respect to this claim for 60 days hereof. The government is *strongly* urged that, if Defendant is going to act on Plaintiff's petition for rulemaking, it do so within that time. (Emphasis in original.)

The SEC Staff then circulated the Petition 4-502 to each of the Commissioners, without benefit of a joint public hearing, and the Commissioners denied it.

The SEC Staff then forwarded the Petition 4-502 to the FINRA, where Mary L. Shapiro was then the Chief Executive Officer, for comment. Unsurprisingly and with the knowledge of Mary L. Shapiro, now Chairperson of the SEC, FINRA's response dated April 22, 2008, effectively advises the SEC to maintain the *status quo*.

Conclusion

The SEC has abdicated and outsourced to the securities industry its responsibility to protect the investing public with respect to matters concerning securities arbitration. The SEC has repeatedly not been supportive of securities arbitration change, unless the securities industry so directs.

Pre-dispute mandatory securities arbitration clauses were accepted by the United States Supreme Court in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), over a vigorous dissent, based primarily upon the contention that "arbitration procedures (are) subject to the SEC's oversight authority" and the factually unsupported underlying assumption that the SEC would exercise that authority to assure a level playing field. After more than twenty (20) years, that assumption should be reexamined.

Hopefully, the SEC is not deaf to the current political message of "change," and it will treat Petition 4-586 with more respect than it has treated all the Petitions for Rulemaking related to securities arbitration preceding it.

Very truly yours,

Les Greenberg

Digitally signed by Les Greenberg
DN: cn=Les Greenberg, c=US, o=Law Offices of Les Greenberg, ou=Attorney at Law, email=LGreenberg@LGEsquire.com
Reason: Petition for Rulemaking 4-586
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