



NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

750 First Street, NE, Suite 1140
Washington, DC 20002
202/737-0900
www.nasaa.org

May 16, 2022

By email to pubcom@finra.org

Jennifer Piorko Mitchell
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006

RE: Regulatory Notice 22-09: Accelerated Processing of Arbitration Proceedings

Dear Ms. Mitchell:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing in response to Financial Industry Regulatory Authority, Inc. (“FINRA”) Regulatory Notice 22-09: *Accelerated Processing of Arbitration Proceedings* (the “Proposal”).² The Proposal would revise FINRA’s customer dispute and industry dispute arbitration codes to allow for accelerated arbitration proceedings involving certain categories of persons. NASAA submits this letter principally to restate our longstanding opposition to mandatory arbitration clauses and secondarily to comment on the substance of the Proposal.³

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² The Proposal is available at <https://www.finra.org/sites/default/files/2022-03/Regulatory-Notice-22-09.pdf>.

³ See, e.g., Letter from NASAA President Mike Rothman Re: Special Notice – Engagement Initiative (June 19, 2017), available at <https://www.nasaa.org/wp-content/uploads/2011/07/FINRA-Comment-Letter-Special-Notice-6-19-17.pdf>; Testimony of NASAA Member Melanie Senter Lubin Re: A Legislative Proposal to Create Hope and Opportunity for Investors, Consumers, and Entrepreneurs, U.S. House of Representatives Committee on Financial Services (Apr. 28, 2017), available at <http://www.nasaa.org/41990/legislative-proposal-create-hope-opportunity-investors-consumers-entrepreneurs-2/>; Letter from NASAA President A. Heath Abshire Re: Mandatory Predispute Arbitration Clauses (May 3, 2013), available at <https://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Letter-to-SEC-on-Arbitration-and-Class-Action-Waivers.pdf>; Letter from NASAA President Ralph Lambiase Re: NASD Proposal to Amend Rule 3110(f) Governing Use of Predispute Arbitration Agreements with Customers (Oct. 3, 2003), available at <https://www.nasaa.org/wp-content/uploads/2011/07/79-NASAA-Letter-to-SEC.37912-60003.pdf>.

I. FINRA Should Discontinue Its Policy of Allowing Mandatory Arbitration Clauses in Retail Customer Contracts.

Investors should be entitled to their choice of forum when bringing claims against their broker-dealers. A customer might reasonably want to choose arbitration pursuant to FINRA's Code of Arbitration Procedure for Customer Disputes.⁴ But a customer might also want to bring an action in a court of competent jurisdiction. Customers should have this choice. They should not have this decision foreclosed to them by virtue of having previously signed an adhesionary broker-dealer customer account agreement with a mandatory arbitration clause.

Mandatory arbitration provisions typically appear as clauses buried within customer account opening agreements. Account opening agreements are lengthy, abstruse contracts of adhesion that are difficult for customers to comprehend. An ordinary retail investor may not appreciate the rights they are surrendering when they sign a customer account agreement with a mandatory arbitration clause. This is true notwithstanding FINRA's steps to highlight the importance of predispute arbitration clauses⁵ and to limit abusive broker-dealer practices in this area.⁶ The fact that the U.S. Supreme Court has upheld the validity of mandatory predispute arbitration agreements, even in contracts of adhesion,⁷ does not mean that permitting their use is good public policy. It is not, and NASAA encourages FINRA to fundamentally revisit its views on this issue.

II. NASAA Supports the Opportunity for Accelerated Arbitration Proceedings Involving Seriously Ill or Older Persons.

Notwithstanding our preference for an end to the use of mandatory arbitration clauses, NASAA supports the Proposal's rule amendments which would institute a new nonbinding goal for panels to complete arbitration proceedings within 10 months upon the request of qualifying parties who are seriously ill or at least 75 years old.⁸ Qualifying arbitrations would thus be on a schedule to finish slightly faster than other arbitrations, including arbitrations proceeding under

⁴ FINRA Rule 12000 *et seq.*

⁵ *E.g.*, NASD Notice to Members 05-09, *NASD Amends Rule Governing Predispute Arbitration with Customers* (Jan. 2005) (discussing amendments to NASD Rule 3110(f) designed to heighten disclosure standards for predispute arbitration provisions in customer account agreements).

⁶ *E.g.*, FINRA Reg. Notice 21-16, *FINRA Reminds Members About Requirements When Using Predispute Arbitration Agreements for Customer Accounts* (Apr. 21, 2021) (noting, among other things, that FINRA rules preclude the inclusion of class action waivers in predispute arbitration provisions).

⁷ *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (upholding, by a 5-4 vote of the justices, a mandatory arbitration clause in an adhesionary corporate employment contract).

⁸ FINRA member firms and their registered representatives will be able to take advantage of the proposed accelerated arbitration schedule as well if a registered representative meets the Proposal's eligibility requirements, however we suspect such instances will be rare and that the Proposal will be invoked most often by claimants.

Jennifer Piorko Mitchell

May 16, 2022

Page 3 of 3

FINRA's current accelerated program for persons with serious health conditions or who are at least 65.⁹ The Proposal would achieve this goal by shortening each component part of an arbitration proceeding, in an accordion-like fashion.¹⁰ The Proposal concedes, though, that "[h]ow parties would meet the shortened deadlines is not known."¹¹

NASAA supports the goal of making arbitrations involving seniors and seriously-ill persons as speedy as possible. But NASAA would not support this objective if we thought the Proposal might threaten claimants' rights or if it were used as tool by defense counsel to attempt to circumvent discovery in the guise of moving the matter along expeditiously. We believe, on whole, that the Proposal poses little risk for claimants if properly administered by FINRA's dispute resolution staff. Given that the benefits and costs of the Proposal seem favorable for retail investors, we accordingly support it.

III. Conclusion

NASAA welcomes an opportunity to discuss these issues further. If you have any questions about this letter, please contact the undersigned or NASAA's General Counsel, Vince Martinez, at vmartinez@nasaa.org or (202) 737-0900.

Sincerely,



Melanie Senter Lubin
NASAA President
Maryland Securities Commissioner

⁹ Proposal at 6 (stating the median time for arbitration proceedings is 15.2 months and the median time for arbitration proceedings under FINRA's current program of accelerated proceedings for persons with serious health conditions or who are at least 65 years old is 13.4 months).

¹⁰ *See id.* at 3.

¹¹ *Id.* at 7.