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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. * SR 2024 - * 021
Amendment No. (req. for Amendments *)

Filing by Financial Industry Regulatory Authority

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * ☑ Amendment * ☐ Withdrawal ☐

Section 19(b)(2) * ☑ Section 19(b)(3)(A) * ☐ Section 19(b)(3)(B) * ☐

Pilot ☐

Extension of Time Period for Commission Action * ☐

Date Expires *

Rule

☐ 19b-4(f)(1) ☐ 19b-4(f)(4)
☐ 19b-4(f)(2) ☐ 19b-4(f)(5)
☐ 19b-4(f)(3) ☐ 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) * ☐ Section 806(e)(2) * ☐

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 3C(b)(2) * ☐

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

## Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Proposed rule change to amend the Codes of Arbitration Procedure to add new FINRA Rules 12808 and 13808 (Accelerated Processing) to accelerate the processing of arbitration proceedings for parties who qualify based on their age or health condition.

## Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.


First Name * Kristine Last Name * Vo

Title * Assistant General Counsel

E-mail * kristine.vo@finra.org

Telephone * (212) 858-4106 Fax


## Signature

Pursuant to the requirements of the Securities Exchange of 1934, Financial Industry Regulatory Authority has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 12/11/2024

By Vice President and Associate General Couns
(Name *)

(Title *) Victoria Crane

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Victoria Crane
Digitally signed by Victoria Crane
Date: 2024.12.11 15:58:49 -05'00'

*Required fields are shown with yellow backgrounds and astericks.*

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information ***

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FINRA-2024-021 19b-4.docx

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change ***

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FINRA-2024-021 Exhibit 1.docx

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A - Notice of Proposed Rule Change, Security-Based Swap Submission, or Advanced Notice by Clearing Agencies ***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2- Notices, Written Comments, Transcripts, Other Communications**

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FINRA-024-021 Exhibit 2a.pdf
FINRA-024-021 Exhibit 2b.docx
FINRA-024-021 Exhibit 2c.pdf

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

☐ Exhibit Sent As Paper Document

**Exhibit 3 - Form, Report, or Questionnaire**

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

☐ Exhibit Sent As Paper Document

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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FINRA-2024-021 Exhibit 5.docx

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

**1. Text of the Proposed Rule Change**

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] the Financial Industry Regulatory Authority, Inc. ("FINRA") is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change to amend the Code of Arbitration Procedure for Customer Disputes ("Customer Code") and the Code of Arbitration Procedure for Industry Disputes ("Industry Code") (together, "Codes") to add new FINRA Rules 12808 and 13808 (Accelerated Processing) to accelerate the processing of arbitration proceedings for parties who qualify based on their age or health condition.

The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

**2. Procedures of the Self-Regulatory Organization**

The FINRA Board of Governors authorized the filing of the proposed rule change with the SEC. No other action by FINRA is necessary for the filing of the proposed rule change.

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice.

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[1] 15 U.S.C. 78s(b)(1).

**3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

(a) Purpose

I. Background

FINRA currently offers a program to expedite arbitration proceedings in the forum administered by FINRA Dispute Resolution Services ("DRS") for parties who have a serious health condition or are at least 65 years old ("current program").[2] When an eligible party makes a request to expedite the proceedings under the current program, DRS staff will expedite the case-related tasks that they can control, such as completing the arbitrator selection process, scheduling the initial prehearing conference, and serving the final award.[3] In addition, the current program "encourage[s]" arbitrators to be sensitive to the needs of parties who are seniors or seriously ill when making scheduling decisions and setting deadlines.[4] Critically, however, the current program does not provide for shortened, rule-based deadlines for parties or provide arbitrators with direction on how quickly the arbitration should be completed.

Although the intent of the current program is to shorten case processing times for parties that qualify based on their age or health condition, cases that qualify for the current program close only marginally more quickly than cases that are not in the current program. While the median time for customer arbitrations that are not in the current

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2 See FINRA, Expedited Proceedings for Senior or Seriously Ill Parties, https://www.finra.org/arbitration-mediation/rules-case-resources/special-procedures/expedited-proceedings-seniors-seriously-ill.

3 See supra note 2.

4 See supra note 2.

program to close is approximately 15.7 months, the median time for customer arbitrations that are in the current program to close is approximately 13.7 months, a difference of just two months.[5]

FINRA believes that it would protect investors and the public interest to materially shorten case processing times for those parties who may be unable to meaningfully participate in a lengthy arbitration because of their age or health condition. As is discussed more fully below, when a party is unable to meaningfully participate in an arbitration—for example, if they become ill and are unable to testify—the outcome of the proceeding may be affected. This potentially harms not only the immediate parties to the arbitration but also the broader investing public because the resolution of the arbitration may not accurately reflect the underlying merits of the case.

Accordingly, FINRA is proposing to add a new rule to the Codes that would help to accelerate the arbitration process for those parties who qualify based on their age or health condition. Unlike the current program, the proposed rule change would establish shortened case-processing deadlines for the parties, including the time to respond to discovery deadlines, and provide direction to arbitrators regarding how quickly the proceeding should be completed. By codifying these shortened deadlines and providing additional direction to arbitrators, FINRA believes that the length of the proceedings subject to the proposed rule change would shorten by approximately six months, which would make a meaningful difference for older parties or those suffering from a serious health condition.[6] The proposed rule change would be more likely than the current

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5 See infra Item 4(B) (discussing Economic Baseline).

6 See infra Item 4(C) (discussing Economic Impacts).

program, which does not provide for shortened, rule-based deadlines for parties or provide arbitrators with direction on how quickly the arbitration should be completed, to accelerate the proceedings for those parties who may not be able to meaningfully participate throughout the course of a lengthy arbitration. If the Commission approves the proposed rule change, the requirements of the new rule would apply to those who qualify and request accelerated processing, thereby replacing the current program. In addition, for those parties who may benefit from shortened proceedings but do not meet the eligibility requirements of the proposed rule change, the proposed rule change would allow the parties to request that the panel consider other factors, including their age and health, when scheduling hearings and discovery, briefing, and motion deadlines. Thus, although these proceedings would not be subject to the shortened, rule-based deadlines of the proposed rule change, the panel may determine at a party's request, to expedite the proceedings based on the party's particular circumstances, including developing a serious health condition during the arbitration proceeding.

## II. Proposed Rule Change

### A. Requesting Accelerated Case Processing

Under the proposed rule change, parties would be able to request accelerated processing if they meet one of two eligibility requirements, based on their age or their health condition.[7] FINRA addresses each of these eligibility requirements in turn below.

#### 1. Eligibility Based on Age

The first way for a party to qualify for accelerated processing under the proposed rule change would be based on their age. Under proposed Rules 12808(a)(1)(A) and

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[7] See proposed Rules 12808(a)(1) and 13808(a)(1).

13808(a)(1)(A), a party may request accelerated processing of a case when initiating an arbitration or filing an answer provided that the party making the request is at least 70 years of age at the time of the request.[8]

FINRA believes it is appropriate for parties who are 70 years of age and older to qualify for accelerated processing because these parties are more likely than younger individuals to become seriously ill or experience an adverse health condition during the course of an arbitration.[9] Because of their age, it is also more likely that parties who are at least 70 years of age may not live to see the outcome of the arbitration proceedings.[10] For these reasons, these parties may not be able to meaningfully participate throughout the course of a lengthy arbitration proceeding. For example, as forum users have noted, elderly parties may be unable to consult with their counsel or otherwise assist in the preparation of the case.[11] These parties also may be unable to testify.[12] This, in turn, could affect the outcome of the proceedings. For example, if a party is unavailable to testify because they are deceased or suffering from an adverse health condition, the arbitrators would have no opportunity to observe the party's demeanor and, thus, may be unable to assess their credibility. By shortening the length of the arbitration for

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8 See proposed Rules 12808(a)(1)(A) and 13808(a)(1)(A).

9 See infra Item 4(C) (discussing Economic Impacts).

10 See infra Item 4(C) (discussing Economic Impacts).

11 In Regulatory Notice 22-09 (March 2022) ("Notice"), FINRA sought comment on a proposed rule change to accelerate arbitration proceedings for those parties who may not be able to meaningfully participate in lengthy proceedings. See infra Item 5 (discussing the Notice and summarizing the comments).

12 See infra Item 5(A) (discussing comments to the Notice addressing the need for the proposed rule change).

individuals who are at least 70 years of age, the proposed rule change would make it more likely that these parties are able to meaningfully participate for the duration of the arbitration proceedings. This, in turn, would help ensure that the outcomes of the cases accurately reflect the underlying merits.

Further, as is discussed in more detail below, a party younger than 70, but who has an eligible health condition, still would be able to request accelerated processing under proposed Rules 12808(a)(1)(B) and 13808(a)(1)(B) provided that the party making the request certifies, in the manner and form required by the Director, that (i) the party has received a medical diagnosis and prognosis and (ii) based on that medical diagnosis and prognosis, the party has a reasonable belief that accelerated processing of the case is necessary to prevent prejudicing the party's interest in the arbitration.

FINRA understands that, under the proposed rule change, some younger parties would not be eligible to request accelerated processing based on either their age or their health condition. Although some of these parties might benefit if their arbitrations were completed more quickly, as discussed in more detail below,[13] FINRA does not believe that a lower age cutoff, such as an age cut off of 65 (consistent with the current program), would be appropriate.

First, under proposed Rules 12808(a)(3) and 13808(a)(3), parties who would not qualify for accelerated processing based on either their age or health condition still would be able to request, once the panel is appointed, that the panel consider other factors, including their age or a change in their health condition during the arbitration proceeding, when scheduling hearings and discovery, briefing, and motion deadlines. Thus, although

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13 See infra Item 4(D) (discussing Alternatives Considered).

these proceedings would not be subject to the shortened, rule-based deadlines of the proposed rule change, the panel may determine at a party's request, to expedite the proceedings based on the party's particular circumstances.

Second, due to the increase in the number of customer claimants who would qualify for accelerated processing,[14] a lower age cutoff might make it difficult for arbitrators—many of whom might have to serve concurrently on more than one arbitration[15]—to comply with their obligations under proposed Rules 12808(b)(2)(B), 12808(b)(2)(C), 13808(b)(2)(B), and 13808(b)(2)(C) to endeavor to hold hearings and render an award within 10 months or less in accelerated proceedings.[16]

Third, a lower age cut off may have a negative impact on non-accelerated customer arbitrations. Arbitrators and industry parties and their counsel are often involved in more than one arbitration at the same time and may seek to extend the case

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14 Lowering the proposed age cutoff from 70 to 65—the same age cutoff for the current program—would increase the total number of customer claimants who would qualify for accelerated processing from 20 percent to 26 percent. In 2023, with a proposed age cutoff of 65, customer claimants in 492 arbitrations (26 percent of 1,891 arbitrations where customers appeared as claimant) would qualify for accelerated processing. See infra Item 4(D) (discussing Alternatives Considered). Although the proposed rule change would permit any party who is a natural person to request accelerated processing, FINRA anticipates, based on its experience with the current program, that most requests would come from customer claimants. See infra note 44 and accompanying text.

15 See infra Item 4(C) (discussing Economic Impacts).

16 Although shortening the length of the proceedings for parties who qualify for accelerated processing is an important goal, FINRA understands that speed cannot come at the cost of procedural fairness. However, FINRA believes that 10 months should provide a reasonable and fair opportunity for discovery, motions, briefing, and hearings to be completed.

processing times of their concurrent, non-accelerated arbitrations in order to meet the shortened deadlines that would apply to their accelerated arbitrations.[17]

Based on these considerations, FINRA believes that an age cutoff of 70 would help ensure that the proposed rule change is effective at helping those parties who would benefit most from accelerated processing. That said, if the Commission approves the proposed rule change, FINRA would monitor the program to determine if adjustments to the age cutoff for qualifying for accelerated processing are warranted.

2. Eligibility Based on Health

In addition to allowing parties to qualify for accelerated processing based on their age, the proposed rule change separately would allow parties to qualify based on their health condition. Specifically, under proposed Rules 12808(a)(1)(B) and 13808(a)(1)(B), a party may request accelerated processing of a case when initiating an arbitration or filing an answer provided that the party making the request certifies, in the manner and form required by the Director, that (i) the party has received a medical diagnosis and prognosis, and (ii) based on that medical diagnosis and prognosis, the party has a reasonable belief that accelerated processing of the case is necessary to prevent prejudicing the party's interest in the arbitration ("eligible health condition").

FINRA believes it is appropriate to allow parties, regardless of age, to qualify for accelerated processing based on an eligible health condition. Parties who are suffering from an eligible health condition may be unable to meaningfully participate in a lengthy arbitration proceeding, which, in turn, could affect the outcome of the proceeding.

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17 See infra Item 4(C) (discussing Economic Impacts).

Unlike the proposed rule change, the current program does not require a certification to qualify for expedited proceedings based on a party's health condition. Under the current program, the Director determines whether the party qualifies for the program on the face of the information contained in the party's request at the outset of the case through the online claim filing form, statement of claim, or optional cover letter.[18] If it is not clear from the request whether the party qualifies for the current program, the Director may request additional information from the party.

FINRA believes that the proposed certification requirement is the most appropriate way to minimize unnecessary intrusions into a party's private health information while, at the same time, allowing FINRA to identify those individuals who could benefit most from accelerated processing because they are suffering from an eligible health condition.

FINRA understands the concerns of some forum users that, unless proof of their medical condition is required, parties may submit a false certification in order to qualify for accelerated processing.[19] However, FINRA has no evidence that parties have falsely claimed to be suffering from a serious health condition under the current program nor any reason to believe that this kind of misconduct is more likely under the proposed rule change. Moreover, FINRA believes that the threat of potential sanctions under existing FINRA Rules 12212 and 13212 should be sufficient to deter parties from falsely

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18 Under the Codes, the term "Director" means the Director of DRS. Unless the Codes provide that the Director may not delegate a specific function, the term includes FINRA staff to whom the Director has delegated authority. See FINRA Rules 12100(m), 12103, 13100(m), and 13103.

19 See infra note 79 and accompanying text.

certifying that they have been diagnosed with an eligible health condition in order to qualify for accelerated processing.[20]

Finally, some forum users have expressed the concern that parties who request accelerated processing on the basis of an eligible health condition could be subject to discovery requests for the production of medical records or other private information about their health condition.[21] FINRA agrees with these forum users that in addition to raising privacy concerns, such discovery requests—or a requirement for additional proof of a party's health condition—could deter parties from making valid requests for accelerated processing and also unnecessarily delay the proceedings.[22] To address these concerns, the proposed rule change would make clear that a party does not open the door to discovery into their health condition merely by requesting accelerated processing.[23] Specifically, under proposed Rules 12808(a)(2) and 13808(a)(2), a party's certification of an eligible health condition shall not alone be sufficient grounds to compel the production of information concerning, or to allow questioning at any hearing about, the party's medical condition. The proposed rule change would not address a party's ability to request medical information for other appropriate reasons that are unrelated to the

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20 Under existing FINRA Rules 12212 and 13212, potential sanctions include, but are not limited to, monetary penalties, an adverse inference, or a preclusion order.

21 See infra note 80 and accompanying text.

22 See infra note 81 and accompanying text.

23 See proposed Rules 12808(a)(2) and 13808(a)(2).

certification. For example, state law may allow a claimant's medical records to be discovered when a claimant places their medical condition at issue in their claim.[24]

Based on these considerations, FINRA believes that the proposed certification requirement and the threat of potential sanctions would be sufficient to protect against abuse of the process while, at the same time, minimizing unnecessary intrusions into a party's private medical information.

3. Requests by Other Parties for Accelerated Processing

Finally, as noted above, for those parties who may benefit from shortened proceedings but do not meet the eligibility requirements of the proposed rule change, proposed Rules 12808(a)(3) and 13808(a)(3) would allow those parties to request that the panel consider other factors, including their age or a change in their health condition during the arbitration proceeding, when scheduling hearings and discovery, briefing, and motions deadlines. Thus, although these proceedings would not be subject to the

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[24] See, e.g., Hansen v. Combined Transp., Inc., Case No. 1:13-cv-01993, 2014 U.S. Dist. LEXIS 63490, at *6-9 (D. Or. May 8, 2014) (because plaintiff alleged emotional distress damages, court found that, under Oregon and Washington law, he had placed his psychological condition at issue and granted the defendants' motion to compel the production of any records of the plaintiff's treatment by a medical professional for emotional or psychological matters); Kirk v. Schaeffler Group USA, Inc., No. 3:13-cv-05032, 2014 U.S. Dist. LEXIS 83963, at *2-9 (W.D. Mo. June 20, 2014) (plaintiff was required, under Missouri law, to produce medical records related to her autoimmune disorder because those records were relevant to her claim that her autoimmune disorder was caused by exposure to chemicals released from the defendants' manufacturing plant); Desrosiers v. Hartford, No. C 12-80104, 2012 U.S. Dist. LEXIS 64554, at *1-4 (N.D. Cal. May 8, 2012) (applying California law, the court compelled compliance with subpoenas that sought the production of the plaintiff's medical records where she alleged that her employer's actions caused her to suffer emotional and psychological injuries).

shortened, rule-based deadlines of the proposed rule change, the panel may determine at a party's request, to expedite the proceedings based on the party's particular circumstances.

B. Determination of Eligibility

Under proposed Rules 12808(b)(1) and 13808(b)(1), the Director would be responsible for determining whether a requesting party qualifies for accelerated processing.[25] When assessing eligibility for accelerated processing, the Director would make an objective determination as to whether the requesting party is at least 70 years of age or has submitted the required certification regarding an eligible health condition. This determination would not require any assessment by the Director regarding the reasonableness of the requesting party's belief that accelerated processing is necessary.

C. Accelerating the Proceedings

Once the Director determines that an arbitration qualifies for accelerated processing, the proposed rule change would accelerate the proceedings in three ways. First, the proposed rule change would accelerate the arbitrator selection process by shortening the deadlines for the Director to send the list of potential arbitrators to the parties.[26] Second, the proposed rule change would provide arbitrators with direction on how quickly the arbitration should be completed.[27] Third, the proposed rule change would shorten certain deadlines that apply to the parties.[28]

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25 See supra note 18.

26 See proposed Rules 12808(b)(2)(A) and 13808(b)(2)(A).

27 See proposed Rules 12808(b)(2)(B), 12808(b)(2)(C), 13808(b)(2)(B), and 13808(b)(2)(C).

28 See proposed Rules 12808(b)(2)(D) and 13808(b)(2)(D).

1. Accelerating the Arbitrator Selection Process

The first way that the proposed rule change would shorten the proceedings is by requiring that the Director send out the lists of potential arbitrators to the parties more quickly.[29] Currently, DRS is required to send a list of potential arbitrators to all parties at the same time, "within approximately 30 days after the last answer is due," regardless of the parties' agreement to extend any answer due date.[30] By contrast, proposed Rules 12808(b)(2)(A) and 13808(b)(2)(A) would require the Director to send the arbitrator lists generated by the list selection algorithm to all parties "as soon as practicable after the last answer is due." In practice, the Director generally sends the arbitrator lists to parties in fewer than 30 days after the last answer due date. By requiring that the Director send the arbitrator lists "as soon as practicable" after the last answer is due, it would signal that the lists shall be sent shortly after the last answer due date, but would retain some flexibility for the Director in sending the lists.

2. Guidance to Arbitrators Regarding Completion of the Arbitration

The second way that the proposed rule change would shorten the length of the proceedings is to provide arbitrators with direction as to how quickly the case should be completed. Specifically, under proposed Rules 12808(b)(2)(B) and 13808(b)(2)(B), the panel shall endeavor to render an award within 10 months of the date the Director determines that a case is subject to accelerated processing. In addition, under proposed

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29 FINRA uses a list selection algorithm that generates, on a random basis, lists of arbitrators from FINRA's rosters of arbitrators for the selected hearing location for each proceeding. The parties select their panel through a process of striking and ranking the arbitrators on the lists generated by the list selection algorithm. See FINRA Rules 12400(a) and 13400(a).

30 See FINRA Rules 12402(c)(1), 12403(b)(1) and 13403(c)(1).

Rules 12808(b)(2)(C) and 13808(b)(2)(C), the panel shall hold a prehearing conference at which it shall set discovery, briefing, and motions deadlines, and schedule hearing sessions, that are consistent with rendering an award within 10 months or less.

By providing arbitrators with specific guidance regarding how quickly they should endeavor to complete an arbitration, FINRA believes that the proposed rule change would be more likely than the current program—which does not provide arbitrators with any similar guidance—to significantly reduce the overall length of the proceedings in cases that qualify for accelerated processing.

FINRA also believes that 10 months is the appropriate timeframe within which arbitrators should endeavor to render awards in accelerated arbitrations. Currently, the median time for customer arbitrations to close by award after a hearing when they are not part of the current program is almost 16 months, as is discussed more fully below.[31] Shortening the length of the proceedings by approximately six months would make a meaningful difference for a party who is at least 70 years old or suffering from an eligible health condition.[32]

As noted above, although shortening the length of the proceedings for parties who qualify for accelerated processing is an important goal, FINRA understands that speed cannot come at the cost of fairness. However, FINRA believes that 10 months should provide a reasonable and fair opportunity for discovery, motions, briefing, and hearings to be completed.[33]

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31 See infra Item 4(B) (discussing Economic Baseline).

32 See infra Item 4(C) (discussing Economic Impacts).

33 See supra note 16.

At the same time, FINRA recognizes that there are some cases that may qualify for accelerated processing but that cannot reasonably be completed within 10 months because, for example, they are too complex. As to these matters, FINRA believes that the proposed rule change—which would establish a benchmark but would not mandate that all cases be completed within 10 months—would provide the arbitrators with sufficient flexibility to accommodate the particular circumstances of each case.[34]

3. Shortening Party Deadlines

Finally, the third way that the proposed rule change would shorten the length of the proceedings is to shorten several of the default deadlines that apply to parties under the Codes, as follows:

- *Serving an Answer*. Under the Codes, a respondent must serve an answer within 45 days of receipt of the statement of claim.[35] Under proposed Rules 12808(b)(2)(D)(i) and 13808(b)(2)(D)(i), a respondent would be required to serve an answer within 30 days of receipt of the statement of claim.
- *Responding to a Third Party Claim.* Under the Codes, a party responding to a third party claim must serve a response within 45 days of receipt of the third

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34 Further, as is discussed more fully, infra note 41 and accompanying text, even after the proposed rule change is adopted, arbitrators would continue to have flexibility under existing FINRA rules to modify the deadlines that apply to the parties when appropriate. See FINRA Rules 12508(b) and 13508(b) (allowing arbitrators to excuse untimely objections to discovery requests where "the party had substantial justification for failing to make the objection within the required time"); FINRA Rules 12207(b) and 13207(b) (authorizing arbitrators to extend or modify any deadline "either on its own initiative or upon motion of a party").

35 See FINRA Rules 12303 and 13303.

party claim.[36] Under proposed Rules 12808(b)(2)(D)(ii) and 13808(b)(2)(D)(ii), a party responding to a third party claim would be required to serve a response within 30 days of receipt of the third party claim.

- *Completing Arbitrator Lists*. Under the Codes, parties must return the ranked arbitrator lists to the Director no more than 20 days after the lists were sent to the parties.[37] Under proposed Rules 12808(b)(2)(D)(iii) and 13808(b)(2)(D)(iii), parties would be required to return the ranked arbitrator lists to the Director no more than 10 days after the lists are sent to the parties.
- *Discovery in Customer Cases*. Under the Customer Code, parties in customer cases are required to produce to all other parties documents that are described in the Document Production Lists on FINRA's website; explain why specific documents cannot be produced; or object and file an objection with the Director within 60 days of the date that the answer to the statement of claim or third party claim is due, unless the parties agree otherwise.[38] Under proposed Rule 12808(b)(2)(D)(iv), parties in customer cases would be required to respond to the Document Production Lists within 35 days of the date the answer to the statement of claim or third party claim is due, unless the parties agree otherwise.
- *Other Discovery Requests*. Under the Codes, parties must respond within 60 days of receipt to requests for other documents or information, unless the

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36 See FINRA Rules 12306 and 13306.

37 See FINRA Rules 12403 and 13404.

38 See FINRA Rule 12506.

parties agree otherwise.[39] Under proposed Rules 12808(b)(2)(D)(v) and 13808(b)(2)(D)(iv), parties would be required to respond to requests for other documents and information within 30 days of receipt, unless the parties agree otherwise.

Based on FINRA's experience, FINRA believes these proposed shortened deadlines are reasonable and would not compromise the fairness of the arbitration proceedings because they would be manageable in most cases. In addition, arbitrators and parties could extend the proposed deadlines if warranted. Specifically, there may be some cases in which the complexity of the case, the volume of discovery, or other factors may justify extending these proposed deadlines.[40] Under such circumstances, the existing provisions of the Codes would provide the parties and arbitrators with the flexibility to address the unique facts and circumstances of each case. Specifically, under existing FINRA Rules 12207(a) and 13207(a), the parties may agree to extend or modify any deadline for serving an answer, returning the ranked arbitrator or chairperson lists, responding to motions, or exchanging documents or witness lists.[41] Under existing FINRA Rules 12207(b) and 13207(b), the panel may extend or modify any deadline for serving an answer, responding to motions, exchanging documents or witness lists, or any other deadline set by the panel, either on its own initiative or upon motion of a party.

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39 See FINRA Rules 12507 and 13507.

40 See infra Item 5(D) (discussing comments to the Notice addressing the proposed shortened deadlines for parties and guidance to arbitrators).

41 Proposed Rules 12808(b)(2)(D)(iv), 12808(b)(2)(D)(v), and 13808(b)(2)(D)(iv) similarly would permit the parties to mutually agree to extend discovery deadlines.

Further, under existing FINRA Rules 12508(b) and 13508(b), the panel may extend the time for a party to object to discovery requests if the party has "substantial justification for failing to make the objection within the required time."

While these provisions in the Codes provide the panel and the parties with flexibility to modify the shortened deadlines in the proposed rule change, FINRA expects the extensions to be the exception and not the rule. Accordingly, if the Commission approves the proposed rule change, FINRA would provide training and guidance to arbitrators on accelerated processing, which would include training on evaluating requests to extend the proposed shortened deadlines.

As noted in Item 2 of this filing, if the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice.[42]

(b) Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[43] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

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42 FINRA notes that the proposed rule change would impact all members, including members that are funding portals or have elected to be treated as capital acquisition brokers ("CABs"), given that the funding portal and CAB rule sets incorporate the impacted FINRA rules by reference.

43 15 U.S.C. 78o-3(b)(6).

FINRA believes that the proposed rule change will protect investors and the public interest by shortening case processing times for those parties—most of whom are likely to be customers—who may not be able to meaningfully participate for the duration of a lengthy arbitration because of their age or health condition. When parties are unable to meaningfully participate in an arbitration, it can affect the outcome of the proceedings. By shortening the length of the arbitration for these parties, the proposed rule change will make it more likely that they are able to meaningfully participate for the duration of the proceedings. This, in turn, will protect investors and the public interest by helping to ensure that arbitration cases are resolved based on the underlying merits.

In addition, those parties who do not meet the eligibility requirements of the proposed rule change still will be able to request, once the panel has been appointed, that the panel consider other factors, including their age or a change in their health condition during the arbitration proceeding, when scheduling hearings and discovery, briefing, and motion deadlines. Thus, although these proceedings would not be subject to the shortened, rule-based deadlines of the proposed rule change, the panel may determine at a party's request, to expedite the proceedings based on the party's particular circumstances.

**4. Self-Regulatory Organization's Statement on Burden on Competition**

FINRA does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed rulemaking, its potential economic impacts,

including anticipated benefits and costs, and the alternatives FINRA considered in assessing how to best meet its regulatory objectives.

Economic Impact Assessment

A. Regulatory Need

The proposed rule change would address concerns that FINRA has received that certain parties who are seriously ill or 70 years or older may be unable to meaningfully participate in a lengthy arbitration. An inability to meaningfully participate harms these parties if, as a result, the resolution of the arbitration does not accurately reflect the underlying merits of the case. For the parties who qualify, the proposed rule change would shorten case deadlines and provide arbitrators with instruction on how quickly the arbitration should be completed.

B. Economic Baseline

The economic baseline is the current provisions under the Codes that address the administration of arbitration proceedings and the current program to shorten case processing times. The proposed rule change is expected to affect the parties to cases in the DRS forum, their counsel, and FINRA arbitrators.

Under the current program, parties who have a serious health condition or are at least 65 years of age may request that the processing of their arbitration be expedited. Since the current program is voluntary, requesting parties presumably anticipate that the benefits from the shortened case processing times more than offset any additional costs, such as paying for expedited legal services. Expedited processing may also impose additional costs on the other parties and arbitrators associated with arbitrations.

From 2019 through 2023, customers requested expedited processing in

approximately 29 percent of customer arbitrations. During this time period, 10,961 customer arbitrations (where customers appeared as claimants) closed where DRS had served the statement of claim on respondents. Parties requested expedited processing in 3,174 of these arbitrations. Ninety-nine percent, or 3,132 of the 3,174 requests, were granted. Parties did not request expedited processing in the remaining 7,787 arbitrations.[44]

Arbitrations in the current program closed only slightly faster than arbitrations not in the current program. The median time for the 3,132 customer arbitrations in the current program to close was approximately 13.7 months. This is two months shorter than the median time for the 7,829 customer arbitrations not in the current program to close, which was 15.7 months.[45]

C. Economic Impacts

The proposed rule change would impact the number of parties who are eligible for accelerated processing.[46] For example, from a sample of 499 requests for expedited

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44 Parties requested expedited processing in few arbitrations where customers appeared only as respondent or that were intra-industry arbitrations. For this reason, FINRA focuses the empirical discussion on customer arbitrations where customers appeared as claimant.

45 FINRA finds similar evidence comparing the length of customer arbitrations that went through the full arbitration process and closed by award after a hearing from 2019 to 2023.

46 As noted above, the proposed rule change would be more likely than the current program, which does not provide for shortened, rule-based deadlines for parties or provide arbitrators with direction on how quickly the arbitration should be completed, to accelerate the proceedings for those parties who may not be able to meaningfully participate throughout the course of a lengthy arbitration. In addition, for those parties who may benefit from shortened proceedings but do not meet the eligibility requirements of the proposed rule change, the proposed rule change would allow the parties to request that the panel consider other factors,

processing that were granted in 2023, 77 percent of the requests (385 requests) were granted on the basis of serious illness or age 70 or over. These parties represent 20 percent of customer claimants (385 of 1,891 arbitrations where customers appeared as claimant). The remaining 23 percent of requests (114 requests), or six percent of customer claimants, were granted solely on the basis of age to parties between the ages of 65 and 69. Under the proposed rule change, these parties would no longer qualify for accelerated processing.[47]

FINRA anticipates that the proposed rule change would shorten the length of arbitrations for parties who request and are granted accelerated processing. In these arbitrations, arbitrators would be required to endeavor to render an award within 10 months. From a sample of arbitrations in the current program in 2020 that have since closed, 384 were granted on the basis of serious illness or age 70 or over. Seventy percent (269 of 384 arbitrations in the current program) took longer than 10 months to close. Among the arbitrations in the current program that took longer than 10 months to

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including their age and health, when scheduling hearings and discovery, briefing, and motion deadlines. Thus, although these proceedings would not be subject to the shortened, rule-based deadlines of the proposed rule change, the panel may determine at a party's request, to expedite the proceedings based on the party's particular circumstances, including developing a serious health condition during the arbitration proceeding.

47 FINRA also identified 31 requests for expedited processing made by customer claimants where the request was based on age but information describing the age was not available. Depending on the age of the customer, these requests may or may not be eligible under the proposed rule change. The sample reflects all arbitrations filed in 2023 where customer claimants requested expedited processing. The sample, therefore, should be representative of the customer claimants who make these requests.

close, approximately 50 percent took longer than 15.3 months to close.[48] As discussed below, the magnitude of the benefits and costs resulting from the proposed rule change would increase as the arbitrations that proceed under accelerated processing shorten.

Relative to the baseline, the proposed rule change would benefit parties who are seriously ill or at least 70 years old by shortening case deadlines for their arbitrations and providing arbitrators with instruction on how quickly the arbitration should be completed. This would help reduce the length of the arbitration and increase the chance that qualifying parties can fully participate. The ability of these parties to meaningfully participate would help facilitate outcomes that are more consistent with the merits of the case.[49] Those parties who, as a result of the shorter processing times settle or are awarded damages earlier than under the current program, may also have a greater ability to meet their short-term financial needs.

The proposed rule change, however, may also impose additional costs on parties and arbitrators to meet the shorter, rule-based deadlines. The parties who are eligible and request accelerated processing would incur these costs at their own discretion. The types of costs the other parties to the proceeding may incur would depend on how they manage

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48 As a comparison, from a sample of 109 arbitrations in the current program in 2020 involving customer claimants who were under the age of 70 and not seriously ill, 72 percent (78 of 109 arbitrations in the current program) took longer than 10 months to close. Among the arbitrations in the current program that took longer than 10 months to close, approximately 50 percent took longer than 14.6 months to close. As of the date of this filing, two arbitrations in the current program in 2020 remained open.

49 Such outcomes can include awards and settlements insofar as settlements reflect the merits of the case. Among the 10,961 customer arbitrations that closed from 2019 through 2023, 8,423 arbitrations (77 percent) resulted in settlements reached by the parties.

their resources to meet the shortened deadlines. For example, these parties may reallocate resources from other activities, possibly increasing the time required to meet other business objectives; or they may incur additional costs from adding staff or using outside counsel; or do a combination of the two. How these parties would adjust to meet the shortened deadlines may differ depending on their business models and available resources. The additional costs parties incur, however, may be partly offset by the gains to efficiency from the shorter deadlines and a more focused effort on the associated tasks.

Participants to non-accelerated arbitrations may also incur costs associated with longer processing times. It could be difficult for arbitrators, industry parties and their counsel—many of whom participate concurrently in more than one arbitration—to maintain their current timelines for non-accelerated arbitrations. As a result, case processing times of non-accelerated arbitrations may lengthen.

Reducing the length of the arbitration may help more parties with serious health issues than are helped under the current program, though the reduction may not be sufficient to help all parties with more serious health issues and shorter life expectancies. Also, under the proposed rule change, parties between the ages of 65 and 69 who are seriously ill would no longer be able to rely on their age to qualify for accelerated processing. These parties may incur additional costs to certify that they have received a medical diagnosis and prognosis in order to take advantage of accelerated processing.

Finally, it is not expected that the proposed rule change would impose costs on those parties who would no longer qualify for accelerated processing on the basis of either their age or health condition. These parties would still be able to ask that the panel consider their age and health in making scheduling decisions and setting deadlines.

D. Alternatives Considered

FINRA considered different age eligibility cutoffs when developing the proposed rule change.[50] FINRA is concerned that age cutoffs greater than 70 would deny accelerated processing to many parties who are at higher risk of becoming seriously ill, experiencing an adverse health condition, or not living to see the outcome of an arbitration. In 2023, relative to the proposed age cutoff of 70, an age cutoff of 75 would decrease the total number of customer claimants who would qualify for accelerated processing from 20 percent to 16 percent.[51] Alternatively, as noted above, lowering the proposed age cutoff from 70 to 65—the same age cutoff for the current program—would increase the total number of customer claimants who would qualify for accelerated processing from 20 percent to 26 percent.[52] FINRA notes that these are estimates of eligibility, and that we do not know the fraction of those eligible who would request accelerated processing if the proposed rule change were adopted.

Even though the data suggests that lowering the proposed age cutoff from 70 to 65 would only affect approximately six percent of customer claimants, FINRA is concerned that this change may reduce the likelihood that the proposed rule change would materially shorten the length of the proceedings for those parties who may be less likely to be able to participate for the duration of a lengthy arbitration. FINRA is also concerned that participation by arbitrators, industry parties and their counsel in more than

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50 See infra Item 5(B).

51 In 2023, with a proposed age cutoff of 75, customer claimants in 295 arbitrations (16 percent of 1,891 arbitrations where customers appeared as claimant) would qualify for accelerated processing.

52 See supra note 14.

one arbitration, including an arbitration that is accelerated under the proposed rule change may affect parties in other arbitrations in the DRS forum in the form of longer processing times.

FINRA understands that the average likelihood of becoming unable to meaningfully participate in an arbitration may differ among populations and that these differences can persist after the age of 65.[53] This suggests that lowering the proposed age cutoff cannot fully equalize the ability of individuals in all populations to participate in the forum. However, populations with higher likelihoods of serious illness or adverse health conditions may experience additional benefits from the eligibility requirements based on health. As noted above, a party younger than 70 would still be able to request accelerated processing if they are suffering from a serious health condition.

Finally, FINRA also considered establishing different deadlines for parties (e.g., requiring the parties to complete the ranked arbitrator lists in 20 days and not the proposed 10 days; and requiring parties to respond to Document Production Lists in 20 days and not the proposed 35 days). When establishing the proposed deadlines, FINRA considered the potential burden on arbitrators and parties relative to their importance on the length of arbitration proceedings to close. FINRA believes that the deadlines as proposed would be manageable and only impose a burden on arbitrators and parties to the extent that the deadlines would help result in meaningfully shortened processing times.

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53 See Elizabeth Arias, Jiaquan Xu & Kenneth Kochanek, United States Life Tables, 2021, National Vital Statistics Reports, Vol. 72, No. 12, https://www.cdc.gov/nchs/data/nvsr/nvsr72/nvsr72-12.pdf.

**5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others**

FINRA published the proposed rule change for comment in Regulatory Notice 22-09.[54] FINRA received 15 comment letters from 14 commenters in response to the Notice.[55] A copy of the Notice is attached as Exhibit 2a. A list of comment letters received in response to the Notice is attached as Exhibit 2b. Copies of the comment letters received in response to the Notice are attached as Exhibit 2c.

Eleven commenters supported FINRA's efforts to accelerate arbitration proceedings for those parties who may not be able to meaningfully participate in lengthy proceedings but suggested modifications.[56] A summary of the comments and FINRA's responses are discussed below.

A. Comments Addressing the Need for the Proposed Rule Change

In its response to the Notice, SIFMA supported the intent behind the proposed rule change—"to ensure that parties to a FINRA arbitration are able to participate meaningfully in their proceedings and obtain a fair outcome"—but questioned whether the proposed rule change is necessary given the existence of the current program. FINRA disagrees that the proposed rule change is unnecessary. The current program has

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54 See supra note 11.

55 One of the 14 commenters, Slater, submitted two comment letters. All references to commenters are to the comment letters as listed in Exhibit 2b.

56 See Cambridge, Cardozo, Caruso, Cornell, FSI, Iannarone, Miami, NASAA, Pace, PIABA, and St. John's. SIFMA stated that the proposed rule change is unnecessary because FINRA's current program for expediting arbitrations sufficiently addresses the issue. The two remaining commenters, Kolber and Slater, did not address the proposed rule change specifically but, rather, expressed concerns about misconduct by attorneys in FINRA arbitrations.

reduced the median time that it takes for customer arbitrations to close by just two months.[57]

FINRA understands that any shortening in the length of an arbitration can be helpful to a party who is elderly or suffering from a serious health condition. However, FINRA believes that the proposed rule change has the potential to shorten the time that it takes for arbitrations to close to approximately 10 months, thereby shortening the median closing time by approximately an additional three months. As a number of commenters noted, the additional time savings contemplated by the proposed rule change could be critical for parties who are elderly or suffering from a serious health condition and who, therefore, may be unable to meaningfully participate in a lengthy arbitration.[58] As Miami stated, "[t]he critical months saved under the proposal could mean the difference in" whether an elderly or sick party is able to meaningfully participate in the proceedings, "whether by testifying, consulting with their attorneys, or making decisions about settlement offers." Cardozo noted the "grave" consequences that some elderly or seriously ill parties face without accelerated processing. Some of these parties die before the arbitration is completed, and others, who are diagnosed with a memory-impairing disease like Alzheimer's, may initially be able to assist in the preparation of their case but then "enter into a steep decline to a point where they can no longer testify on their own behalf."[59] According to Cardozo, "[m]moving quickly in such a case is critical." FINRA believes that, by establishing rule-based deadlines for the parties and codifying the

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57 See supra Item 4(B) (discussing Economic Baseline).

58 See Miami, Cardozo.

59 See Cardozo.

expectation that arbitrators endeavor to render an award within 10 months, the proposed rule change would be more likely than the current program to ensure that cases occur on an accelerated schedule.[60]

SIFMA suggests that, even without the proposed rule change, FINRA could encourage arbitrators to endeavor to render awards in accelerated proceedings within a period of 10 months. FINRA agrees that arbitrator training is important, and, as noted above, if the Commission approves the proposed rule change, FINRA would provide training and guidance to arbitrators on accelerated processing, which would include training on evaluating requests to extend the proposed shortened deadlines.

B. Comments Addressing Which Parties Should Be Eligible for Accelerated Processing

As discussed below, those commenters who addressed the issue of which parties should be eligible for accelerated processing almost uniformly supported allowing parties to qualify based on either their age or their health condition.[61] The principal area of disagreement among the commenters was the appropriate age at which a party should become eligible for accelerated processing.[62] Further, some commenters suggested that FINRA should take into consideration other factors in

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60 See PIABA (stating that "[c]odifying the mandates of an accelerated process" may make it more likely that parties and arbitrators comply with an accelerated schedule).

61 See infra Item 5(B)(1) and (2).

62 See infra Item 5(B)(1).

addition to age and health condition when deciding whether a party should qualify for accelerated processing.[63]

1. Comments Addressing Eligibility Based on Age

All but one of the commenters who addressed the issue supported allowing parties to qualify for accelerated processing based solely on age.[64] The only exception is Cambridge. Specifically, Cambridge questioned the need for parties who are otherwise healthy to qualify for accelerated processing based solely on age. Cambridge stated that accelerated processing should be available only when a party is suffering from an eligible health condition.

FINRA disagrees with Cambridge. Even if they are otherwise healthy at the outset of the arbitration, elderly parties may be more likely because of their age to become seriously ill or die during the arbitration, in which case they would be unable to meaningfully participate for the duration of the proceedings. For this reason, FINRA believes it is appropriate that the proposed rule change would allow parties to qualify for accelerated processing based solely on age.

The remaining commenters, other than Cambridge, focused principally on the question of what the appropriate age cutoff should be for a party to qualify for

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63 See infra Item 5(B)(3).

64 Compare Cardozo, Caruso, Cornell, FSI, Iannarone, Miami, NASAA, Pace, PIABA, SIFMA, and St. John's (all supporting allowing parties to qualify for accelerated processing based solely on age) with Cambridge (recommending that FINRA eliminate eligibility based solely on age). SIFMA generally supported allowing parties to request accelerated processing based on age but suggested that FINRA should require parties to produce proof of their age. FINRA discusses all of the comments addressing the question of what kind of proof should be required to qualify for accelerated processing below. See infra Item 5(C)(1).

accelerated processing. In the Notice, FINRA proposed an age cutoff of 75 years and requested comment on whether 75 was the appropriate age at which parties should be able to request that the proceedings be accelerated.[65] In response, three commenters supported the proposed age cutoff of 75.[66] St. John's recommended lowering the age cutoff to 70. Six commenters urged FINRA to lower the age cutoff to 65.[67] As noted above, those commenters who suggested lowering the age cutoff from 75 to either 70 or 65 relied on some or all of the following three justifications for their recommendation: (1) 65 is the age that is commonly used in other statutes and rules relating to the protection of seniors;[68] (2) lowering the age cutoff to below 75 would account for different life expectancies across different groups;[69] and (3) customer claimants who are 65 years of age and older are more likely to be facing economic hardship because they may not have ongoing income from employment.[70]

After considering the comments, FINRA has determined to propose an age cutoff to qualify for accelerated processing of 70. As discussed in detail above, an age cutoff of 70 would make accelerated processing available to more parties who are at a higher risk of becoming seriously ill or experiencing an eligible health condition during the course of

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65 See supra note 11.

66 See FSI, Miami, SIFMA.

67 See Cardozo, Caruso, Cornell, Iannarone, Pace, PIABA.

68 See Caruso, Iannarone, Pace, PIABA.

69 See Cardozo, Cornell, Iannarone, Pace, PIABA.

70 See Cardozo.

an arbitration, or potentially not living to see the outcome of the arbitration proceeding.[71] However, as noted above, if the Commission approves the proposed rule change, FINRA would monitor the new program to determine if adjustments to the age cutoff for qualification for accelerated processing are warranted.[72]

2. Comments Addressing Eligibility Based on Health Condition

Those commenters who addressed the issue of which parties should be eligible for accelerated processing unanimously supported allowing parties to qualify based on their health condition.[73] However, FSI requested further guidance regarding the kinds of health conditions that would support a request for accelerated processing. Cornell requested that FINRA reconsider the requirement in proposed Rules 12808(a)(1)(B) and 13808(a)(1)(B) that, in order to qualify for accelerated processing based on their health condition, a party must certify that they have a "reasonable belief" that accelerated processing is necessary. In explaining its objection to that standard, Cornell expressed the concern that parties could be subject to sanctions if they and the Director—who, according to Cornell, will have "the authority of determining whether the applicants'

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71 See supra Item 3(a)(II)(A)(1) (discussing Eligibility Based on Age) and Item 4(D) (discussing Alternatives Considered).

72 See supra Item 3(a)(II)(A)(1).

73 See Cambridge, Cardozo, Caruso, Cornell, FSI, Iannarone, Miami, NASAA, Pace, PIABA, SIFMA, and St. John's. Although they generally supported allowing parties to qualify for accelerated processing based on their health condition, some of these commenters suggested that the proposed rule change should require parties to produce additional proof of their health condition. See Cambridge, SIFMA. FINRA discusses these comments on the issue of what proof should be required to establish eligibility based on health condition below. See infra Item 5(C).

beliefs are reasonable"— disagree as to "what conditions warrant an accelerated hearing."

Given the breadth of potential diagnoses and prognoses that could result in parties reasonably believing that they would be prejudiced without accelerated processing, FINRA does not believe it would be helpful to provide examples of eligible health conditions. In addition, FINRA is concerned that doing so could discourage parties with medical diagnoses and prognoses that fall outside of the examples from making a legitimate request for accelerated processing.

FINRA also believes that the "reasonable belief" standard is appropriate. As discussed above, when assessing eligibility for accelerated processing under proposed Rules 12808(b)(1) and 13808(b)(1), the Director would make an objective determination as to whether the requesting party has submitted the required certification regarding an eligible health condition. This determination would not require any assessment by the Director regarding the reasonableness of the requesting party's belief that accelerated processing is necessary. FINRA believes that these concerns are unfounded.

3. Comments Proposing Additional Categories of Eligible Parties

Although they supported making accelerated processing available to parties based on their age or health condition, two commenters suggested that FINRA should allow parties to request accelerated treatment based on other factors.[74] Specifically, St. John's recommended that parties should be able to qualify for accelerated processing based on "need." Under the approach proposed by St. John's, a party's eligibility for accelerated processing would be determined based on a consideration of their "full circumstances,"

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74 See Iannarone, St. John's.

including their medical status, socioeconomic status, and other needs, such as caregiver responsibilities. In addition, both St. John's and Iannarone suggested that parties should qualify for accelerated processing if they are healthy but have a spouse or immediate family member who is suffering from a qualifying health condition.

FINRA understands that there are some parties who would benefit if their arbitration were accelerated but who would not qualify for accelerated processing under the proposed rule change. However, FINRA is concerned that the needs-based approach suggested by St. John's is too vague and subjective to be workable. Although FINRA understands that parties with ill spouses or immediate family members might benefit if — according to St. John's, they were able to "spend less time and money on the arbitration process,"—there is no evidence that these parties would be unable to meaningfully participate in arbitration proceedings absent accelerated processing. Finally, FINRA believes it is unnecessary to expand the categories of eligible parties as suggested by the commenters because the proposed rule change provides those parties who do not meet the eligibility requirements of the proposed rule change with an alternative route to seek to accelerate the proceedings. Specifically, as discussed above, proposed Rules 12808(a)(3) and 13808(a)(3) would allow parties who do not meet the eligibility requirements of the proposed rule change to request, once the panel has been appointed, that the panel consider other factors, including their age or a change in their health condition during the arbitration proceeding, when scheduling hearings and discovery, briefing, and motion deadlines. Thus, although the shortened deadlines in proposed Rules 12808(b) and 13808(b) would not apply to these parties, they would be able to ask the arbitration panel

to accelerate their proceedings based on a consideration of their particular circumstances, including developing a serious health condition after the panel is appointed.

C. Comments Addressing the Proof Required to Qualify for Accelerated Processing

As noted above, although almost all of the commenters supported allowing parties to qualify for accelerated processing based on their age or their health conditions, two of those commenters suggested that, in order to minimize the potential for abuse of the process, FINRA should require parties to produce proof of their age or health condition.[75] To further deter parties from falsely claiming they are eligible for accelerated processing, two commenters suggested that existing sanctions provisions in the Codes should be expanded.[76] FINRA disagrees with these commenters, as discussed below.

1. Comments Addressing Proof of Age

SIFMA suggested that parties requesting accelerated processing on the basis of age should be required to prove they are at least 70 years old by producing "a driver's license, passport, birth certificate, or other similar official record." However, FINRA believes that requiring proof of age is unnecessary. Just as there is no evidence that parties have falsely claimed to be suffering from a serious health condition, FINRA has no evidence that parties have falsified their age to qualify for the current program. Nor is there any reason to believe that parties are more likely to falsify their age under the proposed rule change, particularly when such conduct could result in potential sanctions

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75 See Cambridge, SIFMA.

76 See FSI, SIFMA.

under existing FINRA Rules 12212 and 13212. FINRA is also concerned that requiring proof of age under the proposed rule change could discourage some parties from making legitimate requests for accelerated processing as they may view this as an unnecessary intrusion into their personal information.[77] Further, in the unlikely event that a genuine dispute arises as to whether a party qualifies for accelerated processing on the basis of age, the arbitration panel could require that the party provide proof of age to determine the applicability of the proposed rule change.[78]

2. Comments Addressing Proof of a Party's Health Condition

To minimize the risk that parties will falsely certify that they are suffering from an eligible health condition, two commenters suggested that parties should be required to provide additional proof of their health condition, for example, by providing a certification from a physician.[79] As discussed above, FINRA believes that the proposed certification requirement and the threat of potential sanctions would be sufficient to

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77 In addition, FINRA notes there are increasing concerns with customers' identities being used for fraudulent purposes in the securities industry. See, e.g., Regulatory Notice 20-13 (May 2020) (reminding firms to be aware of fraud during the pandemic); Regulatory Notice 20-32 (September 2020) (reminding firms to be aware of fraudulent options trading in connection with potential account takeovers and new account fraud); Regulatory Notice 21-14 (March 2021) (alerting firms to recent increase in automated clearing house "Instant Funds" abuse); Regulatory Notice 21-18 (May 2021) (sharing practices firms use to protect customers from online account takeover attempts); and Regulatory Notice 22-21 (October 2022) (alerting firms to recent trend in fraudulent transfers of accounts through the Automated Customer Account Transfer Service).

78 See FINRA Rules 12409 and 13413. The panel has the authority to interpret and determine the applicability of all provisions under the Codes.

79 See Cambridge, SIFMA.

protect against abuse of the process while, at the same time, minimizing unnecessary intrusions into private medical information.

Some commenters also expressed the concern that parties who request accelerated processing on the basis of an eligible health condition could be subject to discovery requests for the production of medical records or other private information about their health condition.[80] These commenters stated that in addition to raising privacy concerns, such discovery requests could deter parties from making valid requests for accelerated processing and also unnecessarily delay the proceedings.[81] FINRA agrees with these concerns. As a result, the proposed rule change would make clear that a party does not open the door to discovery into their health condition merely by requesting accelerated processing.[82]

To further protect a party's privacy, Cardozo requested that the proposed rule change require that the certification be submitted only to FINRA staff and not shared with other parties or the arbitrators. However, FINRA believes that such a requirement is unnecessary because the certification required under the proposed rule change would not contain any details regarding the party's medical condition or other private health information.

3. Comments Addressing Sanctions

To provide further protection against abuse of the process, two commenters

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80 See Miami, PIABA.

81 See Miami, PIABA.

82 See proposed Rules 12808(a)(2) and 13808(a)(2).

suggested that the existing sanctions provisions in the Codes should be expanded.[83] More specifically, FSI proposed that arbitrators should be able to remove a matter from the accelerated processing track, and SIFMA proposed that matters should be subject to dismissal as a sanction if a party falsely claims to be eligible for accelerated treatment. However, existing FINRA Rules 12212(a) and 13212(a) already authorize arbitrators to impose a wide range of sanctions, including, assessing monetary penalties payable to one or more parties; precluding a party from presenting evidence; making an adverse inference against a party; assessing postponement or forum fees; and assessing attorneys' fees, costs and expenses. FINRA believes these rules are broad enough and provide arbitrators with sufficient flexibility to address any abuse of accelerated processing.

D. Comments Addressing the Proposed Shortened Deadlines for Parties and Guidance to Arbitrators

1. Comments Addressing the Proposed 10-Month Timeframe for Arbitrators to Endeavor to Render an Award

Two commenters addressed the proposed 10-month timeframe within which arbitrators should endeavor to render awards in accelerated arbitrations.[84] Miami supported the proposed rule change and, based on its experience representing parties in FINRA arbitrations, stated that "arbitrators appear equipped to meet FINRA's proposed guidance to render an award within 10 months or less."[85] SIFMA did not object to the proposed 10-month timeframe per se but, rather, noted that it may not be possible or

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83 See FSI, SIFMA.

84 See Miami, SIFMA.

85 In addition, Miami stated that "existing provisions of the Code provide sufficient flexibility if the shortened deadlines could not be met in a particular case."

appropriate to close all accelerated cases within 10 months. For example, SIFMA noted that large, complex cases may involve voluminous discovery.

For the reasons discussed above, FINRA believes that 10 months is the appropriate timeframe within which arbitrators should endeavor to render awards in accelerated arbitrations.[86] In addition, however, FINRA agrees that there are some cases that may qualify for accelerated processing but which cannot reasonably be completed within 10 months because these cases are complex or involve voluminous discovery. As to these matters, FINRA believes that the proposed rule change would provide the arbitrators with sufficient flexibility to accommodate the particular circumstances of each case. As discussed above, the proposed rule change would establish a benchmark but does not mandate that all cases be completed within 10 months.[87]

2. Comments Addressing the Shortened Deadlines for Parties

As discussed above, in addition to establishing a 10-month timeframe within which arbitrators should endeavor to render an award in accelerated cases, proposed Rules 12808(b)(2)(D) and 13808(b)(2)(D) would accelerate the proceedings by establishing shortened deadlines for the parties. Three commenters expressed concerns regarding some or all of these proposed shortened deadlines.[88] Cambridge recommended against including any deadlines in the proposed rule change "to allow for flexibility in each situation." It also objected to all of the proposed shortened deadlines for filing answers, returning the ranked arbitrator lists, and producing discovery as allegedly too

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86 See supra Item 4(C) (discussing Economic Impacts).

87 See supra Item 3(a)(II)(C)(2).

88 See Cambridge, FSI, SIFMA.

short and unfair to respondents.[89] SIFMA generally supported the proposed deadline for filing answers "provided that the parties are free to grant extensions upon request," but it stated that the proposed deadlines for returning the ranked arbitrator lists and discovery might be difficult or impossible to meet in some cases. FSI took issue only with the proposed shortened discovery deadlines, which FSI claimed were unrealistic and would result in requests for extensions of time "as a matter of course."

FINRA disagrees with Cambridge's suggestion to eliminate all shortened deadlines from the proposed rule change. To meaningfully reduce case processing times for those parties who may be unable to fully participate in lengthy arbitration proceedings—a goal that the current program has been unable to achieve—FINRA believes it is necessary and appropriate to establish rule-based shortened deadlines. As to the other concerns raised by commenters regarding specific deadlines, FINRA understands that the proposed shortened deadlines may not be reasonable in some cases, for example, if the case is complex or involves voluminous discovery. However, as discussed above, FINRA believes that the existing provisions of the Codes provide the parties and arbitrators with sufficient flexibility to modify the proposed shortened deadlines when necessary.[90] Further, as noted above, if the Commission approves the

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89 Cambridge also suggested that, instead of shortening the deadlines that apply to the parties, FINRA should consider establishing concurrent deadlines. For example, Cambridge proposed that the parties could be working on ranking potential arbitrators at the same time that the respondent is preparing the answer to the statement of claim. However, FINRA does not believe it would be appropriate to require the claimant to rank arbitrators before they are provided with an opportunity to review the respondent's answer and any counterclaims and crossclaims.

90 See supra Item 3(a)(II)(C)(3). For this same reason, FINRA also does not believe it is necessary, as suggested by Cardozo, that the proposed rule change provide

proposed rule change, FINRA would provide training and guidance to arbitrators on accelerated processing, which would include training on evaluating requests to extend the proposed shortened deadlines.

E. Other Comments

In response to the Notice, NASAA criticized FINRA member firms for often requiring customers to enter into agreements to arbitrate disputes regarding services provided to such customers. Kolber suggested that the Codes should be amended to provide for sanctioning attorneys for engaging in delay tactics in arbitration. St. John's recommended raising the threshold for simplified arbitration from $50,000 to $100,000. Iannarone suggested that FINRA help ensure that all customer claimants have access to counsel.

All of these comments are beyond the scope of the proposed rule change. However, with respect to NASAA's comment, FINRA notes that its rules do not require customers to enter into agreements to arbitrate disputes with member firms, nor do FINRA rules preclude customers from pursuing relief in state or federal courts. The Supreme Court has held that predispute arbitration agreements are enforceable as to claims brought under the Act.[91]

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parties with the option to "change their minds" and have their cases returned to a regular schedule. If, as Cardozo suggests, the shortened deadlines become too "challenging" for a party, existing FINRA rules would permit them to request that the deadlines be modified.

91 Until the Supreme Court's decision in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), the courts would not enforce predispute arbitration agreements relating to federal securities law claims. In addition, until its rescission in 1987, Rule 15c2-2(a) under the Act provided that: "It shall be a fraudulent, manipulative or deceptive act or practice for a broker or dealer to enter into an agreement with any public customer which purports to bind the customer

With respect to Kolber's comment, FINRA notes that it does not have direct authority to investigate or discipline representative misconduct in the DRS forum.[92] Currently, if an attorney is allegedly engaging in misconduct in the DRS forum, FINRA may make a referral to the attorney's disciplinary agency, which has processes to respond to misconduct of attorneys subject to its jurisdiction.

With respect to St. John's comment, FINRA notes that any increase to the $50,000 threshold for simplified arbitrations would require a separate proposed rule change as the focus of this proposed rule change is on accelerating the processing of arbitration proceedings for parties who qualify based on their age or health condition rather than claim size.

Finally, with respect to Iannarone's comment, FINRA notes that its website offers several resources to help parties find an attorney.[93]

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to the arbitration of future disputes between them arising under the federal securities laws, or to have in effect such an agreement, pursuant to which it effects transactions with or for a customer." As a result of McMahon and the rescission of Rule 15c2-2(a), firms can compel arbitration of customer claims through inclusion of predispute arbitration provisions in their agreements with customers. When member firms use mandatory arbitration clauses, FINRA rules establish minimum disclosure requirements regarding their use to help ensure customers understand these clauses, and to protect customers' rights under FINRA rules. See FINRA Rule 2268. See also Regulatory Notice 21-16 (April 2021) (reminding firms about requirements when using predispute arbitration agreements for customer accounts).

92 Cf. FINRA Rule 8310 (allowing FINRA to impose sanctions on member firms and persons associated with member firms).

93 See Find An Attorney, https://www.finra.org/arbitration-mediation/about/find-attorney.

**6. Extension of Time Period for Commission Action**

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.[94]

**7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)**

Not applicable.

**8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission**

Not applicable.

**9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act**

Not applicable.

**10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act**

Not applicable.

**11. Exhibits**

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 2a. Regulatory Notice 22-09 (March 2022).

Exhibit 2b. List of comment letters received in response to Regulatory Notice 22-09 (March 2022).

Exhibit 2c. Copies of comments letters received in response to Regulatory Notice 22-09 (March 2022).

Exhibit 5. Text of the proposed rule change.

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94 15 U.S.C. 78s(b)(2).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-FINRA-2024-021)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Amend the Codes of Arbitration Procedure to Adopt FINRA Rules 12808 and 13808 (Accelerated Processing) to Accelerate the Processing of Arbitration Proceedings for Parties Who Qualify Based on Their Age or Health Condition

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on , the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend the Code of Arbitration Procedure for Customer Disputes ("Customer Code") and the Code of Arbitration Procedure for Industry Disputes ("Industry Code") (together, "Codes") to add new FINRA Rules 12808 and 13808 (Accelerated Processing) to accelerate the processing of arbitration proceedings for parties who qualify based on their age or health condition.

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

The text of the proposed rule change is available on FINRA's website at http://www.finra.org, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

I. Background

FINRA currently offers a program to expedite arbitration proceedings in the forum administered by FINRA Dispute Resolution Services ("DRS") for parties who have a serious health condition or are at least 65 years old ("current program").[3] When an eligible party makes a request to expedite the proceedings under the current program, DRS staff will expedite the case-related tasks that they can control, such as completing the arbitrator selection process, scheduling the initial prehearing conference, and serving the final award.[4] In addition, the current program "encourage[s]" arbitrators to be

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3 See FINRA, Expedited Proceedings for Senior or Seriously Ill Parties, https://www.finra.org/arbitration-mediation/rules-case-resources/special-procedures/expedited-proceedings-seniors-seriously-ill.

4 See supra note 3.

sensitive to the needs of parties who are seniors or seriously ill when making scheduling decisions and setting deadlines.[5] Critically, however, the current program does not provide for shortened, rule-based deadlines for parties or provide arbitrators with direction on how quickly the arbitration should be completed.

Although the intent of the current program is to shorten case processing times for parties that qualify based on their age or health condition, cases that qualify for the current program close only marginally more quickly than cases that are not in the current program. While the median time for customer arbitrations that are not in the current program to close is approximately 15.7 months, the median time for customer arbitrations that are in the current program to close is approximately 13.7 months, a difference of just two months.[6]

FINRA believes that it would protect investors and the public interest to materially shorten case processing times for those parties who may be unable to meaningfully participate in a lengthy arbitration because of their age or health condition. As is discussed more fully below, when a party is unable to meaningfully participate in an arbitration—for example, if they become ill and are unable to testify—the outcome of the proceeding may be affected. This potentially harms not only the immediate parties to the arbitration but also the broader investing public because the resolution of the arbitration may not accurately reflect the underlying merits of the case.

Accordingly, FINRA is proposing to add a new rule to the Codes that would help to accelerate the arbitration process for those parties who qualify based on their age or

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5 See supra note 3.

6 See infra Item II.B.2 (discussing Economic Baseline).

health condition. Unlike the current program, the proposed rule change would establish shortened case-processing deadlines for the parties, including the time to respond to discovery deadlines, and provide direction to arbitrators regarding how quickly the proceeding should be completed. By codifying these shortened deadlines and providing additional direction to arbitrators, FINRA believes that the length of the proceedings subject to the proposed rule change would shorten by approximately six months, which would make a meaningful difference for older parties or those suffering from a serious health condition.[7] The proposed rule change would be more likely than the current program, which does not provide for shortened, rule-based deadlines for parties or provide arbitrators with direction on how quickly the arbitration should be completed, to accelerate the proceedings for those parties who may not be able to meaningfully participate throughout the course of a lengthy arbitration. If the Commission approves the proposed rule change, the requirements of the new rule would apply to those who qualify and request accelerated processing, thereby replacing the current program. In addition, for those parties who may benefit from shortened proceedings but do not meet the eligibility requirements of the proposed rule change, the proposed rule change would allow the parties to request that the panel consider other factors, including their age and health, when scheduling hearings and discovery, briefing, and motion deadlines. Thus, although these proceedings would not be subject to the shortened, rule-based deadlines of the proposed rule change, the panel may determine at a party's request, to expedite the proceedings based on the party's particular circumstances, including developing a serious health condition during the arbitration proceeding.

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7 See infra Item II.B.3 (discussing Economic Impacts).

II. Proposed Rule Change

A. Requesting Accelerated Case Processing

Under the proposed rule change, parties would be able to request accelerated processing if they meet one of two eligibility requirements, based on their age or their health condition.[8] FINRA addresses each of these eligibility requirements in turn below.

1. Eligibility Based on Age

The first way for a party to qualify for accelerated processing under the proposed rule change would be based on their age. Under proposed Rules 12808(a)(1)(A) and 13808(a)(1)(A), a party may request accelerated processing of a case when initiating an arbitration or filing an answer provided that the party making the request is at least 70 years of age at the time of the request.[9]

FINRA believes it is appropriate for parties who are 70 years of age and older to qualify for accelerated processing because these parties are more likely than younger individuals to become seriously ill or experience an adverse health condition during the course of an arbitration.[10] Because of their age, it is also more likely that parties who are at least 70 years of age may not live to see the outcome of the arbitration proceedings.[11] For these reasons, these parties may not be able to meaningfully participate throughout the course of a lengthy arbitration proceeding. For example, as forum users have noted, elderly parties may be unable to consult with their counsel or otherwise assist in the

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8 See proposed Rules 12808(a)(1) and 13808(a)(1).

9 See proposed Rules 12808(a)(1)(A) and 13808(a)(1)(A).

10 See infra Item II.B.3 (discussing Economic Impacts).

11 See infra Item II.B.3 (discussing Economic Impacts).

preparation of the case.[12] These parties also may be unable to testify.[13] This, in turn, could affect the outcome of the proceedings. For example, if a party is unavailable to testify because they are deceased or suffering from an adverse health condition, the arbitrators would have no opportunity to observe the party's demeanor and, thus, may be unable to assess their credibility. By shortening the length of the arbitration for individuals who are at least 70 years of age, the proposed rule change would make it more likely that these parties are able to meaningfully participate for the duration of the arbitration proceedings. This, in turn, would help ensure that the outcomes of the cases accurately reflect the underlying merits.

Further, as is discussed in more detail below, a party younger than 70, but who has an eligible health condition, still would be able to request accelerated processing under proposed Rules 12808(a)(1)(B) and 13808(a)(1)(B) provided that the party making the request certifies, in the manner and form required by the Director, that (i) the party has received a medical diagnosis and prognosis and (ii) based on that medical diagnosis and prognosis, the party has a reasonable belief that accelerated processing of the case is necessary to prevent prejudicing the party's interest in the arbitration.

FINRA understands that, under the proposed rule change, some younger parties would not be eligible to request accelerated processing based on either their age or their health condition. Although some of these parties might benefit if their arbitrations were

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12 In Regulatory Notice 22-09 (March 2022) ("Notice"), FINRA sought comment on a proposed rule change to accelerate arbitration proceedings for those parties who may not be able to meaningfully participate in lengthy proceedings. See infra Item II.C. (discussing the Notice and summarizing the comments).

13 See infra Item II.C.1 (discussing comments to the Notice addressing the need for the proposed rule change).

completed more quickly, as discussed in more detail below,[14] FINRA does not believe that a lower age cutoff, such as an age cut off of 65 (consistent with the current program), would be appropriate.

First, under proposed Rules 12808(a)(3) and 13808(a)(3), parties who would not qualify for accelerated processing based on either their age or health condition still would be able to request, once the panel is appointed, that the panel consider other factors, including their age or a change in their health condition during the arbitration proceeding, when scheduling hearings and discovery, briefing, and motion deadlines. Thus, although these proceedings would not be subject to the shortened, rule-based deadlines of the proposed rule change, the panel may determine at a party's request, to expedite the proceedings based on the party's particular circumstances.

Second, due to the increase in the number of customer claimants who would qualify for accelerated processing,[15] a lower age cutoff might make it difficult for arbitrators—many of whom might have to serve concurrently on more than one arbitration[16]—to comply with their obligations under proposed Rules 12808(b)(2)(B),

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14 See infra Item II.B.4 (discussing Alternatives Considered).

15 Lowering the proposed age cutoff from 70 to 65—the same age cutoff for the current program—would increase the total number of customer claimants who would qualify for accelerated processing from 20 percent to 26 percent. In 2023, with a proposed age cutoff of 65, customer claimants in 492 arbitrations (26 percent of 1,891 arbitrations where customers appeared as claimant) would qualify for accelerated processing. See infra Item II.B.4 (discussing Alternatives Considered). Although the proposed rule change would permit any party who is a natural person to request accelerated processing, FINRA anticipates, based on its experience with the current program, that most requests would come from customer claimants. See infra note 45 and accompanying text.

16 See infra Item II.B.3 (discussing Economic Impacts).

12808(b)(2)(C), 13808(b)(2)(B), and 13808(b)(2)(C) to endeavor to hold hearings and render an award within 10 months or less in accelerated proceedings.[17]

Third, a lower age cut off may have a negative impact on non-accelerated customer arbitrations. Arbitrators and industry parties and their counsel are often involved in more than one arbitration at the same time and may seek to extend the case processing times of their concurrent, non-accelerated arbitrations in order to meet the shortened deadlines that would apply to their accelerated arbitrations.[18]

Based on these considerations, FINRA believes that an age cutoff of 70 would help ensure that the proposed rule change is effective at helping those parties who would benefit most from accelerated processing. That said, if the Commission approves the proposed rule change, FINRA would monitor the program to determine if adjustments to the age cutoff for qualifying for accelerated processing are warranted.

2. Eligibility Based on Health

In addition to allowing parties to qualify for accelerated processing based on their age, the proposed rule change separately would allow parties to qualify based on their health condition. Specifically, under proposed Rules 12808(a)(1)(B) and 13808(a)(1)(B), a party may request accelerated processing of a case when initiating an arbitration or filing an answer provided that the party making the request certifies, in the manner and form required by the Director, that (i) the party has received a medical diagnosis and

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17 Although shortening the length of the proceedings for parties who qualify for accelerated processing is an important goal, FINRA understands that speed cannot come at the cost of procedural fairness. However, FINRA believes that 10 months should provide a reasonable and fair opportunity for discovery, motions, briefing, and hearings to be completed.

18 See infra Item II.B.3 (discussing Economic Impacts).

prognosis, and (ii) based on that medical diagnosis and prognosis, the party has a reasonable belief that accelerated processing of the case is necessary to prevent prejudicing the party's interest in the arbitration ("eligible health condition").

FINRA believes it is appropriate to allow parties, regardless of age, to qualify for accelerated processing based on an eligible health condition. Parties who are suffering from an eligible health condition may be unable to meaningfully participate in a lengthy arbitration proceeding, which, in turn, could affect the outcome of the proceeding.

Unlike the proposed rule change, the current program does not require a certification to qualify for expedited proceedings based on a party's health condition. Under the current program, the Director determines whether the party qualifies for the program on the face of the information contained in the party's request at the outset of the case through the online claim filing form, statement of claim, or optional cover letter.[19] If it is not clear from the request whether the party qualifies for the current program, the Director may request additional information from the party.

FINRA believes that the proposed certification requirement is the most appropriate way to minimize unnecessary intrusions into a party's private health information while, at the same time, allowing FINRA to identify those individuals who could benefit most from accelerated processing because they are suffering from an eligible health condition.

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[19] Under the Codes, the term "Director" means the Director of DRS. Unless the Codes provide that the Director may not delegate a specific function, the term includes FINRA staff to whom the Director has delegated authority. See FINRA Rules 12100(m), 12103, 13100(m), and 13103.

FINRA understands the concerns of some forum users that, unless proof of their medical condition is required, parties may submit a false certification in order to qualify for accelerated processing.[20] However, FINRA has no evidence that parties have falsely claimed to be suffering from a serious health condition under the current program nor any reason to believe that this kind of misconduct is more likely under the proposed rule change. Moreover, FINRA believes that the threat of potential sanctions under existing FINRA Rules 12212 and 13212 should be sufficient to deter parties from falsely certifying that they have been diagnosed with an eligible health condition in order to qualify for accelerated processing.[21]

Finally, some forum users have expressed the concern that parties who request accelerated processing on the basis of an eligible health condition could be subject to discovery requests for the production of medical records or other private information about their health condition.[22] FINRA agrees with these forum users that in addition to raising privacy concerns, such discovery requests—or a requirement for additional proof of a party's health condition—could deter parties from making valid requests for accelerated processing and also unnecessarily delay the proceedings.[23] To address these concerns, the proposed rule change would make clear that a party does not open the door

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20 See infra note 80 and accompanying text.

21 Under existing FINRA Rules 12212 and 13212, potential sanctions include, but are not limited to, monetary penalties, an adverse inference, or a preclusion order.

22 See infra note 81 and accompanying text.

23 See infra note 82 and accompanying text.

to discovery into their health condition merely by requesting accelerated processing.[24] Specifically, under proposed Rules 12808(a)(2) and 13808(a)(2), a party's certification of an eligible health condition shall not alone be sufficient grounds to compel the production of information concerning, or to allow questioning at any hearing about, the party's medical condition. The proposed rule change would not address a party's ability to request medical information for other appropriate reasons that are unrelated to the certification. For example, state law may allow a claimant's medical records to be discovered when a claimant places their medical condition at issue in their claim.[25]

Based on these considerations, FINRA believes that the proposed certification requirement and the threat of potential sanctions would be sufficient to protect against abuse of the process while, at the same time, minimizing unnecessary intrusions into a party's private medical information.

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24 See proposed Rules 12808(a)(2) and 13808(a)(2).

25 See, e.g., Hansen v. Combined Transp., Inc., Case No. 1:13-cv-01993, 2014 U.S. Dist. LEXIS 63490, at *6-9 (D. Or. May 8, 2014) (because plaintiff alleged emotional distress damages, court found that, under Oregon and Washington law, he had placed his psychological condition at issue and granted the defendants' motion to compel the production of any records of the plaintiff's treatment by a medical professional for emotional or psychological matters); Kirk v. Schaeffler Group USA, Inc., No. 3:13-cv-05032, 2014 U.S. Dist. LEXIS 83963, at *2-9 (W.D. Mo. June 20, 2014) (plaintiff was required, under Missouri law, to produce medical records related to her autoimmune disorder because those records were relevant to her claim that her autoimmune disorder was caused by exposure to chemicals released from the defendants' manufacturing plant); Desrosiers v. Hartford, No. C 12-80104, 2012 U.S. Dist. LEXIS 64554, at *1-4 (N.D. Cal. May 8, 2012) (applying California law, the court compelled compliance with subpoenas that sought the production of the plaintiff's medical records where she alleged that her employer's actions caused her to suffer emotional and psychological injuries).

3. Requests by Other Parties for Accelerated Processing

Finally, as noted above, for those parties who may benefit from shortened proceedings but do not meet the eligibility requirements of the proposed rule change, proposed Rules 12808(a)(3) and 13808(a)(3) would allow those parties to request that the panel consider other factors, including their age or a change in their health condition during the arbitration proceeding, when scheduling hearings and discovery, briefing, and motions deadlines. Thus, although these proceedings would not be subject to the shortened, rule-based deadlines of the proposed rule change, the panel may determine at a party's request, to expedite the proceedings based on the party's particular circumstances.

B. Determination of Eligibility

Under proposed Rules 12808(b)(1) and 13808(b)(1), the Director would be responsible for determining whether a requesting party qualifies for accelerated processing.[26] When assessing eligibility for accelerated processing, the Director would make an objective determination as to whether the requesting party is at least 70 years of age or has submitted the required certification regarding an eligible health condition. This determination would not require any assessment by the Director regarding the reasonableness of the requesting party's belief that accelerated processing is necessary.

C. Accelerating the Proceedings

Once the Director determines that an arbitration qualifies for accelerated processing, the proposed rule change would accelerate the proceedings in three ways. First, the proposed rule change would accelerate the arbitrator selection process by shortening the deadlines for the Director to send the list of potential arbitrators to the

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[26] See supra note 19.

parties.[27] Second, the proposed rule change would provide arbitrators with direction on how quickly the arbitration should be completed.[28] Third, the proposed rule change would shorten certain deadlines that apply to the parties.[29]

1. Accelerating the Arbitrator Selection Process

The first way that the proposed rule change would shorten the proceedings is by requiring that the Director send out the lists of potential arbitrators to the parties more quickly.[30] Currently, DRS is required to send a list of potential arbitrators to all parties at the same time, "within approximately 30 days after the last answer is due," regardless of the parties' agreement to extend any answer due date.[31] By contrast, proposed Rules 12808(b)(2)(A) and 13808(b)(2)(A) would require the Director to send the arbitrator lists generated by the list selection algorithm to all parties "as soon as practicable after the last answer is due." In practice, the Director generally sends the arbitrator lists to parties in fewer than 30 days after the last answer due date. By requiring that the Director send the arbitrator lists "as soon as practicable" after the last answer is due, it would signal that the

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27 See proposed Rules 12808(b)(2)(A) and 13808(b)(2)(A).

28 See proposed Rules 12808(b)(2)(B), 12808(b)(2)(C), 13808(b)(2)(B), and 13808(b)(2)(C).

29 See proposed Rules 12808(b)(2)(D) and 13808(b)(2)(D).

30 FINRA uses a list selection algorithm that generates, on a random basis, lists of arbitrators from FINRA's rosters of arbitrators for the selected hearing location for each proceeding. The parties select their panel through a process of striking and ranking the arbitrators on the lists generated by the list selection algorithm. See FINRA Rules 12400(a) and 13400(a).

31 See FINRA Rules 12402(c)(1), 12403(b)(1) and 13403(c)(1).

lists shall be sent shortly after the last answer due date, but would retain some flexibility for the Director in sending the lists.

2. Guidance to Arbitrators Regarding Completion of the Arbitration

The second way that the proposed rule change would shorten the length of the proceedings is to provide arbitrators with direction as to how quickly the case should be completed. Specifically, under proposed Rules 12808(b)(2)(B) and 13808(b)(2)(B), the panel shall endeavor to render an award within 10 months of the date the Director determines that a case is subject to accelerated processing. In addition, under proposed Rules 12808(b)(2)(C) and 13808(b)(2)(C), the panel shall hold a prehearing conference at which it shall set discovery, briefing, and motions deadlines, and schedule hearing sessions, that are consistent with rendering an award within 10 months or less.

By providing arbitrators with specific guidance regarding how quickly they should endeavor to complete an arbitration, FINRA believes that the proposed rule change would be more likely than the current program—which does not provide arbitrators with any similar guidance—to significantly reduce the overall length of the proceedings in cases that qualify for accelerated processing.

FINRA also believes that 10 months is the appropriate timeframe within which arbitrators should endeavor to render awards in accelerated arbitrations. Currently, the median time for customer arbitrations to close by award after a hearing when they are not part of the current program is almost 16 months, as is discussed more fully below.[32] Shortening the length of the proceedings by approximately six months would make a

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[32] See infra Item II.B.2 (discussing Economic Baseline).

meaningful difference for a party who is at least 70 years old or suffering from an eligible health condition.[33]

As noted above, although shortening the length of the proceedings for parties who qualify for accelerated processing is an important goal, FINRA understands that speed cannot come at the cost of fairness. However, FINRA believes that 10 months should provide a reasonable and fair opportunity for discovery, motions, briefing, and hearings to be completed.[34]

At the same time, FINRA recognizes that there are some cases that may qualify for accelerated processing but that cannot reasonably be completed within 10 months because, for example, they are too complex. As to these matters, FINRA believes that the proposed rule change—which would establish a benchmark but would not mandate that all cases be completed within 10 months—would provide the arbitrators with sufficient flexibility to accommodate the particular circumstances of each case.[35]

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33 See infra Item II.B.3 (discussing Economic Impacts).

34 See supra note 17.

35 Further, as is discussed more fully, infra note 42 and accompanying text, even after the proposed rule change is adopted, arbitrators would continue to have flexibility under existing FINRA rules to modify the deadlines that apply to the parties when appropriate. See FINRA Rules 12508(b) and 13508(b) (allowing arbitrators to excuse untimely objections to discovery requests where "the party had substantial justification for failing to make the objection within the required time"); FINRA Rules 12207(b) and 13207(b) (authorizing arbitrators to extend or modify any deadline "either on its own initiative or upon motion of a party").

3. Shortening Party Deadlines

Finally, the third way that the proposed rule change would shorten the length of the proceedings is to shorten several of the default deadlines that apply to parties under the Codes, as follows:

- Serving an Answer. Under the Codes, a respondent must serve an answer within 45 days of receipt of the statement of claim.[36] Under proposed Rules 12808(b)(2)(D)(i) and 13808(b)(2)(D)(i), a respondent would be required to serve an answer within 30 days of receipt of the statement of claim.
- Responding to a Third Party Claim. Under the Codes, a party responding to a third party claim must serve a response within 45 days of receipt of the third party claim.[37] Under proposed Rules 12808(b)(2)(D)(ii) and 13808(b)(2)(D)(ii), a party responding to a third party claim would be required to serve a response within 30 days of receipt of the third party claim.
- Completing Arbitrator Lists. Under the Codes, parties must return the ranked arbitrator lists to the Director no more than 20 days after the lists were sent to the parties.[38] Under proposed Rules 12808(b)(2)(D)(iii) and 13808(b)(2)(D)(iii), parties would be required to return the ranked arbitrator lists to the Director no more than 10 days after the lists are sent to the parties.
- Discovery in Customer Cases. Under the Customer Code, parties in customer cases are required to produce to all other parties documents that are described

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36 See FINRA Rules 12303 and 13303.

37 See FINRA Rules 12306 and 13306.

38 See FINRA Rules 12403 and 13404.

in the Document Production Lists on FINRA's website; explain why specific documents cannot be produced; or object and file an objection with the Director within 60 days of the date that the answer to the statement of claim or third party claim is due, unless the parties agree otherwise.[39] Under proposed Rule 12808(b)(2)(D)(iv), parties in customer cases would be required to respond to the Document Production Lists within 35 days of the date the answer to the statement of claim or third party claim is due, unless the parties agree otherwise.

- Other Discovery Requests. Under the Codes, parties must respond within 60 days of receipt to requests for other documents or information, unless the parties agree otherwise.[40] Under proposed Rules 12808(b)(2)(D)(v) and 13808(b)(2)(D)(iv), parties would be required to respond to requests for other documents and information within 30 days of receipt, unless the parties agree otherwise.

Based on FINRA's experience, FINRA believes these proposed shortened deadlines are reasonable and would not compromise the fairness of the arbitration proceedings because they would be manageable in most cases. In addition, arbitrators and parties could extend the proposed deadlines if warranted. Specifically, there may be some cases in which the complexity of the case, the volume of discovery, or other factors

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39 See FINRA Rule 12506.

40 See FINRA Rules 12507 and 13507.

may justify extending these proposed deadlines.[41] Under such circumstances, the existing provisions of the Codes would provide the parties and arbitrators with the flexibility to address the unique facts and circumstances of each case. Specifically, under existing FINRA Rules 12207(a) and 13207(a), the parties may agree to extend or modify any deadline for serving an answer, returning the ranked arbitrator or chairperson lists, responding to motions, or exchanging documents or witness lists.[42] Under existing FINRA Rules 12207(b) and 13207(b), the panel may extend or modify any deadline for serving an answer, responding to motions, exchanging documents or witness lists, or any other deadline set by the panel, either on its own initiative or upon motion of a party. Further, under existing FINRA Rules 12508(b) and 13508(b), the panel may extend the time for a party to object to discovery requests if the party has "substantial justification for failing to make the objection within the required time."

While these provisions in the Codes provide the panel and the parties with flexibility to modify the shortened deadlines in the proposed rule change, FINRA expects the extensions to be the exception and not the rule. Accordingly, if the Commission approves the proposed rule change, FINRA would provide training and guidance to arbitrators on accelerated processing, which would include training on evaluating requests to extend the proposed shortened deadlines.

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41 See infra Item II.C.4 (discussing comments to the Notice addressing the proposed shortened deadlines for parties and guidance to arbitrators).

42 Proposed Rules 12808(b)(2)(D)(iv), 12808(b)(2)(D)(v), and 13808(b)(2)(D)(iv) similarly would permit the parties to mutually agree to extend discovery deadlines.

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice.[43]

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[44] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

FINRA believes that the proposed rule change will protect investors and the public interest by shortening case processing times for those parties—most of whom are likely to be customers—who may not be able to meaningfully participate for the duration of a lengthy arbitration because of their age or health condition. When parties are unable to meaningfully participate in an arbitration, it can affect the outcome of the proceedings. By shortening the length of the arbitration for these parties, the proposed rule change will make it more likely that they are able to meaningfully participate for the duration of the proceedings. This, in turn, will protect investors and the public interest by helping to ensure that arbitration cases are resolved based on the underlying merits.

In addition, those parties who do not meet the eligibility requirements of the proposed rule change still will be able to request, once the panel has been appointed, that

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43 FINRA notes that the proposed rule change would impact all members, including members that are funding portals or have elected to be treated as capital acquisition brokers ("CABs"), given that the funding portal and CAB rule sets incorporate the impacted FINRA rules by reference.

44 15 U.S.C. 78o-3(b)(6).

the panel consider other factors, including their age or a change in their health condition during the arbitration proceeding, when scheduling hearings and discovery, briefing, and motion deadlines. Thus, although these proceedings would not be subject to the shortened, rule-based deadlines of the proposed rule change, the panel may determine at a party's request, to expedite the proceedings based on the party's particular circumstances.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

FINRA has undertaken an economic impact assessment, as set forth below, to analyze the regulatory need for the proposed rulemaking, its potential economic impacts, including anticipated benefits and costs, and the alternatives FINRA considered in assessing how to best meet its regulatory objectives.

Economic Impact Assessment

1. Regulatory Need

The proposed rule change would address concerns that FINRA has received that certain parties who are seriously ill or 70 years or older may be unable to meaningfully participate in a lengthy arbitration. An inability to meaningfully participate harms these parties if, as a result, the resolution of the arbitration does not accurately reflect the underlying merits of the case. For the parties who qualify, the proposed rule change would shorten case deadlines and provide arbitrators with instruction on how quickly the arbitration should be completed.

2. Economic Baseline

The economic baseline is the current provisions under the Codes that address the administration of arbitration proceedings and the current program to shorten case processing times. The proposed rule change is expected to affect the parties to cases in the DRS forum, their counsel, and FINRA arbitrators.

Under the current program, parties who have a serious health condition or are at least 65 years of age may request that the processing of their arbitration be expedited. Since the current program is voluntary, requesting parties presumably anticipate that the benefits from the shortened case processing times more than offset any additional costs, such as paying for expedited legal services. Expedited processing may also impose additional costs on the other parties and arbitrators associated with arbitrations.

From 2019 through 2023, customers requested expedited processing in approximately 29 percent of customer arbitrations. During this time period, 10,961 customer arbitrations (where customers appeared as claimants) closed where DRS had served the statement of claim on respondents. Parties requested expedited processing in 3,174 of these arbitrations. Ninety-nine percent, or 3,132 of the 3,174 requests, were granted. Parties did not request expedited processing in the remaining 7,787 arbitrations.[45]

Arbitrations in the current program closed only slightly faster than arbitrations not in the current program. The median time for the 3,132 customer arbitrations in the

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[45] Parties requested expedited processing in few arbitrations where customers appeared only as respondent or that were intra-industry arbitrations. For this reason, FINRA focuses the empirical discussion on customer arbitrations where customers appeared as claimant.

current program to close was approximately 13.7 months. This is two months shorter than the median time for the 7,829 customer arbitrations not in the current program to close, which was 15.7 months.[46]

3. Economic Impacts

The proposed rule change would impact the number of parties who are eligible for accelerated processing.[47] For example, from a sample of 499 requests for expedited processing that were granted in 2023, 77 percent of the requests (385 requests) were granted on the basis of serious illness or age 70 or over. These parties represent 20 percent of customer claimants (385 of 1,891 arbitrations where customers appeared as claimant). The remaining 23 percent of requests (114 requests), or six percent of customer claimants, were granted solely on the basis of age to parties between the ages of 65 and 69. Under the proposed rule change, these parties would no longer qualify for

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46 FINRA finds similar evidence comparing the length of customer arbitrations that went through the full arbitration process and closed by award after a hearing from 2019 to 2023.

47 As noted above, the proposed rule change would be more likely than the current program, which does not provide for shortened, rule-based deadlines for parties or provide arbitrators with direction on how quickly the arbitration should be completed, to accelerate the proceedings for those parties who may not be able to meaningfully participate throughout the course of a lengthy arbitration. In addition, for those parties who may benefit from shortened proceedings but do not meet the eligibility requirements of the proposed rule change, the proposed rule change would allow the parties to request that the panel consider other factors, including their age and health, when scheduling hearings and discovery, briefing, and motion deadlines. Thus, although these proceedings would not be subject to the shortened, rule-based deadlines of the proposed rule change, the panel may determine at a party's request, to expedite the proceedings based on the party's particular circumstances, including developing a serious health condition during the arbitration proceeding.

accelerated processing.[48]

FINRA anticipates that the proposed rule change would shorten the length of arbitrations for parties who request and are granted accelerated processing. In these arbitrations, arbitrators would be required to endeavor to render an award within 10 months. From a sample of arbitrations in the current program in 2020 that have since closed, 384 were granted on the basis of serious illness or age 70 or over. Seventy percent (269 of 384 arbitrations in the current program) took longer than 10 months to close. Among the arbitrations in the current program that took longer than 10 months to close, approximately 50 percent took longer than 15.3 months to close.[49] As discussed below, the magnitude of the benefits and costs resulting from the proposed rule change would increase as the arbitrations that proceed under accelerated processing shorten.

Relative to the baseline, the proposed rule change would benefit parties who are seriously ill or at least 70 years old by shortening case deadlines for their arbitrations and providing arbitrators with instruction on how quickly the arbitration should be completed. This would help reduce the length of the arbitration and increase the chance that

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48 FINRA also identified 31 requests for expedited processing made by customer claimants where the request was based on age but information describing the age was not available. Depending on the age of the customer, these requests may or may not be eligible under the proposed rule change. The sample reflects all arbitrations filed in 2023 where customer claimants requested expedited processing. The sample, therefore, should be representative of the customer claimants who make these requests.

49 As a comparison, from a sample of 109 arbitrations in the current program in 2020 involving customer claimants who were under the age of 70 and not seriously ill, 72 percent (78 of 109 arbitrations in the current program) took longer than 10 months to close. Among the arbitrations in the current program that took longer than 10 months to close, approximately 50 percent took longer than 14.6 months to close. As of the date of this filing, two arbitrations in the current program in 2020 remained open.

qualifying parties can fully participate. The ability of these parties to meaningfully participate would help facilitate outcomes that are more consistent with the merits of the case.[50] Those parties who, as a result of the shorter processing times settle or are awarded damages earlier than under the current program, may also have a greater ability to meet their short-term financial needs.

The proposed rule change, however, may also impose additional costs on parties and arbitrators to meet the shorter, rule-based deadlines. The parties who are eligible and request accelerated processing would incur these costs at their own discretion. The types of costs the other parties to the proceeding may incur would depend on how they manage their resources to meet the shortened deadlines. For example, these parties may reallocate resources from other activities, possibly increasing the time required to meet other business objectives; or they may incur additional costs from adding staff or using outside counsel; or do a combination of the two. How these parties would adjust to meet the shortened deadlines may differ depending on their business models and available resources. The additional costs parties incur, however, may be partly offset by the gains to efficiency from the shorter deadlines and a more focused effort on the associated tasks.

Participants to non-accelerated arbitrations may also incur costs associated with longer processing times. It could be difficult for arbitrators, industry parties and their counsel—many of whom participate concurrently in more than one arbitration—to

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[50] Such outcomes can include awards and settlements insofar as settlements reflect the merits of the case. Among the 10,961 customer arbitrations that closed from 2019 through 2023, 8,423 arbitrations (77 percent) resulted in settlements reached by the parties.

maintain their current timelines for non-accelerated arbitrations. As a result, case processing times of non-accelerated arbitrations may lengthen.

Reducing the length of the arbitration may help more parties with serious health issues than are helped under the current program, though the reduction may not be sufficient to help all parties with more serious health issues and shorter life expectancies. Also, under the proposed rule change, parties between the ages of 65 and 69 who are seriously ill would no longer be able to rely on their age to qualify for accelerated processing. These parties may incur additional costs to certify that they have received a medical diagnosis and prognosis in order to take advantage of accelerated processing.

Finally, it is not expected that the proposed rule change would impose costs on those parties who would no longer qualify for accelerated processing on the basis of either their age or health condition. These parties would still be able to ask that the panel consider their age and health in making scheduling decisions and setting deadlines.

4. Alternatives Considered

FINRA considered different age eligibility cutoffs when developing the proposed rule change.[51] FINRA is concerned that age cutoffs greater than 70 would deny accelerated processing to many parties who are at higher risk of becoming seriously ill, experiencing an adverse health condition, or not living to see the outcome of an arbitration. In 2023, relative to the proposed age cutoff of 70, an age cutoff of 75 would decrease the total number of customer claimants who would qualify for accelerated

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[51] See infra Item II.C.2.

processing from 20 percent to 16 percent.[52] Alternatively, as noted above, lowering the proposed age cutoff from 70 to 65—the same age cutoff for the current program—would increase the total number of customer claimants who would qualify for accelerated processing from 20 percent to 26 percent.[53] FINRA notes that these are estimates of eligibility, and that we do not know the fraction of those eligible who would request accelerated processing if the proposed rule change were adopted.

Even though the data suggests that lowering the proposed age cutoff from 70 to 65 would only affect approximately six percent of customer claimants, FINRA is concerned that this change may reduce the likelihood that the proposed rule change would materially shorten the length of the proceedings for those parties who may be less likely to be able to participate for the duration of a lengthy arbitration. FINRA is also concerned that participation by arbitrators, industry parties and their counsel in more than one arbitration, including an arbitration that is accelerated under the proposed rule change may affect parties in other arbitrations in the DRS forum in the form of longer processing times.

FINRA understands that the average likelihood of becoming unable to meaningfully participate in an arbitration may differ among populations and that these differences can persist after the age of 65.[54] This suggests that lowering the proposed age

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52 In 2023, with a proposed age cutoff of 75, customer claimants in 295 arbitrations (16 percent of 1,891 arbitrations where customers appeared as claimant) would qualify for accelerated processing.

53 See supra note 15.

54 See Elizabeth Arias, Jiaquan Xu & Kenneth Kochanek, United States Life Tables, 2021, National Vital Statistics Reports, Vol. 72, No. 12, https://www.cdc.gov/nchs/data/nvsr/nvsr72/nvsr72-12.pdf.

cutoff cannot fully equalize the ability of individuals in all populations to participate in the forum. However, populations with higher likelihoods of serious illness or adverse health conditions may experience additional benefits from the eligibility requirements based on health. As noted above, a party younger than 70 would still be able to request accelerated processing if they are suffering from a serious health condition.

Finally, FINRA also considered establishing different deadlines for parties (e.g., requiring the parties to complete the ranked arbitrator lists in 20 days and not the proposed 10 days; and requiring parties to respond to Document Production Lists in 20 days and not the proposed 35 days). When establishing the proposed deadlines, FINRA considered the potential burden on arbitrators and parties relative to their importance on the length of arbitration proceedings to close. FINRA believes that the deadlines as proposed would be manageable and only impose a burden on arbitrators and parties to the extent that the deadlines would help result in meaningfully shortened processing times.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

FINRA published the proposed rule change for comment in Regulatory Notice 22-09.[55] FINRA received 15 comment letters from 14 commenters in response to the Notice.[56] A copy of the Notice is available on FINRA's website at http://www.finra.org. A list of comment letters received in response to the Notice is available on FINRA's

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55 See supra note 12.

56 One of the 14 commenters, Slater, submitted two comment letters. See SR-FINRA-2024-021 (Form 19b-4, Exhibit 2b) for a list of abbreviations assigned to commenters (available on FINRA's website at http://www.finra.org).

website. Copies of the comment letters received in response to the Notice are available on FINRA's website.

Eleven commenters supported FINRA's efforts to accelerate arbitration proceedings for those parties who may not be able to meaningfully participate in lengthy proceedings but suggested modifications.[57] A summary of the comments and FINRA's responses are discussed below.

1. Comments Addressing the Need for the Proposed Rule Change

In its response to the Notice, SIFMA supported the intent behind the proposed rule change—"to ensure that parties to a FINRA arbitration are able to participate meaningfully in their proceedings and obtain a fair outcome"—but questioned whether the proposed rule change is necessary given the existence of the current program. FINRA disagrees that the proposed rule change is unnecessary. The current program has reduced the median time that it takes for customer arbitrations to close by just two months.[58]

FINRA understands that any shortening in the length of an arbitration can be helpful to a party who is elderly or suffering from a serious health condition. However, FINRA believes that the proposed rule change has the potential to shorten the time that it takes for arbitrations to close to approximately 10 months, thereby shortening the median

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57 See Cambridge, Cardozo, Caruso, Cornell, FSI, Iannarone, Miami, NASAA, Pace, PIABA, and St. John's. SIFMA stated that the proposed rule change is unnecessary because FINRA's current program for expediting arbitrations sufficiently addresses the issue. The two remaining commenters, Kolber and Slater, did not address the proposed rule change specifically but, rather, expressed concerns about misconduct by attorneys in FINRA arbitrations.

58 See supra Item II.B.2 (discussing Economic Baseline).

closing time by approximately an additional three months. As a number of commenters noted, the additional time savings contemplated by the proposed rule change could be critical for parties who are elderly or suffering from a serious health condition and who, therefore, may be unable to meaningfully participate in a lengthy arbitration.[59] As Miami stated, "[t]he critical months saved under the proposal could mean the difference in" whether an elderly or sick party is able to meaningfully participate in the proceedings, "whether by testifying, consulting with their attorneys, or making decisions about settlement offers." Cardozo noted the "grave" consequences that some elderly or seriously ill parties face without accelerated processing. Some of these parties die before the arbitration is completed, and others, who are diagnosed with a memory-impairing disease like Alzheimer's, may initially be able to assist in the preparation of their case but then "enter into a steep decline to a point where they can no longer testify on their own behalf."[60] According to Cardozo, "[m]moving quickly in such a case is critical." FINRA believes that, by establishing rule-based deadlines for the parties and codifying the expectation that arbitrators endeavor to render an award within 10 months, the proposed rule change would be more likely than the current program to ensure that cases occur on an accelerated schedule.[61]

SIFMA suggests that, even without the proposed rule change, FINRA could encourage arbitrators to endeavor to render awards in accelerated proceedings within a

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59 See Miami, Cardozo.

60 See Cardozo.

61 See PIABA (stating that "[c]odifying the mandates of an accelerated process" may make it more likely that parties and arbitrators comply with an accelerated schedule).

period of 10 months. FINRA agrees that arbitrator training is important, and, as noted above, if the Commission approves the proposed rule change, FINRA would provide training and guidance to arbitrators on accelerated processing, which would include training on evaluating requests to extend the proposed shortened deadlines.

2. Comments Addressing Which Parties Should Be Eligible for Accelerated Processing

As discussed below, those commenters who addressed the issue of which parties should be eligible for accelerated processing almost uniformly supported allowing parties to qualify based on either their age or their health condition.[62] The principal area of disagreement among the commenters was the appropriate age at which a party should become eligible for accelerated processing.[63] Further, some commenters suggested that FINRA should take into consideration other factors in addition to age and health condition when deciding whether a party should qualify for accelerated processing.[64]

(A) Comments Addressing Eligibility Based on Age

All but one of the commenters who addressed the issue supported allowing parties to qualify for accelerated processing based solely on age.[65] The only exception is

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62 See infra Item II.C.2(A) and (B).

63 See infra Item II.C.2(A).

64 See infra Item II.C.2(C).

65 Compare Cardozo, Caruso, Cornell, FSI, Iannarone, Miami, NASAA, Pace, PIABA, SIFMA, and St. John's (all supporting allowing parties to qualify for accelerated processing based solely on age) with Cambridge (recommending that FINRA eliminate eligibility based solely on age). SIFMA generally supported allowing parties to request accelerated processing based on age but suggested that FINRA should require parties to produce proof of their age. FINRA discusses all

Cambridge. Specifically, Cambridge questioned the need for parties who are otherwise healthy to qualify for accelerated processing based solely on age. Cambridge stated that accelerated processing should be available only when a party is suffering from an eligible health condition.

FINRA disagrees with Cambridge. Even if they are otherwise healthy at the outset of the arbitration, elderly parties may be more likely because of their age to become seriously ill or die during the arbitration, in which case they would be unable to meaningfully participate for the duration of the proceedings. For this reason, FINRA believes it is appropriate that the proposed rule change would allow parties to qualify for accelerated processing based solely on age.

The remaining commenters, other than Cambridge, focused principally on the question of what the appropriate age cutoff should be for a party to qualify for accelerated processing. In the Notice, FINRA proposed an age cutoff of 75 years and requested comment on whether 75 was the appropriate age at which parties should be able to request that the proceedings be accelerated.[66] In response, three commenters supported the proposed age cutoff of 75.[67] St. John's recommended lowering the age cutoff to 70. Six commenters urged FINRA to lower the age cutoff to 65.[68] As noted above, those commenters who suggested lowering the age cutoff from 75 to either 70 or

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of the comments addressing the question of what kind of proof should be required to qualify for accelerated processing below. See infra Item II.C.3(A).

66 See supra note 12.

67 See FSI, Miami, SIFMA.

68 See Cardozo, Caruso, Cornell, Iannarone, Pace, PIABA.

65 relied on some or all of the following three justifications for their recommendation: (1) 65 is the age that is commonly used in other statutes and rules relating to the protection of seniors;[69] (2) lowering the age cutoff to below 75 would account for different life expectancies across different groups;[70] and (3) customer claimants who are 65 years of age and older are more likely to be facing economic hardship because they may not have ongoing income from employment.[71]

After considering the comments, FINRA has determined to propose an age cutoff to qualify for accelerated processing of 70. As discussed in detail above, an age cutoff of 70 would make accelerated processing available to more parties who are at a higher risk of becoming seriously ill or experiencing an eligible health condition during the course of an arbitration, or potentially not living to see the outcome of the arbitration proceeding.[72] However, as noted above, if the Commission approves the proposed rule change, FINRA would monitor the new program to determine if adjustments to the age cutoff for qualification for accelerated processing are warranted.[73]

(B) Comments Addressing Eligibility Based on Health Condition

Those commenters who addressed the issue of which parties should be eligible for accelerated processing unanimously supported allowing parties to qualify based on their

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69 See Caruso, Iannarone, Pace, PIABA.

70 See Cardozo, Cornell, Iannarone, Pace, PIABA.

71 See Cardozo.

72 See supra Item II.A.1(II)(A)(1) (discussing Eligibility Based on Age) and Item II.B.4 (discussing Alternatives Considered).

73 See supra Item II.A.1(II)(A)(1).

health condition.[74] However, FSI requested further guidance regarding the kinds of health conditions that would support a request for accelerated processing. Cornell requested that FINRA reconsider the requirement in proposed Rules 12808(a)(1)(B) and 13808(a)(1)(B) that, in order to qualify for accelerated processing based on their health condition, a party must certify that they have a "reasonable belief" that accelerated processing is necessary. In explaining its objection to that standard, Cornell expressed the concern that parties could be subject to sanctions if they and the Director—who, according to Cornell, will have "the authority of determining whether the applicants' beliefs are reasonable"— disagree as to "what conditions warrant an accelerated hearing."

Given the breadth of potential diagnoses and prognoses that could result in parties reasonably believing that they would be prejudiced without accelerated processing, FINRA does not believe it would be helpful to provide examples of eligible health conditions. In addition, FINRA is concerned that doing so could discourage parties with medical diagnoses and prognoses that fall outside of the examples from making a legitimate request for accelerated processing.

FINRA also believes that the "reasonable belief" standard is appropriate. As discussed above, when assessing eligibility for accelerated processing under proposed

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74 See Cambridge, Cardozo, Caruso, Cornell, FSI, Iannarone, Miami, NASAA, Pace, PIABA, SIFMA, and St. John's. Although they generally supported allowing parties to qualify for accelerated processing based on their health condition, some of these commenters suggested that the proposed rule change should require parties to produce additional proof of their health condition. See Cambridge, SIFMA. FINRA discusses these comments on the issue of what proof should be required to establish eligibility based on health condition below. See infra Item II.C.

Rules 12808(b)(1) and 13808(b)(1), the Director would make an objective determination as to whether the requesting party has submitted the required certification regarding an eligible health condition. This determination would not require any assessment by the Director regarding the reasonableness of the requesting party's belief that accelerated processing is necessary. FINRA believes that these concerns are unfounded.

(C) Comments Proposing Additional Categories of Eligible Parties

Although they supported making accelerated processing available to parties based on their age or health condition, two commenters suggested that FINRA should allow parties to request accelerated treatment based on other factors.[75] Specifically, St. John's recommended that parties should be able to qualify for accelerated processing based on "need." Under the approach proposed by St. John's, a party's eligibility for accelerated processing would be determined based on a consideration of their "full circumstances," including their medical status, socioeconomic status, and other needs, such as caregiver responsibilities. In addition, both St. John's and Iannarone suggested that parties should qualify for accelerated processing if they are healthy but have a spouse or immediate family member who is suffering from a qualifying health condition.

FINRA understands that there are some parties who would benefit if their arbitration were accelerated but who would not qualify for accelerated processing under the proposed rule change. However, FINRA is concerned that the needs-based approach suggested by St. John's is too vague and subjective to be workable. Although FINRA understands that parties with ill spouses or immediate family members might benefit if — according to St. John's, they were able to "spend less time and money on the arbitration

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75 See Iannarone, St. John's.

process,"—there is no evidence that these parties would be unable to meaningfully participate in arbitration proceedings absent accelerated processing. Finally, FINRA believes it is unnecessary to expand the categories of eligible parties as suggested by the commenters because the proposed rule change provides those parties who do not meet the eligibility requirements of the proposed rule change with an alternative route to seek to accelerate the proceedings. Specifically, as discussed above, proposed Rules 12808(a)(3) and 13808(a)(3) would allow parties who do not meet the eligibility requirements of the proposed rule change to request, once the panel has been appointed, that the panel consider other factors, including their age or a change in their health condition during the arbitration proceeding, when scheduling hearings and discovery, briefing, and motion deadlines. Thus, although the shortened deadlines in proposed Rules 12808(b) and 13808(b) would not apply to these parties, they would be able to ask the arbitration panel to accelerate their proceedings based on a consideration of their particular circumstances, including developing a serious health condition after the panel is appointed.

3. Comments Addressing the Proof Required to Qualify for Accelerated Processing

As noted above, although almost all of the commenters supported allowing parties to qualify for accelerated processing based on their age or their health conditions, two of those commenters suggested that, in order to minimize the potential for abuse of the process, FINRA should require parties to produce proof of their age or health condition.[76] To further deter parties from falsely claiming they are eligible for accelerated processing, two commenters suggested that existing sanctions provisions

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[76] See Cambridge, SIFMA.

in the Codes should be expanded.[77] FINRA disagrees with these commenters, as discussed below.

(A) Comments Addressing Proof of Age

SIFMA suggested that parties requesting accelerated processing on the basis of age should be required to prove they are at least 70 years old by producing "a driver's license, passport, birth certificate, or other similar official record." However, FINRA believes that requiring proof of age is unnecessary. Just as there is no evidence that parties have falsely claimed to be suffering from a serious health condition, FINRA has no evidence that parties have falsified their age to qualify for the current program. Nor is there any reason to believe that parties are more likely to falsify their age under the proposed rule change, particularly when such conduct could result in potential sanctions under existing FINRA Rules 12212 and 13212. FINRA is also concerned that requiring proof of age under the proposed rule change could discourage some parties from making legitimate requests for accelerated processing as they may view this as an unnecessary intrusion into their personal information.[78] Further, in the unlikely event that a genuine dispute arises as to whether a party qualifies for accelerated processing on the basis of

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77 See FSI, SIFMA.

78 In addition, FINRA notes there are increasing concerns with customers' identities being used for fraudulent purposes in the securities industry. See, e.g., Regulatory Notice 20-13 (May 2020) (reminding firms to be aware of fraud during the pandemic); Regulatory Notice 20-32 (September 2020) (reminding firms to be aware of fraudulent options trading in connection with potential account takeovers and new account fraud); Regulatory Notice 21-14 (March 2021) (alerting firms to recent increase in automated clearing house "Instant Funds" abuse); Regulatory Notice 21-18 (May 2021) (sharing practices firms use to protect customers from online account takeover attempts); and Regulatory Notice 22-21 (October 2022) (alerting firms to recent trend in fraudulent transfers of accounts through the Automated Customer Account Transfer Service).

age, the arbitration panel could require that the party provide proof of age to determine the applicability of the proposed rule change.[79]

(B) Comments Addressing Proof of a Party's Health Condition

To minimize the risk that parties will falsely certify that they are suffering from an eligible health condition, two commenters suggested that parties should be required to provide additional proof of their health condition, for example, by providing a certification from a physician.[80] As discussed above, FINRA believes that the proposed certification requirement and the threat of potential sanctions would be sufficient to protect against abuse of the process while, at the same time, minimizing unnecessary intrusions into private medical information.

Some commenters also expressed the concern that parties who request accelerated processing on the basis of an eligible health condition could be subject to discovery requests for the production of medical records or other private information about their health condition.[81] These commenters stated that in addition to raising privacy concerns, such discovery requests could deter parties from making valid requests for accelerated processing and also unnecessarily delay the proceedings.[82] FINRA agrees with these concerns. As a result, the proposed rule change would make clear that a party does not

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79 See FINRA Rules 12409 and 13413. The panel has the authority to interpret and determine the applicability of all provisions under the Codes.

80 See Cambridge, SIFMA.

81 See Miami, PIABA.

82 See Miami, PIABA.

open the door to discovery into their health condition merely by requesting accelerated processing.[83]

To further protect a party's privacy, Cardozo requested that the proposed rule change require that the certification be submitted only to FINRA staff and not shared with other parties or the arbitrators. However, FINRA believes that such a requirement is unnecessary because the certification required under the proposed rule change would not contain any details regarding the party's medical condition or other private health information.

(C) Comments Addressing Sanctions

To provide further protection against abuse of the process, two commenters suggested that the existing sanctions provisions in the Codes should be expanded.[84] More specifically, FSI proposed that arbitrators should be able to remove a matter from the accelerated processing track, and SIFMA proposed that matters should be subject to dismissal as a sanction if a party falsely claims to be eligible for accelerated treatment. However, existing FINRA Rules 12212(a) and 13212(a) already authorize arbitrators to impose a wide range of sanctions, including, assessing monetary penalties payable to one or more parties; precluding a party from presenting evidence; making an adverse inference against a party; assessing postponement or forum fees; and assessing attorneys' fees, costs and expenses. FINRA believes these rules are broad enough and provide arbitrators with sufficient flexibility to address any abuse of accelerated processing.

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83 See proposed Rules 12808(a)(2) and 13808(a)(2).

84 See FSI, SIFMA.

4. Comments Addressing the Proposed Shortened Deadlines for Parties and Guidance to Arbitrators

(A) Comments Addressing the Proposed 10-Month Timeframe for Arbitrators to Endeavor to Render an Award

Two commenters addressed the proposed 10-month timeframe within which arbitrators should endeavor to render awards in accelerated arbitrations.[85] Miami supported the proposed rule change and, based on its experience representing parties in FINRA arbitrations, stated that "arbitrators appear equipped to meet FINRA's proposed guidance to render an award within 10 months or less."[86] SIFMA did not object to the proposed 10-month timeframe per se but, rather, noted that it may not be possible or appropriate to close all accelerated cases within 10 months. For example, SIFMA noted that large, complex cases may involve voluminous discovery.

For the reasons discussed above, FINRA believes that 10 months is the appropriate timeframe within which arbitrators should endeavor to render awards in accelerated arbitrations.[87] In addition, however, FINRA agrees that there are some cases that may qualify for accelerated processing but which cannot reasonably be completed within 10 months because these cases are complex or involve voluminous discovery. As to these matters, FINRA believes that the proposed rule change would provide the arbitrators with sufficient flexibility to accommodate the particular circumstances of each

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85 See Miami, SIFMA.

86 In addition, Miami stated that "existing provisions of the Code provide sufficient flexibility if the shortened deadlines could not be met in a particular case."

87 See supra Item II.B.3 (discussing Economic Impacts).

case. As discussed above, the proposed rule change would establish a benchmark but does not mandate that all cases be completed within 10 months.[88]

(B) Comments Addressing the Shortened Deadlines for Parties

As discussed above, in addition to establishing a 10-month timeframe within which arbitrators should endeavor to render an award in accelerated cases, proposed Rules 12808(b)(2)(D) and 13808(b)(2)(D) would accelerate the proceedings by establishing shortened deadlines for the parties. Three commenters expressed concerns regarding some or all of these proposed shortened deadlines.[89] Cambridge recommended against including any deadlines in the proposed rule change "to allow for flexibility in each situation." It also objected to all of the proposed shortened deadlines for filing answers, returning the ranked arbitrator lists, and producing discovery as allegedly too short and unfair to respondents.[90] SIFMA generally supported the proposed deadline for filing answers "provided that the parties are free to grant extensions upon request," but it stated that the proposed deadlines for returning the ranked arbitrator lists and discovery might be difficult or impossible to meet in some cases. FSI took issue only with the

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88 See supra Item II.A.1(II)(C)(2).

89 See Cambridge, FSI, SIFMA.

90 Cambridge also suggested that, instead of shortening the deadlines that apply to the parties, FINRA should consider establishing concurrent deadlines. For example, Cambridge proposed that the parties could be working on ranking potential arbitrators at the same time that the respondent is preparing the answer to the statement of claim. However, FINRA does not believe it would be appropriate to require the claimant to rank arbitrators before they are provided with an opportunity to review the respondent's answer and any counterclaims and crossclaims.

proposed shortened discovery deadlines, which FSI claimed were unrealistic and would result in requests for extensions of time "as a matter of course."

FINRA disagrees with Cambridge's suggestion to eliminate all shortened deadlines from the proposed rule change. To meaningfully reduce case processing times for those parties who may be unable to fully participate in lengthy arbitration proceedings—a goal that the current program has been unable to achieve—FINRA believes it is necessary and appropriate to establish rule-based shortened deadlines. As to the other concerns raised by commenters regarding specific deadlines, FINRA understands that the proposed shortened deadlines may not be reasonable in some cases, for example, if the case is complex or involves voluminous discovery. However, as discussed above, FINRA believes that the existing provisions of the Codes provide the parties and arbitrators with sufficient flexibility to modify the proposed shortened deadlines when necessary.[91] Further, as noted above, if the Commission approves the proposed rule change, FINRA would provide training and guidance to arbitrators on accelerated processing, which would include training on evaluating requests to extend the proposed shortened deadlines.

5. Other Comments

In response to the Notice, NASAA criticized FINRA member firms for often requiring customers to enter into agreements to arbitrate disputes regarding services

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91 See supra Item II.A.1(II)(C)(3). For this same reason, FINRA also does not believe it is necessary, as suggested by Cardozo, that the proposed rule change provide parties with the option to "change their minds" and have their cases returned to a regular schedule. If, as Cardozo suggests, the shortened deadlines become too "challenging" for a party, existing FINRA rules would permit them to request that the deadlines be modified.

provided to such customers. Kolber suggested that the Codes should be amended to provide for sanctioning attorneys for engaging in delay tactics in arbitration. St. John's recommended raising the threshold for simplified arbitration from $50,000 to $100,000. Iannarone suggested that FINRA help ensure that all customer claimants have access to counsel.

All of these comments are beyond the scope of the proposed rule change. However, with respect to NASAA's comment, FINRA notes that its rules do not require customers to enter into agreements to arbitrate disputes with member firms, nor do FINRA rules preclude customers from pursuing relief in state or federal courts. The Supreme Court has held that predispute arbitration agreements are enforceable as to claims brought under the Act.[92]

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92 Until the Supreme Court's decision in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), the courts would not enforce predispute arbitration agreements relating to federal securities law claims. In addition, until its rescission in 1987, Rule 15c2-2(a) under the Act provided that: "It shall be a fraudulent, manipulative or deceptive act or practice for a broker or dealer to enter into an agreement with any public customer which purports to bind the customer to the arbitration of future disputes between them arising under the federal securities laws, or to have in effect such an agreement, pursuant to which it effects transactions with or for a customer." As a result of McMahon and the rescission of Rule 15c2-2(a), firms can compel arbitration of customer claims through inclusion of predispute arbitration provisions in their agreements with customers. When member firms use mandatory arbitration clauses, FINRA rules establish minimum disclosure requirements regarding their use to help ensure customers understand these clauses, and to protect customers' rights under FINRA rules. See FINRA Rule 2268. See also Regulatory Notice 21-16 (April 2021) (reminding firms about requirements when using predispute arbitration agreements for customer accounts).

With respect to Kolber's comment, FINRA notes that it does not have direct authority to investigate or discipline representative misconduct in the DRS forum.[93] Currently, if an attorney is allegedly engaging in misconduct in the DRS forum, FINRA may make a referral to the attorney's disciplinary agency, which has processes to respond to misconduct of attorneys subject to its jurisdiction.

With respect to St. John's comment, FINRA notes that any increase to the $50,000 threshold for simplified arbitrations would require a separate proposed rule change as the focus of this proposed rule change is on accelerating the processing of arbitration proceedings for parties who qualify based on their age or health condition rather than claim size.

Finally, with respect to Iannarone's comment, FINRA notes that its website offers several resources to help parties find an attorney.[94]

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

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93 Cf. FINRA Rule 8310 (allowing FINRA to impose sanctions on member firms and persons associated with member firms).

94 See Find An Attorney, https://www.finra.org/arbitration-mediation/about/find-attorney.

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2024-021 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2024-021. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for

website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR-FINRA-2024-021 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[95]

Jill M. Peterson
Assistant Secretary

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95 17 CFR 200.30-3(a)(12).

# Regulatory Notice 22-09

# Accelerated Processing of Arbitration Proceedings

## FINRA Requests Comment on a Proposed Rule to Accelerate Arbitration Proceedings for Seriously Ill or Elderly Parties

**Comment Period Expires: May 16, 2022**


### Summary

FINRA seeks comment on a proposal to accelerate arbitration case processing when requested by parties who are seriously ill or are at least 75 years old. The proposal would help ensure that these parties are able to participate meaningfully in FINRA arbitration by shortening certain case processing deadlines for parties and arbitrators under the Codes.


The text of the proposed amendments is set forth in Attachment A.

Questions regarding this *Notice* should be directed to:

- Victoria Crane, Vice President and Associate General Counsel, Office of General Counsel (OGC), at (202) 728-8104 or victoria.crane@finra.org;
- Thomas Kimbrell, Associate General Counsel, OGC, at (202) 728-6926 or thomas.kimbrell@finra.org; or
- Kristine Vo, Assistant General Counsel, OGC, at (212) 858-4106 or kristine.vo@finra.org.

Questions regarding the Economic Impact Assessment in this *Notice* should be directed to Matthew Kozora, Senior Economist, Office of the Chief Economist, at (202) 728-8804 or matthew.kozora@finra.org.

### Action Requested

FINRA encourages all interested parties to comment. Comments must be received by May 16, 2022.

**March 16, 2022**

**Notice Type**
- Request for Comment

**Suggested Routing**
- Compliance
- Legal
- Operations
- Registered Representatives
- Senior Management

**Key Topics**
- Arbitration
- Code of Arbitration Procedure
- Dispute Resolution
- Senior Investors

**Referenced Rules & Notices**
- FINRA Rule 12103
- FINRA Rule 12212
- FINRA Rule 12303
- FINRA Rule 12306
- FINRA Rule 12403
- FINRA Rule 12506
- FINRA Rule 12507
- FINRA Rule 12508
- FINRA Rule 12509
- FINRA Rule 13212
- FINRA Rule 13103
- FINRA Rule 13303
- FINRA Rule 13306
- FINRA Rule 13404
- FINRA Rule 13507
- FINRA Rule 13508
- FINRA Rule 13509

Comments must be submitted through one of the following methods:

- Online using FINRA's comment form for this *Notice*;
- Emailing comments to pubcom@finra.org; or
- Mailing comments in hard copy to:

  Jennifer Piorko Mitchell
  Office of the Corporate Secretary
  FINRA
  1735 K Street, NW
  Washington, DC 20006-1506

To help FINRA process comments more efficiently, persons should use only one method to comment.

**Important Notes:** Comments received in response to *Regulatory Notices* will be made available to the public on the FINRA website. In general, comments will be posted as they are received.[1]

Before becoming effective, a proposed rule change must be filed with the Securities and Exchange Commission (SEC) pursuant to Section 19(b) of the Securities Exchange Act of 1934 (SEA).[2]

## Background & Discussion

FINRA currently offers a voluntary program to accelerate arbitration proceedings, upon request, for claimants who have a serious health condition or are at least 65 years old (current program).[3] Under the current program, FINRA staff accelerates the case-related tasks that they can control, such as completing the arbitrator selection process, scheduling the initial prehearing conference and serving the final award. In addition, the current program encourages arbitrators to be sensitive to the needs of the parties in making scheduling decisions and setting deadlines. The current program does not, however, provide for shortened, rule-based case processing deadlines for parties or provide arbitrators with instruction on how quickly the arbitration should be completed.

The current program has not resulted in meaningfully shortened case processing times. Cases that qualify for the current program close only slightly more quickly than cases that are not in the current program.[4]

## Proposed Rule

FINRA is proposing to add a new rule to the Codes of Arbitration Procedure (Codes) to allow any party to request accelerated processing of an arbitration proceeding if they: (1) are at least 75 years old; or (2) certify that they have received a medical diagnosis and prognosis, and that based on that information they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration. The proposal would improve the ability of these parties—which FINRA anticipates will primarily be customer claimants—to participate meaningfully in a FINRA arbitration and obtain a fair outcome.

The Director of Dispute Resolution Services (Director) would make an objective determination as to whether the requesting party is at least 75 or has submitted the required certification.[5] If the Director determines that the requesting party qualifies for accelerated processing, the proposal would shorten the timeframe to complete the arbitration as follows:

- **Turnaround Time.** The proposal would provide that a panel in an accelerated case shall endeavor to render the award within 10 months or less and set discovery, briefing and motions deadlines, and schedule hearing sessions, consistent with doing so. The current program encourages arbitrators to be sensitive to the needs of the parties in making scheduling decisions and setting deadlines but does not establish a timeframe by which the arbitration should be completed.
- **Serving an Answer.** The proposal would shorten the deadline for an answer to a statement of claim from 45 to 30 days.[6]
- **Responding to a Third-Party Claim.** The proposal would shorten the deadline for a response to a third-party claim from 45 to 30 days.[7]
- **Completing Arbitrator Lists.** Currently, parties must return the ranked arbitrator lists to FINRA staff no more than 20 days after the lists were sent to the parties.[8] The proposal would shorten this deadline to 10 days.
- **Discovery in Customer Cases.** Currently, parties in customer cases are required to produce to all other parties documents that are described in the Document Production Lists on FINRA's website within 60 days of the date that the answer to the statement of claim is due; explain why specific documents cannot be produced within the required time; or object and file an objection with the Director.[9] The proposal would shorten this deadline to 35 days.
- **Other Discovery Requests.** Currently, parties must respond within 60 days of receipt to requests for other documents or information.[10] The proposal would shorten this deadline to 30 days.

The current provisions of the Codes authorizing the panel to rule on a party's objection to producing a requested document or information, extend or modify any deadline upon motion of a party, and decide discovery-related motions would still apply under the proposal, and would allow the panel to modify the default discovery deadlines under the proposal.[11]

Case processing times are not expected to increase materially for parties who qualify under the current program, but would not qualify under the proposal, as they would retain their ability under the current program to ask that the panel consider their age and health in making scheduling decisions and setting deadlines.

**Proposed 75-Year-Old Age Requirement**

To limit the potential burden on the parties from the shorter deadlines, the proposal would restrict accelerated processing to those parties who are less likely to be able to fully participate in longer proceedings. Fourteen percent (285 of 2,103) of claimants in customer cases filed in 2020, or roughly half of the claimants who qualified under the current program, would have qualified under the proposal.[12]

FINRA is proposing a 75-year-old age requirement to focus on those parties who are most likely to need acceleration. Parties who are 75 or older are significantly more likely to become unable to participate in a hearing after a claim is filed than those who are 65 or older, as demonstrated by published rates of adverse health conditions and mortality.[13] The impact of a 75-year-old age requirement on parties who would seek accelerated processing would be moderated by the fact that parties would be able to qualify on the basis of a medical diagnosis and prognosis irrespective of age.

Because the average likelihood of becoming unable to participate in a hearing at any given age may differ depending on sex, race and ethnicity, as indicated by differences in published average mortality rates, FINRA is seeking comment on ways that FINRA could implement the proposal in an equitable manner that could be effectively administered in the forum. However, the relatively higher average mortality rates for certain groups persist at every age between the ages of 65-74.[14] This suggests that while lowering the age cutoff from 75 would provide a benefit to these groups as a result of their average higher mortality rates, it would not result in more equitable treatment across different groups.

**Proposed Requirement for a Medical Diagnosis and Prognosis**

The proposal attempts to balance concerns with individual privacy and the potential for abuse of the process. To establish that they qualify on the basis of illness, a party would be required to certify that they have received a medical diagnosis and prognosis and that based on that information they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration. They would not, however, be required to provide the specifics of their medical condition, medical records or a note from a physician. The certification would be made on a form provided by FINRA, which would be notarized and submitted when initiating the arbitration or filing the answer. The current provisions in the Codes relating to sanctions could apply if a party submitted a false certification to obtain faster case processing.[15]

## Economic Impact Assessment

### Regulatory Need

The proposal would address concerns that some parties may not be able to participate meaningfully in FINRA arbitration due to illness or age. The current program has not resulted in meaningfully shortened case processing times. For the parties who qualify, the proposal would shorten case deadlines and provide arbitrators with instruction on how quickly the arbitration should be completed. The proposal would thereby help improve the ability of these parties to meaningfully participate in FINRA arbitration.

### Economic Baseline

The economic baseline is the current provisions under the Codes that address the administration of arbitration proceedings and the current program. Under the current program, claimants who have a serious health condition or are at least 65 may find it beneficial to request an accelerated proceeding when faster processing may allow them to participate more fully in the matter.

Relative to cases that are not in the current program, parties and arbitrators in cases that are in the current program may incur additional costs to meet the shortened case processing times. These additional costs may include slowing other business-related activities that require legal services or obtaining additional legal services. Since parties must request to participate in the current program, the parties who would request accelerated processing presumably anticipate that the benefits more than offset these costs.

Parties request the current program in approximately one-quarter of customer arbitrations. For example, from 2017 through 2021, 11,710 customer arbitrations closed where FINRA had served the statement of claim on respondents. A party requested accelerated processing in 27 percent of the arbitrations (3,152 of the 11,710 arbitrations). Ninety-nine percent, or 3,125 of the 3,152 requests, were granted. Parties either did not request or were not qualified in the remaining 8,585 arbitrations.[16]

Arbitrations in the current program closed only slightly faster than arbitrations not in the current program. The median time for the 3,125 customer arbitrations in the current program to close was approximately 13.4 months, and the median time for the 8,585 customer arbitrations not in the current program to close was approximately 15.2 months, or a difference of less than two months.[17]

### Economic Impacts

Relative to the current program, the proposal would benefit parties who are seriously ill or at least 75 by codifying shorter arbitration deadlines. This would reduce the length of the arbitration and help these parties to meaningfully participate in the proceeding. The proposed acceleration of the arbitration process may still be insufficient for some parties to ensure that they are able to meaningfully participate throughout the arbitration process, especially those who are older or more seriously ill. However, more will likely benefit from participation in the proposed accelerated processing than under the current program.

The ability of parties to meaningfully participate may improve the efficiency of FINRA's arbitration forum to obtain outcomes that are more consistent with the merits of the case. This would include the large percentage of cases that settle, insofar as settlements reflect the full merits of the case.[18] An increase in the efficiency of the forum may also increase the protections to customers from wrongdoing, and in particular those who are seriously ill or 75 or older, by helping to ensure that the potential liabilities of industry participants reflect their conduct.

The proposal, however, may also impose additional costs on parties and arbitrators to an arbitration. Parties between the ages of 65 and 74 who are seriously ill would not be able to rely on their age for accelerated processing. These parties may incur additional costs to certify that they have received a medical diagnosis and prognosis.

Parties and arbitrators may also incur additional costs to meet the shorter, rule-based deadlines. The parties who request accelerated processing would incur these costs at their own discretion. The types of costs parties incur may depend on how they manage their resources to meet the shortened deadlines. For example, parties may reallocate resources from other activities, possibly slowing them down; add resources such as additional staffing or outside counsel; or do a combination of

the two. How parties would meet the shortened deadlines is not known and may differ depending on their available resources.[19] The additional costs, however, may be partly offset by the gains to efficiency from the shorter deadlines and a more focused effort on the associated tasks.

For parties who qualify for accelerated processing under the proposal, the magnitude of the benefits and costs would depend on the mandated reduction in time for proceedings relative to the time required under the baseline. Arbitrators would be instructed to render an award within 10 months or less. For the 3,125 customer arbitrations in the baseline sample that closed where parties were granted accelerated processing, 2,268 arbitrations (73 percent) were longer than 10 months. At the median, these 2,268 arbitrations would need to close six months sooner to meet the 10-month timeframe. The remaining 857 arbitrations (27 percent) would have met the 10-month timeframe.

To limit the potential costs, the proposal would not accelerate case processing for parties who are younger than 75. Relative to parties 75 or older, these parties are less likely to be seriously ill or experience adverse health conditions, and are therefore more likely to meaningfully participate in a longer proceeding.[20] From a hand-collected sample of 502 accelerated processing requests in customer arbitrations in 2020, less than half of the requests (217 requests or 43 percent) relate to parties who would not remain eligible under the proposal.[21] The other 285 requests (57 percent) relate to parties who were seriously ill or 75 or older and, therefore, would be eligible to request accelerated processing under the proposal.

It is not expected, however, that the proposal would impose costs on those parties who qualify for accelerated processing under the current program but not under the proposal. These parties would retain the ability to ask that the panel consider their age and health in making scheduling decisions and setting deadlines. In addition, as discussed above, arbitrations in the current program closed only slightly faster than arbitrations not in the current program. FINRA therefore does not believe that processing times would materially change for these parties or have an effect on the efficiency of the forum to facilitate outcomes consistent with the full merits of the case. Similarly, FINRA does not believe that the proposal would have an economic effect on the other parties associated with these arbitrations.

The proposal would also not impose costs on parties who are younger than 65 and not seriously ill. These parties are not eligible for accelerated processing under the current program and would not be eligible under the proposal.

## Alternatives Considered

An alternative to the proposal, similar to the current program, is for parties between the ages of 65 and 74 to be eligible for accelerated processing.[22]

Parties between the ages of 65 and 74 who are seriously ill may benefit from a streamlined process to request accelerated processing without certifying that they have received a medical diagnosis and prognosis. Parties between the ages of 65 and 74 who are not seriously ill may also benefit from accelerated processing and reaching quicker resolution of the dispute.

Relative to the parties who are 75 or older, however, parties who are between the ages of 65 to 74 are less likely to be seriously ill or experience adverse health conditions that may reduce their ability to meaningfully participate. For example, for the U.S. population in 2018, whereas 19.1 percent of those between the ages of 65 and 74 report fair or poor health, 26.6 percent of those 75 or older report fair or poor health.[23] In addition, whereas the average annual mortality rate for those between the ages of 65 to 74 is 1.8 percent, the average annual mortality rate for those between the ages of 75 to 84 is 4.7 percent.[24] The lower likelihood of serious illness or adverse health conditions suggests that the aggregate benefits of providing accelerated processing to these parties when they are not currently seriously ill may not justify the aggregate costs imposed on other parties and arbitrators to meet the shorter, rule-based deadlines.

While parties who are between the ages of 65 and 74 are less likely to be seriously ill than parties who are 75 or older, some parties between the ages of 65 and 74 are more likely to be seriously ill or experience adverse health conditions or mortality than others in this age group. These differences can relate to sex or race. For example, the average annual mortality rate of the Black population (Black male population) for those between the ages of 65 and 74 is 2.6 percent (3.3 percent). Also, by way of example, the annual mortality rate of the Hispanic population (Hispanic female population) for those between the ages of 65 and 74 is 1.4 percent (1.1 percent).[25] Reducing the age at which an individual is eligible for accelerated processing to 65 may provide greater benefits to individuals in groups that are more likely to be seriously ill or experience adverse health conditions or mortality between the ages of 65 and 74. Below, we request comment on the potential importance of these differences for the proposal, as well as alternative ways to implement the proposal in an equitable manner.

## Request for Comments

FINRA requests comment on all aspects of the proposal. FINRA requests that commenters provide empirical data or other factual support for their comments wherever possible. FINRA specifically requests comment concerning the following issues:

1. What has been your experience with the current program to accelerate arbitration proceedings, upon request, for parties who have a serious health condition or are at least 65 years old? What have been the economic impacts, including costs and benefits, from the current program?
2. What would be the impact of the proposed shortened, rule-based deadlines on case processing times and the costs to arbitrate a claim?
3. Would the existing provisions of the Codes governing discovery responses and allowing the panel to modify the discovery deadlines provide sufficient flexibility if the shortened deadlines could not be met in a particular case?
4. Is 75 the right age cutoff for parties to qualify for accelerated processing?
5. Are there alternative ways that FINRA could implement the proposal in an equitable manner that could be effectively administered in the forum? How could FINRA consider differences in the average likelihood that parties may become unable to participate in a hearing based on sex, race and ethnicity, as suggested by differences in published average mortality rates?
6. Should FINRA consider alternatives to the proposed requirement that the requesting party certify that they have received a medical diagnosis and prognosis, and that based on that information they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration?
7. Under the proposal, the current provisions in the Codes relating to sanctions could apply if a party submitted a false certification to obtain faster case processing. Are there alternative approaches that FINRA should consider to limit potential abuse of the process?
8. What has been your experience with requesting and receiving a faster case processing in court or in a non-FINRA arbitration forum? What have been the economic impacts, including costs and benefits?
9. Are there other enhancements or alternative approaches not discussed in this *Notice* that FINRA should consider?

## Endnotes

1. Parties should submit in their comments only personally identifiable information, such as phone numbers and addresses, that they wish to make available publicly. FINRA, however, reserves the right to redact, remove or decline to post comments that are inappropriate for publication, such as vulgar, abusive or potentially fraudulent comment letters. FINRA also reserves the right to redact or edit personally identifiable information from comment submissions.
2. *See* SEA Section 19 and rules thereunder. After a proposed rule change is filed with the SEC, the proposed rule change generally is published for public comment in the *Federal Register*. Certain limited types of proposed rule changes take effect upon filing with the SEC. *See* SEA Section 19(b)(3) and SEA Rule 19b-4.
3. Additional information about the current program is available on FINRA's Expedited Proceedings for Senior or Seriously Ill Parties web page.
4. *See infra* note 17 and accompanying text.
5. The Director may delegate this duty when it is appropriate, unless the Codes provide otherwise. *See* FINRA Rules 12103 and 13103.
6. *See* FINRA Rules 12303 and 13303.
7. *See* FINRA Rules 12306 and 13306.
8. *See* FINRA Rules 12403 and 13404.
9. *See* FINRA Rule 12506.
10. *See* FINRA Rules 12507 and 13507.
11. *See* FINRA Rules 12508, 12509, 13508 and 13509.
12. *See* the Economic Impact Assessment for further discussion of requests for accelerated processing in customer arbitrations filed in 2020.
13. *See infra* notes 23 and 24 and accompanying text.
14. *See infra* note 24 and accompanying text.
15. *See* FINRA Rules 12212 and 13212.
16. Accelerated processing was requested in few intra-industry arbitrations. For example, from 2017 through 2021, 6,636 intra-industry arbitrations closed where FINRA had served the statement of claim on respondents. A party requested accelerated processing in only 76 of the 6,636 arbitrations (one percent), and was granted accelerated processing in 70 of the 76 requests. For this reason, FINRA focuses on customer arbitrations, however the same economic effects may occur if an associated person requests and is granted accelerated processing.
17. Alternatively, FINRA can compare the length of customer arbitrations that went through the full arbitration process and closed by award after a hearing. Among the 11,710 customer arbitrations that closed during the sample period, 1,205 arbitrations closed by award after a hearing. Parties requested and were qualified for the current program in 291 arbitrations. Parties either did not request or were not qualified in the remaining 914 arbitrations. The median time for the 291 arbitrations in the current program to close was 13.0 months, and the median time for the 914 arbitrations not in the current program to close was 16 months, or a difference of three months.

18. Among the 11,710 customer arbitrations that closed from 2017 through 2021, 8,814 arbitrations (75 percent) resulted in settlements reached by the parties.

19. The magnitude of the costs for a party to comply with the shortened, rule-based deadlines may increase with their involvement in other, concurrent arbitrations. Industry parties, and in particular larger firms that provide services to a greater number of customers, may be more likely to incur the additional costs from adhering to multiple shortened timeframes. In the customer arbitrations in the baseline sample where parties qualified for the current program, 61 percent of the named firms were large, nine percent were mid-size, and 30 percent were small. Sixty-four percent of the large firms were concurrently involved in more than one arbitration in the current program. This percentage decreases to approximately 48 percent for mid-size firms and 30 percent for small firms. Also, 43 percent of the arbitrators appointed to customer arbitrations in the baseline sample where parties qualified for the current program were concurrently involved in more than one arbitration in the current program.

20. *See infra* notes 23 and 24 and accompanying text.

21. FINRA also identified 60 requests for accelerated processing in customer arbitrations where the request was based on age but information describing the age was not available. Depending on the age of the party, these requests may or may not be eligible under the proposal.

22. Among the hand-collected sample of accelerated processing requests, a similar number of requests were made by parties who were not seriously ill and 75 or older and by parties who were not seriously ill and between the ages of 65 and 74.

23. *See* National Center for Health Statistics. Health, United States, 2019: Table 16.

24. *See* Elizabeth Arias and Jiaquan Xu, "United States Life Tables, 2018," National Vital Statistics Reports, Vol. 69, No. 12.

25. *See id.* The average annual mortality rate for the total male population (total female population) for those between the ages of 65 and 74 is 2.3 percent (1.5 percent).

**Alphabetical List of Written Comments**
**Regulatory Notice 22-09**

1. Kevin M. Carroll, Securities Industry and Financial Markets Association ("SIFMA") (May 16, 2022)

2. Steven B. Caruso ("Caruso") (April 28, 2022)

3. Michael Edmiston, Public Investors Advocate Bar Association ("PIABA") (May 16, 2022)

4. Scott Eichhorn, Austin Booth, Hillary Gabriele & Peter Sitaras, University of Miami School of Law Investor Rights Clinic ("IRC") (May 16, 2022)

5. Daiquan Frasier, Diego Gomez, Jonathan Lee & Elissa Germaine, Elisabeth Haub School of Law at Pace University ("Pace") May 16, 2022

6. Elizabeth Goldman, Nolan Daniels, Daniela de la Lama, Xuan Feng, Adam Gakin, Laetitia Krisel, Marc Siegel, Matthew Vernace & Frechette Wallen, Cardozo School of Law Securities Arbitration Clinic ("Cardozo") (April 26, 2022)

7. Nicole G. Iannarone ("Iannarone") (May 16, 2022)

8. William A. Jacobson, Esq. & Austin Law, Cornell Securities Law Clinic ("Cornell") (May 13, 2022)

9. Chelsea Karen, Brenna O'Connor, Skye Boutte, Sebastian Vollkommer & Christine Lazaro, Esq, St. John's University School of Law Securities Arbitration Clinic (St. John's) (May 10, 2022)

10. Daniel H. Kolber ("Kolber") (May 11, 2022)

11. Melanie Senter Lubin, North American Securities Administrators Association, Inc. ("NASAA") (May 16, 2022)

12. Seth A. Miller, Cambridge Investment Research, Inc. ("Cambridge") (May 11, 2022)

13. David P. Slater, Esq. ("Slater 1") (March 30, 2022)

14. David P. Slater, Esq. (“Slater 2”) (May 6, 2022)

15. Robin Traxler, Financial Services Institute (“FSI”) (May 16, 2022)


May 16, 2022

Via E-Mail to pubcom@finra.org

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 22-09 (Accelerated Processing of Arbitration Proceedings)

Dear Ms. Mitchell:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on Notice 22-09 (the "Notice").[2] The Notice proposes new rules to allow senior or seriously ill parties to request accelerated processing of their arbitration proceedings. SIFMA supports the intent of the Notice to ensure that parties to FINRA arbitration are able to participate meaningfully in their proceedings and obtain a fair outcome.

We do, however, have several concerns about the proposed rules, namely: (1) whether the proposed rules are necessary or warranted given the current program; (2) regardless, whether the proposed rules are sufficient to prevent abuse; and (3) whether some of the rule-based case deadlines have been cut too short such that they may undermine the fairness of the process. Accordingly, we respectfully submit the following comments and recommendations for your consideration.

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] FINRA Regulatory Notice 22-09 (Accelerated Processing of Arbitration Proceedings), March 16, 2022, https://www.finra.org/rules-guidance/notices/22-09.

**The current program is sufficient to address FINRA's concerns and there is no evidence of investor harm.**

As explained in the Notice, FINRA already offers a program to accelerate arbitration proceedings for senior or seriously ill parties.[3] The program has reduced the median time to close a case by 1.8 months, from 15.2 months to 13.4 months. The Notice does not allege that seniors' or seriously ill parties' interests are being prejudiced by the pace of proceedings under the current program, or that they are unable to participate meaningfully in their proceeding, or unable to obtain a fair outcome. Nevertheless, the proposed rules would require the panel to "endeavor" to render an award within 10 months. The current program could provide the same guidance as the proposed rules, encouraging panels to make scheduling decisions and set deadlines consistent with a 10-month timeline. Thus, the proposed rules are not necessary given the current program and additional guidance that may be issued thereunder, nor are they warranted by a showing of investor harm to seniors or seriously ill parties.

**The standard for granting accelerated arbitration proceedings are insufficient to prevent abuse.**

We agree that a 75-year-old age requirement is appropriate for granting expedited arbitration. The proposed rule, however, requires no actual proof of age. Thus, it is subject to abuse. At a minimum, the rule should require the party to show proof of age by reference to a date of birth on a driver's license, passport, birth certificate, or other similar official record.

Similarly, the certification for serious illness requires no explanation or support. It would be literally impossible to tell whether the certificate was legitimate and truthful. Thus, it too would be subject to abuse. At a minimum, the certification and rules should require: (i) that the party have a *subjectively* reasonable belief (not just a reasonable belief) that accelerated case processing is necessary, and (ii) that case processing *within 10 months* is necessary to prevent prejudicing the party's interest in the arbitration, and (iii) a signature from both the party and *a physician* on the certification.

The Notice states that the Director will make an "objective determination" as to whether the party is at least 75 or has submitted the required certification. Yet, as discussed above, it would be essentially impossible for the Director to make an objective determination without sufficient supporting documentation to show age, or a more stringent certification requirement for serious illness. In any event, the rules should be made consistent with the Notice and explicitly require that "The Director will *objectively* determine…." whether the party has met the grounds for accelerated arbitration.

Finally, the Notice states that "[t]he current provisions in the Codes relating to sanctions could apply if a party submitted a false certification to obtain faster case processing" and cites to FINRA Rules 12212 and 13212. The preamble and rule history, however, should clarify that sanctions should be available for *both* a false statement that the claimant meets the 75-year-old age requirement, and a false certification of serious illness. Available sanctions should be expanded to include dismissal of the claim.

[3] *See* https://www.finra.org/arbitration-mediation/expedited-proceedings-senior-or-seriously-ill-parties.

**Some of the case deadlines are too short and would undermine the fairness of the process.**

- **Turnaround Time.** We do not object to a 10-month resolution time per se. The preamble and rule history, however, should make clear that it is an aspirational goal, and that it may not be appropriate or attainable in all accelerated proceedings (e.g., in large, complex cases where claimant's counsel will continue to seek the same volume of discovery that they ordinarily would, but in less than half the time). Panels should also be mindful in cases where a party has requested accelerated arbitration, but their own actions or the actions of their counsel cause delays or prolong proceedings (e.g., the claimant's counsel's schedule cannot accommodate the expedited schedule).

- **Serving an Answer.** We are generally supportive of shortening the time to answer from 45 days to 30 days, provided that the parties are free to grant extensions upon request.

- **Responding to a Third-Party Claim.** Likewise, we are generally supportive of shortening the time to respond to a third-party claim from 45 days to 30 days, provided that the parties are free to grant extensions upon request.

- **Completing Arbitrator Lists.** We object to shortening the deadline to return the ranked arbitrator list from 20 to 10 days. Ten days is insufficient time to submit arbitrator rankings, particularly since the unit is calendar and not business days. For example, a list issued on a Friday would be due only two Mondays later – effectively one work week later. This could prove difficult or impossible to meet if counsel is on vacation or involved in a hearing. We recommend that parties should have 15 days, at a minimum. Arbitrator ranking is a particularly important part of the process and in fairness, the parties deserve ample time to complete it.

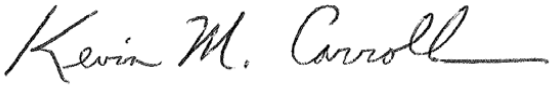
- **Discovery in Customer Cases.** Currently, parties in customer cases must produce Document Production List documents within 60 days of the date that the answer is due. The proposal would shorten this deadline to 35 days. We believe 45 days is a more reasonable deadline. In addition, the rule should explicitly allow for accommodation and relief in the form of additional time, upon a party's request, particularly in cases where, among other things, (i) the case is complex, (ii) the documents requested are voluminous, including without limitation email productions, and/or (iii) the documents are difficult to locate or retrieve due to the passage of time.

- **Other Discovery Requests.** Currently, parties must respond within 60 days of receipt to requests for other documents or information. The proposal would shorten this deadline to 30 days. Likewise, we believe 45 days is a more reasonable deadline. Likewise, the rule should allow for additional time under the conditions stated immediately above.

* * *

If you have any questions or would like to further discuss these issues, please contact the undersigned.

Sincerely,



Kevin M. Carroll
Managing Director and
Associate General Counsel

cc: Richard Berry, EVP and Director of Dispute Resolution, FINRA DRS
Victoria Crane, VP and Associate General Counsel, OGC
Thomas Kimbrell, Associate General Counsel, OGC
Kristine Vo, Assistant General Counsel, OGC

**Steven B. Caruso**
**Vero Beach, FL**
[REDACTED]

April 28, 2022

The purpose of this letter is to provide the Financial Industry Regulatory Authority, Inc. ("FINRA") with comments to Regulatory Notice 22-09 ("RN 22-09") that was issued on March 16, 2022.

I am a retired attorney whose prior practice was exclusively devoted to the representation of individual and institutional investors in their disputes with the securities industry. Moreover, I am the immediate past Chairman of FINRA's National Arbitration and Mediation Committee ("NAMC") and a former public member of the NAMC – in fact, I served in both positions during two separate and distinct terms, the former Chairman of FINRA's Discovery Task Force Committee ("DTFC"), a former member of the Securities Investor Protection Corporation ("SIPC") Modernization Task Force and a former President, former member and current Director Emeritus of the Public Investors Advocate Bar Association ("PIABA").

It is my understanding that FINRA seeks comment on a proposal to add a new rule to the FINRA Codes of Arbitration Procedure ("FINRA Codes") which would "allow any party to request accelerated processing of an arbitration proceeding if they: (1) are at least 75 years old; or (2) certify that they have received a medical diagnosis and prognosis and that, based on that information, they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration."

It is my further understanding that the procedural predicate for this proposal would be effectuated through the shortening of certain case processing deadlines for parties and arbitrators including, but not necessarily limited to, the deadlines that are currently applicable to the service of certain pleadings, the selection of arbitrators, certain portions of the discovery aspects of an arbitration proceeding and the timing for the eventual service of arbitration awards.

**Preliminary Comments**

As noted in RN 22-09, it is clear that the current system which allows for the purported accelerated processing of an arbitration case for individuals who are 65 years old and/or have a serious health condition has never achieved its stated objective.

The primary reason for this, however, has very little to do with the number of arbitration cases that are within the individual target-age range of 65 years or older. To the contrary, as I have seen from my own experiences over the 40-year period of time that I was involved in securities arbitrations at both FINRA and at the New York Stock

Exchange, the failure to achieve the desired expediency for vulnerable investors was more directly attributable to the schedules of both counsel for the parties and individual arbitrators.

Thus, the proposed change, which would allow any party to request accelerated processing of an arbitration proceeding if they: (1) are at least 75 years old; or (2) certify that they have received a medical diagnosis and prognosis and that, based on that information, they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration, will not, by itself, have a significant impact on the desired objective although it will reduce the overall number of cases that fall within the stated parameter for expediency.

**Systemic Delays are Inconsistent with Investor Protection**

It is deeply concerning that, rather than immediately addressing the proposed solution to one of the least controversial rule amendments in recent memory by effectuating a rule filing with the SEC, FINRA has instead chosen to "kick the proverbial can" down the road through the issuance of the request for comment that is encompassed within RN 22-09.

While it is unclear as to when FINRA decided that, before any substantive rule filing could ever be effectuated, it was necessary to first solicit comment from primarily the securities industry and, to a much lesser extent, anyone else who may happen to stumble across its regulatory notices, it should be noted that the last substantive dispute resolution rule filing with the SEC was completed in October of 2020 – nearly 1 ½ years ago.

These systemic delays are inconsistent with the investor protection mandate that FINRA claims are the hallmark of its existence. Consider, for example, just the following few additional "requests for comment" that have fallen into the regulatory rule-making abyss:

Regulatory Notice 17-34 ("RN 17-34"), entitled "FINRA Requests Comment on the Efficacy of Allowing Compensated Non-Attorneys to Represent Parties in Arbitration," was issued on October 18, 2017 and requested comment on proposed amendments to the FINRA Code which would "further restrict [the] representation of parties" by non-attorney representative firms ("NARs").

As stated in RN 17-34, among the predicates for the proposed amendments to the FINRA Code were "allegations reported to FINRA [that] raise serious concerns" about the conduct of NARS in the FINRA arbitration forum as well as the fact that "investors who retain representation by NAR firms may be more likely to experience harm at the hand of their representative and have less legal recourse to receive compensation for that harm."

The comment period for RN 17-34 expired on December 18, 2017.

Thereafter, in June 2018, the members of the NAMC expressed unanimous support for a prohibition on allowing compensated NARs from representing parties in all arbitration cases in the FINRA forum and, in December 2018, the FINRA Board approved the filing of proposed changes to the FINRA Code with the SEC to prohibit compensated NARs from being able to represent parties in all arbitration cases.

Notwithstanding both the unanimous support of the NAMC for a prohibition on allowing compensated NARs from representing parties in all arbitration cases in the FINRA forum and the approval of the FINRA Board for the filing of a proposed rule change with the SEC consistent with this recommendation, as of the present date, nothing has been filed in the subsequent forty (40) month period of time nor has any explanation been provided to explain this unconscionable delay.

Regulatory Notice 18-22 (“RN 18-22”), entitled “Discovery of Insurance Information in Arbitration,” was issued on July 26, 2018 and requested comment on proposed amendments to the FINRA Code so as to require member firms and associated persons, upon request, to produce documents concerning third-party insurance coverage in customer-initiated arbitration proceedings.

As stated in RN 18-22, among the predicates for the proposed amendments to the FINRA Code were the “regulatory need” for this information which would “benefit customers to determine a litigation strategy in arbitration cases” and the “economic impact” for the same that would “increase the consistency and efficiency of the arbitration forum” in terms of the continuing problem of unpaid arbitration awards that has been an issue that has impacted the FINRA forum for years.

The comment period for RN 18-22 expired on September 24, 2018.

Notwithstanding both the October 2016 support of the NAMC for the proposed amendments to the FINRA Code so as to require member firms and associated persons, upon request, to produce documents concerning third-party insurance coverage in customer-initiated arbitration proceedings and the consideration of the FINRA Board of the same in May 2019, as of the present date, nothing has been filed in the subsequent thirty five (35) month period of time nor has any explanation been provided to explain this unconscionable delay.

These limited examples are not, unfortunately, just isolated instances of inaction. Of equal, if not greater importance, are the proposed revisions to the expungement rules and procedures which remain in limbo notwithstanding the critical investor protection attributes of the same.

**Specific Comments to Issues Presented**

With respect to the specific issues presented in RN 22-09 for comment, I would offer the following responses:

1. What has been your experience with the current program to accelerate arbitration proceedings, upon request, for parties who have a serious health condition or are at least 65 years old? What have been the economic impacts, including costs and benefits, from the current program?

As noted above, the current program has clearly failed to achieve its stated objectives. Accordingly, the economic impacts, which would be minimal at best even if the program were to be implemented as originally designed, has no relevance to the consideration of the proposed modifications.

2. What would be the impact of the proposed shortened, rule-based deadlines on case processing times and the costs to arbitrate a claim?

The proposed shortened, rule-based deadlines on case processing times would be beneficial if arbitrators are able and/or willing to recognize the importance of the proposed changes and are willing to challenge parties who purport to claim that their availability for hearing are limited.

3. Would the existing provisions of the Codes governing discovery responses and allowing the panel to modify the discovery deadlines provide sufficient flexibility if the shortened deadlines could not be met in a particular case?

As experience has clearly demonstrated, panels have often been unwilling to modify existing discovery deadlines. This suggests that arbitrator training on the importance of accelerated case processing has been lacking and/or has not received the institutional support of FINRA in terms of its importance.

4. Is 75 the right age cutoff for parties to qualify for accelerated processing?

I would suggest that the age cutoff should remain 65 years of age, which would be consistent with a majority of courts, until such time as the proposed shortened, rule-based deadlines on case processing times could be evaluated in terms of effectiveness.

5. Are there alternative ways that FINRA could implement the proposal in an equitable manner that could be effectively administered in the forum? How could FINRA consider differences in the average likelihood that parties may become unable to participate in a hearing based on sex, race and ethnicity, as suggested by differences in published average mortality rates?

The predicate for this question, which suggests that the current system is inequitable, is a theoretical academic solution in search of a problem. Unless and until FINRA can ascertain the sex, race and ethnicity of claimant-investors in its arbitration forum, the predicate that the current system may be inequitable is a “false-flag” exercise that appears to be seeking a politically correct statement that is not based on reality.

6. Should FINRA consider alternatives to the proposed requirement that the requesting party certify that they have received a medical diagnosis and prognosis, and that based on that information they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration?

If FINRA were to consider any alternatives to the proposed certification it would clearly lead to prolonged discovery of confidential medical records which would most likely be illegal and would most certainly delay the processing of arbitration cases from the date of initiation until the date of award issuance.

7. Under the proposal, the current provisions in the Codes relating to sanctions could apply if a party submitted a false certification to obtain faster case processing. Are there alternative approaches that FINRA should consider to limit potential abuse of the process?

The current provisions which allow arbitrators to impose sanctions would be more than adequate to address the proposed concerns.

8. What has been your experience with requesting and receiving a faster case processing in court or in a non-FINRA arbitration forum? What have been the economic impacts, including costs and benefits?

I do not have any recent experience with court or non-FINRA arbitration forums that would provide any insight into this issue.

9. Are there other enhancements or alternative approaches not discussed in this Notice that FINRA should consider.

I believe that my prior comments suggest both enhancements and alternative approaches that should be considered by FINRA with respect to the issues presented in RN 22-09.

**Closing Comments**

Finally, it has to be noted that, in my experience, a significant portion of the delays that have been associated with respect to rulemaking by the FINRA Dispute Resolution forum can be directly attributable to the “economic impact assessments” that FINRA seems compelled to undertake for every item that is being considered.

Although FINRA states that a “limited statement of economic impact” is warranted where “the rule is narrow in focus, making minor adjustments to existing rules or primarily administrative, or it appears that any burden imposed by the rule will be of minimal significance only,” as evidenced by RN 22-09, this is clearly not the case. [See, e.g., *Framework Regarding FINRA’s Approach to Economic Impact Assessment for Proposed Rulemaking*, available at

https://www.finra.org/sites/default/files/Economic%20Impact%20Assessment_0_0.pdf (visited April 22, 2022).

Moreover, although FINRA states that it relies on "relevant advisory committees, leading academics and investors as key sources of information in developing our economic impact assessments," in all of the years that I served on the NAMC there was never a single occasion where our committee was ever consulted by anyone associated with FINRA's Office of the Economist.

Simply put, in those circumstances, such as with respect to RN 22-09, where an economic impact assessment is incapable of being predicated on any reliable statistical data, it does not serve any purpose to engage in a theoretical academic exercise and I would hope that FINRA will recognize this so that the rulemaking process can be accelerated in the interests of investor protection.

**Conclusion**

Thank you for providing me with the opportunity to submit my comments on this matter.

**PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION**
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May 16, 2022

Via email to: pubcom@finra.org
Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K. Street, NW
Washington, D.C. 20006-1506

Re: **FINRA Regulatory Notice 22-09**
FINRA Proposed Rule to Accelerate Processing of Arbitration Proceedings for Seriously Ill or Elderly Parties)

Dear Ms. Piorko Mitchell:

I write on behalf of the Public Investors Advocate Bar Association ("PIABA"), an international, not-for profit, voluntary bar association that consists of attorneys who represent investors in disputes with the securities industry. Since its formation in 1990, PIABA's mission has been to promote the interests of the public investor by, among other things, seeking to protect such investors from abuses in the arbitration process created by the Financial Industry Regulatory Authority ("FINRA"), seeking to make the arbitration process as just and fair as possible, and advocating for public education related to investment fraud, industry misconduct and the securities industry's arbitration process. Our members and their clients have a fundamental interest in the rules promulgated by FINRA that govern the arbitration process and the practices of brokers and broker-dealer firms.

PIABA welcomes the opportunity to comment on the proposed amendment to the customer *Code of Arbitration Procedure* described in FINRA Regulatory Notice 22-09 ("RN 22-09") and proposed rule change to "allow any party to request accelerated processing of an arbitration proceeding if they: (1) are at least 75 years old; or (2) certify that they have received a medical diagnosis and prognosis and that, based on that information, they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration." The proposed rule change codifies, in part, current FINRA guidelines regarding expedited proceeding requests, with some important differences addressed herein. The proposed rule would shorten procedural deadlines, including those related to turnaround time (10 months or less), serving an answer or third-party claim (within 30 days of filing the initial pleading), arbitrator rankings (10 days), responses to the FINRA Discovery Guide (35 days) and other discovery requests (30 days).

PIABA applauds FINRA's efforts to protect a vulnerable population of investors. For many who are elderly or seriously ill, the FINRA arbitration process is unduly burdensome and works against the investor's ability to participate meaningfully in the arbitration process. However, there are serious concerns regarding some of the proposed rule provisions that may result in a greater burden for, or act as a bias against, investors.

As noted in RN 22-09 and apparent to those who represent investors in FINRA arbitration, FINRA's current "program" allowing claimants ages 65 or older or seriously ill to request an accelerated process fails to ensure the process is, in fact, accelerated. While FINRA's program was designed to "encourage" arbitrators to bear in mind the needs of those who requested an accelerated process, it is rare that granting a request for acceleration resulted in actual acceleration of the process. Generally, PIABA members report having their request for acceleration granted, but during the IPHC, the panel regularly accept respondent counsel's representations that they are "unavailable" for hearing within the accelerated timelines and do not otherwise enforce the accelerated schedule. Some PIABA's members have experienced a complete disregard of the program after their request for acceleration was granted. One such example is in a currently pending case where a ninety-two (92) year old woman was initially granted acceleration. When she sought leave to amend her statement of claim four (4) months before the scheduled hearing, the arbitrators *sua sponte* vacated the hearing dates and demanded that the parties confer to set new dates. Neither the investor-claimant nor the brokerage-respondent requested that the hearing dates be vacated. Despite that fact, and despite granting the claimant's request for an accelerated process, the arbitrators ignored FINRA's "encouragement" to adhere to the program. Codifying the mandates of an accelerated process may circumvent this type of misconduct.

To date, it appears that arbitrators receive very little training regarding the management of a case filed by an elderly or seriously ill claimant and the purported accelerated process.[1] Proper training and codifying the program's intent – with the deadlines clearly noted – will rightly put the responsibility on the arbitrators to maintain an accelerated process. Since FINRA anticipates that the current "program" will still be available to those who do not qualify for an accelerated process under the proposed rule change (for example, because they are age 70), sufficient arbitrator training is even more important. Training should be clear that the proposed rule change should be followed, but that, even if a claimant does not qualify (or does not formally cite the rule in a request), arbitrators have the discretion to consider age, health, and other factors when setting hearing dates and deadlines and should maintain a sensitivity to these issues.

While there is a possibility counsel and arbitrators may have difficulty adhering to the shortened deadlines due to scheduling conflicts, it should be reiterated in the proposed rule change and training that the rule should be followed absent stipulation *by all parties* to longer deadlines or date setting. This permits flexibility on the part of the claimant requesting the accelerated schedule, who may for example be willing to allow longer time for a particular response (e.g., a Statement of Answer or discovery responses), but has a critical need for the hearing date to be set on an accelerated schedule.

FINRA will need to train arbitrators to be vigilant against litigation tactics that work to delay the arbitration process, such as nonexistent scheduling conflicts, overly broad and burdensome discovery

[1] FINRA's online Basic Arbitrator Training materials devote a portion of one slide to expedited procedures (Module 6, Slide 5). FINRA devotes one page to this issue in its Chairperson Training, p. 11 (June 2021).

requests, and unnecessary motion practice. As an example, an opposing party may propound discovery requests that include medical records that are unrelated to the case, other than to the qualification for an accelerated process. Such an invasive request should be denied. The certification by the claimant requesting the accelerated process as described in RN 22-09 is sufficient and training for arbitrators should be clear that FINRA is not condoning discovery of medical information for purpose of qualifying for the accelerated schedule. Similarly, an opposing party may engage in motion practice to object to the application for an accelerated process based upon the claimant's medical condition in order to force a claimant to reveal medical information. Tactics such as these invade the investors' right to privacy of medical information, could intimidate investors and discourage them from applying for an accelerated process, and delay the proceedings in contravention of the purpose of the Code. These considerations must be addressed when revisiting the proposed rule change and arbitrator training materials.

With regard to the age threshold proposed in RN 22-09, PIABA strongly believes FINRA should maintain the current threshold of 65 years of age. There are two primary reasons: (1) most states with civil and/or criminal statutes protecting vulnerable populations from financial or physical abuse have an age threshold of 65;[2] and (2) setting the threshold at 75 may unfairly exclude or otherwise create disparities for portions of the population who may have lower life expectancies.[3]

By keeping the age threshold at 65 years old, FINRA will remain consistent most states with statutes that create a private right of action for financial elder abuse that also maintain age 65 as the threshold and be more inclusive of a broader demographic of investors. PIABA strongly urges FINRA to maintain the 65-year-old threshold for the purposes of consistency and inclusion.

With regard to qualification based on "serious illness," RN 22-09 fails to develop what would be required, and the language leaves a wide gap for interpretation. As noted above, an investor would be required to:

> Certif[y], in the manner and form required by the Director, that: (i) the party has received a medical diagnosis and prognosis and (ii) based on that medical diagnosis and prognosis, the party has a reasonable belief that accelerated processing of the case is necessary to prevent prejudicing the party's interest in the arbitration.[4]

Although the new language states that it is the party who must have a "reasonable belief" that acceleration is necessary, RN 22-09 states that it is up to the Director to determine whether a party has met the parameters for acceleration. PIABA believes that having the Director use subjective judgment to determine whether an investor is inappropriate. An investor should not be required to disclose private medical information merely to qualify for an accelerated process. PIABA urges FINRA to look carefully at this issue to balance claimant privacy with a fair and consistent process.

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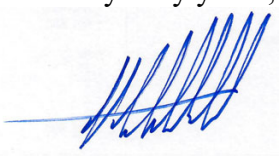
[2] *States with a Civil Private Right of Action for Financial Elder Abuse and Exploitation,* J. Aidikoff, A. Rivkin, 24 PIABA Bar J. 29-46 (2017).

[3] See, *The Association Between Income and Life Expectancy in the United States, 2001 – 2014* R. Chetty, M. Stepner, S. Abraham, JAMA Vol. 315, No. 16 (Apr. 26, 2016). The gap in life expectancy between the richest 1% and poorest 1% of individuals was 14.6 years.

[4] FINRA, Regulatory Notice 22-09 (2022).

PIABA acknowledges and appreciates the opportunity to comment on this important issue. We thank you for the opportunity to comment and urge FINRA to continue its efforts to protect the public investor and provide investors with a fair and objective arbitration process.

Very truly yours,



Michael Edmiston
President, PIABA

May 16, 2022

**Via Email to pubcom@finra.org**
Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

**Re: Regulatory Notice 22-09 – Accelerated Processing of Arbitration Proceedings**

Dear Ms. Mitchell:

The University of Miami School of Law Investor Rights Clinic ("IRC") greatly appreciates the opportunity to comment on FINRA's proposal to accelerate arbitration case processing for seriously ill or elderly parties.[1] The IRC is a University of Miami School of Law clinical program that represents investors of modest means who have suffered investment losses, but due to the size of their claims, cannot find legal representation. As the only *pro bono* organization in Florida assisting investors of modest means, the IRC has represented numerous elderly and seriously ill investors in FINRA's current program for expedited proceedings. For, Because of the importance of expedited proceedings to these clients, and the proposed accelerated processing times would further the intent of those proceedings, the IRC supports FINRA's proposal, with additional recommendations and commentary below.

## I. Experience Under the Current Program and Importance of Expedited Proceedings

According to FINRA Regulatory Notice 22-09, the median time for the 3,125 customer arbitrations in the current program to close was approximately 13.4 months, and the median time for the 8,585 customer arbitrations not in the current program to close was approximately 15.2 months, or a difference of less than two months. The new proposal looks to shorten "turnaround time" by giving guidance to arbitrators to endeavor to render the award within ten months or less, or at least 3.4 months shorter than the median time under the current program. Unlike other aspects of the new proposal, the "turnaround time" provides only guidance rather than a rule-based deadline. Only if effectively implemented will the new proposal lead to a significant time savings beyond the current non-accelerated program and accelerated program.

Our experience with the current accelerated arbitration program aligns with the experience of FINRA overall in that accelerated arbitrations sometimes lead to shorter, but not

[1] FINRA Regulatory Notice 22-09. *Accelerated Processing of Arbitration Proceedings*.

significantly shorter, arbitrations for those in the program.[2] The University of Miami School of Law Investor Rights Clinic has represented several individuals in recent years who have requested and have been granted accelerated arbitration proceedings under the current program.

In a standard arbitration case filed on March 5, 2020, FINRA granted Claimant's request to expedite the arbitration proceeding on April 27, 2020, and the final hearing was scheduled for March 23, 2021. The parties reached a settlement following a mediation on February 22, 2021, nearly one year from the date of filing. Sadly, however, the IRC's client died prior to the mediation and did not live to see the recovery of his retirement savings. In a simplified arbitration filed on March 11, 2021, FINRA granted Claimant's request to expedite the arbitration proceeding on March 15, 2021, and the final hearing was scheduled for March 25, 2022. The parties reached an agreement to settle on March 9, 2022, almost exactly one year from the date of filing. The IRC filed the statement of claim in another standard arbitration on March 12, 2021, and FINRA granted Claimant's request to expedite the arbitration proceeding on March 15, 2021. The parties reached an agreement to settle on November 9, 2021, about eight months after the date of filing. The final hearing was scheduled for November 10, 2021.

Thus, the experience of the IRC shows that FINRA has granted each of our clients' requests in recent years for expedited proceedings under the current program, and that the time to close of these arbitrations ranged from eight to 12 months across simplified and standard cases. Based on that evidence, arbitrators appear equipped to meet FINRA's proposed guidance to render an award within 10 months or less of filing. In some cases, the proposed guidance would reduce the time to close experienced by clients of the IRC by about two months. The experience of the IRC also shows that some expedited arbitration proceedings can close in less than ten months from filing to final hearing and decision.

In the experience of the IRC, it is important for elderly or sick adults to have access to accelerated proceedings and to be able to meaningfully participate in the proceedings. The critical months saved under the proposal could mean the difference in claimants having meaningful participation in their arbitrations, whether by testifying, consulting with their attorneys, or making decisions about settlement offers. This is often as important to clients of the IRC as the recovery of their losses; many clients express a strong desire to have their claims heard and to see justice done. Further, for many retirees with immediate income or liquidity needs, receiving timely settlements or awards is very important. In a balance of the benefits and costs, the benefit of accelerated proceedings for seniors and those with medical conditions outweighs any burdens the proposal may impose on the parties, and because such burdens may be mitigated in appropriate cases. In considering burdens of the proposal, the certification requirement actually strengthens the process by adding an additional requirement of certification to the current process and raises the age of claimants eligible for accelerated proceedings to 75 from the current age of 65.

[2] As a preliminary matter, before comparing our experiences with accelerated arbitrations and non-accelerated arbitrations, a distinction needs to be made between simplified arbitrations and full arbitrations. Many of our clients participate in simplified arbitrations because the amount at issue is often under $50,000. These cases are often shorter than full arbitrations before accounting for whether they were done under the accelerated program or the non-accelerated program.

## II. Flexibility in Discovery Deadlines Under the Current Code

The accelerated proceedings proposal shortens deadlines or serving answers, completing arbitrator lists, and discovery. The existing provisions of the Code provide sufficient flexibility if the shortened deadlines could not be met in a particular case. As they currently stand, the rules establish a mechanism for modifying the deadlines where parties have a legitimate conflict or need. Parties can agree to modify the discovery deadlines, or arbitrators can extend the deadlines on their own. Additionally, the rules mandate a requirement of good faith. FINRA Rules 12506 and 12507 clearly state that the time limits only apply "unless the parties agree otherwise." According to FINRA Rule 12207, the parties can agree in writing to extend or modify the deadlines to exchange documents independently from FINRA or the arbitrator(s) in their case. FINRA Rule 12207 allows for a panel to extend or modify the deadline to exchange documents, or any other discovery deadline set by the panel, either on its own initiative or by motion of a party. Therefore, even if one party does not agree, the current rules provide enough flexibility for a party with good cause to pursue extending the discovery deadlines on their own, giving arbitrators a method to ensure that the discovery process is fair to both parties and not unduly burdensome to one. Parties do not need any additional flexibility with discovery deadlines beyond this existing provision. Importantly, the current provisions of the Code also provide sufficient flexibility while safeguarding against potential abuse by either party through the requirement that the parties act in "good faith."

## III. Other Enhancements for Expedited Proceedings

FINRA should take measures to protect the integrity of the discovery process. Neither party should receive less than adequate discovery because the case moves through the FINRA arbitration process on an accelerated basis. First, arbitrators could receive additional training or materials that help them understand the appropriate scope of discovery. Specifically, non-attorney arbitrators could receive training on what type of documents may be necessary to prove or disprove certain issues. Arbitrators will then be better informed when deciding requests for additional time or motions to compel production. This training should emphasize the importance of claimants in expedited proceedings to receive full and fair access to the same discovery as claimants in other types of proceedings, regardless of the shortened deadlines. Second, FINRA could provide arbitrators with additional training specific to the expedited arbitration process. This training would include, in addition to the appropriate amount of discovery, more information about how to reach a fair and equitable resolution of a case in a shortened timeframe. Arbitrators could also receive resources about how to communicate effectively with claimants who are elderly or have medical conditions, including neutral or un-biased language. This important information might help overcome any unconscious biases regarding elderly or sick claimants that might influence an arbitrator's decision during an expedited arbitration.

In addition, the proposed rule-bases deadlines do not extend to the date of final hearings or deadline for written submissions. Rather, these dates are deadlines remain in the discretion of arbitrators who would "endeavor to render the award within 10 months or less." The IRC estimates that the shortened deadlines for answers, arbitrator rankings, and discovery would save at least 80 days, or almost three months, of processing time compared to the current program.

These time savings alone should give arbitrators the ability to resolve expedited proceedings in a shorter time period.

## IV. Proposed Requirement for Certification by Requesting Party

The proposed requirement to certify receipt of a medical diagnosis and prognosis provides claimants a simple process to secure an accelerated arbitration process while protecting their privacy. The proposed requirement strikes the appropriate balance between an individual's privacy and the potential for abuse of the process. Keeping the language of the requirement broad— "a medical diagnosis and prognosis"—sufficiently safeguards claimants from having to reveal any private details regarding their medical conditions. Alternatives to this requirement risk claimants' privacy and may impose too great of a burden to make the benefit of accelerated proceedings worth the effort. For example, if claimants were required to divulge greater details of their medical diagnosis and prognosis, such a requirement would not only be intrusive on claimants' privacy but also may deter them from seeking accelerated proceedings. Additionally, if claimants needed to obtain medical records to demonstrate their diagnosis and prognosis, this too may deter them from going through the trouble of obtaining such documentation. Accordingly, a simple statement made on a form provided by FINRA allows claimants to obtain the accelerated proceedings they need without imposing much of a burden or infringing upon their privacy.

The "reasonable belief" standard is proper for this proposed requirement. Because each claimant and the impact their respective medical conditions may have on a particular arbitration may vary, a flexible standard is necessary to accommodate for these largely individualized determinations. As such, "reasonable belief" is appropriate because it only asks claimants to judge, within reason, the impact of their conditions instead of a higher standard which may require them to make a more concrete determination or to disclose confidential medical information.

However, it is critical to note that this standard may have an unintended and counterproductive consequence in the event that respondents wish to challenge claimants' certifications. While the proposal does not contemplate a mechanism by which respondents may do so, this issue may, without FINRA's express prohibition to the contrary, arise in discovery. For example, respondents may contest the need for accelerated arbitration and serve requests for documents or information relevant to this issue, placing additional issues in dispute that are not relevant to the merits of the claim. For this reason, FINRA should adopt a rule stating that any discovery concerning a medical condition of a claimant as it relates to providing the basis for accelerated proceedings is prohibited.

The potential for challenges by respondents creates a risk that certifications may become a new area for discovery of claimant's medical files, adding an additional burden that claimants must overcome for their claims to be arbitrated fairly. Because of concerns that respondents will now want proof of the medical conditions asserted in certifications, it is essential that FINRA has procedures to protect claimants' medical privacy. Without a method for respondents to challenge certifications that also protects claimants' privacy, new discovery by respondents regarding the certifications may prejudice claimants. To the extent that additional information is required to

evaluate a claimant's certification or request for an expedited trial, the request should come from the director.

The IRC is opposed to additional requirements for the party certification proposal because it is not overly burdensome, yet still requires a sworn, legal attestation. Further, the Code relating to sanctions may apply if a claimant submits a false certification so as to deter unscrupulous conduct. As such, the proposed requirement sufficiently protects claimants' privacy, deters falsified certifications, and is efficient and consistent with the objective of accelerating these proceedings.

## V. Conclusion

The IRC is committed to protecting the savings and peace of mind of senior investors and investors with medical conditions. For the reasons stated above, the IRC strongly supports FINRA's efforts to provide prompt, rules-based resolution of disputes to this susceptible group and supports the proposal for accelerated processing times, with suggested enhancements and clarifications. The IRC thanks FINRA for the opportunity to comment on this important topic.

Respectfully,

/s/ *Scott Eichhorn*
Scott Eichhorn
*Acting Director*

/s/ *Austin Booth*
Austin Booth
*Student Intern*

*/s/ Hillary Gabriele*
Hillary Gabriele
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May 16, 2022

**VIA EMAIL**

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

**Re: Regulatory Notice 22-09, Accelerated Processing of Arbitration Proceedings**

Dear Ms. Mitchell:

The Fairbridge Investor Rights Clinic at the Elisabeth Haub School of Law at Pace University,[1] operating through John Jay Legal Services, Inc.,[2] welcomes the opportunity to respond to FINRA's request for comment on the proposed rule to accelerate arbitration proceedings for seriously ill or elderly parties. Our clinic clients tend to be senior citizens who often could benefit from an expedited arbitration process due to their age or health concerns. We believe that accelerated processing of FINRA arbitration proceedings would help ensure that seriously ill and elderly investors are afforded the opportunity to participate in the arbitration process. We support FINRA's efforts on the proposed rule.

[1] The Pace Investor Rights Clinic, which opened in 1997, was the nation's first law school clinic in which law students, for academic credit and under close faculty supervision, provide pro bono representation to individual investors of modest means in arbitrable securities disputes. *See* Barbara Black, *Establishing A Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL EDUC. 35 (2000); *see also* Press Release 97-101, Securities Exchange Commission, *SEC Announces Pilot Securities Arbitration Clinic To Help Small Investors – Levitt Response To Concerns Voiced At Town Meetings* (Nov. 12 1997), *available at* http://www.sec.gov/news/press/pressarchive/1997/97-101.txt.

[2] John Jay Legal Services, Inc. is a not-for-profit legal services firm that houses and runs the clinic and externship programs at the Elisabeth Haub School of Law at Pace University. In our clinics, students provide direct legal representation and access to justice for clients on a pro bono basis while being supervised by clinical faculty. In our externships, students work with and learn from practicing lawyers in a variety of placements tailored to their interests. These experiential learning programs offer students the opportunity to gain real-world practical legal experience during their time at Haub Law.

The Clinic's mission is to represent investors of modest means who have been harmed by the misconduct of their brokers, as well as to advocate for the protection and education of small investors. Many of our clients are elderly and have been the target of financial exploitation and fraud. In addition, our elderly clients often face health challenges, including physical illness and diminished capacity. In fact, sadly, one of our clients recently passed away before his filed arbitration case reached a hearing.

As stated above, we support FINRA's efforts on the proposed rule. However, we recommend that FINRA lower the cutoff age for parties to qualify for the accelerated processing of arbitration proceedings to 65 from the proposed 75. In addition, we believe FINRA has struck the right balance in the proposal regarding certification of the need for accelerated processing in those under the cutoff age.

**Cutoff Age**

We recommend lowering the cutoff age for parties to qualify for accelerated processing of arbitration proceedings to 65 from the proposed 75. First, age 65 appears to be the widely-accepted age in our society as the cutoff for seniors. For example, FINRA Rule 2165, which provides protections against the financial exploitation of seniors and other vulnerable adults, uses age 65 as its cutoff.

Second, while the Regulatory Notice cites to differences in the percentages of the U.S. population reporting fair or poor health between people ages 65 to 74 and those over age 75, and the average annual mortality rate of those ages 65-74 and ages 75-84,[3] we believe these differences are small when compared to the benefit of providing greater access to meaningful participation in FINRA arbitration. In addition, people age 65 and older suffer or begin to suffer from similar cognitive illnesses as those age 75 and older.[4] For example, dementia and Alzheimer's disease are the fifth leading cause of death in adults 65 or older.[5] Alzheimer's disease leads to cognitive declines, such as memory loss and language problems,[6] which impacts meaningful participation in arbitration proceedings.

Finally, as FINRA recognizes in the Regulatory Notice, "reducing the age at which an individual is eligible for accelerated processing to 65 may provide greater benefits to individuals in groups that are more likely to be seriously ill or experience adverse health conditions or mortality between the ages of 65 and 74."[7] These groups include racial and ethnic minorities, as well as those from various geographic areas and lower income levels. For example, the Regulatory Notice references the higher mortality rate for Black and Black male populations

[3] FINRA Regulatory Notice 22-09 at 8.
[4] Promoting Health For Older Adults, The National Center for Chronic Disease Prevention and Health Promotion, January 2022, *available at* https://www.cdc.gov/chronicdisease/resources/publications/factsheets/promoting-health-for-older-adults.htm
[5] *Id.*
[6] *Id.*
[7] FINRA Regulatory Notice 22-09 at 8.

ages 65-74.[8] The Regulatory Notice also references the National Center for Health Statistics table showing discrepancies in fair or poor health status by race, origin, percent of poverty level, and geographic location.[9] Thus, we believe that setting a lower cutoff age to account for these disparities would be a fairer and more equitable way of protecting investors.

**Certification of Medical Diagnosis by Requesting Party**

We believe FINRA's proposal to require a party, under the cutoff age, to certify their reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration strikes the right balance. A possible alternative to the proposed method would be to require investors to provide medical records or a note from their physician documenting a particular health issue. However, we believe this would be an unnecessary invasion of investors' privacy and could deter valid requests for accelerated processing. Further, members of certain marginalized communities may be reluctant to disclose their medical information due to higher levels of institutional distrust. This alternate method could have a disproportionate negative impact on such investors. Therefore, we support FINRA's proposal as sufficient to deter abuse of the process while avoiding a disproportionate burden on these and other investors concerned about their privacy.

We appreciate the opportunity to provide feedback to FINRA on this important investor protection concern and FINRA's efforts to protect seriously ill or elderly parties.

Respectfully submitted,

Fairbridge Investor Rights Clinic
Elisabeth Haub School of Law
Pace University

Daiquan Frasier, Student Intern
Diego Gomez, Student Intern
Jonathan Lee, Student Intern
Elissa Germaine, Director

[8] FINRA Regulatory Notice 22-09 at 8.
[9] *Id.* at footnote 23.

April 26, 2022

Re: Comment Letter on FINRA Regulatory Notice 22-09

The Securities Arbitration Clinic at the Benjamin N. Cardozo School of Law ("the Cardozo Clinic") submits this letter in response to the Financial Industry Regulatory Authority's (FINRA) proposed amendment to the Code of Arbitration Procedure to accelerate arbitration proceedings for elderly or seriously ill claimants**.** The Cardozo Clinic represents and advocates on behalf of low and middle-income retail investors. Our experience with our client population, the majority of whom are over 65, informs our comment. We often represent people with significant disabilities, serious illnesses, and small trusts for people with disabilities. The majority of our clients are people of color, and many clients suffer from chronic illnesses and a number of them have been diagnosed with cancer. Many of our clients have limited formal education, and many do not speak English as their primary language. The vast majority of our clients qualify for a waiver of FINRA filing fees because they have minimal income. Indeed, a number of our clients often have to choose between paying for food, rent, or much-needed medication on a regular basis. Waiting an excess of time to resolve a dispute for these clients is, therefore, an extreme hardship.

We support FINRA's proposal for a formal rule to accelerate the cases of elderly and seriously ill retail customers. However, we recommend that FINRA use a 65-year age threshold for expedited case review. Statistical evidence from the Center for Disease Control and Prevention (CDC) demonstrates that changing the age threshold to 75 years will discriminatorily impact Black claimants, especially Black male claimants. Indeed, the 75-year threshold exceeds the average life expectancy of Blacks in America overall and is several years beyond the life expectancy for Black males.[1] FINRA's proposed age limit also fails to take into account the lower life expectancy for others in our client population—namely those in poverty and with

[1] Elizabeth Arias et al., *Provisional Life Expectancy Estimates for January Through June, 2020*, NVSS: VITAL STAT. RAPID RELEASE (Feb. 2021), https://www.cdc.gov/nchs/data/vsrr/VSRR10-508.pdf.
Through the first half of 2020, the life expectancy of for non-Hispanic Black males declined by three years, from 71.0 to 68.3. This does not factor in that, due to the Covid-19 pandemic, life expectancy has declined even further since June 2020. *See* Theresa Andrasfay & Noreen Goldman, *Reductions in 2020 US Life Expectancy Due to COVID-19 and the Disproportionate Impact on the Black and Latino Populations*, 118:5 PNAS (Jan. 14, 2021), https://www.pnas.org/doi/full/10.1073/pnas.2014746118.

limited education. There are strong correlations between higher mortality rates and poverty, and even stronger correlations based on limited education.[2]

Quite often, there are very real consequences for people over 65 forced to wait for adjudication of their claims. Clients are often in serious need of redress and do not have ongoing income from employment to carry them through periods of hardship. In one of our cases, where the broker orchestrated an improper distribution from a 66-year-old client's IRA account, the purported "income" from the distribution meant that our client's rent increased significantly, as did her Medicare payment. She also had an inordinate tax bill to pay. The Cardozo Clinic was ultimately able to reverse the consequences in various appeals to Social Security and SCRIE (Senior Citizen Rent Increase Exemption—the housing program that determined our client's rent) and obtain a Private Letter Ruling from the IRS to return the funds to our client's IRA. However, before she came to us, she was in danger of losing her apartment, risked having to use half of her retirement savings to pay taxes, and could not afford her increased Medicare payments. Indeed, it was only because we were able to obtain additional food aid for her that she had enough to eat in the interim period when we were obtaining relief on her behalf. There were thus real consequences in her having to wait for adjudication of her claim. Because we settled the claim, we were able to significantly limit the time it took for the claim to be resolved. However, trying the case to conclusion would have cost valuable time and put our client at even greater risk.

The consequences of having to wait for adjudication in a case brought by a seriously ill person are grave. Some die while waiting for relief. In other cases, we have clients who are diagnosed with a memory-impairing disease like Alzheimer's Disease. Our clients with Alzheimer's may at first suffer from limited cognitive impairment but still can ably assist in the prosecution of their case. However, even with a brief passage of time, their memories and cognitive abilities may enter into a steep decline to a point when they can no longer testify on their own behalf. Moving quickly in such a case is critical. Adverse consequences often continue even after the client's death. Although we recommend to our clients who do not yet have a will that they prepare one, and we will prepare simple wills without cost, they do not always agree to do it in time. On several occasions, in some of our court proceedings, the lack of a will (and therefore a lack of an executor of the estate) left us with no option for continuing representation of our clients' interests after their death. Once a client dies, an attorney no longer has a client she is authorized to represent. For the representation of a decedent's interest to continue, the representative of the client's estate, i.e., the executor, must enter into a new retainer agreement with counsel. On two occasions within the last several years, we had to file Federal Rule of Civil Procedure Rule 25 Death Notices in a federal court. Those cases were summarily dismissed because the clients died intestate. This meant that the wrongs committed against those clients by unscrupulous, unlicensed brokers went without redress. While those cases were federal court cases, given the relevant timing (both deaths occurred within 10 months of our initial filing), the result would have been the same if we had filed their cases against registered persons before FINRA.

[2] Anne Case & Angus Deaton, *Life Expectancy in Adulthood Is Falling for Those Without a BA Degree, But as Educational Gaps Have Widened, Racial Gaps Have Narrowed*, 118:11 PNAS (Mar. 8, 2021), https://www.pnas.org/doi/10.1073/pnas.2024777118.

We also write to express our concerns about privacy in connection with the certification of a severe illness. Many of our clients view their medical conditions and their attendant challenges as deeply personal and are loathe to share them with strangers or doctors. We also have concerns that some arbitrators may have regarding biases against certain medical diagnoses. For example, a number of our clients are HIV positive and fear the abjectly unfair stigma that certain individuals hold against them. Accordingly, we ask that certification of serious illness be submitted to FINRA personnel specifically dedicated for such review rather than the arbitrator assigned to the case. We also ask that such information be precluded from review by Respondent. Most of our clients come to us because there has been a serious breach of their trust by the named Respondent(s). We do not believe that these claimants should suffer the additional indignity of having their private medical conditions more publicly exposed to people who have already taken advantage of them.

Finally, we propose that the rule include an option in any accelerated case, by request of the Claimant, to be returned to the regular track. In some instances, our clients feel that fast-tracking a case is too stressful and more challenging than a regular tracked case might be. We believe that at-risk people in those situations should be granted the right to change their minds and request additional time to manage through their cases.

Respectfully submitted,

Cardozo School of Law Securities Arbitration Clinic

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**Nicole Iannarone**
Assistant Professor of Law

May 16, 2022

**VIA EMAIL TO pubcom@finra.org**

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 22-09

Dear Ms. Mitchell:

Thank you for the opportunity to comment on FINRA's proposal to accelerate arbitration proceedings for seriously ill or elderly parties.[1] My comments are informed by teaching, research, and law practice. I am a law professor who teaches corporate and securities law, civil dispute resolution, and professional regulation. My research focuses on retail investor experiences with financial advisers, exploring the intersection between professional regulation, civil dispute resolution, transparency, and technology. My recent works analyze arbitration in the FINRA forum.[2] Projects in process similarly evaluate party experiences in the FINRA forum, including participant gender and case outcome, expungement, analysis of smaller claims arbitration, and virtual arbitration proceedings. My work is driven by experience representing the most vulnerable retail investors. I founded the Investor Advocacy Clinic at Georgia State University College of Law and directed the clinic until it closed, working exclusively with investors who could not obtain legal counsel due to the size of their claims. Most of our clients were over 65 years of age. I am also currently the chair of the FINRA National Arbitration and Mediation Committee (NAMC) and an arbitrator on the FINRA neutral roster.

The FINRA forum hears more securities disputes than any arbitration forum in the county. As Professor Jill Gross found in her historical analysis of the arbitration of securities disputes, securities arbitration is "a central and critical component in a system of investor protection."[3] The proposal outlined in Regulatory Notice 22-09 plays an important role in this investor protection mechanism – without the

[1] The following comments are submitted in my individual capacity and represent my own views.
[2] *See, e.g.*, Nicole G. Iannarone, *Structural Barriers to Inclusion in Arbitrator Pools*, 46 WASH. L. REV. 1398 (2021) (evaluating diversity and inclusion in FINRA arbitrator pool); Charlotte Alexander & Nicole G. Iannarone, *Winning, Defined? Text-Mining Arbitration Decisions*, 42 CARDOZO L. REV. 1695 (2021) (using computational textual analytics to study FINRA awards); Charlotte Alexander & Nicole G. Iannarone, *Coding and Collaboration: Data Analytics in the Law School Classroom*, 23 TENN. J. BUS. L. 202 (2022) (describing course using FINRA awards); Nicole G. Iannarone, *Finding Light in Arbitration's Dark Shadow*, 4 UNLV L. FORUM 1 (2020) (transparency to support investor protection).
[3] Jill I. Gross, *The Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 2016 J. DISP. RESOL. 171, 174 (2016).

ability to expeditiously and fairly resolve a dispute, investors are not protected. Accordingly, I generally support the proposed changes to the FINRA arbitration rules that permit senior and seriously ill parties to expedite proceedings. However, expedited proceedings should not come at the expense of a claimant's ability to obtain the information needed to adequately prepare for a proceeding in the forum. In addition, I write to request that the time between NAMC recommendations, consideration of those recommendations, and, when approved, filing of rule proposals, be expedited to protect investors and ensure the legitimacy of functionally mandatory securities arbitration.

Expanding Access to Expedited Proceedings

The proposal will allow certain parties to expedite their cases. I agree with commentors who support expanding investors' right to seek expedited proceedings by lowering the age threshold for claimants seeking expedited relief.[4] Like Mr. Caruso, I believe retaining the current 65 years of age cutoff and adopting it in this proposal. In addition, I agree with the St. John's Securities Arbitration Clinic's proposal of expanding the range of conditions permitting expedited proceedings to include the illness of an immediate family member.

Increasing Speed Should Not Decrease Fairness

Especially when a party is ill or advanced in age, ensuring they are able to quickly resolve a dispute can make a significant difference in their life. However, speed should be balanced with fairness and ensuring that a party seeking an expedited proceeding does not lose the ability to adequately present their case. Though I am in the early stages of research, preliminary results of a study I am undertaking suggest that claimants who proceed on a *pro se* basis experience the shortest amount of time between case filing and final award. Due to the limitations on data publicly provided within the FINRA forum, it is not possible to ascertain what contributes to these preliminary findings. Assuming the result is validated, the phenomenon should be studied to determine the cause, and, in particular, whether it is due to an inability to obtain documents through discovery, a lack of knowledge about the documents that are presumptively discoverable or may be requested from an opposing party, or an unfamiliarity with the FINRA arbitration process that prejudices the *pro se* investor-claimant. Last year, after receiving complaints about claimants' access to necessary discovery documents, the SEC's Office of the Investor Advocate announced that it is examining "the impact of discovery abuse on the cost, duration and disposition of FINRA customer arbitration cases."[5] In addition, a respondent party's request to expedite cases because they technically meet the standard but are not in need of expedited relief should be rigorously examined to ensure that it is not being used strategically to disadvantage a retail investor by, for example, expediting a case to limit their access to discovery. The potential problem is magnified

[4] *See* Steven B. Caruso, Comment on Regulatory Notice 22-09 (Apr. 28, 2022) ("I would suggest that the age cutoff should remain 65 years of age, which would be consistent with a majority of courts, until such time as the proposed shortened, rule-based deadlines on case processing times could be evaluated in terms of effectiveness."); Cardozo Law Securities Arbitration Clinic Comment Letter on FINRA Regulatory Notice 22-09 (May 2, 2022); St. John's University School of Law Securities Arbitration Clinic Comment on Regulatory Notice 22-09 (May 10, 2022).

[5] U.S. Securities and Exchange Commission, Office of the Investor Advocate, Report on Objectives Fiscal Year 2022 at 31 (June 2021), available at https://www.sec.gov/files/sec-office-investor-advocate-report-on-objectives-fy2022.pdf.

when investors are not able to obtain counsel or where respondents have more resources, including access to counsel who regularly appear in the forum.[6]

Accordingly, while I support the proposal, I recommend that, in conjunction with the proposal, three enhancements: (1) discovery transparency for independent study; (2) access to counsel; and (3) robust arbitrator training and written materials.

First, although FINRA provides more transparency than most arbitration forums, providing more information concerning the experience of parties in discovery can help ensure that retail investors are not unfairly prejudiced in expedited proceedings. Providing docket sheets listing (or detailing in award documents) whether discovery documents are voluntarily exchanged, whether documents are withheld under objection, whether *pro se* claimants have access to discovery, and whether documents are only produced after significant conferral or a motion to compel is filed would make independent assessment of retail investor experiences in expedited cases possible.

Second, informational and experiential asymmetries can be eliminated if FINRA were to ensure that all claimant investors have access to counsel to assist them. Preliminary research suggests that investors proceed on a *pro se* basis in nearly half of all FINRA claims seeking $100,000 or less that resulted in an award between 2014 and 2019. Though these preliminary results have not yet been validated, it is possible that the number of self-represented claimants will increase. In 2017, law professors commented on the need for FINRA to support existing securities arbitration clinics that provide investors with legal assistance in this forum and to fund new clinics in areas of need.[7] At one time, investors had access to over two dozen law school clinics to assist them in navigating the FINRA arbitration process.[8] Since 2017, multiple law school clinics, including the one I founded, no longer provide representation to investors with smaller claims. Today, investors in 45 states do not have access to counsel if the size of their claim is too small for a private attorney to undertake – typically $100,000 or less.[9] An investor facing an illness or advanced age should not be placed in the position of navigating an expedited proceeding and securing discovery they need for their case alone. Nor should any investor suffer in the rare case an experienced forum participant who meets the criteria invokes expedited proceedings not on the basis of need but in order to disadvantage an investor claimant. FINRA should support existing law school clinics and help expand free legal advice to underserved investors to eliminate informational and experiential asymmetries that may be magnified in expedited proceedings.

Finally, I recommend that Dispute Resolution Services invest resources in developing informational documents and arbitrator training in conjunction with the proposal if it is enacted. Investors should understand how expediting their proceeding will impact it, the discovery materials they are able to

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[6] One commentor noted this issue in their comment. *See* Daniel Kolber, Comment Regarding Regulatory Notice 22-09 (May 11, 2022) ("These proposed rules only make matters worse because they magnify the already unfair advantage that Finra members, especially the larger ones, enjoy over individual claimants, in retaining experienced, costly securities lawyers.").
[7] *See* Letter of Securities Arbitration Clinic Professors (June 19, 2017), https://www.finra.org/sites/default/files/notice_comment_file_ref/SN-32117_GSU_comment.pdf.
[8] Nicole G. Iannarone & Christine Lazaro, *Investor Protection Requires Access to Representation*, FinancialPlanning (Dec. 16, 2021), https://www.financial-planning.com/opinion/investor-protection-requires-access-to-representation.
[9] *Id*.

request or that are presumptively discoverable, and how to seek information or relief if an opposing party does not cooperate. Moreover, in the event a respondent party qualifies for and seeks expedited treatment, arbitrators need sufficient training and information to balance the need for fairness with the interest of an expeditious resolution.

The NAMC's Docket of Pending Recommendations

I also write concerning the time between the NAMC's recommendations and filing of proposals related to Board-approved recommendations. The NAMC has made multiple recommendations that are outstanding, and the NAMC is currently considering recommending a large docket of proposals to improve all parties' experiences in the FINRA forum.

The NAMC plays an important role within FINRA. As one of FINRA's twelve advisory committees, the NAMC provides "feedback on rule proposals, regulatory initiatives and industry issues."[10] The NAMC's role is codified within FINRA's rules, where it is given "the authority to recommend rules, regulations, procedures and amendments relating to arbitration, mediation, and other dispute resolution matters to the Board."[11] NAMC members are distinguished expert participants in the FINRA arbitration forum, representing all voices in the FINRA forum.[12] Public members include lawyers who represent investors with smaller cases for free and attorneys who represent investors in the most complex cases with millions of dollars at stake. Non-public members include lawyers who represent brokerage firms – large and small – and associated persons who have disputes with member firms. The NAMC's members are also arbitrators and mediators. The wide range of voices on the NAMC is not by accident. According to FINRA, "[t]his diverse composition ensures a neutral approach in the administration of Dispute Resolution's forum, promoting fairness to all parties."[13]

All NAMC members volunteer their time and expertise to improve the forum. NAMC recommendations are made only after significant debate and a consensus, if not (often) unanimity. The NAMC convenes as a full committee three times each year. In between full committee meetings, subcommittees continue the NAMC's work. NAMC subcommittees meet on a regular basis. It is not uncommon for NAMC members to have subcommittee meetings on multiple days each week. NAMC members collectively devote hundreds of hours of their time to considering changes in the best interest of the forum.

NAMC members' deep knowledge of and engagement in the FINRA forum means that recommended rule changes are well-informed and thoughtfully considered. If there are items that should be included as part of NAMC's processes to assist FINRA in considering the evaluations more expeditiously, I welcome the opportunity to discuss how to incorporate such analysis into the NAMC evaluation process. In addition, given the number of recommendations currently under NAMC consideration, additional

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[10] FINRA, *Advisory Committees*, https://www.finra.org/about/governance/advisory-committees.
[11] FINRA Rule 14102(b) (2015).
[12] FINRA, *Advisory Committees*, https://www.finra.org/about/governance/advisory-committees ("The NAMC members include investors, securities industry professionals and FINRA arbitrators and mediators.").
[13] *Id*.

resources may be necessary for these important enhancements to be considered. In this regard, I join in the comments of former NAMC chair Steven Caruso that NAMC recommendations should be considered more expeditiously[14] and respectfully request that FINRA dedicate additional resources to accomplish this aim.

Thank you for the opportunity to comment on this proposal to expedite proceedings for senior and seriously ill parties. Investor protection will be strengthened if the proposal includes a wider range of investors, resources for investors who are considering seeking expedited processing on their own, access to representation in the forum, and a prohibition on gamesmanship to disadvantage retail investors unsophisticated in the forum. In addition, I respectfully request that NAMC recommendations be more expeditiously considered and welcome conversation concerning the steps we can take to work towards that goal.

Respectfully submitted,

*/s/ Nicole G. Iannarone*

Nicole G. Iannarone
Assistant Professor of Law

[14] *See* Steven B. Caruso, Comment Concerning Regulatory Notice 22-09 (Apr. 28, 2022).


**WILLIAM A. JACOBSON**
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May 13, 2022

**Via Electronic Filing (pubcom@finra.org)**

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

**RE: Regulatory Notice 22-09 (Proposed Rule to Accelerate Arbitration for Seriously Ill or Elderly Parties)**

Dear Ms. Mitchell:

The Cornell Securities Law Clinic ("Clinic") submits this comment letter in response to the proposed rule ("Proposed Rule") of the Financial Industry Regulatory Authority ("FINRA") regarding accelerated arbitration for seriously ill or elderly parties. The Clinic is a Cornell Law School curricular offering, in which law students provide representation to public investors and public education as to investment fraud in the largely rural "Southern Tier" region of upstate New York. For more information, please see: http://securities.lawschool.cornell.edu.

As explained in greater detail below, the Clinic supports FINRA's initiative in providing the elderly and those with serious conditions a means to timely resolve their disputes.[1] Indeed, a dedicated procedure is necessary for those unable to wait out FINRA's ordinary hearing timeline. The trend in average timelines for proceedings further supports the need for an expedited process.[2] Still, for the reasons stated below, the Proposed Rule's age requirement and standard for the applicant's "reasonable belief that accelerated processing . . . is necessary"[3] should be reconsidered.

[1] This letter is written in the interest of investors. Our clinic takes no position regarding industry proposals.
[2] FINRA DISPUTE RESOLUTION STATISTICS, https://www.finra.org/arbitration-mediation/dispute-resolution-statistics.
[3] FINRA REG. NOTICE 22-09, https://www.finra.org/rules-guidance/notices/22-09#_edn3.

**I. The Qualifying Age for Accelerated Processing Should be 65**

FINRA has proposed a 75-year-old age requirement for applicants who wish to request an expedited process based on age, a 10-year increase from its existing standard of 65.[4] The notice of the Proposed Rule reasons that those who are 75 are "significantly more likely to become unable to participate in a hearing after a claim is filed" than those who are 65. However, increasing the age qualification is problematic for several reasons.

First, increasing the age requirement to 75 would likely limit a claimant's ability to take full advantage of any award the claimant receives. Indeed, FINRA acknowledges that those who are 75 and older may lose the capacity to participate in a hearing, likely to due to limitations such as the ability to recall, give testimony, or physically attend hearings. However, these limitations in ability also affect the opportunities that one can take. Indeed, a person who is the age of 65 would likely be able to better utilize any award for themselves when compared to a person who is 75 and would likely have more age-related restrictions.

Next, keeping the age requirement at 65 would make the Proposed Rule more equitable in light discrepancies in life expectancy across the population. FINRA acknowledges that the 75-year-old age requirement presents certain challenges given the discrepancies in sex and race-related mortality rates. Indeed, mortality rates between the ages of 65 and 74 differ, and these differences should be acknowledged. Still, FINRA should also consider that involving other qualifications, such as race and gender, when determining whether to grant an expedited hearing under this rule, could lead to problems.

Specifically, FINRA and the Director would need to determine how these metrics can be verified. Age is the most appropriate (and should be the only) metric considered as it can be directly verified, whereas people may assert the right to self-identify other aspects of their identity. Additionally, the statistics presented by FIRNA demonstrating discrepancies in life expectancy, while certainly worthy of consideration, are not necessarily reflective of the individuals who would be claimants. As a result, keeping the age at 65 as a catch-all would best account for the variances in life expectancy without requiring FINRA to wrestle with the potential issues that could arise if they considered different requirements based on an applicants race and gender.

Furthermore, race and sex are two of many demographic characteristics that are determinative of a person's life expectancy. For example, the state where one lives may also be determinative,[5] and in at least ten states, life expectancy is within one year of 75. Therefore, if FINRA were to consider additional factors, beyond a claimants age, in determining whether the

[4] FINRA EXPEDITED PROCEEDINGS FOR SENIORS & SERIOUSLY ILL, https://www.finra.org/arbitration-mediation/expedited-proceedings-seniors-seriously-ill.
[5] CDC NATIONAL CENTER FOR HEALTH STATISTICS: LIFE EXPECTANCY AT BIRTH BY STATE, https://www.cdc.gov/nchs/pressroom/sosmap/life_expectancy/life_expectancy.htm

party qualifies for accelerated hearing, it would also have the challenges of dealing with the complexities in judging whether the standards are met, as well as what those standards (i.e., any

demographic characteristic that is determinative of mortality) would be, considering that only race and sex alone are not determinative.

In short, the differences in life expectancies across different groups are another reason that FINRA should maintain the age of 65, as a means of ensuring that the rule is as objective as possible and would allow FINRA to avoid complexities of bespoke standards for different groups.

**II. FINRA should reconsider the standard for a “reasonable belief”**

Under the Proposed Rule, a party may also request an expedited process on the grounds that, based on a medical condition, the party has a "reasonable belief that accelerated processing" is necessary. However, this standard is problematic without a clear understanding of what constitutes a "reasonable belief." Indeed, requesting parties and FINRA may have different understandings of what conditions warrant an expedited hearing. But, under the language of this Proposed Rule, the Director will have the authority of determining whether the applicants' beliefs are reasonable.

This standard may be unfair to applicants when considering that their determinations of necessity are based on their individual understandings. On the other hand, FINRA regularly deals with a wide array of applicants of different backgrounds and health conditions; and as a result, it is likely to have at least a different, if not stricter, standard of what may constitute a reasonable belief to requesting an expedited process. Moreover, given that sanctions may be considered as a response to false certifications, there are significant implications tied to whether the "reasonable belief" standard is met. It would be unfair to punish applicants who utilize this rule on a good faith basis merely because their belief as to whether their condition warrants an expedited hearing is deemed unreasonable by an entity with a much different perspective.

Therefore, for transparency, the reasonable belief standard should be further defined, and applicants should not be sanctioned on the basis that their belief as to the necessity of an expedited hearing is unreasonable. Sanctions should be based only on a false or fraudulent representation of facts, not based on an opinion with which the Director may disagree.

**III. Conclusion**

The Clinic appreciates the opportunity to comment on the Proposed Rule and respectfully requests FINRA to take the Clinic's comments into consideration.

Respectfully Submitted,

*William A. Jacobson*

William A. Jacobson, Esq.
Clinical Professor of Law
Director, Cornell Securities Law Clinic

*Austin Law*

Austin Law
Cornell Law School, 2022

**From:** Daniel Kolber
**To:** Comments, Public; [REDACTED]
**Subject:** Comment Regarding Regulatory Notice 22-09
**Date:** Wednesday, May 11, 2022 9:43:59 AM



This is my comment on the proposed rules to allow accelerated processing of cases for senior parties. These proposed rules only make matters worse because they magnify the already unfair advantage that Finra members, especially the larger ones, enjoy over individual claimants, in retaining experienced, costly securities lawyers. Until the Codes of Arbitration Procedure for Customer and Industry Disputes are amended to specifically allow arbitrators to sanction an attorney for a party for contemptuous conduct modeled after Finra Code of Procedure Rule 9280, the proposed rules allow attorneys to use many techniques to deliberately delay proceedings. Arbitrators are not trained judges but are expected to act as such. When you have experienced lawyers, accustomed to practicing before federal and state judges who have the power to sanction lawyers for dilatory tactics, present their case to an arbitration panel who have no such powers, watch out! These aggressive lawyers can, and do, "get away with murder," so to speak. It's like when in middle school the regular teacher is replaced by a substitute teacher and the class clown uses the opportunity to take over the class with her antics. Expecting experienced litigators to "cooperate" in "good faith" without threat of sanctions is naive at best and complicit in perpetuating an unfair process at worst.

Originally submitted on May 7, 2022 and resubmitted on May 11, 2022
Daniel H. Kolber,
Executive Representative, Intellivest Securities, Inc.

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May 10, 2022

**Via email to pubcom@finra.org**
Ms. Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, D.C. 20006-1506

**Re: Regulatory Notice 22-09: FINRA Requests Comment on a Proposed Rule to Accelerate Arbitration Proceedings for Seriously Ill or Elderly Parties**

Dear Ms. Mitchell:

The St. John's University School of Law Securities Arbitration Clinic (the "Clinic") would like to thank you for the opportunity to comment on the proposed rule change concerning the acceleration of arbitration proceedings for seriously ill or elderly parties pursuant to Regulatory Notice 22-09. The Clinic is a curricular offering where students represent public investors of limited means in disputes against their investment brokers.[1] In addition to representing aggrieved investors, the Clinic is committed to investor education and protection.

FINRA's Rule Proposal seeks to accelerate arbitration case processing when requested by parties who are seriously ill or at least 75 years old. Those who are younger than 75 but are seriously ill would be required to obtain a certification that they have received a medical diagnosis and prognosis, and that based on such information, they would have a reasonable belief that accelerated processing is necessary in order to prevent their interests from being prejudiced in the arbitration process. The proposal would allow these parties to participate meaningfully in FINRA arbitration by reducing certain case processing deadlines for parties and arbitrators under the Codes of Arbitration Procedure.

[1] For more information, please see https://www.stjohns.edu/law/about/places/securities-arbitration-clinic.

Specifically, this rule would require a panel to render an award within 10 months or less; the deadline for an answer to a statement of claim would be shortened from 45 to 30 days; the deadline for a response to a third-party claim would be shortened from 45 to 30 days; and the deadline for which the parties must submit their ranked arbitrator lists would be shortened from 20 to 10 days. Additionally, the deadline for producing all documents listed on the Document Production Lists on FINRA's website would be reduced from 60 days of the date that the answer to the statement of claim is due to 35 days; and the deadline for parties to respond to requests for other discovery documents or information would be shortened from 60 days to 30 days.

The rule proposal is an effort by FINRA to give those who are seriously ill or elderly the ability to participate in FINRA arbitrations in an accelerated manner. FINRA is attempting to not only allow those who are experiencing adverse health conditions or who are elderly to have the option to see a FINRA arbitration through to completion, but also to ensure that the arbitration is not more onerous or time consuming than necessary, taking into consideration the health and age of these specific parties.

The Clinic commends FINRA's efforts in increasing elderly and seriously ill parties' ability to participate in the FINRA arbitration process. However, the Clinic believes that the age requirement should be lowered to 70 years old, and that the medical diagnosis certification should be available for those who are younger than 70 years old and seriously ill as well as those who have a dependent spouse who is seriously ill.

The Clinic believes that the proposed age requirement of 75 should be lowered to 70. The age requirement of 75 is arbitrary and should be reconsidered in light of ethnic, geographic, and health-related factors. For the year 2020, the average life expectancy in the United States was 77 years old.[2] This number declined from 2019, in large part due to the high number of deaths resulting from the pandemic. The average life expectancy is 74.2 years old for males and 79.9 years old for females.[3] There is significant variation of life expectancy across racial and ethnic lines. For example, while the average life expectancy for white individuals was 78.8 years old in 2019, for Hispanic individuals the average was 81.9 years old, and for Black individuals, the average was 74.8 years old.[4] These numbers are from 2019, so presumably they also declined in 2020.

Additionally, life expectancy varies based on geographic location in the United States.[5] For example, in 2019 in Mississippi, the average life expectancy for both sexes was 74.4 years old; the average for males was 71.2 years old and for females was 77.6 years old.[6] In comparison, in Hawaii, the state with the highest life expectancy data, the average life expectancy for both sexes was 80.9 years old.[7] Research suggests that life expectancy is highest in states in the West and the Northeast, while life expectancy in

[2] *See* CDC, NCHS Data Brief No. 427 (Dec. 2021), https://www.cdc.gov/nchs/data/databriefs/db427.pdf.
[3] *Id.*
[4] *See* CDC, *United States Life Tables, 2019*, National Vital Statistics Reports, Vol. 70, No. 19 (Mar. 22, 2022), https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-19.pdf.
[5] *See* CDC, *U.S. State Life Tables, 2019*, National Vital Statistics Reports, Vol. 70, No. 18 (Feb. 10, 2022), https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-18.pdf.
[6] *Id.*
[7] *Id.*

Southern states is lower. There is also a correlation between race, geographic location, and health concerns that cause death. People of color are more likely to live in densely populated areas that are impoverished compared to white and Asian Americans.[8] In those neighborhoods, there are "higher exposures to environmental toxins" and a lack of access to "quality health-care services."[9] Compared to their white counterparts, "these groups often experience health complications at higher rates" because of these systemic inequities.[10] Additionally, research shows that as they age, people of color experience deterioration as they age at higher rates compared to white Americans because of psychological impacts of marginalization.[11] Both institutional and cultural racism can negatively impact health.[12]

In light of these issues, it is apparent that certain groups, based on ethnicity and geography, will not benefit from the Proposed Rule as they are less likely to have a life expectancy that exceeds the age of 75. To provide more equitable access to the benefits proposed here, FINRA should lower the age requirement to no older than 70 years.

Moreover, the rule should consider more than age and serious illness. In the proposal, FINRA is considering a claimant's ability to fully participate in the arbitration hearing as a basis for considering accelerated processing. However, it is the Clinic's position that there may be other valid justifications for accelerated processing of claims. For example, senior investors who have experienced financial loss may experience additional emotional trauma while their claim proceeds. Accelerated processing may minimize the further negative health impacts experienced by senior investors who have lost funds due to the misconduct of their financial advisor. Additionally, older investors have limited ability to recover lost funds through other means as they are often retired or close to retired and no longer earning income or increasing savings. Accordingly, such investors may benefit from a dispute resolution process that is as accelerated as practical to provide a meaningful opportunity to recover lost funds when they are most needed by the investor. These investors should have the ability to seek accelerated processing of their claims, even when younger than age 70.

Unfortunately, allowing those with a serious illness to also apply for accelerated processing will not adequately address these concerns. For example, people who live in the South or Southeast have a higher risk of heart disease, smoking, and cancer compared to those who live in New England or coastal cities.[13] However, these health considerations may not be sufficient to qualify for accelerated processing. For these reasons, the Clinic suggests, as an alternative to the proposal, assessing the need for accelerated processing for claimants younger than 70 years old that considers their full circumstances. This approach would consider the medical status, socioeconomic status

[8] National Equity Atlas, *Life expectancy: Your race should not determine your ability to live a long and healthy life* (2015-2016), www.Nationalequityatlas.org/indicators/Life_Expectancy#/.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *See* Williams, D. R., & Mohammed, S. A., *Racism and health I: Pathways and scientific evidence*. 57 American Behavioral Scientist 1152-1173 (2013), https://pubmed.ncbi.nlm.nih.gov/24347666/.
[13] Mary Kekatos, *New CDC report reveals US life expectancy by state; 7-year difference between lowest, highest*, Eyewitness News (Feb. 2022) https://abc7.com/life-expectancy-average-us-2022-cdc-report-highest/11551976/.

and other needs, such as caregiver responsibilities, in deciding whether to provide a claimant with accelerated processing of their claim. Looking at these factors would allow for a determination that considers more than just the age of the claimant or a serious illness. Since FINRA currently offers expedited proceedings for all claimants over the age of 65 regardless of the reason, an approach that considers need will capture a smaller number of cases than the present option.

Further, a more fact specific analysis would address inequities in the application of this rule. As an example, it can consider socioeconomic status and ensure that those who would most benefit from an accelerated process have access to it. The median household income in 2020 was $67,521, a decrease of almost 3% from 2019.[14] The median income for Black households was $45,870 and for Hispanic households was $55,321.[15] Even small investment losses for those at or below these levels can be devastating. Moreover, socioeconomic status "is a consistent and reliable predictor of a vast array of outcomes across the life span, including physical and psychological health."[16] An approach that considers the totality of a claimant's circumstances will allow for more equitable implementation of the proposal.

The Clinic also urges FINRA to allow those claimants who have a dependent spouse who is seriously ill to seek accelerated processing of their claims. Many of the clients that we assist at the Clinic have dependent spouses who are seriously ill. Individuals who might not themselves be seriously ill and are younger than 70 years old, but who have spouses who are seriously ill and can get a medical diagnosis certification, would benefit from accelerated processing of their claims as they must spend time and resources aiding their dependent spouse. Expanding the scope of the medical diagnosis certification to include seriously ill spouses would help individuals spend less time and money on the arbitration process and more time with their spouse who needs their attention.

Finally, the Clinic suggests that FINRA consider increasing the threshold for simplified claim processing from $50,000 to $100,000. In other words, claimants should have the ability to opt for a decision on the papers or a special proceeding for claims up to $100,000. The simplified claim process is significantly shorter than the turnaround time for a full hearing. In 2021, a paper arbitration took on average six months whereas a special proceeding took on average eight months.[17] In comparison, a full arbitration hearing took on average seventeen months, more than twice as long as a special proceeding and almost three times as long as a paper case.[18] Additionally, 20% of the total claims that went to a hearing for 2021 were heard by a single arbitrator, with 15% of the claims falling within that range for 2020, and 18.7% falling within that range

[14] United States Census Bureau, *Income and Poverty in the United States: 2020* (Sept. 2021), https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf.
[15] *Id.*
[16] American Psychological Assoc., *Ethnic and Racial Minorities & Socioeconomic Status*, https://www.apa.org/pi/ses/resources/publications/minorities.
[17] FINRA, *Dispute Resolution Statistics* (through Mar. 2022), https://www.finra.org/arbitration-mediation/dispute-resolution-statistics.
[18] *Id.*

for 2019.[19] This shows that a small portion of the cases being filed are likely alleging damages of $100,000 or less. These claimants would greatly benefit from the option of accelerated processing through an alternative case processing method. Expanding the number of claims that would be eligible for simplified arbitration would create a path for faster turnaround without requiring that the parties participate in a full hearing, or otherwise qualify for accelerated processing.

In conclusion, the Clinic believes that the rule is a step forward in helping those parties who are elderly or seriously ill and would benefit from an accelerated arbitration process. However, the proposal should be amended to reduce the age threshold from 75 to 70 years old. Further, FINRA should consider changing the medical diagnosis certification requirement to apply to those parties who are younger than 70 and have a dependent spouse who is seriously ill. Additionally, the Clinic requests that FINRA consider offering accelerated processing for those claimants who can demonstrate that such processing would be appropriate based on a totality of their circumstances.

Thank you for the opportunity to comment on this important proposal.

Respectfully submitted,

/s/
Chelsea Karen
*Legal Intern*

/s/
Brenna O'Connor
*Legal Intern*

/s/
Skye Boutte
*Legal Intern*

/s/
Sebastian Vollkommer
*Legal Intern*

/s/
Christine Lazaro, Esq.
*Director of the Securities Arbitration Clinic*
*And Professor of Clinical Legal Education*

[19] *Id.* In 2021, 231 cases were decided after a hearing; in 2020, it was 120 cases; and in 2019, it was 241 cases. In 2021, 185 cases were heard by three arbitrators; in 2020, it was 102 cases; and in 2019, it was 196 cases. We have concluded that in 2021, 46 cases were heard by a single arbitrator (20%); in 2020, it was 18 cases (15%); and in 2019, it was 45 cases (18.7%).

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 Abshure 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 clauses[5] 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.

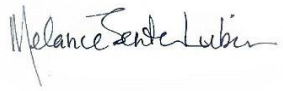
FINRA's current accelerated program for persons with serious health conditions or who are at least 65.[9] The Proposal would achieve this goal by shortening each component part of an arbitration proceeding, in an accordion-like fashion.[10] The Proposal concedes, though, that "[h]ow parties would meet 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.

**VIA ELECTRONIC MAIL: pubcom@finra.org**

May 11, 2022

Jennifer Piorko Mitchell
Office of the Corporate Secretary
The Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1506

**Re: Regulatory Notice 22-09: Request for Comment on a Proposed Rule to Accelerate Arbitration Proceedings for Seriously Ill or Elderly Parties**

Dear Ms. Mitchell,

Cambridge Investment Research, Inc. ("Cambridge") appreciates the opportunity to comment on the proposed rule change contemplated in RN-22-09 (the "Proposal") that would amend The Financial Industry Regulatory Authority's ("FINRA") Codes of Arbitration Procedure ("Codes"). Cambridge understands that this proposed rule change would allow any party to request accelerated processing of an arbitration proceeding if they: 1) are at least 75 years old; or 2) certify that they have received a medical diagnosis and prognosis, and that based on that information they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration.

Cambridge understands that there are situations in which a party to an arbitration proceeding may have a medical condition that may necessitate an accelerated processing of the arbitration. Cambridge supports the Proposal and its applicability in certain limited circumstances; however, for the reasons detailed below, Cambridge encourages FINRA to provide additional limits and guidelines for when an accelerated arbitration proceeding would be available and, further, to consider allowing for greater flexibility in setting an accelerated arbitration schedule.

**I. Age Requirement**

Cambridge encourages FINRA to establish additional limitations regarding the circumstances in which a party could request an accelerated proceeding. Specifically, Cambridge questions the necessity for a party to make a request solely due to the party being 75 years old. FINRA notes in the Proposal that the age requirement would be moderated by the medical diagnosis and prognosis qualification available under the Proposal. Cambridge agrees that individuals 75 years old or older could still qualify for the accelerated arbitration proceeding if they meet the requirements of the medical diagnosis and prognosis qualification; however, this highlights situations where one of the parties does not meet the medical qualification and is an otherwise healthy individual. Under those circumstances, it is difficult to understand the need for a healthy 75-year-old to request accelerated arbitration solely due to age.

FINRA points to published rates of adverse health conditions and mortality. As noted above and as described in the Proposal, those 75-year-olds with adverse health conditions may qualify for the accelerated arbitration proceeding under the proposed medical diagnosis and prognosis provision. Removal of the proposed age provision would best balance the need for a mechanism to allow qualifying individuals to request an accelerated proceeding with the need to maintain a fair and balanced procedural process for all parties involved in the arbitration. Therefore, Cambridge respectfully requests FINRA remove the proposed age requirement as a method for a party to request an accelerated arbitration proceeding.

**II. Medical Diagnosis and Prognosis Requirement**

Cambridge understands and appreciates FINRA's desire to improve the ability for parties with a medical condition to meaningfully participate in an arbitration proceeding by providing a mechanism for the party to request an accelerated arbitration. However, Cambridge encourages FINRA to provide greater clarity regarding the medical diagnosis requirement and to require more stringent requirements for requesting an accelerated proceeding due to a medical condition. These requirements would allow individuals with a qualifying medical condition to still request and obtain an accelerated proceeding while ensuring that the process is not misused and remains fair for all parties involved.

Specifically, Cambridge suggests that the party requesting an accelerated proceeding on the basis of illness be required to obtain a medical certification. The form utilized by the party requesting the accelerated proceeding could include a section in which the medical professional certifies that, to a reasonable degree of medical certainty, the party has a medical condition that would not enable the party to participate meaningfully in an arbitration proceeding within the next 18 months. This medical certification would establish the necessity for the accelerated arbitration proceeding and would prevent a party from misusing the process.

**III. Accelerated Arbitration Proceeding Timeframe**

Cambridge recognizes that there are circumstances in which a party may need an accelerated arbitration proceeding in order to participate meaningfully in the arbitration. However, Cambridge respectfully requests that FINRA not establish firm deadlines in an accelerated arbitration. Rather, Cambridge encourages FINRA to allow for flexibility in each situation to determine deadlines based on the circumstances.

Imposition of a pre-determined, shortened schedule in an accelerated arbitration proceeding is too rigid. Simply having a medical certification that qualifies a party for the accelerated proceeding does not indicate that all situations should be treated uniformly. The medical conditions and accommodations needed by each party could vary widely, depending on the nature of each party's circumstances. The parties to the arbitration should be encouraged to work together to determine deadlines that consider the medical condition of the qualifying party. However, in the absence of an agreement between the parties, the arbitrators should have the latitude to adjust the deadlines for the arbitration to accommodate the party with the qualifying medical condition.

A strict, shortened schedule assumes that the accelerated arbitration proceeding exists in a vacuum and does not take into consideration other factors outside of the immediate proceeding. Arbitrations are dependent on the availability of the arbitrators, particularly if the arbitration must occur within an accelerated amount of time. A pre-determined, set schedule may affect the arbitrator selection process due to the unavailability of arbitrators during the abbreviated timeframe. Further, attorneys simultaneously handle multiple cases at once. In looking at each case on its face, there is no discernable difference between the cases. However, strictly establishing an accelerated schedule requires the prioritization of the accelerated proceeding solely based on the shortened timeline and deadlines. As part of the scheduling flexibility proposed by Cambridge, these extraneous factors would be part of the considerations made by the parties and the arbitration panel when scheduling, while ultimately giving appropriate weight to the party's medical condition.

In the absence of the deadline scheduling flexibility proposed by Cambridge, several of the proposed new deadlines are too abbreviated. For example, the Proposal would shorten the deadline for an answer to a statement of claim from 45 days to 30 days. Additionally, the proposed reduction of the deadline for discovery from 60 days to 35 days nearly reduces the time in half to complete discovery requests. Arbitration lists must be ranked and returned within ten (10) days under the Proposal. This greatly reduced deadline unduly burdens the respondent in the arbitration. In many proceedings, the time period relevant to the dispute spans years, requiring respondents to collect, review and organize hundreds if not thousands of documents and communications from multiple sources and systems. This involves significant internal resources from many departments

or teams, including operations, technology, finance, supervision, and compliance. Only after documents and communications are collected can respondent's counsel begin evaluating the matter, which necessitates sufficient time to provide effective representation to their client.

In contrast, claimants and their counsel have ample time to evaluate the merits and arguments of their case prior to filing the arbitration. In most jurisdictions, the shortest statute of limitations applicable to certain claims by a claimant is two years from the date of discovery and could be as long as five or ten years. Shortening the timeframe for respondents to file the answer and discovery may deny respondents a meaningful opportunity to research and draft a well-crafted answer to the statement of claim. The absence of sufficient time to prepare an informed responsive pleading could result in significant prejudice.

Rather than shorten the deadlines as proposed, Cambridge suggests FINRA maintain the existing deadlines but consider establishing concurrent deadlines. As an example, once the statement of claim has been filed, the parties could begin working on the arbitrator rankings during the time the respondent completes the answer to the statement of claim. In this way, the overall time for the completion of the arbitration proceeding could be shortened without shortening the individual deadlines within the arbitration. At a minimum, Cambridge requests FINRA not shorten the timelines to file an answer or produce discovery to anything less than 45 days to ensure a fair and orderly process for all parties involved in the proceeding.

Cambridge appreciates the opportunity to offer comments regarding the proposed rule to accelerate arbitration proceedings for seriously ill or elderly parties. Cambridge would be happy to discuss further any of the comments or recommendations outlined in this letter.

Respectfully submitted,

*/s/*
Seth A. Miller
General Counsel
Executive Vice President, Chief Risk Officer

# David Slater Comment On Regulatory Notice 22-09

David Slater

N/A

I was Chairman of a Panel. At the Pretrial Hearing Claimant asked for an an Expedited Hearing as his client was elderly and ill. The attorneys had first been asked if the Panel , as constituted was satisfactory and t]both counsel agreed it was. The panel requested an expedited hearing and Respondent counsel advised they were too busy and not available. As Chairman i advised that an expedited hearing would be held. Respondent then advised the panel was not acceptable and I should be recused. I later learned the case was settled, but I received a complaint call from FINRA. I was chastised for not being reasonable and the rule regarding expedited Arbitration is merely advisory. i note, I have received no new cases since the incident. I do not believe the matter was handled appropriately.

# David P. Slater, Esq Comment On Regulatory Notice 22-09

David P. Slater, Esq
Attorney

Busy Respondent Attorneys will argue they "are not available" and will move FINRA to disqualify an arbitrator who try's to enforce the rule. It has happened to me.

FINANCIAL SERVICES INSTITUTE

VOICE OF INDEPENDENT FINANCIAL SERVICES FIRMS AND INDEPENDENT FINANCIAL ADVISORS

**VIA ELECTRONIC MAIL**

May 16, 2022

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: FINRA Regulatory Notice 22-09: Proposed Rule to Accelerate Arbitration Proceedings for Seriously Ill or Elderly Parties

Dear Ms. Mitchell:

On March 16, 2022, the Financial Industry Regulatory Authority, Inc. (FINRA) published its request for public comment on Regulatory Notice 22-09, which proposed procedures to accelerate arbitration proceedings for seriously ill or elderly parties.[1] The proposed FINRA Arbitration Procedure Code revisions seek to ensure that all parties (including those who are seriously ill or are at least 75 years old) are able to participate meaningfully in FINRA arbitration by shortening certain case processing deadlines.

The Financial Services Institute[2] (FSI) appreciates the opportunity to comment on this important proposal. FSI supports FINRA's efforts to accelerate arbitration proceedings for those who meet the prerequisite qualifications of being seriously ill or at least 75 years old. We offer select comments on the proposal aimed at balancing the need for accelerated proceedings with ensuring the time necessary to collect and provide information needed for a panel to assess the matter before it.

## Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the US, there are more than 160,000 independent financial advisors, which account for approximately 52.7 percent of all producing registered representatives.[3] These financial advisors are self-employed independent contractors, rather than employees of the Independent Broker-Dealers (IBD).[4]

[1] FINRA Proposed Rule to Accelerate Arbitration Proceedings for Seriously Ill or Elderly Parties (March 16, 2022), Regulatory Notice 22-09 | FINRA.org (FINRA Proposal).

[2] The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

[3] Cerulli Associates, Advisor Headcount 2016, on file with author.

[4] The use of the term "financial advisor" or "advisor" in this letter is a reference to an individual who is a registered representative of a broker-dealer, an investment adviser representative of a registered investment adviser firm, or a

FSI's IBD member firms provide business support to independent financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. FSI members make substantial contributions to our nation's economy. According to Oxford Economics, FSI members nationwide generate $35.7 billion in economic activity. This activity, in turn, supports 408,743 jobs including direct employees, those employed in the FSI supply chain, and those supported in the broader economy. In addition, FSI members contribute nearly $7.2 billion annually to federal, state, and local government taxes.[5]

Independent financial advisors are small-business owners and job creators with strong ties to their communities. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans. Their services include financial education, planning, implementation, and investment monitoring. Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide Main Street Americans with the affordable financial advice, products, and services necessary to achieve their investment goals.

## Discussion

### I. FSI Supports FINRA's Proposal to Accelerate Arbitration Proceedings for Those Who Qualify as Seriously Ill or Are At Least 75 Years Old

FINRA's proposal will allow any party to request accelerated processing of an arbitration proceeding if they: (1) are at least 75 years old; or (2) certify that they have received a medical diagnosis and prognosis, and that based on that information they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration.

FINRA's current voluntary program will accelerate arbitration proceedings, upon request, for those who have a serious health condition or are at least 65 years old. However, as FINRA has noted in its announcement, "the current program has not resulted in meaningfully shortened case processing times."[6] The cases that do qualify for the current program close only slightly more quickly than cases that are not in the current program. [7]

For the parties who qualify, the proposal would shorten case deadlines and provide arbitrators with instructions on how quickly the arbitration should be completed. FSI members support this proposed rule as it will expedite participation in FINRA's arbitration proceedings for parties that may be otherwise prejudiced. To tailor the accelerated arbitrations to those most in need, FSI supports FINRA's decision to increase the age for these proceedings to 75 given that the proposed revisions also provide an avenue for those under the age threshold to certify, based on medical need, the need for an accelerated process. This provision ((a)(1)(B)) provides flexibility, as does (a)(3), to ensure that these accelerated arbitration procedures are applied equally across different populations (with potentially different life expectancies and health challenges). For cases that meet these criteria FINRA should review resources available to ensure that after the

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dual registrant. The use of the term "investment adviser" or "adviser" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.

[5] Oxford Economics for the Financial Services Institute, The Economic Impact of FSI's Members (2020).

[6] See FINRA Proposal.

[7] *Id.*

statement of claim has been served and an answer filed, that a panel is promptly appointed to initiate the arbitration schedule and proceeding.

While FSI recognizes the necessity of balancing individual privacy with the potential for abuse of this accelerated process, FSI encourages FINRA to provide examples of its expectations for the type(s) of "medical diagnosis and prognosis" that would "qualify" for use of the certification. The proposed rule indicates that the "Director of Dispute Resolution Services (Director) would make an objective determination as to whether the requesting party…has submitted the required certification." By providing the public with a better understanding of the types of situations where accelerated procedures are appropriate, it will instill confidence in this process and encourage qualified individuals to avail themselves of the certification process.

In addition, FINRA should consider possible additional avenues to those sanctions outlined in the Code to address cases where it comes to light that the certification process has been abused to ensure that these types of proceedings are reserved for those who truly need expedited consideration. It is unclear from the sanctions outlined in the Code whether the panel (or Director) could remove a matter from expedited proceedings. This may be one appropriate sanction or recourse in cases of abuse of the certification process.

## II. FSI Encourages FINRA to Balance the Need for Accelerated Proceedings with Establishing a Full Factual Record to Enable the Panel to Evaluate the Matter

FSI believes that the proposed shortened discovery timeframes should be revisited to ensure that a fulsome record can be established for the arbitration panel to consider. Discovery inevitably takes time – from identifying individuals with information and knowledge at each firm to finding relevant documents, reviewing them, and producing the documents. FSI suggests the discovery deadline for items on FINRA's Document Production Lists[8] for customer cases should be reduced from 60 days to 45 days. The current proposal of 35 days is too short and could undercut the ability to establish a full factual record for the panel's consideration. Similarly, FSI suggests, for the reasons noted above, that the timeframe for other discovery requests should be slightly longer than the proposed reduction to 30 days (currently 60 days is allowed) to 40 days. FSI believes that these suggested discovery deadlines are more realistic and will reduce the need for requesting extensions of time from the panel as a matter of course.

[8] See FINRA Discovery Guide, located at https://www.finra.org/arbitration-mediation/discovery-guide

## Conclusion

With the suggestions noted above, FSI believes that this proposal to revise FINRA's arbitration proceedings will protect investor interests, ensure efficient and timely resolution of disputes, and allow the requisite parties to meaningfully participate in FINRA arbitration. FSI applauds FINRA for its ongoing focus on protection of senior investors and vulnerable adults.

FSI is committed to constructive engagement in the regulatory process and welcomes the opportunity to work with FINRA on this and other important regulatory efforts. Thank you for considering FSI's comments. Should you have any questions, please contact me at (202) 393-0022.

Respectfully submitted,

Robin Traxler
Senior Vice President, Policy & Deputy General Counsel

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

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**12000. CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES**

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**PART VIII SIMPLIFIED ARBITRATION, ACCELERATED PROCESSING, AND DEFAULT PROCEEDINGS**

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**12808. Accelerated Processing**

**(a) Requests for Accelerated Processing**

(1) A party may request accelerated processing of a case when initiating an arbitration pursuant to Rule 12302 or filing an answer pursuant to Rule 12303, provided that the party making the request:

(A) is at least 70 years of age at the time of the request; or

(B) certifies, in the manner and form required by the Director, that: (i) the party has received a medical diagnosis and prognosis and (ii) based on that medical diagnosis and prognosis, the party has a reasonable belief that accelerated processing of the case is necessary to prevent prejudicing the party's interest in the arbitration. The party shall not be required to disclose the details of their medical diagnosis or prognosis with the certification.

(2) A party's certification made pursuant to paragraph (a)(1)(B) of this Rule shall not alone be sufficient grounds to compel the production of information

concerning, or allow questioning at any hearing about, the party's medical condition, diagnosis or prognosis.

(3) A party who does not meet the requirements of paragraph (a)(1) of this Rule may request that the panel consider other factors, including a party's age and health, when scheduling hearings and discovery, briefing, and motions deadlines, but shall not qualify for accelerated processing pursuant to paragraph (a).

**(b) Accelerating the Proceedings in Eligible Arbitrations**

(1) The Director shall determine if a party's request for accelerated processing complies with the requirements of paragraph (a)(1) of this Rule.

(2) If the Director determines that a request complies with the requirements of paragraph (a)(1) of this Rule:

(A) the Director shall send the arbitrator lists generated by the list selection algorithm to all parties at the same time, as soon as practicable after the last answer is due, notwithstanding any agreement of the parties to extend any answer due date;

(B) the panel shall endeavor to render an award within 10 months of the date the Director determines that a case shall be subject to accelerated processing;

(C) the panel shall hold a prehearing conference at which it shall set discovery, briefing, and motions deadlines, and schedule hearing sessions, that are consistent with rendering an award within 10 months or less; and,

(D) all other provisions of the Code shall apply, except as modified as follows:

(i) respondent(s) must serve the signed and dated Submission Agreement and answer on each party, pursuant to Rule 12303, within 30 days of receipt of the statement of claim;

(ii) a party responding to a third party claim must serve all other parties with the signed and dated Submission Agreement and answer, pursuant to Rule 12306, within 30 days of receipt of the third party claim;

(iii) no more than 10 days after the date upon which the Director sends the arbitrator lists to the parties, the ranked arbitrator lists of each separately represented party, pursuant to Rule 12402 or Rule 12403, must be completed via the Party Portal or, if the party is a *pro se* customer who opted out of using the Party Portal pursuant to Rule 12300(a), returned to the Director by first-class mail, overnight mail service, hand delivery, email or facsimile;

(iv) unless the parties agree otherwise, within 35 days of the date the answer to the statement of claim is due, or, for parties added by amendment or third party claim, within 35 days of the date their answer is due, parties must respond to Document Production Lists pursuant to Rule 12506; and

(v) unless the parties agree otherwise, within 30 days from the date a discovery request other than the Document Production Lists is received, the party receiving the request must respond to the discovery request pursuant to Rule 12507(b)(1).

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**13000. CODE OF ARBITRATION PROCEDURE FOR INDUSTRY DISPUTES**

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**PART VIII SIMPLIFIED ARBITRATION; DEFAULT PROCEEDINGS; SEXUAL ASSAULT CLAIMS, SEXUAL HARASSMENT CLAIMS, OR STATUTORY EMPLOYMENT DISCRIMINATION CLAIMS; [AND] INJUNCTIVE RELIEF; AND ACCELERATED PROCESSING**

* * * * *

**13808. Accelerated Processing**

**(a) Requests for Accelerated Processing**

(1) A party may request accelerated processing of a case when initiating an arbitration pursuant to Rule 13302 or filing an answer pursuant to Rule 13303, provided that the party making the request:

(A) is at least 70 years of age at the time of the request; or

(B) certifies, in the manner and form required by the Director, that: (i) the party has received a medical diagnosis and prognosis and (ii) based on that medical diagnosis and prognosis, the party has a reasonable belief that accelerated processing of the case is necessary to prevent prejudicing the party's interest in the arbitration. The party shall not be

required to disclose the details of their medical diagnosis or prognosis with the certification.

(2) A party's certification made pursuant to paragraph (a)(1)(B) of this Rule shall not alone be sufficient grounds to compel the production of information concerning, or allow questioning at any hearing about, the party's medical condition, diagnosis or prognosis.

(3) A party who does not meet the requirements of paragraph (a)(1) of this Rule may request that the panel consider other factors, including a party's age and health, when scheduling hearings and discovery, briefing, and motions deadlines, but shall not qualify for accelerated processing pursuant to paragraph (a).

**(b) Accelerating the Proceedings in Eligible Arbitrations**

(1) The Director shall determine if a party's request for accelerated processing complies with the requirements of paragraph (a)(1) of this Rule.

(2) If the Director determines that a request complies with the requirements of paragraph (a)(1) of this Rule:

(A) the Director shall send the arbitrator lists generated by the list selection algorithm to all parties at the same time, as soon as practicable after the last answer is due, notwithstanding any agreement of the parties to extend any answer due date;

(B) the panel shall endeavor to render an award within 10 months of the date the Director determines that a case shall be subject to accelerated processing;

(C) the panel shall hold a prehearing conference at which it shall set discovery, briefing, and motions deadlines, and schedule hearing sessions, that are consistent with rendering an award within 10 months or less; and,

(D) all other provisions of the Code shall apply, except as modified as follows:

(i) respondent(s) must serve the signed and dated Submission Agreement and answer on each party, pursuant to Rule 13303, within 30 days of receipt of the statement of claim;

(ii) a party responding to a third party claim must serve all other parties with the signed and dated Submission Agreement and answer, pursuant to Rule 13306, within 30 days of receipt of the third party claim;

(iii) no more than 10 days after the date upon which the Director sends the arbitrator lists to the parties, the ranked arbitrator lists of each separately represented party, pursuant to Rule 13404, must be completed via the Party Portal; and

(iv) unless the parties agree otherwise, within 30 days from the date a discovery request is received, the party receiving the request must respond to the discovery request pursuant to Rule 13507.

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