



Cornell University
Law School

Lawyers in the Best Sense

WILLIAM A. JACOBSON
Clinical Professor of Law
Director, Cornell Securities Law Clinic
138 Hughes Hall
Ithaca, NY 14853
T: 607-255-6293
F: 607-255-8887
E: waj24@cornell.edu

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 FINRA 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

Jennifer Piroko Mitchell

May 13, 2022

Page 3

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.

Jennifer Piroko Mitchell

May 13, 2022

Page 4

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