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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,

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⁸ FINRA Regulatory Notice 22-09 at 8.

⁹ *Id.* at footnote 23.