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**VIA EMAIL TO [pubcom@finra.org](mailto: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.<sup>1</sup> 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.<sup>2</sup> 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 country. 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.”<sup>3</sup> The proposal outlined in Regulatory Notice 22-09 plays an important role in this investor protection mechanism – without the

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<sup>1</sup> The following comments are submitted in my individual capacity and represent my own views.

<sup>2</sup> 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).

<sup>3</sup> 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 commentators who support expanding investors' right to seek expedited proceedings by lowering the age threshold for claimants seeking expedited relief.<sup>4</sup> 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."<sup>5</sup> 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

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<sup>4</sup> 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).

<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> At one time, investors had access to over two dozen law school clinics to assist them in navigating the FINRA arbitration process.<sup>8</sup> 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.<sup>9</sup> 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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<sup>6</sup> One commentator 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.”).

<sup>7</sup> 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](https://www.finra.org/sites/default/files/notice_comment_file_ref/SN-32117_GSU_comment.pdf).

<sup>8</sup> 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>.

<sup>9</sup> *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."<sup>10</sup> 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."<sup>11</sup> NAMC members are distinguished expert participants in the FINRA arbitration forum, representing all voices in the FINRA forum.<sup>12</sup> 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."<sup>13</sup>

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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<sup>10</sup> FINRA, *Advisory Committees*, <https://www.finra.org/about/governance/advisory-committees>.

<sup>11</sup> FINRA Rule 14102(b) (2015).

<sup>12</sup> FINRA, *Advisory Committees*, <https://www.finra.org/about/governance/advisory-committees> ("The NAMC members include investors, securities industry professionals and FINRA arbitrators and mediators.").

<sup>13</sup> *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<sup>14</sup> 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*

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<sup>14</sup> See Steven B. Caruso, Comment Concerning Regulatory Notice 22-09 (Apr. 28, 2022).