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**Via email to [pubcom@finra.org](mailto: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.<sup>1</sup> 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.

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> These numbers are from 2019, so presumably they also declined in 2020.

Additionally, life expectancy varies based on geographic location in the United States.<sup>5</sup> 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.<sup>6</sup> In comparison, in Hawaii, the state with the highest life expectancy data, the average life expectancy for both sexes was 80.9 years old.<sup>7</sup> Research suggests that life expectancy is highest in states in the West and the Northeast, while life expectancy in

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<sup>2</sup> See CDC, NCHS Data Brief No. 427 (Dec. 2021), <https://www.cdc.gov/nchs/data/databriefs/db427.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> 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>.

<sup>5</sup> 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>.

<sup>6</sup> *Id.*

<sup>7</sup> *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.<sup>8</sup> In those neighborhoods, there are “higher exposures to environmental toxins” and a lack of access to “quality health-care services.”<sup>9</sup> Compared to their white counterparts, “these groups often experience health complications at higher rates” because of these systemic inequities.<sup>10</sup> 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.<sup>11</sup> Both institutional and cultural racism can negatively impact health.<sup>12</sup>

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.<sup>13</sup> 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

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<sup>8</sup> 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#/](http://www.Nationalequityatlas.org/indicators/Life_Expectancy#/).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 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/>.

<sup>13</sup> 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.<sup>14</sup> The median income for Black households was \$45,870 and for Hispanic households was \$55,321.<sup>15</sup> 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.”<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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

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<sup>14</sup> 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>.

<sup>15</sup> *Id.*

<sup>16</sup> American Psychological Assoc., *Ethnic and Racial Minorities & Socioeconomic Status*, <https://www.apa.org/pi/ses/resources/publications/minorities>.

<sup>17</sup> FINRA, *Dispute Resolution Statistics* (through Mar. 2022), <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics>.

<sup>18</sup> *Id.*

for 2019.<sup>19</sup> 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,

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<sup>19</sup> *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%).