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December 14, 2017

Via E-mail

Marcia E. Asquith
Office of the Corporate Secretary
FINRA 1735 K Street, NW
Washington, DC 20006-1506
pubcom@finra.org

Re: Regulatory Notice 17-34
Non-Attorney Representatives in Arbitration

Dear Ms. Asquith:

This letter is written to comment on the efficacy of allowing compensated non-attorney representatives (“NAR companies”) to represent parties in arbitration. This law firm has an established history practicing in the securities arbitration field and has dealt with such companies in several matters. For the reasons set forth below, we are of the opinion that NAR companies pose a serious threat to the effectiveness, fairness, and quality of securities arbitration. Furthermore, we strongly believe that such representatives present a substantial risk of harm to investors. Therefore, the FINRA Code of Arbitration Procedure (“the Code”) should be amended to prohibit NAR companies entirely.

Pursuant to Rule 12208 parties to an arbitration may not be represented by non-attorneys if State law prohibits such representation or the representative has previously been barred from the securities industry.¹ Many States prohibit this type of representation and have deemed it to constitute the unauthorized practice of law.² These States and their respective bar committees

¹ Rule 12208(c)

² Sarah Rudolph Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?*, 48 U.C. Davis L. Rev. 921, 949 (2015). Florida, Illinois, Virginia, Alabama, and Arkansas are among the states that prohibit NAR firms from appearing in arbitrations.

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found that representing a party in arbitration constitutes the practice of law because it requires substantive legal analysis as well as practical lawyering skills including motion practice, examining witnesses and presenting opening and closing arguments at the hearing.³ States that prohibit non-attorney representatives in arbitration include, but are not limited to: Alabama, Arkansas, Arizona, California, Connecticut, Florida, Illinois, Kansas, Ohio, and Virginia.⁴

FINRA arbitrations require the same expertise and lawyering skills listed above. Furthermore, the legal and financial issues argued in a FINRA arbitration are complex issues that require the degree of skill and care of a lawyer who is bound to uphold ethical rules. As others have noted, NAR companies are not bound by such rules; therefore, there may be little to no recourse for consumers harmed by a non-attorney representative's ineffective assistance of counsel.

Investors may be fraudulently led to believe that they have an actionable claim by NAR companies, after payment of an "Investigation" fee. If an attorney engaged in such conduct, the client could seek recourse through a malpractice suit. NAR companies, on the other hand, cannot be sued for malpractice because they are not held to the professional or ethical standards of attorneys. Permitting such conduct diminishes the legitimacy of securities arbitration as an effective means of dispute resolution.

Even restricting the appearance of non-attorneys to states in which the practice is prohibited has proven to be ineffective. NAR companies have found ways to skirt such rules by filing paper-only claims and avoiding appearance in the state. This firm has also dealt with a NAR company that is indirectly owned and controlled by a previously barred member of the securities industry. He has shifted ownership of his company several times to circumvent the FINRA Rule prohibiting barred members from representing others in arbitrations. This shows that while Rule 12208 aims to prevent fraudulent behavior in arbitrations, it has little bite in practicality and stronger measures need to be put in place.

NAR companies may argue that ownership by a barred member does not prohibit other non-barred employees from appearing in arbitrations. This argument falls short and FINRA should consider a piercing the corporate veil analogy. Courts pierce the corporate veil where the owner dominated and controlled the corporation and used this control to commit fraud which was the proximate cause of injury.⁵ A similar analysis should be undertaken when barred members of the industry form asset recovery firms to continue to prey on unwary investors.

³ *Supra* note 2 at 950.

⁴ *Supra* note 2; *See also, infra* notes 12-13; *Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct. of Santa Clara County*, 949 P.2d 1 (Cal. 1998); *In re Peterson*, 163 B.R. 665 (Bankr. D. Conn. 1994); *Disciplinary Counsel v. Alexicole, Inc.*, 105 Ohio St. 3d 52, (Ohio 2004).

⁵ *See, Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135 at 141 (1993); *See generally, U.S. v. Best Foods*, 524 U.S. 51 (1998).

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Both the SEC and FINRA have addressed the risk of NAR companies in the past. On August 6, 2016 the SEC released an Investor Alert regarding Asset Recovery Companies.⁶ The Alert notes that these companies charge investors exorbitant fees to file boilerplate complaints and send a demand letter to the opposing party.⁷ Importantly, the SEC notes that these are steps that the investors can take “easily on their own, free of charge.”⁸ FINRA similarly issued an Investor Alert warning investors of the risk of “Recovery Scams.”⁹ This Alert notes that fraudulent recovery companies will often seek out investors who have traded in speculative securities and lost money.¹⁰ Both Alerts underscore the serious risks posed by allowing NAR companies to continue to solicit investors and attempt to represent them in arbitrations. Investors stand to lose even more through recovery scams, further exacerbating their market losses.

This firm has learned of cases in which the harm caused by NAR companies is glaringly apparent. In one instance, an investor from California was fraudulently induced to pay a retainer fee which he never recovered. The company cold-called the investor several times offering to help him recoup losses in his brokerage account. The investor did not believe his losses were recoverable due to the speculative nature of his portfolio, but he agreed to let the company represent him after repeated telephone solicitations. The NAR company required him to sign a contract entitling the company to 30% of any funds recovered and to pay a non-refundable \$9,800 processing fee. The investor paid the fee and has never heard from the company again.

Unfortunately, the scenario above is not an outlier when dealing with NAR companies. In July 2017, a former NAR company client filed a claim against the company for failure to repay \$375,000 in loans.¹¹ The investor was convinced to “invest” his settlement funds into the company with the promise of payable interest. However, like the investor from California, this investor sent his funds to the NAR company and has not heard from them since. Mishandling client funds or failing to return retainer fees that have not be earned is rightfully one of the most harshly punished forms of attorney misconduct. If such conduct were allowed to occur unpunished, it would sully the ethical reputation of our profession. However, NAR companies have no incentive to return client fees because there is little the client can do to claim them.

If that conduct is not disconcerting enough, NAR companies’ performance in arbitration is frequently inept. These companies often bring claims in states which have outlawed non-attorney representation. The claims proceed through the normal process only to be dismissed at

⁶*Investor Alert: What You Should Know about Asset Recovery Companies*, SEC.GOV, (Aug. 9, 2016), https://www.sec.gov/oiea/investor-alerts-bulletins/ia_assetrecovery.html

⁷ *Id.*

⁸ *Id.*

⁹*It Can Be Hard to Recover from “Recovery” Scams*, FINRA.ORG, (Sep. 19, 2016), <http://www.finra.org/investors/alerts/it-can-be-hard-to-recover-from-recovery-scams>

¹⁰ *Id.*

¹¹ See AFF. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT: *Kenneth B. Rowan v. Cold Spring Advisory Group LLC*, INDEX NO: 605223/2017 available at <https://iapps.courts.state.ny.us/webcivil/FCASSearch>

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hearing for the unauthorized practice of law.^{12,13} As a result, investors are forced to drop their claims altogether or the entire process is delayed for several months.

In the instances that NAR companies are authorized to appear in arbitration, they rarely achieve positive outcomes for their clients. A search of the FINRA Awards Database focusing on just one NAR company returned 27 award results. Of these awards, approximately 74% were dismissed with approximately 32% of those dismissals resulting in expungement recommendations. This demonstrates that NAR companies are willing to bring frivolous and unfounded claims in an effort to extort settlements from broker-dealers and harm associated persons unnecessarily. Furthermore, any valid claims brought by NAR companies rarely achieve positive outcomes for their clients because of the poor quality of representation. A majority of the awards secured by this NAR company were against respondents who either failed to appear at the hearing or appeared pro se.

Attorneys who violate their ethical rules are subject to serious sanctions including suspension and disbarment. These rules prohibit conduct such as tampering or destroying evidence, failing to respond to discovery requests, and suborning perjury. NAR companies are not bound by the same rules so there is no recourse if they engage in such conduct. On the contrary, NAR companies are behooved to manipulate the arbitral process by destroying evidence, ignoring discovery requests, and suborning perjury because it allows them to strengthen their case with no fear of reprisal. Such conduct destroys the integrity of FINRA arbitrations and delegitimizes the process.

Rule 12208 was a laudable attempt to afford smaller investors the opportunity to secure representation in FINRA arbitrations in cases that attorneys would not take. However, in practicality, the Rule has been manipulated by NAR companies to fraudulently exploit unwary investors. The classic rationale for allowing NAR companies to appear in arbitration is that it affords investors with small claims the ability to pursue these actions. However, such investors can already receive competent and free representation from pro bono services such as law school clinics. These clinics are overseen by licensed attorneys and the work is performed by full-time law students. The level of work performed by these clinics is far superior to the boilerplate complaints filed by NAR companies and it costs the investors nothing. Furthermore, as the SEC noted, most of the actions taken by NAR companies can easily be performed by the investors themselves. Therefore, the investors gain little from NAR company representation.

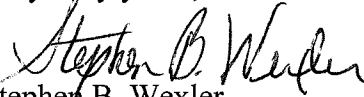
¹²*Tom Halling v. Cape Securities Inc., Lon Charles Faccini, Jr., and Michael Allen Lovett*, 2017 WL 947700 (2017) (Brahin, Arb.).

¹³*Jay R. Simon v. Aegis Capital Corp., Robert Jay Eide, Kevin C. Meade, Nicholas Francis Milano, Anthony Michael Monaco, Sr. Jonathan Edward Rago, George Gregory Kott, and Kevin Charles McKenna*, 2016 WL 6125023 (2016) (Parker, Arb.).

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FINRA should amend the Code to prohibit non-attorney representation entirely. These companies have proven over time that they are incapable of providing competent representation for aggrieved investors. Their involvement in the FINRA dispute resolution process undermines its effectiveness, fairness, and efficiency. Their conduct destroys the credibility and integrity of FINRA arbitrations and the entire process is compromise by their involvement. As such, NAR companies should be prohibited from representing investors in FINRA forums.

Very truly yours,


Stephen B. Wexler

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