



# COLD SPRING

## ADVISORY GROUP

December 18, 2017

[VIA E-mail to PUBCOM@finra.org](mailto:PUBCOM@finra.org)

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

RE: REGULATORY NOTICE 17-34

Dear Ms. Asquith:

Cold Spring Advisory Group, LLC (“CSAG”) submits this response to FINRA’s Request for Comments set forth in Regulatory Notice 17-34 (the “Notice”). CSAG is a non-attorney entity that has successfully represented investors in the FINRA Arbitration Forum (the “Forum”) since 2014, and through its involvement with investors in securities arbitrations and mediations has been instrumental in the return to investors of assets in excess of \$4,000,000. CSAG has first-hand knowledge of the FINRA Arbitration process, both its positives and its negatives, and is therefore uniquely qualified to provide input as requested in the Notice from the perspective of an established Non-Attorney Representative (“NAR”) firm.

### OVERALL POSITION

The position of CSAG is that NAR firms are an added resource to curtail the activities of unscrupulous brokers, broker/dealers, and the infectious wrongdoing that continues to plague the investor community. The Wolf of Wall Street existed and continues to exist, and unquestionably NAR firms help provide additional recovery avenues for investors. FINRA can implement protective measures to address concerns without using a broad stroke to eliminate this effective service currently available to help investors recover losses.

## CONCERNS ABOUT THE TASK FORCE REPORT METHODOLOGY

Preliminarily, however, CSAG is compelled to call attention to a serious failure of the Task Force's investigation of NAR's efficacy. Consistent with the self-serving nature of FINRA as its own financial money-making entity in which fines of brokerage firms are NEVER distributed back to the harmed investors (a fact that Senator Elizabeth Warren from Massachusetts is well aware and is investigating), FINRA now seeks to investigate the representation of investors without having surveyed the investors themselves! FINRA's Task Force did not receive a single shred of *investor* testimony in support of its Task Force conclusion according to Appendix III of the Task Force's report. CSAG requested transcripts of the testimony the Task Force heard, but was told that "The Task Force made only its final Report (attaching an interim summary that also was published) publicly available and made no recordings of any subcommittee or Task Force meetings." The Notice, therefore had to be the result of submissions by individuals and entities other than the individuals sought to be "protected", to wit, the investors.

It is simply remarkable that FINRA did not reach out to the individuals whom they allegedly are trying to protect. Had they done so, they would have inevitably determined that those individuals have received (speaking only through this firm's experience as a leader in the NAR field), results which exceed the statistical results submitted by PIABA and FINRA relating to awards and recovery. It is also a fact that FINRA has absolutely no idea of settlements which occurred through NARs on behalf of investors, because those settlements, like settlements through attorneys, are not reported. However, this submission will shed light on those recoveries in general terms because specifics cannot be disclosed due to the confidential nature of settlement agreements.

It is also troubling that the FINRA Department of Dispute Resolution did not present more information to the Task Force. FINRA had the ability to gather meaningful information to be presented to the Task Force by mailing a form letter questionnaire to the investors that have used the services of NARs. It is without question that FINRA's Department of Dispute Resolution has all the information in its database to correspond with every Claimant who filed a claim through the services of an NAR. FINRA fails to realize, or chooses not to realize, that most of the Claimants that retain NAR firms are located outside metropolitan areas where access to counsel is limited at best, and the chances of those investors reviewing a FINRA website for comments about their experience is remote at best. This lack of fair research is problematic and inexcusable if the true purpose of the Notice is to query investors who utilized the services of NARs.

## ANALYSIS OF RESPONSES TO THE NOTICE

Of course, if the filings associated with this Notice are any indication of what may have been submitted to the Task Force, it is clear that members of the Plaintiff's Bar and Respondent's Bar barely submitted input, and it is also a fact that of all the thousands of participants in the Forum, only a mere handful have provided submissions to this Notice. It is easy to conclude, therefore, that the concern about NAR firms is conjured up by a few "bad apples in the bunch" who really are not looking out for the general welfare of the investor community, some of which, for example, are rural farmers in the Midwest of this country who have limited access to attorneys who know anything about the FINRA Forum.

One must ask why did the individuals and entities that submitted input to the Notice do so?<sup>1</sup> A review of the responses reflects that 5 sources provided input, (1) a few representatives of Plaintiff's Bar, (2) a few representatives of Respondent's Bar, (3) a few arbitrators, (4) firms like CSAG that support NAR firms and (5) Investors who were made aware of the desire for input. The explanations for the responses against NAR participation are simple: the Plaintiff's Bar is hypothetically losing business (it would be absurd to think for a moment that Plaintiff's Bar exists to serve the public without compensation), and the Respondent's Bar, while they should be thankful for the business of defending their broker and broker dealer clients, know that NAR participation increases the number of claims against their clients, which exposes those firms to net capital issues effecting the payment of legal fees. It is also a fact, that some of the responses to this Notice were submitted by law firms that represented the brokers against whom NARs filed complaints on behalf of investors. Many of their clients had CRDs that warranted revocation of licenses by FINRA's Department of Enforcement, but because of the laxity and failure of that Department to take aggressive action against dues-paying brokers, those brokers have been allowed to perpetuate abuse on the investor public, so of course those attorneys desire to see NARs and their marketing arms truncated.

With regard to the other categories of submissions, the Arbitrator Kashouty's input was, and is, clearly supportive of the efficacy of NAR firms and there is no stronger confirmation needed to show that experienced NAR firms can handle and represent investors in arbitrations just as well as "legal counsel", and that the "specialization" purported to be in the possession of lawyers is merely a mirage. The input from William Jacobson, an attorney and Director of the Cornell Securities clinic, is likewise supportive of the continued use of NARs, and FINRA simply can't overlook the fact that Mr. Jacobson administers a law school clinic which FINRA itself deems to be a resource for investors. Obviously, CSAG is a proponent of NAR involvement in the arbitration process and lastly, there are responses from investors, the actual individuals that

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<sup>1</sup> CSAG has corresponded with Kenneth Andrichik (Senior VP and Chief Counsel) and Kristine Vo (Assistant Chief Counsel) of FINRA's Office of Dispute Resolution regarding the failure of FINRA to post Responses onto the portal in a timely manner. To the extent that responses are posted after the cut-off date, CSAG reserves the right to update this Response to address submissions accordingly.

FINRA seeks to protect. Unless FINRA takes those investor letters seriously, a decision to limit the role of NAR firms was made with a hidden agenda.

#### ADDRESSING THE ISSUES RAISED IN THE NOTICE

The Final Report of the Task Force, which was the basis for the Notice, reflected some “concerns” regarding NAR firms, but those “concerns” are completely, and surprisingly unsubstantiated. For example, while the Notice states that “Forum users have reported that NAR firms **require** retainer agreements that reflect a \$25,000 non-refundable fee” (see page 2 of the Notice, emphasis added), this firm has no such requirement whatsoever and it is irresponsible that the Task Force made such a conclusion about NARs without providing or seeing evidence of that contention. Secondly, the Task Force had no evidence of what the fees that may be charged are used for. Each case is unique in terms of complexity and the degree of necessary analysis to create an effective statement of claim.

For example, in any given case, NAR firms may be required to literally analyze thousands of pages relating to an abused account in order to calculate mark-ups and mark downs, turnover ratios, cost-to-equity ratios, or to obtain expert testimony for which payment to a forensic entity would have to be rendered. The Task Force neither sought, nor was presented with the parameters of fees charged by NARs, so how could it make a determination that the fees were (a) unreasonable or (b) mandatory? The lack of identification of whom provided input into this contention is highly suspicious recalling, again, that no investor was presented to the Task Force, and CSAG suggests that this “evidence-less” contention was fueled by a law firm, lawyer, or pro se litigant that CSAG sued on behalf of an abused investor.

Similarly, and outrageously, the Task Force had no basis to contend that NAR firms file “frivolous or stale claims to attempt to elicit settlements”. How could that contention be supported unless a Respondent or representative planted that idea with the Task Force since there are no awards in the FINRA Award Database reflecting such a conclusion involving NARs? It is also beyond comprehension how this can be a legitimate concern of FINRA given the multitude of decisions in its own FINRA Award Database where *legal counsel* has filed “stale or frivolous claims” that were outright denied pursuant to FINRA Rule 12206. If one searches the FINRA Arbitrations Awards Online site for cases involving Rule 12206 (the “Eligibility Rule”) several attorney’s names appear repeatedly. It is simply ludicrous that the Task Force suggested this as a concern to possibly justify denying investors access to NARs given the plethora of cases where individuals admitted to the Bar had cases dismissed outright.

The most unsubstantiated “contention” by the Task force is reflected in its “concern” that confidentiality provisions in settlement agreements were breached by posting a picture of a settlement check to market an NAR’s services on a website (see page 3 of the Notice). The undersigned has no knowledge of any NAR firm posting any pictures of “settlement checks”, other than CSAG so the “concern” has to be addressed by CSAG. While it is true that CSAG, with client permission, does post a “stock photographic check” with the amount of a settlement for purposes of advertising successful results, it is an absolute fact that the client is not identified on the posting, nor is the broker or brokerage firm that was involved in a settlement. There is absolutely NO basis to conclude that any Confidentiality Agreement was ever breached by the encrypted marketing of results obtained through the efforts of this NAR, and in fact, when litigated, the Supreme Court of the State of New York, dismissed that exact claim (see Supreme Court of the State of New York County of Nassau Spartan Capitals [sic] Securities v John Russo individually and as trustee of the John Russo Trust, and Cold Spring Advisory Group, Index No. 610284-16).

Likewise, the remaining “concerns” listed through the Notice are without substantiation, and speaking for this firm only, there is no avoidance of signing arbitration submission agreements with the name of this NAR to avoid naming an individual in an effort to circumvent the unauthorized practice of law (see page 3 of the Notice). To the extent that it occurred in one case, there is no systematic avoidance, and were FINRA to ask for input from this firm, it would provide copies of over 50 Statement of Claims filed by CSAG to prove the fallacy of this “concern”.

Yet another contention that is beyond comprehension in the Notice, is the “concern “of the Task Force that “NAR firms handle only small claims (decided on written submissions) to avoid hearing locations in which unauthorized practice of law would be an issue” (see Page 2 of the Notice). The absurdity of this contention is beyond explanation. It is axiomatic that if a client has a claim of \$50,000 or less, FINRA requires the Arbitration to proceed under Rule 12800 as a Simplified Arbitration. Claimant may choose between having their case decided on the papers submitted by the parties or to request a hearing with a single arbitrator. To suggest that someone other than the NAR firm or the client understood why a paper submission was chosen, is yet another twist in a badly written plot. It seems that if the Task Force and the adversaries to NAR participation had their way, the option for a case to be heard on the papers should be eliminated as well. If a client wants to limit his claim to \$50,000 so that the cost of a case is limited, why shouldn’t that Claimant be allowed to do so since that is the purpose of Simplified Arbitrations, to limit costs in obtaining justice.

With regard to the representation of Investors in arbitrations and mediations, and speaking for this NAR only, it is a fact that clients of this firm have participated in the settlement of cases resulting in payment by the wrongdoing firms and brokers in excess of \$4,000,000. This has occurred NOT, as the Notice implies, as a result of filing frivolous claims, but as a result of

firms and brokers confronted with and realizing their wrongdoing by an entity that understands the trickery of brokers and broker dealers.

These results don't come because this NAR firm doesn't know what it's doing in the FINRA Forum. These results occur because this NAR knows exactly how the FINRA arbitration process works and seeks to hold brokers and brokerage firms accountable in a forum which this firm understands and has practiced within every business day since 2014. This firm is involved in the assistance of investors recovering funds every day and only exists for that purpose. It doesn't get involved in real estate closings, it doesn't prepare wills, and it is not distracted from its focus.

The brokerage industry does not like that this NAR firm knows, for example, about the use of New Account Forms that are pre-populated with "Speculation" as an objective with the hope the client signs it without noticing so in the event the investor sues the broker, the broker already has a "defense" in place. They do not like that this NAR firm knows about hidden commissions in Private Placements, and knows that mark-ups and mark downs are used to camouflage the commissions they charge, and knows how firms and brokers use deal flow to manipulate Commission over Asset (CoA) ratios to their advantage.

Simply stated, the industry doesn't like knowing they are in a fair fight because of this knowledge so they try their best to keep NAR firms out of the Forum, as they did in presenting to the Task Force. Their desires have nothing to do with protecting the public; it has everything to do with protecting their bottom lines and wallets. Paranoia is dangerous when a pen is in the hand of an adversary.

#### MISCELLANEOUS ISSUES

CSAG is also concerned about the failure of FINRA to allow the court system to deal with the unauthorized practice of law, where that issue belongs. In NO instance, has a Respondent, or their/its counsel sought a Declaratory Judgement in any state seeking a decision relating to the legitimacy of a NAR to appear in that state using the FINRA forum. This is the reason why FINRA received "serendipitous" input to the Task Force. The issues are not clear, and it is well documented at this point which states, by legislation and case law, require investors to be represented by counsel in those states (California, Illinois, and Florida for example). In fact, FINRA provides a notice to the Claimant upon filing cases with those states as jurisdiction, that counsel must appear in that state. The broad stroke action being proposed in the Notice therefore, is not necessary to protect investors, but rather, came because self-interested opposition to NAR firms provided their biased input to the Task Force to avoid judicial declaration, and the Task Force took the bait without support.

While there are undoubtedly individuals and entities whom are averse to the allowance of NAR firms in the Forum based upon their own financial insecurities (with complete disregard to the welfare of the investor public), the undeniable truth is that as far as this NAR is concerned, there are absolutely no decisions adverse to the ultimate resolution of a FINRA case in which there was a conclusive ruling that this NAR was involved in the unauthorized practice of law. Specifically, in those rare instances where it appeared that there was actual concern about a particular state's legislative or case law determination about NAR firms in general, (and not merely a smoke screen allegation by an adversary looking to distract the panel from the underlying merits of a broker's wrongdoing), this firm advised its client about the need to withdraw and to obtain counsel, and counsel was obtained to represent that client in the matter.

As a result of this mindful practice, there is not a single case available in the FINRA database where a client of this NAR firm received a decision or award in which that client was not represented by counsel at the time of the decision when an actual concern about the unauthorized practice of law was possible. The raising of the issue by a subjective adversary does not mean there is unauthorized practice of law, nor does the rare analysis of an Arbitrator in a case where an NAR firm no longer appeared on behalf of a Claimant.

Although entities such as PIABA and some of its members are convulsing to twist the arm of regulators to prevent the continued benefit to the public of specialized NAR assistance, their members cannot be allowed to do so by twisting the facts. There are certain members of PIABA who respect the NAR assistance, and certain members who have a hidden agenda to do all they can to prevent NAR firms from "taking a bite from their apple", and it has nothing to do with the welfare of the public. Were this the proper forum, this NAR firm could list pages of decisions by attorneys and members of PIABA in which their clients were denied relief, but this not the proper forum for such a discussion. Viewing the proposed action through objective lenses, there simply are no overwhelming facts to support a conclusion other than that NAR firms are as efficient as counsel, and there is no proof to the contrary. The FINRA database is replete with cases dismissed, and sanctions ordered against counsel, but no such data exists with regard to NARs.

The suggestion that investors may have no recourse against NARs if they are dissatisfied with NAR representation is again, preposterous, as FINRA has no idea whether an NAR has insurance to cover potential issues (most brokerage firms do not carry stock broker blanket bond coverage, which explains why so many awards are rendered uncollectable, and so many brokers declare bankruptcy to avoid investor recovery). Rather, FINRA could consider mandating NAR firms to carry insurance to remain a participant in the Forum, and also have law firms, especially solo practitioners do the same, because there is no proof that firms or lawyers carry insurance. This is a solution-driven suggestion to maintain investor protection which seems to be a concern, and rightfully so.

The Notice states that 1/5<sup>th</sup> of all filings are small claim filings and that investors have limited access to attorneys “because attorneys may not be willing to offer services given the small dollar amount of the dispute” (see page 3 of the Notice). The Notice then goes on to say that some of the investors are served by law school arbitration clinics, and others by NAR Firms. If FINRA were to disallow the representation of NAR firms, by its own admission, 1/5 of all FINRA claims would go unrepresented, or somehow miraculously, law school clinics, (which utilize law students that have not passed the bar exam and have no litigation experience whatsoever) would be representing investors. The guidance of a professor, or two, of over 1/5 of the cases filed at FINRA is simply a disaster waiting to happen. In addition, how would an investor located in Illinois who used a law clinic in New York or Washington, pay for the law students to travel to Illinois? The Notice even admits as such (see page 4 of the Notice, 1<sup>st</sup> paragraph). Would forensics be prepared by the law clinic? No, the client would have to absorb that cost, which is exactly what retainer fees with NAR firms cover anyway. The logic is absurd.

The Notice also states that there is no mechanism for investors to take action against NAR firms. That is completely wrong. The exact same mechanism exists for NAR, as it does for claims against lawyers. A lawsuit is filed. There is no guarantee whatsoever that a lawyer can honor a lawsuit by an investor, and FINRA should endeavor to determine how many clients have sued their lawyers over cases which resulted in sanctions, or outright dismissals.

A serious error of presumption in the Notice, is that all attorneys that practice in its forum are experienced securities attorneys. This is simply not true. But it is a fact that NAR firms only do securities work. The concerns raised, while likely valid to some extent, do not solve the problem of incompetent attorneys, of which there are many based upon the publically available awards alone. FINRA does not police attorneys although it has been asked to do so in many instances, and it should not extend itself beyond imposing reasonable assurances of compliance with NARs.

The Notice also correctly considers the potential of investors to not avail themselves of counsel due to the restriction of marketing imposed on the legal profession. Attorneys are generally prohibited from reaching out directly to investors, and it becomes cost prohibitive to reach out to the general public, thereby decreasing the likelihood of investors having redress over wrongdoing. This is most certainly the void that NAR firms fill in aiding and educating the investor community that has no idea about the ability to seek redress through FINRA’s Department of Dispute Resolution.

## CONCLUSION

The continued use of NAR firms by investors has not been shown to warrant the exclusion of NARs from appearing in the FINRA Forum. To the extent that FINRA desires additional layers

of protection and to enhance recovery in the case of investor complaints, there are options that can be required of *all* participants in the FINRA Arbitration Forum. There is no basis for extinguishing the use of NAR firms by investors, as NAR firms have proven to be an effective resource to an underserved and underinformed population of investors.

Respectfully Submitted,



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