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Invested in America

December 15, 2017

Via E-Mail to 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 (non-attorney representatives in arbitration), dated October 18, 2017 ("Notice 17-34")

Dear Ms. Asquith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on Notice 17-34.[2] Notice 17-34 requests comment on whether FINRA should continue to permit compensated non-attorney representatives ("CNAR firms") to represent customer claimants in securities arbitration and mediation. In the interests of investor protection and the integrity of the arbitral forum, and for the reasons further detailed below, SIFMA recommends that FINRA henceforth prohibit CNAR firms from representing customer claimants.

As a threshold matter, we remain supportive of FINRA's position of allowing customer claimants to appear pro se – just as they may in court, or together with the help of a trusted relative or friend, or with the assistance of a law school arbitration clinic. At the same time, proceeding in FINRA's arbitral forum without the benefit of direct representation by a duly licensed attorney is not without its risks.

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] Notice 17-34, available at http://www.finra.org/industry/notices/17-34.

The FINRA Code of Arbitration for Customer Disputes is 50-pages in length and contains over 80 rules, each with numerous subparts. Many of the rules have also been subject to frequent amendments and include interpretive materials and related regulatory notices. The rules are thus fairly sophisticated and the arbitration process is fairly complex. A claimant customer's representative may be called upon to advise his or her client in the following areas, among others:

> (1) advising investors as to whether or not they are compelled to arbitrate under their investor-broker agreement; (2) advising investors of the eligibility rules and statute of limitations for any potential claims; (3) advising investors as to the scope of the arbitrators authority; (4) advising investors whether to settle the dispute before filing a claim; (5) advising investors as to the merits of specific claims and defenses; (6) advising investors whether attorneys or expert witnesses should be hired; (7) advising investors whether a petition to stay the arbitration should be filed; (8) advising investors on the possibility and merits of related or alternative civil actions; (9) conducting discovery including depositions; (10) oral advocacy including; presenting evidence, raising objections, examining witnesses and voir dire of experts, preparing opening and closing arguments; (11) written advocacy including preparing and filing the initial written states of claims, answers, counter-claims, motions, and legal memoranda; (12) confirming, collecting or vacating and arbitral award.[3]

In order to reasonably protect the rights and property of a customer claimant, the person giving the foregoing advice should possess legal skill and a knowledge of the law greater than that possessed by the average layperson.[4]

FINRA cannot ensure the competency of CNAR firms.

Notice 17-34 acknowledges that the competency of CNAR firms is a key element in weighing the costs and benefits of whether such firms should continue to be allowed to represent customer claimants. An attorney's competence is evidenced by, among other things, his or her graduation from an accredited law school, passage of the bar exam, completion of a robust bar application, and acceptance into a state bar association. With respect to a CNAR firm, however, FINRA has no current means to measure or ensure competency, nor respectfully, should it put itself in the business of doing so.

FINRA cannot ensure the accountability of CNAR firms to their clients or to FINRA.

Attorneys are subject to professional and ethical standards that establish a minimal level of conduct below which the attorney may be subject to a bar complaint and disciplinary action – up to and including disbarment – by his or her bar association. In addition, most attorneys carry malpractice and/or professional liability insurance. CNAR firms, on the other hand, are not subject to any conduct rules, or to oversight or discipline by a licensing board, and it is uncertain what insurance coverages, if any, they carry. Thus, FINRA has no identifiable means to hold CNAR firms accountable to either their clients or their duties and obligations in FINRA's arbitral forum.

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[3] *See Fla. Bar re Advisory Opinion on Nonlawyer Representation in Sec. Arbitration*, 696 So. 2d 1178, 1180 – 81 (Fla. 1997).

[4] This statement remains true regardless of whether a particular state bar association concludes that representing a client in FINRA arbitration technically constitutes the "practice of law." *See id.* at 1182 (concluding that it does).

FINRA is aware of ongoing harmful conduct by CNAR firms towards customer claimants.

Notice 17-34 also acknowledges at the very outset that there are only a small number of CNAR firms regularly practicing in the forum, but that these firms continue to engage in a litany of abusive and harmful practices towards customer claimants including, among many others, charging excessive fees, and pursuing frivolous claims. There is little doubt that these ongoing malpractices are the result of the combination of CNAR firms' lack of competence and lack of accountability to both their clients and the arbitral forum.

Any marginal benefits that CNAR firms may provide to customers with smaller claims are overwhelmingly outweighed by the above-described costs and burdens imposed by CNAR firms. CNAR firms represent a known, clear and present danger to investor protection and forum integrity that requires immediate attention. We reiterate our recommendation that FINRA henceforth prohibit CNAR firms from representing customer claimants.

We believe that our recommended ban should be accompanied by additional FINRA investor education on representation options for customer claimants in the FINRA forum. We are hopeful that such a ban might encourage further engagement by law school arbitration clinics, and present a new opportunity for law firms who may want to specialize in smaller claims.

Thank you for the opportunity to share the foregoing recommendations to better protect investors and enhance the integrity of FINRA's arbitration forum. If you have any questions or would like to further discuss these issues, please contact the undersigned.

Sincerely,

Kevin M. Carroll
Managing Director and
Associate General Counsel

cc: ***via e-mail to*:**
Robert L.D. Colby, Chief Legal Officer, FINRA
Richard W. Berry, Executive Vice President and Director FINRA-DR