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The purpose of this letter is to provide the Financial Industry Regulatory Authority, Inc. ("FINRA") with comments to Regulatory Notice 22-09 ("RN 22-09") that was issued on March 16, 2022.

I am a retired attorney whose prior practice was exclusively devoted to the representation of individual and institutional investors in their disputes with the securities industry. Moreover, I am the immediate past Chairman of FINRA's National Arbitration and Mediation Committee ("NAMC") and a former public member of the NAMC – in fact, I served in both positions during two separate and distinct terms, the former Chairman of FINRA's Discovery Task Force Committee ("DTFC"), a former member of the Securities Investor Protection Corporation ("SIPC") Modernization Task Force and a former President, former member and current Director Emeritus of the Public Investors Advocate Bar Association ("PIABA").

It is my understanding that FINRA seeks comment on a proposal to add a new rule to the FINRA Codes of Arbitration Procedure ("FINRA Codes") which would "allow any party to request accelerated processing of an arbitration proceeding if they: (1) are at least 75 years old; or (2) certify that they have received a medical diagnosis and prognosis and that, based on that information, they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration."

It is my further understanding that the procedural predicate for this proposal would be effectuated through the shortening of certain case processing deadlines for parties and arbitrators including, but not necessarily limited to, the deadlines that are currently applicable to the service of certain pleadings, the selection of arbitrators, certain portions of the discovery aspects of an arbitration proceeding and the timing for the eventual service of arbitration awards.

Preliminary Comments

As noted in RN 22-09, it is clear that the current system which allows for the purported accelerated processing of an arbitration case for individuals who are 65 years old and/or have a serious health condition has never achieved its stated objective.

The primary reason for this, however, has very little to do with the number of arbitration cases that are within the individual target-age range of 65 years or older. To the contrary, as I have seen from my own experiences over the 40-year period of time that I was involved in securities arbitrations at both FINRA and at the New York Stock

Exchange, the failure to achieve the desired expediency for vulnerable investors was more directly attributable to the schedules of both counsel for the parties and individual arbitrators.

Thus, the proposed change, which would allow any party to request accelerated processing of an arbitration proceeding if they: (1) are at least 75 years old; or (2) certify that they have received a medical diagnosis and prognosis and that, based on that information, they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration, will not, by itself, have a significant impact on the desired objective although it will reduce the overall number of cases that fall within the stated parameter for expediency.

Systemic Delays are Inconsistent with Investor Protection

It is deeply concerning that, rather than immediately addressing the proposed solution to one of the least controversial rule amendments in recent memory by effectuating a rule filing with the SEC, FINRA has instead chosen to "kick the proverbial can" down the road through the issuance of the request for comment that is encompassed within RN 22-09.

While it is unclear as to when FINRA decided that, before any substantive rule filing could ever be effectuated, it was necessary to first solicit comment from primarily the securities industry and, to a much lesser extent, anyone else who may happen to stumble across its regulatory notices, it should be noted that the last substantive dispute resolution rule filing with the SEC was completed in October of 2020 – nearly 1 ½ years ago.

These systemic delays are inconsistent with the investor protection mandate that FINRA claims are the hallmark of its existence. Consider, for example, just the following few additional "requests for comment" that have fallen into the regulatory rule-making abyss:

Regulatory Notice 17-34 ("RN 17-34"), entitled "FINRA Requests Comment on the Efficacy of Allowing Compensated Non-Attorneys to Represent Parties in Arbitration," was issued on October 18, 2017 and requested comment on proposed amendments to the FINRA Code which would "further restrict [the] representation of parties" by non-attorney representative firms ("NARs").

As stated in RN 17-34, among the predicates for the proposed amendments to the FINRA Code were "allegations reported to FINRA [that] raise serious concerns" about the conduct of NARS in the FINRA arbitration forum as well as the fact that "investors who retain representation by NAR firms may be more likely to experience harm at the hand of their representative and have less legal recourse to receive compensation for that harm."

The comment period for RN 17-34 expired on December 18, 2017.

Thereafter, in June 2018, the members of the NAMC expressed unanimous support for a prohibition on allowing compensated NARs from representing parties in all arbitration cases in the FINRA forum and, in December 2018, the FINRA Board approved the filing of proposed changes to the FINRA Code with the SEC to prohibit compensated NARs from being able to represent parties in all arbitration cases.

Notwithstanding both the unanimous support of the NAMC for a prohibition on allowing compensated NARs from representing parties in all arbitration cases in the FINRA forum and the approval of the FINRA Board for the filing of a proposed rule change with the SEC consistent with this recommendation, as of the present date, nothing has been filed in the subsequent forty (40) month period of time nor has any explanation been provided to explain this unconscionable delay.

Regulatory Notice 18-22 ("RN 18-22"), entitled "Discovery of Insurance Information in Arbitration," was issued on July 26, 2018 and requested comment on proposed amendments to the FINRA Code so as to require member firms and associated persons, upon request, to produce documents concerning third-party insurance coverage in customer-initiated arbitration proceedings.

As stated in RN 18-22, among the predicates for the proposed amendments to the FINRA Code were the "regulatory need" for this information which would "benefit customers to determine a litigation strategy in arbitration cases" and the "economic impact" for the same that would "increase the consistency and efficiency of the arbitration forum" in terms of the continuing problem of unpaid arbitration awards that has been an issue that has impacted the FINRA forum for years.

The comment period for RN 18-22 expired on September 24, 2018.

Notwithstanding both the October 2016 support of the NAMC for the proposed amendments to the FINRA Code so as to require member firms and associated persons, upon request, to produce documents concerning third-party insurance coverage in customer-initiated arbitration proceedings and the consideration of the FINRA Board of the same in May 2019, as of the present date, nothing has been filed in the subsequent thirty five (35) month period of time nor has any explanation been provided to explain this unconscionable delay.

These limited examples are not, unfortunately, just isolated instances of inaction. Of equal, if not greater importance, are the proposed revisions to the expungement rules and procedures which remain in limbo notwithstanding the critical investor protection attributes of the same.

Specific Comments to Issues Presented

With respect to the specific issues presented in RN 22-09 for comment, I would offer the following responses:

1. What has been your experience with the current program to accelerate arbitration proceedings, upon request, for parties who have a serious health condition or are at least 65 years old? What have been the economic impacts, including costs and benefits, from the current program?

As noted above, the current program has clearly failed to achieve its stated objectives. Accordingly, the economic impacts, which would be minimal at best even if the program were to be implemented as originally designed, has no relevance to the consideration of the proposed modifications.

2. What would be the impact of the proposed shortened, rule-based deadlines on case processing times and the costs to arbitrate a claim?

The proposed shortened, rule-based deadlines on case processing times would be beneficial if arbitrators are able and/or willing to recognize the importance of the proposed changes and are willing to challenge parties who purport to claim that their availability for hearing are limited.

3. Would the existing provisions of the Codes governing discovery responses and allowing the panel to modify the discovery deadlines provide sufficient flexibility if the shortened deadlines could not be met in a particular case?

As experience has clearly demonstrated, panels have often been unwilling to modify existing discovery deadlines. This suggests that arbitrator training on the importance of accelerated case processing has been lacking and/or has not received the institutional support of FINRA in terms of its importance.

4. Is 75 the right age cutoff for parties to qualify for accelerated processing?

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.

5. Are there alternative ways that FINRA could implement the proposal in an equitable manner that could be effectively administered in the forum? How could FINRA consider differences in the average likelihood that parties may become unable to participate in a hearing based on sex, race and ethnicity, as suggested by differences in published average mortality rates?

The predicate for this question, which suggests that the current system is inequitable, is a theoretical academic solution in search of a problem. Unless and until FINRA can ascertain the sex, race and ethnicity of claimant-investors in its arbitration forum, the predicate that the current system may be inequitable is a “false-flag” exercise that appears to be seeking a politically correct statement that is not based on reality.

6. Should FINRA consider alternatives to the proposed requirement that the requesting party certify that they have received a medical diagnosis and prognosis, and that based on that information they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration?

If FINRA were to consider any alternatives to the proposed certification it would clearly lead to prolonged discovery of confidential medical records which would most likely be illegal and would most certainly delay the processing of arbitration cases from the date of initiation until the date of award issuance.

7. Under the proposal, the current provisions in the Codes relating to sanctions could apply if a party submitted a false certification to obtain faster case processing. Are there alternative approaches that FINRA should consider to limit potential abuse of the process?

The current provisions which allow arbitrators to impose sanctions would be more than adequate to address the proposed concerns.

8. What has been your experience with requesting and receiving a faster case processing in court or in a non-FINRA arbitration forum? What have been the economic impacts, including costs and benefits?

I do not have any recent experience with court or non-FINRA arbitration forums that would provide any insight into this issue.

9. Are there other enhancements or alternative approaches not discussed in this Notice that FINRA should consider.

I believe that my prior comments suggest both enhancements and alternative approaches that should be considered by FINRA with respect to the issues presented in RN 22-09.

Closing Comments

Finally, it has to be noted that, in my experience, a significant portion of the delays that have been associated with respect to rulemaking by the FINRA Dispute Resolution forum can be directly attributable to the "economic impact assessments" that FINRA seems compelled to undertake for every item that is being considered.

Although FINRA states that a "limited statement of economic impact" is warranted where "the rule is narrow in focus, making minor adjustments to existing rules or primarily administrative, or it appears that any burden imposed by the rule will be of minimal significance only," as evidenced by RN 22-09, this is clearly not the case. [See, e.g., *Framework Regarding FINRA's Approach to Economic Impact Assessment for Proposed Rulemaking*, available at

https://www.finra.org/sites/default/files/Economic%20Impact%20Assessment_0_0.pdf (visited April 22, 2022).

Moreover, although FINRA states that it relies on “relevant advisory committees, leading academics and investors as key sources of information in developing our economic impact assessments,” in all of the years that I served on the NAMC there was never a single occasion where our committee was ever consulted by anyone associated with FINRA’s Office of the Economist.

Simply put, in those circumstances, such as with respect to RN 22-09, where an economic impact assessment is incapable of being predicated on any reliable statistical data, it does not serve any purpose to engage in a theoretical academic exercise and I would hope that FINRA will recognize this so that the rulemaking process can be accelerated in the interests of investor protection.

Conclusion

Thank you for providing me with the opportunity to submit my comments on this matter.