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Via Email to pubcom@finra.org
Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 22-09 – Accelerated Processing of Arbitration Proceedings

Dear Ms. Mitchell:

The University of Miami School of Law Investor Rights Clinic ("IRC") greatly appreciates the opportunity to comment on FINRA's proposal to accelerate arbitration case processing for seriously ill or elderly parties.[1] The IRC is a University of Miami School of Law clinical program that represents investors of modest means who have suffered investment losses, but due to the size of their claims, cannot find legal representation. As the only *pro bono* organization in Florida assisting investors of modest means, the IRC has represented numerous elderly and seriously ill investors in FINRA's current program for expedited proceedings. For, Because of the importance of expedited proceedings to these clients, and the proposed accelerated processing times would further the intent of those proceedings, the IRC supports FINRA's proposal, with additional recommendations and commentary below.

I. Experience Under the Current Program and Importance of Expedited Proceedings

According to FINRA Regulatory Notice 22-09, the median time for the 3,125 customer arbitrations in the current program to close was approximately 13.4 months, and the median time for the 8,585 customer arbitrations not in the current program to close was approximately 15.2 months, or a difference of less than two months. The new proposal looks to shorten "turnaround time" by giving guidance to arbitrators to endeavor to render the award within ten months or less, or at least 3.4 months shorter than the median time under the current program. Unlike other aspects of the new proposal, the "turnaround time" provides only guidance rather than a rule-based deadline. Only if effectively implemented will the new proposal lead to a significant time savings beyond the current non-accelerated program and accelerated program.

Our experience with the current accelerated arbitration program aligns with the experience of FINRA overall in that accelerated arbitrations sometimes lead to shorter, but not

[1] FINRA Regulatory Notice 22-09. *Accelerated Processing of Arbitration Proceedings*.

significantly shorter, arbitrations for those in the program.[2] The University of Miami School of Law Investor Rights Clinic has represented several individuals in recent years who have requested and have been granted accelerated arbitration proceedings under the current program.

In a standard arbitration case filed on March 5, 2020, FINRA granted Claimant's request to expedite the arbitration proceeding on April 27, 2020, and the final hearing was scheduled for March 23, 2021. The parties reached a settlement following a mediation on February 22, 2021, nearly one year from the date of filing. Sadly, however, the IRC's client died prior to the mediation and did not live to see the recovery of his retirement savings. In a simplified arbitration filed on March 11, 2021, FINRA granted Claimant's request to expedite the arbitration proceeding on March 15, 2021, and the final hearing was scheduled for March 25, 2022. The parties reached an agreement to settle on March 9, 2022, almost exactly one year from the date of filing. The IRC filed the statement of claim in another standard arbitration on March 12, 2021, and FINRA granted Claimant's request to expedite the arbitration proceeding on March 15, 2021. The parties reached an agreement to settle on November 9, 2021, about eight months after the date of filing. The final hearing was scheduled for November 10, 2021.

Thus, the experience of the IRC shows that FINRA has granted each of our clients' requests in recent years for expedited proceedings under the current program, and that the time to close of these arbitrations ranged from eight to 12 months across simplified and standard cases. Based on that evidence, arbitrators appear equipped to meet FINRA's proposed guidance to render an award within 10 months or less of filing. In some cases, the proposed guidance would reduce the time to close experienced by clients of the IRC by about two months. The experience of the IRC also shows that some expedited arbitration proceedings can close in less than ten months from filing to final hearing and decision.

In the experience of the IRC, it is important for elderly or sick adults to have access to accelerated proceedings and to be able to meaningfully participate in the proceedings. The critical months saved under the proposal could mean the difference in claimants having meaningful participation in their arbitrations, whether by testifying, consulting with their attorneys, or making decisions about settlement offers. This is often as important to clients of the IRC as the recovery of their losses; many clients express a strong desire to have their claims heard and to see justice done. Further, for many retirees with immediate income or liquidity needs, receiving timely settlements or awards is very important. In a balance of the benefits and costs, the benefit of accelerated proceedings for seniors and those with medical conditions outweighs any burdens the proposal may impose on the parties, and because such burdens may be mitigated in appropriate cases. In considering burdens of the proposal, the certification requirement actually strengthens the process by adding an additional requirement of certification to the current process and raises the age of claimants eligible for accelerated proceedings to 75 from the current age of 65.

[2] As a preliminary matter, before comparing our experiences with accelerated arbitrations and non-accelerated arbitrations, a distinction needs to be made between simplified arbitrations and full arbitrations. Many of our clients participate in simplified arbitrations because the amount at issue is often under $50,000. These cases are often shorter than full arbitrations before accounting for whether they were done under the accelerated program or the non-accelerated program.

II. Flexibility in Discovery Deadlines Under the Current Code

The accelerated proceedings proposal shortens deadlines or serving answers, completing arbitrator lists, and discovery. The existing provisions of the Code provide sufficient flexibility if the shortened deadlines could not be met in a particular case. As they currently stand, the rules establish a mechanism for modifying the deadlines where parties have a legitimate conflict or need. Parties can agree to modify the discovery deadlines, or arbitrators can extend the deadlines on their own. Additionally, the rules mandate a requirement of good faith. FINRA Rules 12506 and 12507 clearly state that the time limits only apply "unless the parties agree otherwise." According to FINRA Rule 12207, the parties can agree in writing to extend or modify the deadlines to exchange documents independently from FINRA or the arbitrator(s) in their case. FINRA Rule 12207 allows for a panel to extend or modify the deadline to exchange documents, or any other discovery deadline set by the panel, either on its own initiative or by motion of a party. Therefore, even if one party does not agree, the current rules provide enough flexibility for a party with good cause to pursue extending the discovery deadlines on their own, giving arbitrators a method to ensure that the discovery process is fair to both parties and not unduly burdensome to one. Parties do not need any additional flexibility with discovery deadlines beyond this existing provision. Importantly, the current provisions of the Code also provide sufficient flexibility while safeguarding against potential abuse by either party through the requirement that the parties act in "good faith."

III. Other Enhancements for Expedited Proceedings

FINRA should take measures to protect the integrity of the discovery process. Neither party should receive less than adequate discovery because the case moves through the FINRA arbitration process on an accelerated basis. First, arbitrators could receive additional training or materials that help them understand the appropriate scope of discovery. Specifically, non-attorney arbitrators could receive training on what type of documents may be necessary to prove or disprove certain issues. Arbitrators will then be better informed when deciding requests for additional time or motions to compel production. This training should emphasize the importance of claimants in expedited proceedings to receive full and fair access to the same discovery as claimants in other types of proceedings, regardless of the shortened deadlines. Second, FINRA could provide arbitrators with additional training specific to the expedited arbitration process. This training would include, in addition to the appropriate amount of discovery, more information about how to reach a fair and equitable resolution of a case in a shortened timeframe. Arbitrators could also receive resources about how to communicate effectively with claimants who are elderly or have medical conditions, including neutral or un-biased language. This important information might help overcome any unconscious biases regarding elderly or sick claimants that might influence an arbitrator's decision during an expedited arbitration.

In addition, the proposed rule-bases deadlines do not extend to the date of final hearings or deadline for written submissions. Rather, these dates are deadlines remain in the discretion of arbitrators who would "endeavor to render the award within 10 months or less." The IRC estimates that the shortened deadlines for answers, arbitrator rankings, and discovery would save at least 80 days, or almost three months, of processing time compared to the current program.

These time savings alone should give arbitrators the ability to resolve expedited proceedings in a shorter time period.

IV. Proposed Requirement for Certification by Requesting Party

The proposed requirement to certify receipt of a medical diagnosis and prognosis provides claimants a simple process to secure an accelerated arbitration process while protecting their privacy. The proposed requirement strikes the appropriate balance between an individual's privacy and the potential for abuse of the process. Keeping the language of the requirement broad— "a medical diagnosis and prognosis"—sufficiently safeguards claimants from having to reveal any private details regarding their medical conditions. Alternatives to this requirement risk claimants' privacy and may impose too great of a burden to make the benefit of accelerated proceedings worth the effort. For example, if claimants were required to divulge greater details of their medical diagnosis and prognosis, such a requirement would not only be intrusive on claimants' privacy but also may deter them from seeking accelerated proceedings. Additionally, if claimants needed to obtain medical records to demonstrate their diagnosis and prognosis, this too may deter them from going through the trouble of obtaining such documentation. Accordingly, a simple statement made on a form provided by FINRA allows claimants to obtain the accelerated proceedings they need without imposing much of a burden or infringing upon their privacy.

The "reasonable belief" standard is proper for this proposed requirement. Because each claimant and the impact their respective medical conditions may have on a particular arbitration may vary, a flexible standard is necessary to accommodate for these largely individualized determinations. As such, "reasonable belief" is appropriate because it only asks claimants to judge, within reason, the impact of their conditions instead of a higher standard which may require them to make a more concrete determination or to disclose confidential medical information.

However, it is critical to note that this standard may have an unintended and counterproductive consequence in the event that respondents wish to challenge claimants' certifications. While the proposal does not contemplate a mechanism by which respondents may do so, this issue may, without FINRA's express prohibition to the contrary, arise in discovery. For example, respondents may contest the need for accelerated arbitration and serve requests for documents or information relevant to this issue, placing additional issues in dispute that are not relevant to the merits of the claim. For this reason, FINRA should adopt a rule stating that any discovery concerning a medical condition of a claimant as it relates to providing the basis for accelerated proceedings is prohibited.

The potential for challenges by respondents creates a risk that certifications may become a new area for discovery of claimant's medical files, adding an additional burden that claimants must overcome for their claims to be arbitrated fairly. Because of concerns that respondents will now want proof of the medical conditions asserted in certifications, it is essential that FINRA has procedures to protect claimants' medical privacy. Without a method for respondents to challenge certifications that also protects claimants' privacy, new discovery by respondents regarding the certifications may prejudice claimants. To the extent that additional information is required to

evaluate a claimant's certification or request for an expedited trial, the request should come from the director.

The IRC is opposed to additional requirements for the party certification proposal because it is not overly burdensome, yet still requires a sworn, legal attestation. Further, the Code relating to sanctions may apply if a claimant submits a false certification so as to deter unscrupulous conduct. As such, the proposed requirement sufficiently protects claimants' privacy, deters falsified certifications, and is efficient and consistent with the objective of accelerating these proceedings.

V. Conclusion

The IRC is committed to protecting the savings and peace of mind of senior investors and investors with medical conditions. For the reasons stated above, the IRC strongly supports FINRA's efforts to provide prompt, rules-based resolution of disputes to this susceptible group and supports the proposal for accelerated processing times, with suggested enhancements and clarifications. The IRC thanks FINRA for the opportunity to comment on this important topic.

Respectfully,

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