



PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION

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May 16, 2022

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

Re: **FINRA Regulatory Notice 22-09**

FINRA Proposed Rule to Accelerate Processing of Arbitration
Proceedings for Seriously Ill or Elderly Parties)

Dear Ms. Piorko Mitchell:

I write on behalf of the Public Investors Advocate Bar Association (“PIABA”), an international, not-for-profit, voluntary bar association that consists of attorneys who represent investors in disputes with the securities industry. Since its formation in 1990, PIABA’s mission has been to promote the interests of the public investor by, among other things, seeking to protect such investors from abuses in the arbitration process created by the Financial Industry Regulatory Authority (“FINRA”), seeking to make the arbitration process as just and fair as possible, and advocating for public education related to investment fraud, industry misconduct and the securities industry’s arbitration process. Our members and their clients have a fundamental interest in the rules promulgated by FINRA that govern the arbitration process and the practices of brokers and broker-dealer firms.

PIABA welcomes the opportunity to comment on the proposed amendment to the customer *Code of Arbitration Procedure* described in FINRA Regulatory Notice 22-09 (“RN 22-09”) and proposed rule change to “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.” The proposed rule change codifies, in part, current FINRA guidelines regarding expedited proceeding requests, with some important differences addressed herein. The proposed rule would shorten procedural deadlines, including those related to turnaround time (10 months or less), serving an answer or third-party claim (within 30 days of filing the initial pleading), arbitrator rankings (10 days), responses to the FINRA Discovery Guide (35 days) and other discovery requests (30 days).

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PIABA applauds FINRA's efforts to protect a vulnerable population of investors. For many who are elderly or seriously ill, the FINRA arbitration process is unduly burdensome and works against the investor's ability to participate meaningfully in the arbitration process. However, there are serious concerns regarding some of the proposed rule provisions that may result in a greater burden for, or act as a bias against, investors.

As noted in RN 22-09 and apparent to those who represent investors in FINRA arbitration, FINRA's current "program" allowing claimants ages 65 or older or seriously ill to request an accelerated process fails to ensure the process is, in fact, accelerated. While FINRA's program was designed to "encourage" arbitrators to bear in mind the needs of those who requested an accelerated process, it is rare that granting a request for acceleration resulted in actual acceleration of the process. Generally, PIABA members report having their request for acceleration granted, but during the IPHC, the panel regularly accept respondent counsel's representations that they are "unavailable" for hearing within the accelerated timelines and do not otherwise enforce the accelerated schedule. Some PIABA's members have experienced a complete disregard of the program after their request for acceleration was granted. One such example is in a currently pending case where a ninety-two (92) year old woman was initially granted acceleration. When she sought leave to amend her statement of claim four (4) months before the scheduled hearing, the arbitrators *sua sponte* vacated the hearing dates and demanded that the parties confer to set new dates. Neither the investor-claimant nor the brokerage-respondent requested that the hearing dates be vacated. Despite that fact, and despite granting the claimant's request for an accelerated process, the arbitrators ignored FINRA's "encouragement" to adhere to the program. Codifying the mandates of an accelerated process may circumvent this type of misconduct.

To date, it appears that arbitrators receive very little training regarding the management of a case filed by an elderly or seriously ill claimant and the purported accelerated process.¹ Proper training and codifying the program's intent – with the deadlines clearly noted – will rightly put the responsibility on the arbitrators to maintain an accelerated process. Since FINRA anticipates that the current "program" will still be available to those who do not qualify for an accelerated process under the proposed rule change (for example, because they are age 70), sufficient arbitrator training is even more important. Training should be clear that the proposed rule change should be followed, but that, even if a claimant does not qualify (or does not formally cite the rule in a request), arbitrators have the discretion to consider age, health, and other factors when setting hearing dates and deadlines and should maintain a sensitivity to these issues.

While there is a possibility counsel and arbitrators may have difficulty adhering to the shortened deadlines due to scheduling conflicts, it should be reiterated in the proposed rule change and training that the rule should be followed absent stipulation *by all parties* to longer deadlines or date setting. This permits flexibility on the part of the claimant requesting the accelerated schedule, who may for example be willing to allow longer time for a particular response (e.g., a Statement of Answer or discovery responses), but has a critical need for the hearing date to be set on an accelerated schedule.

FINRA will need to train arbitrators to be vigilant against litigation tactics that work to delay the arbitration process, such as nonexistent scheduling conflicts, overly broad and burdensome discovery

¹ FINRA's online Basic Arbitrator Training materials devote a portion of one slide to expedited procedures (Module 6, Slide 5). FINRA devotes one page to this issue in its Chairperson Training, p. 11 (June 2021).

requests, and unnecessary motion practice. As an example, an opposing party may propound discovery requests that include medical records that are unrelated to the case, other than to the qualification for an accelerated process. Such an invasive request should be denied. The certification by the claimant requesting the accelerated process as described in RN 22-09 is sufficient and training for arbitrators should be clear that FINRA is not condoning discovery of medical information for purpose of qualifying for the accelerated schedule. Similarly, an opposing party may engage in motion practice to object to the application for an accelerated process based upon the claimant's medical condition in order to force a claimant to reveal medical information. Tactics such as these invade the investors' right to privacy of medical information, could intimidate investors and discourage them from applying for an accelerated process, and delay the proceedings in contravention of the purpose of the Code. These considerations must be addressed when revisiting the proposed rule change and arbitrator training materials.

With regard to the age threshold proposed in RN 22-09, PIABA strongly believes FINRA should maintain the current threshold of 65 years of age. There are two primary reasons: (1) most states with civil and/or criminal statutes protecting vulnerable populations from financial or physical abuse have an age threshold of 65;² and (2) setting the threshold at 75 may unfairly exclude or otherwise create disparities for portions of the population who may have lower life expectancies.³

By keeping the age threshold at 65 years old, FINRA will remain consistent most states with statutes that create a private right of action for financial elder abuse that also maintain age 65 as the threshold and be more inclusive of a broader demographic of investors. PIABA strongly urges FINRA to maintain the 65-year-old threshold for the purposes of consistency and inclusion.

With regard to qualification based on "serious illness," RN 22-09 fails to develop what would be required, and the language leaves a wide gap for interpretation. As noted above, an investor would be required to:

Certif[y], in the manner and form required by the Director, that: (i) the party has received a medical diagnosis and prognosis and (ii) based on that medical diagnosis and prognosis, the party has a reasonable belief that accelerated processing of the case is necessary to prevent prejudicing the party's interest in the arbitration.⁴

Although the new language states that it is the party who must have a "reasonable belief" that acceleration is necessary, RN 22-09 states that it is up to the Director to determine whether a party has met the parameters for acceleration. PIABA believes that having the Director use subjective judgment to determine whether an investor is inappropriate. An investor should not be required to disclose private medical information merely to qualify for an accelerated process. PIABA urges FINRA to look carefully at this issue to balance claimant privacy with a fair and consistent process.

² *States with a Civil Private Right of Action for Financial Elder Abuse and Exploitation*, J. Aidikoff, A. Rivkin, 24 PIABA Bar J. 29-46 (2017).

³ See, *The Association Between Income and Life Expectancy in the United States, 2001 – 2014* R. Chetty, M. Stepner, S. Abraham, JAMA Vol. 315, No. 16 (Apr. 26, 2016). The gap in life expectancy between the richest 1% and poorest 1% of individuals was 14.6 years.

⁴ FINRA, Regulatory Notice 22-09 (2022).

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PIABA acknowledges and appreciates the opportunity to comment on this important issue. We thank you for the opportunity to comment and urge FINRA to continue its efforts to protect the public investor and provide investors with a fair and objective arbitration process.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Michael Edmiston", is written over a light blue rectangular background.

Michael Edmiston
President, PIABA