



**FINANCIAL
SERVICES
INSTITUTE**

VOICE OF INDEPENDENT
FINANCIAL SERVICES
FIRMS AND INDEPENDENT
FINANCIAL ADVISORS

VIA ELECTRONIC MAIL

December 18, 2017

Ms. Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 17-34; Request for Comment on the Efficacy of Allowing Compensated Non-Attorneys to Represent Parties in Arbitration (Notice)

Dear Ms. Asquith:

On October 18, 2017, the Financial Industry Regulatory Authority, Inc. (FINRA) published its request for comment regarding the efficacy of continuing to permit non-attorneys to represent clients in FINRA mediations and arbitrations and whether non-attorney representatives should be subject to increased restrictions. The Financial Services Institute¹ (FSI) appreciates the opportunity to comment on the Notice. While FSI recognizes that non-attorney representatives (NARs) provide an important service to investors, particularly those with small value claims, FSI supports placing additional requirements on NARs, which we outline in more detail in our comments below.

Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the US, there are approximately 167,000 independent financial advisors, which account for approximately 64.5% percent of all producing registered representatives.² These financial advisors are self-employed independent contractors, rather than employees of the Independent Broker-Dealers (IBD).

FSI's IBD member firms provide business support to independent financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. Independent financial advisors are small-business owners with strong ties to their communities and know their clients personally. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans. Their services include financial

¹ The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry, and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

² The use of the term "financial advisor" or "advisor" in this letter is a reference to an individual who is a registered representative of a broker-dealer, an investment adviser representative of a registered investment adviser firm, or a dual registrant. The use of the term "investment adviser" or "advisor" in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.

education, planning, implementation, and investment monitoring. Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide Main Street Americans with the financial advice, products, and services necessary to achieve their investment goals.

FSI members make substantial contributions to our nation's economy. According to Oxford Economics, FSI members nationwide generate \$48.3 billion of economic activity. This activity, in turn, supports 482,100 jobs including direct employees, those employed in the FSI supply chain, and those supported in the broader economy. In addition, FSI members contribute nearly \$6.8 billion annually to federal, state, and local government taxes. FSI members account for approximately 8.4% of the total financial services industry contribution to U.S. economic activity.³

Discussion

A. Benefits and Pitfalls of NARs in the FINRA Mediation and Arbitration Processes

As explained in the Notice, FINRA Codes of Arbitration and Mediation Procedure (Codes) permit compensated persons who are not licensed as attorneys to represent investors in FINRA arbitration and mediation. The Codes do include certain exceptions that are discussed below in detail. For reasons we outline in more detail in this section, we believe attorney representation is more desirable than representation by a NAR. We believe the skills, experience and required standards of conduct that attorneys bring to the mediation and arbitration process boosts the integrity of the process and, where practicable, is in the best interest of the investing public. However, we also understand that not all investors can afford attorney representation and other representation, such as law school arbitration clinics, are not always available. In those circumstances, we acknowledge that NAR firms can play an important role in the FINRA adjudication process.

A licensed attorney will, presumably, have the knowledge and experience to skillfully navigate the complexities of a FINRA mediation or arbitration. Further, communications between those attorneys and their clients are subject to attorney-client privilege. Meaning, attorney-client communications are shielded from compulsory disclosure, even in the presence of a legal demand. This allows investors the freedom to openly discuss the facts and circumstances of their claims without fear that the information may, subsequently, be used against them. With few exceptions and limitations, it also allows attorneys to ask whatever questions needed to perform a thorough analysis of the matter, without concern that the representative may later be called to testify against the client. This freedom of exchange is an important part of client representation that is lacking in the relationship between a NAR and an investor; and helps the arbitration process move along expeditiously and efficiently.

Moreover, attorneys are subject to ethical rules. These rules, among other things, often prevent attorneys from pursuing frivolous claims. NAR firms, however, are free to bring frivolous claims in an effort to obtain fees, which clogs up the arbitration and mediation forums with claims that should have never been initiated.

Further, where appropriate, investors, attorney adversaries, or even arbitrators may report attorneys who fail to follow ethics rules, or who are otherwise derelict in their

³ Oxford Economics for the Financial Services Institute, The Economic Impact of FSI's Members (2016).

representation. In lieu of taking individual legal action, the attorney may be reported to the bar of the state in which he is licensed. NARs, on the other hand, may not be subject to licensure requirements or analogous disciplinary oversight. An investor may be able to sue the NAR by bringing an individual legal action, which would result in the investor, once again, finding themselves thrust into a complex legal proceeding. For these reasons, there is little doubt that representation by licensed attorneys is preferable over representation by a NARs. Nonetheless, as stated above, we understand this preference in not an option for all investors.

Often, the question facing investors is not whether to elect a higher cost attorney over a lower cost NAR.⁴ Instead, in the absence of an available legal clinic or familial representation, the issue is whether the investor should hire an attorney versus representing himself.⁵ An investor who represents himself is unlikely to understand the legal issues presented in the case or have the skill to navigate the legal process. Conversely, a NAR that has experience representing clients in FINRA forums may be able to better navigate the process. Moreover, with self-representation, the investor's lack of skill is typically accompanied by a lack of objectivity. A NAR may be more objective than the investor.

B. Suggested Restrictions on NARs

i. Strict Enforcement of Existing FINRA Rules

FINRA rules place restrictions on who may act as a NAR. First, an individual may not act as a NAR, if state law prohibits that representation.⁶ Currently, Florida, the District of Columbia and Illinois, are among the states that have determined that nonlawyers who represent customers in a FINRA arbitration are engaged in the unauthorized practice of law.⁷ Second, disbarred or suspended attorneys, and individuals who have been barred or suspended from the securities industry, may not act as NARs.

Still, FSI's members have reported that disbarred attorneys and individuals who have been barred from the securities industry are acting as NARs. These individuals are offenders with a demonstrated inability to follow rules and their participation in the mediation or arbitration process, not only violates FINRA rules, but it also demeans the integrity of the process. Thus, an important first step is ensuring that the current rule-based restrictions are adhered to.

ii. Examination and Qualifying Process for NARs

The outcome of the arbitration process obviously impacts the aggrieved investor. Thus, the individual investor protection considerations are incontrovertible. However, the guiding legal precedent, and awards, stemming from the arbitration process impact not only the aggrieved investor, but also have a fundamental impact on marketplace integrity, overall. Therefore, we suggest that, like most other individuals who meaningfully participate in the securities industry, individuals who want to act as NARs should be required to pass a basic skill examination.

⁴ See, generally, Regulatory Notice 17-34 at p. 3.

⁵ *Id.*

⁶ See FINRA Rules 12208, 13208 and 14106.

⁷ See, e.g., Ill. Bar. Ass'n Opinion No. 13-03 (January 2013) (holding that while FINRA arbitrations do not require involve the same legal complexities as court proceedings, representation provided by non-attorneys in this forum involves the use of legal knowledge and skill and, as such, constitutes the unauthorized practice of law), available at <http://lawprofessors.typepad.com/files/ill.13-031.pdf>

The NARs qualifying examination should, at minimum, test the individual's knowledge of the securities industry, standards of accepted ethical conduct, and of the rules governing FINRA mediations and arbitrations. We suggest that to be eligible to take the qualifying examination, an individual should be able to demonstrate:

- A high school diploma, or an equivalent degree;
- A four-year college degree; or four years of experience working in the securities industry in a registered capacity; and
- A minimum of three years of experience working in the securities industry in a registered capacity, within the last ten years.

For the sake of clarity, individuals who do not have college degrees, would need a total of seven years of experience in a registered capacity. Three of those years would need to be within the ten-year prior immediately preceding the examination date.

Post examination, and each year thereafter, NARs should be required to certify under penalty of perjury that:

1. The individual has not been disbarred and is not suspended from the practice of law in any state;
2. The individual has not been barred and is not suspended from participating in the securities industry;
3. The individual has determined that his or her representation of investors does not require the individual to be a member of the bar of any state;
4. The individual agrees not to charge representation fees exceeding 25% of an investor's recovery (award or settlement amount paid to the investor);⁸
5. The individual shall provide competent representative to a client, including the skill, thoroughness and preparation necessary for the representation;
6. The individual shall act with reasonable diligence and promptness in representing a client; and
7. If, at any time, the representations set forth in paragraphs 1-3 (above) become untrue, the individual will promptly report the change in circumstances to FINRA and will no longer act as a NAR.

The NAR would also be required to provide a copy of this certification to each new client and this certification may be used by the investor in any subsequent litigation against the NAR.

The NAR should also have professional liability or similar insurance that would protect the investor in case of professional malpractice on the part of the NAR and should submit to a background check. The purpose of the background check is to confirm that individuals acting as NARs do not have felony convictions, convictions related to crimes involving fraud, manipulation or deceit, or to confirm that the NAR has not been suspended or disbarred from the securities

⁸ Investors with low value claims, who cannot afford an attorney, would be the likely client base for NARs. Therefore, investor protection interests support implementing a maximum fee of 25% of any settlement or award. Attorneys typically charge a fee of between 33% to 40%. The discounted rate accounts for the absence of attorney-client privilege, non-applicability of ethics rules, and other differentials between NARs and attorneys.

industry or the practice of law. Any person who fails the background check, or does not meet the insurance requirements, should not be permitted to act as a NAR.⁹

Individuals who provide proof of insurance, pass the qualifying examination and background check, and submit the required certification to FINRA, will be placed on an approved NARs list. Only those individuals that are on the list would be permitted to act as NARs in FINRA mediations and arbitrations. The list should be made accessible to investors on FINRA's website and should be included in the initial documents FINRA provides to investors after a claim has been filed.

It is unlikely that this process would eliminate all issues deriving from non-attorney representation in FINRA proceedings. Nonetheless, it provides investors with continued access to representation by NARs, ensures that NARs are reasonably qualified to participate in the arbitration or mediation process, and assists FINRA in better ensuring that those who FINRA rules prohibit from acting as NARs, are not doing so. It would also serve to maintain the efficiency and cost-effectiveness of FINRA's Dispute Resolution Program.

Conclusion

We are committed to constructive engagement in the regulatory process and welcome the opportunity to work with the Department on this and other important regulatory efforts.

Thank you for considering FSI's comments. Should you have any questions, please contact me at (202) 393-0022.

Respectfully submitted,



Robin Traxler
Vice President, Regulatory Affairs & Associate General Counsel

⁹ Critically, The Social Security Disability Applicants' Access to Professional Representation Act of 2010 (PRA), Public Law No. 111-142 was enacted by Congress on February 27, 2010. Among other things, the PRA extends the Social Security Administration's authority to withhold 25% of a claimant's past due benefits for payment to "eligible non-attorney representatives". The eligibility requirements established for non-attorney representatives is substantially reflective of the proposed requirements suggested herein by FSI.