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May 16, 2022

Via E-Mail 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 Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on Notice 22-09 (the "Notice").[2] The Notice proposes new rules to allow senior or seriously ill parties to request accelerated processing of their arbitration proceedings. SIFMA supports the intent of the Notice to ensure that parties to FINRA arbitration are able to participate meaningfully in their proceedings and obtain a fair outcome.

We do, however, have several concerns about the proposed rules, namely: (1) whether the proposed rules are necessary or warranted given the current program; (2) regardless, whether the proposed rules are sufficient to prevent abuse; and (3) whether some of the rule-based case deadlines have been cut too short such that they may undermine the fairness of the process. Accordingly, we respectfully submit the following comments and recommendations for your consideration.

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] FINRA Regulatory Notice 22-09 (Accelerated Processing of Arbitration Proceedings), March 16, 2022, https://www.finra.org/rules-guidance/notices/22-09.

The current program is sufficient to address FINRA's concerns and there is no evidence of investor harm.

As explained in the Notice, FINRA already offers a program to accelerate arbitration proceedings for senior or seriously ill parties.[3] The program has reduced the median time to close a case by 1.8 months, from 15.2 months to 13.4 months. The Notice does not allege that seniors' or seriously ill parties' interests are being prejudiced by the pace of proceedings under the current program, or that they are unable to participate meaningfully in their proceeding, or unable to obtain a fair outcome. Nevertheless, the proposed rules would require the panel to "endeavor" to render an award within 10 months. The current program could provide the same guidance as the proposed rules, encouraging panels to make scheduling decisions and set deadlines consistent with a 10-month timeline. Thus, the proposed rules are not necessary given the current program and additional guidance that may be issued thereunder, nor are they warranted by a showing of investor harm to seniors or seriously ill parties.

The standard for granting accelerated arbitration proceedings are insufficient to prevent abuse.

We agree that a 75-year-old age requirement is appropriate for granting expedited arbitration. The proposed rule, however, requires no actual proof of age. Thus, it is subject to abuse. At a minimum, the rule should require the party to show proof of age by reference to a date of birth on a driver's license, passport, birth certificate, or other similar official record.

Similarly, the certification for serious illness requires no explanation or support. It would be literally impossible to tell whether the certificate was legitimate and truthful. Thus, it too would be subject to abuse. At a minimum, the certification and rules should require: (i) that the party have a *subjectively* reasonable belief (not just a reasonable belief) that accelerated case processing is necessary, and (ii) that case processing *within 10 months* is necessary to prevent prejudicing the party's interest in the arbitration, and (iii) a signature from both the party and *a physician* on the certification.

The Notice states that the Director will make an "objective determination" as to whether the party is at least 75 or has submitted the required certification. Yet, as discussed above, it would be essentially impossible for the Director to make an objective determination without sufficient supporting documentation to show age, or a more stringent certification requirement for serious illness. In any event, the rules should be made consistent with the Notice and explicitly require that "The Director will *objectively* determine…." whether the party has met the grounds for accelerated arbitration.

Finally, the Notice states that "[t]he current provisions in the Codes relating to sanctions could apply if a party submitted a false certification to obtain faster case processing" and cites to FINRA Rules 12212 and 13212. The preamble and rule history, however, should clarify that sanctions should be available for *both* a false statement that the claimant meets the 75-year-old age requirement, and a false certification of serious illness. Available sanctions should be expanded to include dismissal of the claim.

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[3] *See* https://www.finra.org/arbitration-mediation/expedited-proceedings-senior-or-seriously-ill-parties.

Some of the case deadlines are too short and would undermine the fairness of the process.

- **Turnaround Time.** We do not object to a 10-month resolution time per se. The preamble and rule history, however, should make clear that it is an aspirational goal, and that it may not be appropriate or attainable in all accelerated proceedings (e.g., in large, complex cases where claimant's counsel will continue to seek the same volume of discovery that they ordinarily would, but in less than half the time). Panels should also be mindful in cases where a party has requested accelerated arbitration, but their own actions or the actions of their counsel cause delays or prolong proceedings (e.g., the claimant's counsel's schedule cannot accommodate the expedited schedule).

- **Serving an Answer.** We are generally supportive of shortening the time to answer from 45 days to 30 days, provided that the parties are free to grant extensions upon request.

- **Responding to a Third-Party Claim.** Likewise, we are generally supportive of shortening the time to respond to a third-party claim from 45 days to 30 days, provided that the parties are free to grant extensions upon request.

- **Completing Arbitrator Lists.** We object to shortening the deadline to return the ranked arbitrator list from 20 to 10 days. Ten days is insufficient time to submit arbitrator rankings, particularly since the unit is calendar and not business days. For example, a list issued on a Friday would be due only two Mondays later – effectively one work week later. This could prove difficult or impossible to meet if counsel is on vacation or involved in a hearing. We recommend that parties should have 15 days, at a minimum. Arbitrator ranking is a particularly important part of the process and in fairness, the parties deserve ample time to complete it.

- **Discovery in Customer Cases.** Currently, parties in customer cases must produce Document Production List documents within 60 days of the date that the answer is due. The proposal would shorten this deadline to 35 days. We believe 45 days is a more reasonable deadline. In addition, the rule should explicitly allow for accommodation and relief in the form of additional time, upon a party's request, particularly in cases where, among other things, (i) the case is complex, (ii) the documents requested are voluminous, including without limitation email productions, and/or (iii) the documents are difficult to locate or retrieve due to the passage of time.

- **Other Discovery Requests.** Currently, parties must respond within 60 days of receipt to requests for other documents or information. The proposal would shorten this deadline to 30 days. Likewise, we believe 45 days is a more reasonable deadline. Likewise, the rule should allow for additional time under the conditions stated immediately above.

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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: Richard Berry, EVP and Director of Dispute Resolution, FINRA DRS
Victoria Crane, VP and Associate General Counsel, OGC
Thomas Kimbrell, Associate General Counsel, OGC
Kristine Vo, Assistant General Counsel, OGC