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Lawyers in the Best Sense

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Via Electronic Filing

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

RE: Comment on SR-FINRA-2023-013 (Order Approving a Proposed Rule Change to Amend the FINRA Codes of Arbitration Procedure and Code of Mediation Procedure to Revise and Restate the Qualifications for Representatives in Arbitrations and Mediations)

Dear Ms. Countryman:

The Cornell Securities Law Clinic (“Clinic”) appreciates the opportunity to provide this comment letter regarding the proposal (the “Rule Proposal”) to amend the Financial Industry Regulatory Authority (“FINRA”) Codes in order to clarify the qualifications for compensated non-attorney representatives (“Compensated NARs”) in arbitrations and mediations. The Clinic is a Cornell Law School curricular offering in which law students provide representation to public investors and public education as to investment fraud in the "Southern Tier" region of upstate New York. For more information, please see: <http://securities.lawschool.cornell.edu>.

The Rule Proposal was initially filed with the United States Securities and Exchange Commission (“SEC”) on October 5, 2023, and published in the *Federal Register* for public comment eight days later.¹ On January 11, 2024, the SEC issued an order approving the Rule Proposal, and on April 8, 2024, it opened a new thirty-day period for interested parties to file statements supporting or opposing the approved Rule Proposal.² As explained in greater detail below, the Clinic supports FINRA's Rule Proposal limiting Compensated NARs in arbitration. Detailed below are reasons we support the Rule Proposal along with our suggestions for clarification on the scope of equivalent programs in which law school students may participate.

¹ See Exchange Act Release No. 99915 (Apr. 8, 2024), 89 FR 25676 (Apr. 10, 2024) (File No. SR-FINRA2023-013).

² See *id.*

I. The Clinic Supports Barring Compensated NARs from Representing Parties in Arbitration and Mediation

In 2017, the Clinic recommended that FINRA gather more comprehensive information to assess the magnitude of inappropriate NAR firm conduct.³ While the Clinic maintains its desire for comparative data on the rates of misconduct by attorneys and Compensated NARs, it finds that the information reported in the present Rule Proposal is sufficient to support prohibiting Compensated NARs in FINRA arbitrations and mediations. Specifically, the Clinic finds that continuing to permit representation from Compensated NARs creates an excessive risk of harm to investors, and the Rule Proposal would prevent such harm by barring Compensated NARs from representing parties in FINRA arbitrations and mediations.

Virtually all disputes between securities broker-dealers and their customers are adjudicated in arbitrations held at FINRA. Under FINRA's current rules, Compensated NARs may represent parties in FINRA arbitrations and mediations if permitted by the law of the state where the arbitration is held. In recent years, both FINRA and the SEC have cautioned investors about the risks of obtaining representation from non-attorneys.⁴ Compensated NARs are often less skilled than licensed attorneys about securities laws and regulations, which are critical for accurately determining the validity of a claim and the appropriate measure of damages.⁵ As a result, Compensated NARs may improperly assess claims and damages or fail to adequately defend against challenges from opposing broker-dealers, who are typically represented by experienced and knowledgeable attorneys.⁶

Moreover, Compensated NARs are not subject to the same rules of professional responsibility and disciplinary processes as licensed attorneys.⁷ Unlike licensed attorneys, who

³ See Letter from William A. Jacobson, Director, Cornell Securities Law Clinic, to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, dated December 7, 2017, https://www.finra.org/sites/default/files/17-34_Cornell_Comment.pdf.

⁴ See Committee on Professional Responsibility, *Report on Non-Lawyers Representing Customers in FINRA Dispute Resolution Arbitrations*, N.Y. CITY BAR (Nov. 28, 2018), <https://www.nycbar.org/reports/non-lawyers-representing-customers-in-finra-dispute-resolution-arbitrations/>.

⁵ See Letter from Jeffrey Kaplan, Dimond Kaplan & Rothstein, P.A., to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, dated December 19, 2017, https://www.finra.org/sites/default/files/notice_comment_file_ref/17-34_DKR_comment.pdf (“Aggrieved investors using paid, non-attorney representatives generally will not get the benefit of a someone who can navigate the intricacies of a FINRA proceeding with the skill of a trained lawyer. Therefore, aggrieved investors who hire such representatives may be risking their lone chance of a positive outcome of their dispute with a brokerage firm.”).

⁶ See *id.*

⁷ *Id.* See also Exchange Act Release No. 98703 (Oct. 6, 2023), 88 FR 71053 n.16 (Oct. 13, 2023) (File No. SR-FINRA2023-013) (“Generally, licensed attorneys are required to have: (1) completed a bachelor’s degree program (or its equivalent) and a legal education as required by a licensing state; (2) passed a state bar exam; (3) passed the Multistate Professional Responsibility Examination; (4) passed a licensing state’s character and fitness review, which includes questions about academic conduct at law school, criminal history, social conduct in general and any applicable disciplinary actions; and (5) taken a legal binding oath with a licensing state’s supreme court or high-court equivalent. In addition, many states require attorneys to complete continuing legal education, including ethics credits, to maintain a law license. In addition, all jurisdictions require lawyers to abide by rules of professional conduct, which are enforced through state disciplinary processes.”).

are subject to the rules of professional responsibility promulgated by the state licensing authorities and typically carry malpractice insurance, Compensated NARs are not bound by such ethical standards and do not offer such protections.⁸ Because a FINRA arbitrator's decision is generally final and non-appealable, meaning that arbitration is typically the investor's one and only opportunity to recover the losses they have suffered, ineffective assistance from a Compensated NAR poses a significant risk of harm to investors.⁹

Finally, representation by Compensated NARs poses additional risks to investors because anecdotal evidence indicates that many Compensated NARs are, or work in conjunction with, former securities industry professionals who have left the industry, sometimes as a result of professional misconduct or criminal activity.¹⁰ Because these Compensated NARs are not governed by rules of professional conduct and are not subject to sanctions for misconduct, allowing these individuals to continue representing parties in arbitration and mediation creates an excessive risk of harm for unsuspecting investors

II. The Clinic Supports Codifying Permissible Representation by Students in Law School Clinics with Additional Clarification on the Scope of "Equivalent" Programs

The Rule Proposal correctly recognizes the important role that law students in Securities Arbitration Clinics ("SACs") fulfill for underrepresented investors in FINRA arbitrations and mediations. In many cases, SACs and law students can provide high-quality representation for investors who cannot find or afford the services of a licensed attorney. For example, our Clinic has served clients since 2008 in upstate New York, focusing primarily on investors with smaller claims (i.e., claims for \$100,000 or less).

⁸ See Andrew Stoltmann and David Neuman, *Report: Non-Attorney Representatives in FINRA Arbitration*, PIABA (Dec. 18, 2017), <https://piaba.org/piaba-newsroom/report-nar>; Letter from Robert C. Port, Gaslowitz Frankel LLC, to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, dated December 18, 2017, https://www.finra.org/sites/default/files/notice_comment_file_ref/17-34_gaslowitz_comment.pdf.

⁹ See Letter from Robert C. Port, *supra* note 8; Letter from Jeffrey Kaplan, *supra* note 5.

¹⁰ See, e.g., Letter from Samuel B. Edwards, Shepherd Smith Edwards & Kantas, to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, dated December 18, 2017, <https://www.finra.org/sites/default/files/2023-10/sr-finra-2023-13.pdf> ("NARs have been historically created by and run by former registered representatives that can no longer survive in the securities industry. While FINRA changed the rules for NARs to exclude any suspended or removed member, there are many situations where a FINRA registered representative is not actually suspended, but because of their customer complaint or regulatory history (or even criminal history), they can no longer survive in the securities business"); Letter from Martin H. Kaplan, Gusrae Kaplan Nusbaum PLLC, to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, dated November 1, 2017, https://www.finra.org/sites/default/files/notice_comment_file_ref/17-34_GKNPLLC_comment.pdf ("While FINRA Rules prohibit[] NAR Firms from representing clients in certain situations, including but not limited to, 'the (NAR) is currently suspended or barred from the securities industry in any capacity,' NAR firms are controlled by and employ barred individual."); Letter from Ryan K. Bakhtiari, Aidikoff, Uhl & Bakhtiari, to Marcia E. Asquith, Office of the Corporate Secretary, FINRA, dated December 11, 2017, https://www.finra.org/sites/default/files/notice_comment_file_ref/17-34_Bakhtiari-Aidikoff_Comment.pdf; Letter from Jeffrey Kaplan, *supra* note 5.

Recent research suggests that investors represented by SACs have higher recovery rates in small claims cases compared to those that appeared pro se or represented by attorneys.¹¹ At the same time, state rules and disciplinary processes often function as additional safeguards against malpractice by SACs and law students, requiring close supervision by a supervising attorney who assumes responsibility for the law students' work.¹² For those reasons, the Clinic maintains its support for distinguishing SACs from Compensated NARs.¹³

The Clinic does, however, recommend clarifying the scope of the phrase "its equivalent" in the Rule Proposal. Currently, the Rule Proposal states that parties may be represented by "a student enrolled in a law school participating in a law school clinical program or its equivalent and practicing under the supervision of an attorney."¹⁴ FINRA has noted that "its equivalent" accounts for flexibility in law school programs and that FINRA intends to evaluate these programs on a case-by-case basis.¹⁵ However, the current text of the Rule Proposal is vulnerable to a broad interpretation of "its equivalent," as it does not explicitly state whether an "equivalent" program must be academic in nature or part of an academic curriculum.¹⁶ The Clinic thus recommends narrowing the scope of "equivalent" programs by modifying the language to, ". . . a student enrolled in a law school participating in a law school clinical program or an *equivalent curricular program* and practicing under the supervision of an attorney."¹⁷

¹¹ See *Professor Iannarone Delivers Keynote at 2024 SEC Investor Advocacy Clinic Summit*, DREXEL UNIV. (Apr. 3, 2024), <https://drexel.edu/law/about/news/articles/overview/2024/April/iannarone-keynote-sec-clinic-summit/>

¹² See, e.g., D.C. Ct. App. R. 48 (stating that the supervising lawyer shall "[a]ssume full responsibility for guiding the student's work in any pending case or matter or other activity in which the student participates and for supervising the quality of that student's work."); Mich. Ct. R. 8.120 ("Representation must be conducted under the supervision of a state bar member. Supervision by a state bar member includes the duty to examine and sign all pleadings filed."); MS Code § 73-3-207 (2020) ("Law students will be subject to the same standards and rules of professional conduct and ethics and the same rules of discipline as are licensed attorneys."); 27 N.C. Admin. Code 1C.0205 (stating that a supervising attorney shall "read, approve, and personally sign any pleadings or other papers prepared by a certified law student prior to the filing thereof."); Or. State. Bar. R. Regul. and Polic. 13.30 ("The member of the bar under whose supervision an eligible law student does any of the things permitted by these rules shall assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work.")

¹³ The Cornell Securities Law Clinic has recovered several hundred thousand dollars for investors in small cases since its launch in 2008.

¹⁴ See Exchange Act Release No. 98703 (Oct. 6, 2023), 88 FR 71051–52 (Oct. 13, 2023) (File No. SR-FINRA2023-013).

¹⁵ See Letter from Kristine Vo, Assistant General Counsel, Office of General Counsel, FINRA, to Vanessa Countryman, Secretary, Commission, dated January 8, 2024, <https://www.sec.gov/comments/sr-finra-2023-013/srfinra2023013-366519-893662.pdf>.

¹⁶ See Letter from Mark Quinn, Director of Regulatory Affairs, Cetera Financial Group, to Vanessa Countryman, Secretary, Commission, dated November 3, 2023, <https://www.sec.gov/comments/sr-finra-2023-013/srfinra2023013-294099-714822.pdf>.

¹⁷ See *id.*

III. The Clinic Supports Proposed Provisions Prohibiting Certain Persons From Representing Parties in FINRA Arbitrations and Mediations

The Rule Proposal appropriately clarifies that, in addition to state law, the laws of United States jurisdictions that are not states, such as the District of Columbia and territories of the United States, may also disqualify a person from representing a party in FINRA arbitrations or mediations.¹⁸ In doing so, the Rule Proposal explicitly prohibits persons who are suspended or barred from the securities industry or the practice of law in those jurisdictions from representing parties in FINRA arbitrations and mediations, which safeguards investors against the risk of improper representation. For that reason, the Clinic supports this provision of the Rule Proposal.

Conclusion

The Clinic appreciates the opportunity to comment on the Rule Proposal. For the foregoing reasons, the Clinic supports the Rule Proposal, which would increase the integrity and quality of representation in the FINRA arbitrations and mediations.

Respectfully Submitted,

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¹⁸ See Exchange Act Release No. 98703 (Oct. 6, 2023), 88 FR 71055 (Oct. 13, 2023) (File No. SR-FINRA2023-013).