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Via email to rule comments@sec.gov
Vanessa A. Countryman, Secretary
Securities and Exchange
Commission 100 F Street, NE
Washington, DC 20549-1090

Re: Release No. 99915, April 8, 2024; In the Matter of the Financial Industry Regulatory Authority, Inc.; Order Scheduling Filing of Statements on Review Regarding an 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 (File No. SR-FINRA-2023-013)

Dear Secretary Countryman,

Thank you for the opportunity to comment on the order scheduling filing of statements on review related to File No. SR-FINRA-2023-013, regarding an 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. We are writing this comment on behalf of the Securities Arbitration Clinic of St. John's University School of Law (Clinic). The Clinic is part of the St. Vincent De Paul Legal Program, Inc., a not-for-profit legal services organization. The Clinic represents aggrieved investors with small dollar claims and is committed to investor protection and education. Accordingly, the Clinic has a strong interest in the rules governing the Codes of Arbitration and Mediation Procedure.

As explained in our November 3, 2023 letter regarding FINRA-2023-013, the Clinic supports prohibiting compensated non-attorney representatives (NARs) from representing parties in FINRA Dispute Resolution Services (DRS), while continuing to permit representation by supervised law school clinic students and uncompensated NARS. We have considered Commissioner Peirce's concerns about the potential gap in representation as a result of prohibiting compensated from FINRA arbitration.[1] We continue to believe that investors would be better served if compensated NARs were prohibited from representing parties in DRS for the supplemental reasons discussed below.

First, we do not believe that reputational concerns are sufficient to produce good representation by compensated NARs. The behavior and practice of compensated NARs are not constrained by the same ethical rules as attorneys. Due to the absence of a disclosure mechanism comparable to a state bar that provides the public with disciplinary information about attorneys licensed in their state, potential clients are unable to determine whether a NAR has a history of misconduct.[2] Moreover, there have been instances where brokers with a history of securities regulations violations have represented small claim investors in the DRS forum and taken advantage of them, just as they did their brokerage firm customers.[3]

Second, we believe that FINRA should prohibit compensated NARs, even though some states may already regulate the practice of law in this area and other states may be scrutinizing the issue. As noted in the proposal, state law is not always clear regarding whether compensated NARs are legally permissible in a particular jurisdiction.[4] Further, FINRA is unable to identify any "U.S. jurisdiction that explicitly allows parties to be represented by compensated NARs in the DRS forum by statute or rule."[5] While there are no statutes or rules explicitly permitting parties to be represented by compensated NARs, some states explicitly have held that

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[1] *See* Statement of Commissioner Hester M. Peirce, *Filling the Gap, Comments on the Proposal to Amend FINRA's Codes of Arbitration Procedure and Code of Mediation Procedure to Modify the Qualifications for Representatives in Arbitrations and Mediations* (April 8, 2024), available at https://www.sec.gov/news/statement/peirce-finra-04082024.

[2] *See* Andrew Stoltman & David Neuman, A Menace to Investors: Non-Attorney Representatives in FINRA Arbitration, Public Investors Advocate Bar Association (PIABA) Report (December 18, 2017), at 10-12, available at https://piaba.org/piaba-newsroom/report-nar (PIABA NARs Report); *see also* Securities and Exchange Commission, Release No. 34-98703; File No. SR-FINRA-2023-013, at 71052, available at https://www.finra.org/sites/default/files/2023-10/SR-FINRA-2023-013-federal-register-notice.pdf (SEC Release No. 34-98703).

[3] *See e.g.,* PIABA NARs Report at 15, 26-29; SEC Release No. 34-98703 at 71052, 71059.

[4] *See* SEC Release No. 34-98703, at 71053.

[5] *Id.*

representation of a party in arbitration is the practice of law.[6] However, in New York, parties in arbitrations have been able to be represented by non-attorneys.[7]

Representation by a non-attorney raises concerns for a party – concerns which were set forth by the Securities Industry Conference on Arbitration (SICA) as early as 1995.[8] SICA had received complaints, beginning in 1991, that NARs often filed frivolous claims and otherwise engaged in unethical practices.[9] SICA detailed several issues related to NARs, in addition to the concerns about the unauthorized practice of law. SICA raised issues with conduct, which if engaged in by an attorney, would be regulated by ethical rules. For example, certain NARs utilized misleading advertising.[10] SICA also recognized that communications between a customer and a NAR are not protected by attorney-client privilege, and therefore, the customer or the NAR may be compelled to testify about their conversations.[11] SICA found that certain NARs may be inclined to settle cases early for lower amounts, which may or may not be in the customer's best interest.[12] SICA also pointed out that NARs are not obligated to carry malpractice insurance.[13]

Both SICA and the NYCBA raised concerns about the legal issues raised in securities arbitration claims and the ability of NARs to adequately represent customers. SICA recognized that many legal issues are raised in arbitration.[14] The NYCBA recognized that customer rights are "grounded in the anti-fraud provisions of the federal securities laws, analogous state laws, and common law principles of fraud, negligence, contract and fiduciary duty."[15] The NYCBA also recognized that procedurally, arbitrations are more akin to trial practice, with FINRA arbitrations subject to comprehensive rules of procedure.[16] For example, parties make motions, take discovery, and are entitled to present evidence in trial-like fashion.[17]

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[6] The New York City Bar Association (NYCBA) has studied this issue and issued a report in 2018 entitled, "Report on Non-Lawyers Representing Customers In FINRA Dispute Resolution Arbitrations by the Committee on Professional Responsibility," available at https://www.nycbar.org/reports/non-lawyers-representing-customers-in-finra-dispute-resolution-arbitrations/ (hereinafter, the NYCBA Report). The NYCBA Report recognized that the Supreme Courts of Arkansas, Arizona, and California have held that representing a party in an arbitration is the practice of law. *Id.* at 6. Similarly, the Florida Bar and the Illinois Bar deem representation in arbitration to be the practice of law. *Id.* The NYCBA Report recognized, however, that most states have not expressly ruled on whether the representation of a party in arbitration is the practice of law, leaving it to be determined on a case by case basis. *Id.*

[7] *Id.* at 4.

[8] *See* Report of the Securities Industry Conference on Arbitration on Representation of Parties in Arbitration by Non-Attorneys, 22 Fordham Urb. L.J. 507 (1995), available at https://ir.lawnet.fordham.edu/ulj/vol22/iss3/2.

[9] *Id.* at 512.

[10] *Id.* at 516.

[11] *Id.* at 519.

[12] *Id.* at 521.

[13] *Id.* at 522.

[14] *Id.* at 521.

[15] NYCBA Report at 9.

[16] *Id.* at 9-10.

[17] *Id.* at 10.

Moreover, the NYCBA acknowledged that customers are "asymmetrically arrayed against firms," who are often repeat players in the forum.[18] While a firm may be able to make up for an unfair result in future cases, customers have no recourse, as arbitration awards may not be appealed and are rarely vacated. NYCBA summed up its concerns as follows:

> We believe FINRA not only has the power to act, it also has a responsibility to do so in its role as a provider of arbitration venues. To the extent that arbitration succeeds as a private dispute resolution system outside the traditional court system, it must be seen as fundamentally fair, and especially as regards its more vulnerable participants. When private parties agree to arbitrate in arms-length agreements, then those concerns are properly relegated to the good judgment of the parties. However, when arbitration agreements are imposed as contracts of adhesion upon parties of unequal bargaining power, as they often are in FINRA Customer Arbitrations, then we believe the provider of arbitration services has a greater responsibility to ensure vulnerable parties are not taken advantage of. That responsibility extends beyond the selection of unbiased arbitrators; it may also require rules to ensure that customers are not victimized by unscrupulous non-attorney advocates.[19]

Accordingly, customers represented by non-attorneys have fewer protections than those represented by attorneys. Further, in the absence of a FINRA rule, customers in different states will have differing levels of protection within the DRS forum. Given these concerns, we believe a general prohibition on compensated NARs best serves investors and the DRS forum.

Third, although small dollar claimants may have more difficulty getting representation if compensated NARs are prohibited, we believe that the risks of this form of compromised representation outweigh the possible benefit of increased access to any representation. The evidence suggests that compensated NARs use dangerous, manipulative tactics, including engaging in aggressive sales techniques, pursuing frivolous claims, and charging clients non-refundable processing or investigation fees, while possibly achieving worse outcomes or awards for their clients or settling cases for lower amounts than attorneys.[20] In fact, it appears that NARs have been engaging in these tactics for decades.[21] Rather than through compensated NARs, the gap in representation can be remedied, in part, through support for law school clinics nationwide, which provide small dollar claimants with effective legal assistance on a pro bono basis. At the same time, supervised law school students gain valuable experience through their clinic work, creating a pool of experienced lawyers entering the work force, which increases the quality of representation for all investors. Students at our Clinic conduct diligent factual investigations and learn about FINRA arbitration rules and practice through supervised, hands-on experience pursuant to a Student Practice Order. Students also make meaningful policy contributions to securities laws, as demonstrated by this letter.

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[18] *Id.*
[19] *Id.* at 12.
[20] *See* SEC Release No. 34-98703, at 71052,71054, 71056.
[21] *See* SICA Report.

Respectfully submitted,

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