



May 8, 2024

VIA ELECTRONIC SUBMISSION

Ms. Vanessa A. Countryman, Secretary
U.S. Securities & Exchange Commission
100 F. Street, N.E.
Washington, DC 20549

Re: Securities Exchange Act Rel. No. 99915 and SR-FINRA-2023-013

Dear Ms. Countryman,

Thank you for the opportunity to comment on Securities Exchange Act Release No. 99915 concerning SR-FINRA-2023-013, a rule proposing that compensated non-attorney representatives (NARs) be prohibited from appearing in the FINRA Dispute Resolution Services forum.

My professional background informs my comments. I am a law professor who teaches, among other subjects, Securities Regulation. I am the chair elect of the Securities Regulation Section of the American Association of Law Schools (AALS). Prior to my current appointment, I founded the Investor Advocacy Clinic at Georgia State Law and represented retail investors throughout the six years the clinic operated. In the clinic, I worked with investors who were unable to find attorneys to represent them in FINRA arbitration due to the so-called small size of their claims. Our clients typically suffered damages of \$100,000 or less. Since 2021, I have served as Chair of the FINRA National Arbitration and Mediation Committee (NAMC). I have been a public member of the NAMC since June 2018. In addition, my scholarship examines retail investors' experiences in FINRA arbitration, focusing specifically on the experiences of investors who have lost \$100,000 or less due to stockbroker misconduct. As a result of this background, I write to offer my insight into this important retail investor protection issue and provide feedback on questions posed by Commissioner Peirce. My comments are limited to the appearance of NARs in arbitration cases governed by the Customer Code of Arbitration Procedure. The opinions in this letter are my own.

Compensated NARs have been the Subject of Significant Public Engagement for Nearly a Decade and the Proposed Rule has been Fully Vetted

In a recent speech, Commissioner Peirce expressed concern about “the dwindling of genuine Commission and staff engagement with the public” due to, among other things, “unreasonably short public comment periods, [and] pared back final rules with substantial elements on which

the public has not commented.”¹ FINRA’s proposal to bar compensated NARs does not suffer from those concerns. Rather, commenters, including myself, have expressed concern that after significant public and industry engagement, FINRA rule proposals including the NARs rule have been significantly delayed despite unanimous public and industry support after extensive and repeated public engagement.²

The instant proposal began with engagement of the type Commissioner Peirce recommends.³ FINRA issued a Regulatory Notice seeking the public’s feedback on whether NARs posed concerns within the FINRA forum in 2017.⁴ In Regulatory Notice 17-34, FINRA posed broad questions to assist in its study of NARs.⁵ Regulatory Notice 17-34 was promulgated as a result of the 2015 Dispute Resolution Task Force Report that recommended investigation into concerns related to NARs.⁶ The Task Force, with experienced and knowledgeable industry and public representatives, spent a year studying the FINRA forum before issuing its report. Importantly, the Task Force, though given a directive from FINRA, ensured that it solicited broad public participation by establishing an email box through which it received 188 comments, seeking written comment from 33 interested organizations, conducting telephone interviews, and publishing an interim report upon which it solicited additional input before filing its final report.⁷ Regulatory Notice 17-34 also received significant public input, with 59 comments received from individuals and organizations. That input was not the end of FINRA’s inquiry into this issue.

As a member of the NAMC in June 2018, I was part of the discussion of the rule that is subject of this request for comments. The role of the NAMC is to provide advice to FINRA by “recommend[ing] rules, regulations, procedures and amendments relating to arbitration, mediation, and other dispute resolution matters to the Board.”⁸ FINRA Dispute Resolution Services used the feedback received from Regulatory Notice 17-34 to present a proposed rule to the NAMC for comments. The NAMC is composed of experts in securities arbitration and mediation representing public and industry viewpoints. Former NAMC chair Steven B. Caruso recounted that “the members of the NAMC expressed unanimous support for a prohibition on allowing compensated NARs from representing parties in all arbitration proceedings.”⁹ I was a public member of the NAMC at that time. Moreover, as a long-time member of the NAMC and its current Chair, I can report that public and non-public members often have different

¹ Commissioner Peirce Blasts SEC for Lack of Public Engagement, The CLS Blue Sky Blog (Apr. 4, 2024), <https://clsbluesky.law.columbia.edu/2024/04/04/commissioner-peirce-blasts-sec-for-lack-of-public-engagement/>.

² Letter from Steven B. Caruso re: FINRA Reg. Notice 22-09 (Apr. 28, 2022), https://www.finra.org/sites/default/files/NoticeComment/Steven%20B.%20Caruso_4.28.2022_FINRA_Comment_RN%2022-09%20%28redacted%20ppi%29.pdf; Letter from Nicole G. Iannarone re: FINRA Regulatory Notice 22-09 (May 16, 2022),

https://www.finra.org/sites/default/files/NoticeComment/Nicole%20Iannarone_5.16.2022_Comment%20on%20FINRA%20Reg%20No%2022-09.pdf.

³ *Supra* note 1 (“we should use concept releases, public roundtables, and potentially consensus workshops to help us identify problems in need of solving and workable solutions.”).

⁴ See FINRA Regulatory Notice 17-34, <https://www.finra.org/rules-guidance/notices/17-34> (Oct. 2017).

⁵ *Id.*

⁶ Final Report and Recommendations of the FINRA Dispute Resolution Task Force, <https://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf>.

⁷ *Id.* at 4-5.

⁸ FINRA Rule 14102.

⁹ See Caruso Letter, *supra* note 2.

viewpoints on issues before the NAMC. That both public and non-public members of the NAMC unanimously supported banning compensated NARs from the FINRA forum speaks volumes about the negative impact of compensated NARs on retail investor protection.

FINRA’s Board approved the filing of a rule change prohibiting compensated NARs from appearing in the forum in December 2018. Since becoming Chair of the NAMC in 2021, I have asked, at each meeting of the NAMC about the status of the rule that is the subject of this request for comments. I can report that I was not alone in expressing concern that such an important investor protection rule has been pending for nearly six years. Indeed, the concerns related to compensated NARs have been expressed for decades – not just the six years the current NAR proposal has been pending and the prior three years it was extensively studied.¹⁰

I was surprised when proceedings were initiated concerning a rule proposal that has been so extensively studied and upon which so many opportunities for public engagement have been presented. It is my opinion that there is no need for additional commentary or study on a proposal that has been so comprehensively vetted and to which industry and public representatives agree. The Commission should implement the proposal.

Impact of NARs on Retail Investors

I agree with Commissioner Peirce that “[t]he void of representation for investors with low-dollar claims remains particularly acute.”¹¹ Retail investors with claims that are significant – up to \$100,000 – have great difficulty finding representation if they are harmed at the hands of a stockbroker. Commissioner Peirce requested feedback “to provide additional context by providing examples of low- and high-quality representation by paid no-lawyer representatives.”¹² It is very difficult to provide such context. While FINRA provides more transparency than most arbitration forums, the only public data from which retail investor experiences can be studied are awards issued in arbitration cases that conclude via an arbitrator’s decision. In a forthcoming publication, I have undertaken a review of all arbitration awards in customer cases from 2015-2019.¹³ There are significant limitations to studying awards in decided cases and extrapolating what the findings show. However, given the lack of transparency concerning resolved claims, this is the only data from which the public can provide the requested context.¹⁴ Despite these limitations, however, I have uncovered descriptive findings that may be useful in considering the instant proposal. NARs appear in 5% of small (investor seeking \$100,000 or less in damages) claims awards from 2015-2019.¹⁵ Most NARs appear in awards where the investor’s claim

¹⁰ See, e.g., *Report of the Securities Industry Conference on Arbitration on Representation of Parties in Arbitration by Non-Attorneys*, 22 FORDHAM URB. L.J. 507, 512 (1995) (describing concerns with NARs arising in 1991).

¹¹ 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 Representations in Arbitrations and Mediations*, https://www.sec.gov/news/statement/peirce-finra-04082024?utm_medium=email&utm_source=govdelivery (Apr. 8, 2024)

¹² *Id.*

¹³ See Nicole G. Iannarone, *Small Claims Securities Arbitration*, __ U. Penn. Bus. L. Rev. __ (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4787240.

¹⁴ *Id.* at 28-32 (describing limitations).

¹⁵ *Id.* at 37.

qualifies for simplified treatment (claim size of up to \$50,000).¹⁶ In awards where an investor seeks \$100,000 or more, NARs recovered damages in 22% of claims, as compared to the 48% recovery rate for attorneys and the 16% recovery rate for pro se investors.¹⁷ In simplified-qualifying cases, where most NARs appeared, their recovery rate was 27%, compared to a 24% pro se recovery rate and 40% attorney recovery rate.¹⁸ Moreover, investors represented by law school clinics recovered in 56% of awards, compared to the 38% non-clinic attorney recovery rate.¹⁹ My research uncovered a significant relationship between representation type (attorney, NAR, or pro se) and recovery of \$1 or more in simplified-qualifying cases.²⁰ Moreover, investors represented by law school clinics recovered in 56% of awards, compared to the 38% non-clinic attorney recovery rate.²¹

From FINRA award data alone, I cannot determine whether every NAR is compensated or not compensated.²² The data show that the result of NAR representation in small claims is similar to pro se results, suggesting that the presence of a NAR in a smaller claim may not help the investor. Indeed, if the NAR is compensated, and the investor has already been damaged by a loss of investment funds, the retail investor is harmed again. Commenters in the past have expressed these concerns, particularly where some compensated NARs have charged high fees and do not have ethical requirements to only charge reasonable fees and not file frivolous claims.²³

In my research, I have often argued that greater transparency concerning settled proceedings is necessary in the FINRA forum.²⁴ With that transparency, greater context could be provided. The SEC should consider whether FINRA currently provides sufficient transparency to ensure investor protection and permit enhancements to its forum.

Investor Access to Representation

Law school clinics fill an important representation gap, though there are not nearly enough of them to fill the full need. For over a decade, I and many other law professors and policymakers have expressed concern about the lack of funding for law school clinics.²⁵ In 2017, I cautioned against a total NAR ban unless more resources were devoted to ensuring that retail investors had adequate representation.²⁶ Today, after intensively studying the issue from the only available public data, my research findings that NARs recover at rates similar to pro se parties lead me to conclude that compensated NARs should be entirely barred from the FINRA forum. FINRA and

¹⁶ *Id.* at 41, Figure 8 (illustrating 48 total NARs in dataset, with 45 appearing in simplified-qualifying cases).

¹⁷ *Id.* at 51.

¹⁸ *Id.* at 52.

¹⁹ *Id.* at 52.

²⁰ *Id.* at 53.

²¹ *Id.* at 52.

²² I can determine, however, that one NAR appears in over 40% of awards in my dataset and that representative is affiliated with an organization that appears to be a compensated NAR.

²³ *Id.* at 18-19.

²⁴ *See, e.g., id.* at 61-63.

²⁵ *See, e.g.,* Nicole G. Iannarone and Christine Lazaro, *Investor Protection Requires Access to Representation*, *Financial Planning Magazine* (Dec. 16, 2021), <https://www.financial-planning.com/opinion/investor-protection-requires-access-to-representation>.

²⁶ *See* Nicole G. Iannarone Letter re: FINRA Regulatory Notice 17-34 (Dec. 18, 2017).

the SEC are best positioned to protect investors. Indeed, both have investor protection at the core of their missions. States may have great difficulty uncovering unlicensed practice of law in securities arbitration due to its confidential nature. Indeed, state regulators may only hear about concerns after victimization has already occurred.

A FINRA ban on compensated NARs should not, however, be the end of the Commission's inquiry into this important investor protection issue. Rather, the Commission should work with FINRA and Congress to ensure that retail investors with small claims have access to high-quality legal representation through the creation of more law school clinics. I agree with Commissioner Peirce that law school clinics increase the pool of available representation for investors with smaller claims while students are in law school and after they graduate and become fully licensed. FINRA should expand its current clinic outreach efforts to encourage former clinic students to engage in pro bono representation after they graduate and become fully licensed. Moreover, expanding the number of clinics would result in the availability of more trained attorneys who could meet their pro bono obligations through investor representation in the FINRA forum.

Thank you for focusing on this important investor protection issue. Should I be able to provide any additional information or context that may assist in these proceedings, please do not hesitate to contact me.

Respectfully submitted,

/s/ Nicole G. Iannarone

Nicole G. Iannarone