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March 12, 2025

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

RE: File No. SR-FINRA-2024-021 (Proposed Rule Change to Amend the Codes of Arbitration Procedure to Adopt FINRA Rules 12808 and 13808 (Accelerated Processing) to Accelerate the Processing of Arbitration Proceedings for Parties Who Qualify Based on Their Age or Health Condition) – Response to Comments

Dear Ms. Countryman:

This letter is being submitted by the Financial Industry Regulatory Authority, Inc. ("FINRA") in response to comments received by the Securities and Exchange Commission ("SEC" or "Commission") regarding the above-referenced rule filing. The proposed rule change would amend the FINRA Code of Arbitration Procedure for Customer Disputes ("Customer Code") and the FINRA Code of Arbitration Procedure for Industry Disputes ("Industry Code") (together, "Codes") to adopt FINRA Rules 12808 and 13808 (Accelerated Processing) to accelerate the processing of arbitration proceedings for parties who qualify based on their age or health condition ("Proposal").[1]

The Commission published the Proposal for comment in the Federal Register on December 26, 2024, and received seven comments in response.[2] Cambridge, Caruso, FSI,

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1 See Securities Exchange Act Release No. 101957 (December 18, 2024), 89 FR 105128 (December 26, 2024) (Notice of Filing of File No. SR-FINRA-2024-021).

2 See Letter from Daniel H. Kolber, CEO & General Counsel, Intellivest Securities, Inc., dated January 3, 2025 ("Intellivest"); letter from Seth A. Miller, General Counsel & President, Advocacy & Administration, Cambridge Investment Research, Inc., to Vanessa Countryman, Secretary, SEC, dated January 15, 2025 ("Cambridge"); letter from David T. Bellaire, Executive Vice President & General Counsel, Financial Services Institute, to Vanessa Countryman, Secretary, SEC, dated January 16, 2025 ("FSI"); letter from Adam Gana, President, Public Investors Advocate Bar Association, to Vanessa Countryman, Secretary, SEC, dated January 16, 2025 ("PIABA"); letter from Alice L. Stewart, Associate Professor of Law & Director of Legal Clinics, Rachel T. Shaw, Staff Attorney & Adjunct Professor of Law, Minu Nagashunmugam & Danny O'Byrne, Certified Student Attorneys, Securities Arbitration Clinic, University of Pittsburgh School of Law, to Vanessa Countryman, Secretary, SEC, dated January 16, 2025 ("Pitt

PIABA, Pitt Law, and St. John's expressed general support for the Proposal.[3] These commenters also expressed concerns with certain aspects of the Proposal and suggested modifications.

The following are FINRA's responses to the commenters' material concerns.

I. Requesting Accelerated Case Processing

A. Eligibility Based on Age

The Proposal would amend the Codes to allow a party to request accelerated processing of a case when initiating an arbitration or filing an answer provided the party making the request is at least 70 years of age at the time of the request.[4] All but one of the commenters who addressed this requirement supported allowing parties to qualify for accelerated processing based solely on age.[5] Cambridge questioned the need for parties who are otherwise healthy to qualify for accelerated processing based solely on age. Cambridge stated that accelerated processing should be available only when a party is suffering from an eligible health condition.

On balance, FINRA believes that an age standard is warranted. Even if an elderly party is otherwise healthy at the outset of the arbitration, the party may be more likely because of their age to become seriously ill (or potentially deceased) during the arbitration proceeding, in which case they would be unable to meaningfully participate for the duration of the proceeding. For this reason, FINRA believes it is appropriate that the Proposal allow parties to qualify for accelerated processing based solely on age.

Law"); letter from Jaclyn Rommeney, Chris O'Connor, Joseph Alfonzetti, Legal Interns & Elissa Germaine & Christine Lazaro, Supervising Attorneys, St. Vincent De Paul Legal Program, Inc., Securities Arbitration Clinic, St. John's University School of Law, to Vanessa Countryman, Secretary, SEC, dated January 16, 2025 ("St. John's"); and letter from Steven B. Caruso, dated May 24, 2024 ("Caruso").

3 Intellivest did not address the Proposal specifically but, rather, raised comments about the cost and fairness of FINRA arbitration. See infra Section III (Other Comments).

4 See proposed Rules 12808(a)(1)(A) and 13808(a)(1)(A).

5 Compare Caruso, PIABA, Pitt Law, and St. John's (all supporting allowing parties to qualify for accelerated processing based solely on age) with Cambridge (recommending that FINRA eliminate eligibility based solely on age, but as an alternative, supports an age cutoff of 75). As explained in the Proposal, age cutoffs greater than 70 would deny accelerated processing to many parties who are at higher risk of becoming seriously ill, experiencing an adverse health condition, or not living to see the outcome of an arbitration. See Proposal, supra note 1, 89 FR 105133, 105135.

The remaining commenters focused principally on what should be the appropriate age cutoff for a party to qualify for accelerated processing. FSI supported the proposed age cutoff of 70 because it "supports outcomes more accurately reflective of the underlying merits, while balancing the number of expedited proceedings and the impact on other individuals seeking timely arbitration of their cases." St. John's and Pitt Law supported the proposed age cutoff of 70. St. John's recommended, however, that FINRA also consider lowering the age cutoff further to 65. Pitt Law suggested that after rule adoption and monitoring of the rule, FINRA should consider lowering the age cutoff to 65. PIABA and Caruso urged FINRA to lower the age cutoff to 65.[6]

Reasons the commenters provided for lowering the age cutoff to 65 included: (1) 65 is recognized as the traditional retirement age, and the age that is commonly used in other statutes and rules relating to the protection of seniors;[7] (2) lowering the age cutoff to 65 would account for different life expectancies across different groups or individuals with undiagnosed medical conditions that preclude them from being eligible under the health condition prong of the Proposal;[8] (3) customer claimants who are 65 years of age and older are more likely to be facing economic hardship because they may not have ongoing income from employment;[9] and (4) for proceedings where the party is represented by one of the 10 law school securities arbitration clinics, reducing the length of arbitration would allow for continuity of representation and enhanced learning opportunities for students enrolled in law school clinics.[10]

As explained in the Proposal, even though the data suggests that lowering the proposed age cutoff from 70 to 65 would only affect approximately six percent of customer claimants, FINRA is concerned that this change may reduce the likelihood that the Proposal would materially shorten the length of the proceedings for those parties who may be less likely to be able to participate for the duration of a lengthy arbitration.[11] A lower age cutoff might make it difficult for arbitrators to comply with their obligations under the Proposal to endeavor to hold hearings and render an award within 10 months or less in accelerated proceedings.[12] Arbitrators

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6 Caruso commented that FINRA should explain the "selection of 70 years of age as being the proper cut-off." FINRA notes that the Proposal provided statistical data. See infra notes 11-12.

7 See PIABA.

8 See St. John's and PIABA.

9 See PIABA, Pitt Law, and St. John's.

10 See Pitt Law.

11 See Proposal, supra note 1, 89 FR 105128, 105129, 105133, 105134.

12 See Proposal, supra note 1, 89 FR 105128, 105129.

and industry parties and their counsel are often involved in more than one arbitration at the same time. These arbitrators also may seek to extend the case processing times of their concurrent, non-accelerated arbitrations to meet the shortened deadlines that would apply to their accelerated arbitrations.[13]

In addition, as discussed in more detail below, under the Proposal, a party younger than 70 would still be able to request accelerated processing if they are suffering from a serious health condition.[14] Moreover, parties who would not qualify for accelerated processing based on either their age or health condition would be able to request, once the panel is appointed, that the panel consider other factors, including their age or a change in their health condition during the arbitration proceeding, when scheduling hearings and discovery, briefing, and motion deadlines.[15] Thus, although these proceedings would not be subject to the shortened, rule-based deadlines of the Proposal, the panel may determine at a party's request, to expedite the proceedings based on the party's particular circumstances.

Pitt Law recommended that FINRA "provide training and guidance to arbitrators on setting deadlines" to ensure that younger parties who are not eligible based on either their age or health condition "do not face unreasonably long wait times." Further, Caruso recommended "enhanced arbitrator training" "so that arbitrators have the required guidance that will be needed to effectively implement the proposed new rules."

FINRA agrees that arbitrator training is important, and, if the SEC approves the Proposal, FINRA will provide training and guidance to arbitrators on the Proposal, which will include training on various ways that arbitrators can expedite cases, as well as monitor the new program to determine if adjustments to the age cutoff for qualification for accelerated processing are warranted.

B. Eligibility Based on Health Condition

Under the Proposal, a party younger than 70, but who has an eligible health condition, would be able to request accelerated processing provided that the party making the request certifies, in the manner and form required by the Director, that (i) the party has received a medical diagnosis and prognosis and (ii) based on that medical diagnosis and prognosis, the party has a reasonable belief that accelerated processing of the case is necessary to prevent prejudicing the party's interest in the arbitration.[16]

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13 See id.

14 See proposed Rules 12808(a)(1)(B) and 13808(a)(1)(B).

15 See proposed Rules 12808(a)(3) and 13808(a)(3).

16 See supra note 14. Under the Codes, the term "Director" means the Director of DRS. Unless the Codes provide that the Director may not delegate a specific function, the term

Those commenters who addressed the issue of which parties should be eligible for accelerated processing unanimously supported allowing parties to qualify based on their health condition.[17] However, PIABA expressed concern that the proposed amendment would require claimants to "produce medical records to qualify" and suggested that the "claimant's attestation of a serious medical condition should suffice."

As discussed in the Proposal, FINRA believes that the proposed certification requirement is the most appropriate way to minimize unnecessary intrusions into a party's private health information while, at the same time, allowing FINRA to identify those individuals who could benefit most from accelerated processing because they are suffering from an eligible health condition. In addition, FINRA notes that under proposed Rules 12808(a)(2) and 13808(a)(2), a party's certification of an eligible health condition shall not alone be sufficient grounds to compel the production of information concerning, or to allow questioning at any hearing about, the party's medical condition.

Cambridge suggested that parties should be required to provide additional proof of their health condition to minimize the risk that parties will falsely certify that they are suffering from an eligible health condition. For example, Cambridge suggested adding an "objective qualification criteria" "similar to the procedure in most states and the District of Columbia for obtaining a special parking permit" such as a "Disability Parking Placard." As explained in the Proposal, the Director would make an objective determination as to whether the party requesting accelerated processing is at least 70 years of age or has submitted the required certification regarding an eligible health condition.[18]

In addition, as discussed in the Proposal, FINRA has no evidence that parties have falsely claimed to be suffering from a serious health condition under the current program[19] nor any

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includes FINRA staff to whom the Director has delegated authority. See FINRA Rules 12100(m), 12103, 13100(m), and 13103.

17 See Cambridge, Caruso, FSI, PIABA, Pitt Law, and St. John's.

18 See Proposal, supra note 1, 89 FR 105130, 105135. This determination would not require any assessment by the Director regarding the reasonableness of the requesting party's belief that accelerated processing is necessary. See id.

19 FINRA currently offers a program to expedite arbitration proceedings in the forum administered by FINRA Dispute Resolution Services ("DRS") for parties who have a serious health condition or are at least 65 years old. When an eligible party makes a request to expedite the proceedings under the current program, DRS staff will expedite the case-related tasks that they can control, such as completing the arbitrator selection process, scheduling the initial prehearing conference, and serving the final award. Critically, however, the current program does not provide for shortened, rule-based deadlines for parties or provide arbitrators with direction on how quickly the arbitration should be completed. See FINRA, Expedited Proceedings for Senior or Seriously Ill

reason to believe that this kind of misconduct is more likely under the Proposal.[20] Moreover, FINRA believes that the threat of potential sanctions under existing FINRA Rules 12212 and 13212 should help deter parties from falsely certifying that they have been diagnosed with an eligible health condition in order to qualify for accelerated processing. Specifically, under FINRA Rules 12212(a) and 13212(a), unless prohibited by applicable law, sanctions may include, but are not limited to: assessing monetary penalties payable to one or more parties; precluding a party from presenting evidence; making an adverse inference against a party; assessing postponement and forum fees; and assessing attorneys' fees, costs and expenses. The panel may sanction a party for failure to comply with any provision of the Codes, or any order of the panel or single arbitrator authorized to act on behalf of the panel.[21]

In addition, FINRA notes that if the SEC approves the Proposal, FINRA will update its guidance to arbitrators to clarify that potential sanctions may include the ability to remove a matter from accelerated processing if parties are found to have either misrepresented their age or medical condition to qualify for accelerated processing under the Codes.[22] FINRA will also monitor the new program for potential misrepresentation[23] as well as to determine if adjustments to the criteria for qualification based on an eligible health condition are warranted.

C. Additional Categories of Eligible Parties

Although St. John's supported making accelerated processing available to parties based on their age or health condition, St. John's raised concerns that the Proposal is not designed to address disparities in life expectancies based on factors such as ethnicity and geography. In addition, St. John's raised concerns about *pro se* parties who St. John's asserted "may not be equipped to make such a request."

Parties, https://www.finra.org/arbitration-mediation/rules-case-resources/special-procedures/expedited-proceedings-seniors-seriously-ill.

20 See Proposal, supra note 1, 89 FR 105128, 105130. FINRA is also concerned that a requirement for additional proof of a party's health condition could deter parties from making valid requests for accelerated processing and also unnecessarily delay the proceedings. See id.

21 See FINRA Rules 12212(a) and 13212(a).

22 See FINRA Dispute Resolution Services Arbitrator's Guide, https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf. FSI noted that "FINRA Rules 12212(a) and 13212(a) adequately authorize arbitrators to impose additional sanctions to address improper conduct" and suggested that arbitrators should be able to "remove [a] case from expedited arbitration and the required deadlines" if parties are "found to have either misrepresented their age or medical condition."

23 FSI commented that under the Proposal there may be more incentive to "improperly seek placement on the accelerated track."

FINRA recognizes that there are some parties who could benefit if their arbitration were accelerated but who would not qualify for accelerated processing under the Proposal. However, FINRA is concerned that an approach based on multiple additional factors could become too complex to be workable. In addition, as discussed in the Proposal, FINRA is concerned that an increase in those eligible for accelerated processing under the Proposal might make it difficult for arbitrators—many of whom might serve concurrently on more than one arbitration—to comply with their obligations under the Proposal to endeavor to hold hearings and render an award within 10 months or less in accelerated proceedings.[24]

In addition, although FINRA recognizes the concerns raised by St. John's with respect to *pro se* parties, FINRA is not aware of any concerns that *pro se* parties have been unable to make requests under the current program. FINRA also notes that it advises arbitrators to be sensitive to the fact that *pro se* parties are most likely inexperienced in either litigation or the arbitration process, and that *pro se* parties may need some guidance from the panel.[25] The Basic Arbitrator Training Program reminds arbitrators that *pro se* parties "may need more procedural direction and specific deadlines for discovery requests and responses."[26]

If the SEC approves the Proposal, FINRA will update its website to provide guidance to *pro se* parties regarding the availability of and process for requesting accelerated processing under Rules 12808 and 13808.[27] In addition, the guidance will include that *pro se* parties who do not qualify for accelerated processing based on either their age or health condition may request, once the panel is appointed, that the panel consider other factors, including their age or a change in their health condition during the arbitration proceeding, when scheduling hearings and discovery, briefing, and motion deadlines.[28]

II. Accelerating the Proceedings

Once the Director determines that an arbitration qualifies for accelerated processing, the Proposal would accelerate the proceedings in three ways. First, the Proposal would accelerate the arbitrator selection process by shortening the deadlines for the Director to send the list of

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24 See supra note 12 and accompanying text.

25 See FINRA Dispute Resolution Services Arbitrator's Guide, https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf.

26 See FINRA DRS Basic Arbitrator Training Program Transcript, p. 28, https://www.finra.org/sites/default/files/2024-05/FINRA-Basic-Arbitrator-and-Expungement-Training-Full-Course-Transcript.pdf.

27 See FINRA, Resources for Investors Representing Themselves, https://www.finra.org/arbitration-mediation/about/pro-se.

28 See supra note 15.

potential arbitrators to the parties.[29] Second, the Proposal would provide arbitrators with direction on how quickly the arbitration should be completed.[30] Third, the Proposal would shorten certain deadlines that apply to the parties.[31]

Caruso supported the proposed amendment because it "would be meritorious and beneficial to the arbitration process." Cambridge recommended against including any deadlines in the Proposal "to allow for flexibility" and for FINRA to "encourage parties and arbitrators to work together to determine an appropriate schedule that considers the unique circumstances of their particular case." Cambridge continued that "[i]n the absence of an agreement between the parties, the arbitrators should have the latitude to adjust deadlines for the arbitration to accommodate the party with the qualifying medical condition." Further, Cambridge commented that the proposed shortened discovery deadlines "may deny respondents a meaningful opportunity to prepare an informed responsive pleading which could result in significant prejudice."

To meaningfully reduce case processing times for those parties who may be unable to fully participate in lengthy arbitration proceedings—a goal that the current program has been unable to fully achieve—FINRA believes it is necessary and appropriate to establish rule-based shortened deadlines. However, FINRA believes that the existing provisions of the Codes provide the parties and arbitrators with sufficient flexibility to modify the proposed shortened deadlines when necessary.[32]

III. Other Comments

Intellivest expressed its views that FINRA arbitration is becoming more expensive and less fair than courts and that unlike the court system each hearing is assessed a fee by FINRA. This comment is outside the scope of the Proposal. However, FINRA notes that the DRS forum is intended to provide impartial dispute resolution that is less costly and faster than traditional

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29 See proposed Rules 12808(b)(2)(A) and 13808(b)(2)(A).

30 See proposed Rules 12808(b)(2)(B), 12808(b)(2)(C), 13808(b)(2)(B), and 13808(b)(2)(C).

31 See proposed Rules 12808(b)(2)(D) and 13808(b)(2)(D).

32 Under existing FINRA Rules 12207(a) and 13207(a), the parties may agree to extend or modify any deadline for serving an answer, returning the ranked arbitrator or chairperson lists, responding to motions, or exchanging documents or witness lists. Under existing FINRA Rules 12207(b) and 13207(b), the panel may extend or modify any deadline for serving an answer, responding to motions, exchanging documents or witness lists, or any other deadline set by the panel, either on its own initiative or upon motion of a party. Further, under existing FINRA Rules 12508(b) and 13508(b), the panel may extend the time for a party to object to discovery requests if the party has "substantial justification for failing to make the objection within the required time." While these provisions in the Codes provide the panel and the parties with flexibility to modify the shortened deadlines in the Proposal, FINRA expects the extensions to be the exception and not the rule.

litigation. The DRS forum charges low arbitration fees, uses a customer-friendly discovery guide, strictly limits dispositive motions made prior to the party resting its case, and provides sanctions for frivolous motions and abusive motion practices.[33] In addition, FINRA waives fees for customers experiencing financial hardship.[34] FINRA also makes available efficient and cost-effective alternative processes to a full arbitration proceeding for certain smaller claims. For example, claimants may proceed "on the papers," where an arbitrator will make a decision based solely on the documents submitted.[35]

Intellivest also suggested that FINRA rules should be amended to provide for sanctioning attorneys for engaging in delay tactics in arbitration. FINRA notes that it does not have direct authority to investigate or discipline representative misconduct in the DRS forum.[36] If an attorney is clearly engaging in misconduct in the DRS forum, FINRA will make a referral to the attorney's disciplinary agency, which has processes to respond to misconduct of attorneys subject to its jurisdiction.

IV. Conclusion

FINRA believes that the Proposal will protect investors and the public interest by shortening case processing times for those parties—most of whom are likely to be customers—who may not be able to meaningfully participate for the duration of a lengthy arbitration because of their age or health condition. When parties are unable to meaningfully participate in an arbitration, it can affect the outcome of the proceedings. This potentially harms not only the immediate parties to the arbitration but also the broader investing public because the resolution of the arbitration may not accurately reflect the underlying merits of the case.

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FINRA believes that the foregoing responds to the material concerns raised by the commenters on the Proposal and that the Proposal should be approved. If you have any questions, please contact me at 212-858-4106, or email: Kristine.Vo@finra.org.

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33 See, e.g., FINRA Rules 12212, 12504, 12506, 12511, 13212, 13504, and 13511.

34 See FINRA, Waivers, https://www.finra.org/arbitration-mediation/about/fees.

35 See FINRA Rules 12800 and 13800; see also Simplified Arbitrations: Three Ways to Present Your Case to Arbitrators, https://www.finra.org/arbitration-and-mediation/simplifiedarbitrations.

36 Cf. FINRA Rule 8310 (allowing FINRA to impose sanctions on member firms and persons associated with member firms).

Sincerely,

/s/ Kristine Vo

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