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December 17, 2017

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 17-34
Non-Attorney Representatives in Arbitration

Ms. Asquith:

Please allow this letter to serve as my response to FINRA's request for comment regarding non-attorney representatives ("NAR") in FINRA arbitration.

Allow me to preface this comment by stating that I have been honored and privileged to have been able to represent customers (and the occasional broker) in FINRA for approximately 5 years now. I have had the opportunity to arbitrate before some wonderful arbitrators (even in cases where I have lost), both attorney and non-attorney. I have also had the privilege of working with some absolutely fantastic attorneys (and some non-attorneys) on the other side of the aisle. Nothing that I say in this comment should be taken as an insult or denigration to any person.

I feel compelled to take the time to write this letter because of a number of the comments that have been submitted to FINRA despite the authors of such comments apparently not actually having any actual experience with any NAR firms. Instead, many of the comments seem to be filed by claimant's attorneys who potentially do not have a lot of business right now due to the 8-year bull market, or by respondent firms who don't like to be taken to arbitration. As can be clearly understood, the motivations behind such comments may be less than altruistic.

Accordingly, my comment should perhaps be accorded some additional weight, as my comment will be against my own interests. Obviously, the less competition in the

forum, the more clients potentially available for me to represent. However, I feel compelled to do what is in the best interest of investors, rather than in my own self-interest.

I do note as a proviso that I do not and cannot comment on all NAR firms. I have experience with only one particular NAR firm, which unfortunately has been the victim of unjustified attack in a couple of the comments previously submitted.

I began litigating in FINRA approximately 5 years ago. At the time, as a result of a mediation in one of my cases, I was introduced by a very well-known mediator in this forum to an NAR firm by the name of Stock Market Recovery Consultants ("SMRC"). The mediator believed that I could be of help for this firm.

Stock Market Recovery Consultants has been helping investors recover investment losses before FINRA for 15 years. In that time, they have helped hundreds of (if not over one thousand) investors recover millions upon millions of dollars, including numerous six-figure settlements. While originally SMRC litigated all the way through and including the hearings themselves, they stopped doing so because as an NAR firm, they felt that they were not given a fair chance by certain arbitrators, who seemed to have a bias against non-attorney representatives. Accordingly, SMRC began employing attorneys to handle the arbitration hearings in the event a case could not be resolved. SMRC has retained me on a number of occasions to handle hearings in certain of their cases. This is even reflected on some of the awards that I have been able to achieve over the years. I have recovered millions of dollars for investors in cases that originally began as SMRC cases.

SMRC will also seek my counsel and/or involvement in cases where there are particular legal issues involved. SMRC does not hold themselves out as attorneys, and they know their limitations and when a particular issue is above their ability, in which case they act accordingly and, in my humble opinion, responsibly.

To my own personal knowledge, SMRC also assists investors when nobody else will. There have been suggestions made in the comments previously submitted that perhaps NAR firms should be limited to claims of \$100,000 or less. I believe that this suggestions will harm and not help investors. SMRC has helped hundreds of investors with claims over \$100,000. The following is a typical scenario that I frequently encounter in my practice. I will get a call from a potential client who saw my name in some awards, or who was referred to me by SMRC, and the client has suffered a 6-figure or even 7-figure loss. The problem, however, is that the losses were incurred 6, 7, 8+ years before. When I ask the investor why they waited so long to attempt to do something, they respond that they tried and reached out to dozens of lawyers, and nobody was willing to take their case. Many times these investors live in small towns, and there are a few local lawyers, none of whom know anything about securities arbitration. Other times, the clients have reached out to multiple securities arbitration lawyers, but none of them were willing to take the case because the prospects for recovery were low or because the attorney wanted a 5-figure retainer up-front which the client could not afford. Obviously, a client who has just lost their life savings is not going to be able to, or willing to, risk whatever little money they have left. Unfortunately, unless I have a good faith argument to make to a Panel, I am

forced to turn these clients away, and people who would have had a good chance at recovery had they been able to find someone to help them instead recover nothing. Even when I have an argument that I can make, many times some arbitrators will take a strict stance and dismiss the claim on eligibility grounds.

I will give just two examples specifically involving SMRC, although I could give dozens more.

I had one case where my client knew a very well-to-do, big-name lawyer in his city. When he suffered losses in his account (several hundred thousand dollars of losses), he spoke to this lawyer friend of his who told him that he had no case and shouldn't even bother. Of course, not understanding anything about securities law, the contours of securities arbitration, or FINRA concepts such as suitability, this attorney was 100% incorrect. The client in fact, in my opinion, had a very good case, as he was an elderly gentleman whose retirement account had been invested in rather aggressive equities. The gentleman was referred to me by SMRC, and we filed the case, but due to the passage of time, the settlement value of our case was drastically reduced, and making matters worse, due to his advanced age, my client actually passed away prior to the hearing.

In another case in which SMRC retained me to handle the hearing, involving a widow whose husband had passed away from cancer leaving her with his accounts, in the middle of cross-examination, Respondent's counsel asked her why she had waited so long to file the claim. With tears pouring down her face, the widow emotionally exclaimed that she had spoken to dozen of attorneys, "but nobody would help me. I heard an advertisement on the radio for Stock Market Recovery Consultants, and I called, and they listened to my story and I begged them, will you help me? And Benjamin Lapin¹ said, I WILL HELP YOU!" Bear in mind that this was not a small case. This widow had suffered 6-figure damages (approximately \$200,000), and yet no attorney was willing to take her case. The passage of time substantially impacted this case, and this investor was undoubtedly harmed by her inability to find representation prior to SMRC.

I know many, many respondent-side attorneys and mediators who absolutely love Benjamin Lapin and Mitchell Markowitz, the principals of SMRC. They cannot voice their support, for obvious reasons. SMRC has done nothing but help investors in FINRA for 15 years now. And that help has not been limited to only small claims. SMRC has helped investors with losses as low as a few thousand dollars to losses in the millions. The suggestion that only customers with small claims have been helped by NAR firms is a patently false absurdity.

FINRA's Notice mentions that FINRA has been informed of NAR firms taking up-front fees of \$25,000. I know that FINRA cannot possibly be referring to SMRC, because SMRC does not take any up-front fees from clients. I am aware, however, of numerous Claimant's lawyers who take up-front non-refundable retainer fees in the 5-figures, due to the way that FINRA has devolved into a very expensive pseudo-court proceeding full of oppressive discovery and abusive motion practice, where rather than customers being able

¹ Benjamin Lapin is one of principals of SMRC.

to simply present their story and get a ruling, the customer does not stand a chance without spending tens of thousands of dollars on experts and expert reports. Accordingly, since up-front retainers are taken by some NAR firms as well as many (if not most) attorneys, I severely question why FINRA believes that this is a concern solely relating to NAR firms as opposed to the forum in general. It is not the representative that creates the need for these fees but the obscenely high standards that have unfortunately (and in my opinion, incorrectly) been created through practice for a claimant to have any shot at winning a case. If FINRA is aware of particular instances of fraud or overreach by particular NAR firms (or attorneys), then I would imagine FINRA certainly has the ability to deal directly with that NAR firm (or attorney), and the customer would certainly have legal options available to them in state court or federal court.

Similarly, I question the statement mentioned in the Notice, and parroted by many of the anti-NAR comments previously submitted, that NAR firms should perhaps not be allowed to represent investors before FINRA because they do not have malpractice insurance. To my knowledge, there is only one state in the country that requires attorneys to maintain malpractice insurance: the State of Oregon. I know plenty of attorneys who do not carry malpractice insurance. Is FINRA going to next start soliciting comments on what types of attorneys can practice before FINRA? Once FINRA starts deciding who can practice before it and under what conditions, despite the individual or firm not having done anything wrong, simply on the basis of a broad classification, it is a very dangerous and slippery slope until someone else starts deciding what other conditions and exclusions they want to start imposing.

Again, if FINRA is aware of particular abuses by particular firms, then that is something that FINRA undoubtedly has the jurisdiction to handle. However, to start imposing broad, and as demonstrated above, arbitrary rules on a subset of representatives is far too overbroad and will only have the effect of harming, not helping investors.

In fact, if FINRA is so worried about investors (as it should be, since FINRA's stated goal is investor protection) and insurance requirements, then FINRA should be soliciting comments on imposing insurance requirements on broker-dealers and brokers, and not on customer representatives. I have dozens of unpaid awards because the broker-dealer went out of business and there was no insurance coverage. Why is FINRA worrying about malpractice committed in the course of arbitration (a very difficult cause of action to maintain or win on in court regardless of the person allegedly committing the malpractice), and not the conduct of the broker-dealer leading to the arbitration in the first place?! Is FINRA aware of even a single case where an NAR firm was successfully sued for malpractice in state court but there were no funds to satisfy the award, or is this an academic straw-man submitted by those who would seek to do away with NAR firms for their own motivations? I am certainly aware of unpaid arbitration awards; being the recipient of current unpaid awards in the amount of millions of dollars. Why isn't this FINRA's primary concern?

FINRA's Notice also notes that there are no rules of professional conduct for NAR firms, whereas such rules exist for attorneys. However, this to me is a red herring. Under

the common law of every state in this country, NAR firms representing clients in arbitration would have the broadest of fiduciary duty to their clients, including the duties of care, good faith, loyalty, and competence. If an NAR firm chooses to act with anything other than absolute professional conduct, they would be putting themselves in severe harm's way. Some of the comments suggest that there is recourse for an aggrieved customer against an attorney but not an NAR firm. I do not understand this suggestion. Why is a lawsuit against an attorney for malpractice different than a lawsuit against an NAR firm for breach of fiduciary duty?

FINRA's Notice also mentions a concern that NAR firms use the forum for inappropriate business practices, or to file frivolous or stale claims in order to elicit a settlement. Inappropriate according to who? Frivolous or stale according to who? The broker-dealers who have lost the investors their life savings? The broker-dealers whose employees have engaged in fraudulent and unethical business practices? Is FINRA now usurping the role of the arbitrators to determine each case on its own merits? This section of the Notice really puzzles me. If I withdrew or failed to file a case every time a respondent told me that I had no case, or that my case was frivolous, I would have had only one case over the past 5 years. In these same cases, where I am told by the broker-dealer's attorney that the case was "stale" or "frivolous" or that I had "no case," I have gone on to win dozens of awards and settlements, including numerous 6-figure awards and settlements (including cases that I have taken over from SMRC, where I was informed by the respondent that the case was "stale" and/or "frivolous"). Clearly FINRA believes that arbitrators are competent to make such determinations, otherwise FINRA would adjudicate claims rather than arbitrators. If a claim is "stale" or "frivolous," arbitrators are certainly competent to make that determination. I do not shed tears for broker-dealers who make hundreds of millions or billions of dollars a quarter, or whose entire businesses are modeled on shady, boiler-room type tactics. If these brokerage firms would spend more time acting like responsible fiduciaries and monitoring their associated persons rather than trying to figure out what crazy new product they can use to squeeze out another commission from the customer, maybe there would be fewer investor losses and fewer arbitrations filed. Again, this type of argument leads to the same slippery slope mentioned above. FINRA should not be getting involved whatsoever in what constitutes an allegedly "stale" or "frivolous" claim. Trust me when I say that broker-dealers fare far better in FINRA than they would in court, otherwise they would not fight so hard every time the claimant's bar attempts to do away with mandatory arbitration. If these broker-dealers really think that FINRA's forum is being abused, then do away with the whole mandatory arbitration and let customers start filing claims in court, which will be ten times cheaper for customers in terms of forum fees, and where they will have far better chances of winning and far higher damages when they do win.

The fact is that restricting NAR firms would do nothing other than provide fewer options for defrauded investors, which as I described above, can have devastating consequences. It would also interfere with a customer's freedom to contract, which I believe would also violate the Federal Arbitration Act and the Supreme Court's interpretation thereof. Similarly, while I do not comment on whether those states who prohibit NAR practice are acting contrary to the FAA (and whose restrictions are therefore

preempted by, and consequently voided by, the Supremacy Clause), the fact is that every such State has the option to prosecute and obtain an injunction against such NAR firm should it deem such action appropriate.

The suggestion that FINRA needs to save customers from hiring NAR firms assumes that customers are unable to perform their own due diligence, and is implicitly quite insulting to the intelligence of investors. If NAR firms are holding themselves out as attorneys, then they are committing a crime. If NAR firms are not holding themselves out as attorneys, then what right does FINRA have to step in and tell investors that they cannot select the representatives of their choosing? As I stated above, with regard to the personal knowledge I have of SMRC, they are often the only ones willing to represent a customer without taking money upfront, something that hardly any attorney is willing to do. I would also imagine that clinics and the like have certain restrictions on the types of investors they are willing to represent (presumably elderly or low-income individuals), which means that for everyone else, FINRA's suggested restriction of NAR firms would effectively be precluding them from having any representation if they are unable to find an attorney willing to take their case.

One of the comments has pointed out that this very same concern regarding NAR representation in the NASD has been voiced for over 25 years. Nothing was done then, and yet here we are 25 years later. FINRA is still operating, broker-dealers are still operating, customers are still being represented, and arbitration decisions are still being rendered. Clearly this is not an issue that requires broad action. If there is a specific NAR firm that has been engaging in specific repeated abuses, then FINRA should take it up with that specific NAR firm.

If FINRA is really interested in investor protection, then there are far better things to be worried about. Rather than asking whether NAR firms are competent to represent investors before FINRA, we should be asking why FINRA has become so difficult to litigate in that one would even need an attorney in the first place. Arbitration is supposed to be a simplified process where an investor should be able to present their claim without the need for an attorney. Unfortunately, FINRA has become just a far more expensive substitute for court where the customers lose their right to have their case heard by a jury of their peers and where attorneys engage in abusive litigation tactics, particularly when it comes to discovery and motion practice. FINRA has become a forum where for some reason, common sense has gone out the window, and it has become almost mandatory to have to pay an expert tens of thousands of dollars otherwise the customer stands no chance of recovery. Instead of worrying about NAR firms and what I imagine is a minimal impact on the forum, FINRA should be asking real questions, such as why customers fare so much worse in FINRA than they would in court, and why so often even when a customer is successful, the damages awarded are a minute fraction of what a plaintiff would have received from a jury in court.

Some of the comments previously posted have listed anecdotal stories of a single negative experience with an NAR firm. I do not denigrate these opinions nor do anything other than commiserate with what must have been a very trying experience. However, I

can unequivocally state that FINRA's actions in painting any broad strokes (again, I am not stating that FINRA cannot and should not do something about repeated instances of particular abuses of which FINRA is made aware and which can be substantiated) will do investors far more harm than good.

Again, I cannot speak to my personal experience with NAR firms other than SMRC and their impact on investors. That experience and SMRC's impact on investors to my knowledge has been nothing but positive, and as a whole I believe SMRC has done more for investor protection than any other claimant's representative.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Jo E Neuman', with a stylized flourish at the end.

Jonathan E. Neuman, Esq.