

November 4, 2021

Via E-mail: [NASAAComments@nasaa.org](mailto:NASAAComments@nasaa.org)

Broker-Dealer Market and Regulatory Policy and Review Project Group  
Broker-Dealer Arbitration Project Group  
Investment Adviser Regulatory Policy and Review Project Group  
North American Securities Administrators Association, Inc.

**Re: Proposed Model Rules for Unpaid Arbitration Awards  
Under the Uniform Securities Acts of 1956 and 2002**

Ladies and Gentlemen:

Please allow this to serve as comments of Cetera Financial Group, Inc. (“Cetera”) with respect to proposed model rules relating to unpaid arbitration awards rendered against broker-dealers, agents, investment advisers, and investment adviser representatives. Cetera is the corporate parent of five broker-dealers and three investment advisers, and serves more than 1 million customers in all 50 United States. The majority of our representatives offer both securities brokerage and investment advisory services to customers.

The proposed model rules (collectively, the “Proposal”) would make failure to pay an arbitration award or judgement of a court arising out of a customer-initiated claim or satisfy the terms of a regulatory order a dishonest or unethical business practice under applicable state law and subject violators to sanctions including suspension or revocation of their ability to conduct business. It would generally apply in the same way to individual agents, broker-dealers, and state-registered investment advisers and investment adviser representatives. (For brevity and ease of reference, we will refer to all of the registered entities and individuals that would be subject to the model rules as “Registrants”.)

FINRA currently has a rule which provides that a member firm or associated person must pay an arbitration award within 30 days of receipt, unless the member firm or associated person has filed a motion to vacate the award with a court of competent jurisdiction.<sup>1</sup> If the member firm or associated person fails to comply with the arbitration award or the terms of a settlement agreement related to an arbitration, FINRA may suspend the membership of the firm or associated person. As the text accompanying the Proposal notes, the FINRA rule only prevents the member firm or individual from being an active member or associated person of a FINRA member until the award has been satisfied. In some circumstances, suspended firms and

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<sup>1</sup> See FINRA Rule 12904(j).

individuals may continue to be registered with NASAA member jurisdictions and conduct business in other securities-related capacities, such as investment advisers or investment adviser representatives. (Associated persons may also have the ability to conduct other financial-related business such as sales of insurance, subject to registration with applicable authorities.)

The Proposal includes three primary stated objectives. It seeks to:

1. Give NASAA member jurisdictions explicit authority to prevent broker-dealers and associated persons with unsatisfied judgments, arbitration awards, or regulatory orders from conducting business in other investment-related capacities;
2. Add a provision making such authority applicable to investment advisers and investment adviser representatives, many of whom are not FINRA members or associated with a FINRA member; and
3. Expand the ability of NASAA member jurisdictions to address attempts by Registrants to avoid payment of judgments and arbitration awards unless alternative payment arrangements are made between the claimant and the Registrant.

### **Considerations in Formulating Applicable Rules**

As NASAA and its' member jurisdictions consider this issue and creating means to ensure that Registrants satisfy their obligations to customers, they should be guided by the following principles:

- Keep it simple. Create a specific and objective standard to define conduct that is deemed unacceptable.
- Treat similarly situated individuals and entities the same. All Registrants should all be subject to the same standards.
- Strive for consistency with other regulatory regimes to which Registrants are subject.
- Deal with the relatively simple issue at hand. Registrants that do not meet their obligations to customers should be subject to sanctions, but expanding this discrete topic into a broader discussion about how to assure that all arbitration awards are paid is beyond the scope of the current initiative.

### **Summary of Our Comments**

Cetera supports the primary concept embodied in the Proposal. Suspension of the ability of Registrants to conduct securities brokerage and investment advisory business if they fail to pay arbitration awards or judgements is an appropriate means to ensure that they fulfill their obligations to customers. We also believe it is appropriate to apply the same standards to broker-dealers, investment advisers, and their respective agents. Many of these firms and

individuals conduct securities brokerage and investment advisory activities simultaneously. Placing the same restrictions on their activities regardless of the capacity in which they are acting is the correct approach. FINRA has adopted a specific rule requiring member firms and associated persons to pay validly rendered judgments and arbitration awards. The fact that there is no self-regulatory organization for investment advisers to enact or enforce a similar rule creates an unlevel playing field and should be corrected.

### **Specific Issues in the Proposal**

While we support the primary thrust of the Proposal, we believe that some of its' provisions are unnecessary, unwarranted, and potentially inconsistent with other laws or regulations. We offer the following specific comments and suggestions:

**I. Section (x) should include a provision allowing Registrants the opportunity to pursue vacatur of arbitration awards and appeal of judgments rendered by courts prior to the imposition of sanctions.**

Section (x) of the Proposal gives NASAA member jurisdictions the ability to suspend Registrants from operating in any investment-related business if they fail to pay a judgment or arbitration award. This provision should be amended to be consistent with the FINRA rule and provide that filing of a motion to vacate an arbitration award with a court of competent jurisdiction or an appeal of a judgment rendered by a court would operate as a stay to the general rule. Registrants must be allowed an opportunity to vindicate their rights to appeal under applicable law. Requiring payment of an arbitration award or imposing sanctions on Registrants prior to completion of the appeal process effectively guts the right to judicial review and should be changed.

**II. Section (y) should be eliminated from the Proposal.**

Section (x) of the Proposal gives NASAA member jurisdictions the ability to suspend any Registrant from operating in an investment-related business if they fail to pay a judgment or arbitration award. It states simply and directly that if the Registrant does not pay, they cannot continue to operate. Unless a motion to vacate or appeal is pending, it does not matter why the Registrant has not paid or what other actions they have taken, and their motives are irrelevant. It requires only a determination of a single objective fact. This is simple, straightforward, and absolutely clear.

Section (y) goes further, and provides that a Registrant who "attempts" to avoid payment of an arbitration award or final judgment is also subject to suspension or other sanctions. This will create several specific problems:

- The concept of "attempting" to do anything is extremely broad and imprecise. It necessarily involves an inquiry into the facts and circumstances surrounding what could be a long, complicated, and unconnected series of events. More importantly, it requires an inquiry into the state of mind, intent, and motives of the actor. It does not provide any effective guidance to Registrants about what types of activities are

proscribed, creating uncertainty for both Registrants and regulatory authorities. Determinations regarding motives and intent are inherently difficult to make, but more importantly, we do not believe that this provision adds in any material way to the authority that NASAA member jurisdictions would have to accomplish the objectives embodied in the Proposal. Failure to pay an arbitration award is an objective fact. If payment has not been made and no appeal is pending, the registrant should be suspended and that should be the end of the inquiry.

- It is our understanding that the intent of Section (y) is to prevent Registrants from taking actions to frustrate the ability of claimants to collect arbitration awards or judgments. This is a laudable goal, and we do not disagree with the spirit in which it is undertaken. However, the language of the Proposal is so broad that it could be extended to cover circumstances or actions taken by Registrants in good faith and for reasons that are unrelated to payment of the award or judgment, in both time and substance. For example, a Registrant may buy, sell, or transfer assets, pay compensation to themselves or affiliates, or utilize any number of entities or business structures prior to or during the pendency of a customer claim. Narratives about the reasons for and effects of these activities may be reconstructed after the fact with the benefit of hindsight. This will encourage far-reaching and irrelevant inquiries without meaningful incremental benefits for investors.
- Including the concept of “attempts” in the Proposal is additionally complicated by potential interaction with other applicable laws, particularly the U.S. Bankruptcy Code. The text accompanying the Proposal seeks comment about whether or not the automatic stay provided in the Bankruptcy Code creates such a complication and whether the language requires adjustment as a result. An extended discussion of the Bankruptcy Code and how this provision may interrelate with it is beyond the scope of our comments, but we believe that any regulation that could restrict the ability of a debtor to utilize any provision of the Bankruptcy Code would be pre-empted by federal law and presumptively invalid. This would be true particularly in cases filed under Chapter 13 of the Bankruptcy Code. In those instances, the ability of the debtor to continue to conduct business and earn income may be the sole asset of the bankruptcy estate. Anything that impairs its’ value would almost certainly conflict with the exclusive jurisdiction of the Bankruptcy Court over the debtor and the bankruptcy estate.

The Bankruptcy Code contains numerous provisions regarding transfers of assets and other transactions that are designed to frustrate creditors in their ability to assert claims and collect payments from debtors. There are many precedents and a long history of adjudicating these issues in bankruptcy and other insolvency cases. These inquiries are complicated and best left to the courts to sort out. The time and resources that would be required to resolve them are not an appropriate use of the scarce enforcement resources available to NASAA member jurisdictions. The solution in this instance is not to add language of the type suggested in Question No. 2 in the text of the Proposal. The better approach is to eliminate the concept of

“attempts” to avoid payment. Lack of payment is an objective fact. Best to leave it at that.

**III. Consideration of other facilities to fund payment of unpaid arbitration awards should be undertaken only with extreme caution.**

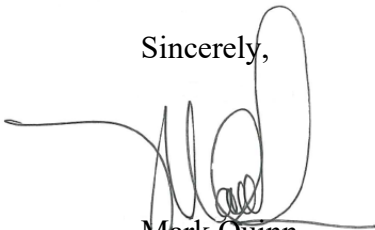
The text accompanying the Proposal includes a series of questions about specific issues. In particular, Question No. 4 seeks comment about other possible methods that might be employed to ensure payment of arbitration awards and judgments. We will not suggest any such method at this time, but we would note that the text discusses other approaches that were considered but not included, such as the possibility of establishing recovery funds that would be used to satisfy unpaid arbitration awards, or requirements for Registrants to maintain Error and Omission insurance to cover claims made against them.

The Proposal notes that there has not been broad political support for either of these approaches. That is certainly true, but more importantly, both would have significant negative collateral consequences that vastly transcend the relatively straightforward matter that the Proposal is designed to address. In particular, establishment of any type of recovery fund is a huge and complicated topic. If it is ever considered, it must be the subject of its own rulemaking process and not simply as an add-on to something like the current Proposal. We believe it is likely that some commentors will suggest creation of recovery funds, insurance requirements, or other similar approaches as solutions to the unpaid arbitration award issue. We would simply like to point out that any such suggestions should be recognized for what they are: Ill-conceived and far beyond the scope of the current discussion.

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Thank you for the opportunity to provide these comments. As always, we look forward to engagement with NASAA and its member jurisdictions on matters of policy and regulation. If we can offer any further information or assistance, please let me know.

Sincerely,



Mark Quinn  
Director of Regulatory Affairs

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