



VIA ELECTRONIC MAIL

November 4, 2021

Kristen Standifer (kstandifer@dfi.wa.gov)
Patrick Costello (patrick.costello@sec.state.ma.us)
Stephen Brey (breys@michigan.gov)
NASAA Corporate Office (nasaacomment@nasaa.org)

Re: **REQUEST FOR PUBLIC COMMENT REGARDING A PROPOSED MODEL RULE FOR UNPAID ARBITRATION AWARDS UNDER THE UNIFORM SECURITIES ACTS OF 1956 AND 2002**

Dear Ms. Standifer, Mr. Costello, and Mr. Brey:

On October 5, 2021, the North American Securities Administrators Association (“NASAA”) released for public comment a Request for Public Comment Regarding a Proposed Model Rule for Unpaid Arbitration Awards Under the Uniform Securities Acts of 1956 and 2002 (“Model”). The Broker-Dealer Market and Regulatory Policy and Review Project Group, the Broker-Dealer Arbitration Project Group, and the Investment Adviser Regulatory Policy and Review Project Group (the “Project Groups”) drafted the Model that “will serve as bases for enforcement actions related to unpaid awards and allow member jurisdictions to prevent the registration of firms and individuals, whether as broker-dealers, agents, investment advisers, or investment adviser representatives, if the firm or individual has outstanding FINRA arbitration awards or other regulatory obligations.”¹

The Financial Services Institute² (FSI) supports this important proposal and appreciates the opportunity to comment. The Financial Industry Regulatory Authority’s (FINRA) alternative dispute resolution system, and specifically its arbitration program, provides an accessible mechanism for resolving disputes quickly, economically, and fairly. The continued reliance on, and success of, FINRA arbitration requires that participants view the program as fair and effective. We believe that the Model can make an important contribution to ensuring that awards are paid, compensating the harmed party as well as supporting confidence in the arbitration program.

Below, FSI will address questions raised in the request for public comment with the intent of helping the Project Groups develop a final Model that will help significantly reduce the

¹ Request for Public Comment Regarding a Proposed Model Rule for Unpaid Arbitration Awards Under the Uniform Securities Acts of 1956 and 2002. <https://www.nasaa.org/wp-content/uploads/2021/10/Request-For-Public-Comment-Unpaid-Arbitration-Awards-Model-Rules.pdf>

² The Financial Services Institute (FSI) is an advocacy association comprised of members from the independent financial services industry and is the only organization advocating solely on behalf of independent financial advisors and independent financial services firms. Since 2004, through advocacy, education, and public awareness, FSI has been working to create a healthier regulatory environment for these members so they can provide affordable, objective financial advice to hard-working Main Street Americans.

number of unpaid awards, help compensate victims, and potentially protect other investors from harm.

Background on FSI Members

The independent financial services community has been an important and active part of the lives of American investors for more than 40 years. In the US, there are more than 160,000 independent financial advisors, which account for approximately 52.7 percent of all producing registered representatives.³ These financial advisors are self-employed independent contractors, rather than employees of the dually registered Independent Broker-Dealers (IBD) and Registered Investment Adviser (RIA) firms through which they are licensed.⁴

FSI's member firms provide business support to independent financial advisors in addition to supervising their business practices and arranging for the execution and clearing of customer transactions. Independent financial advisors are small-business owners and job creators with strong ties to their communities. These financial advisors provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans. Their services include financial education, planning, implementation, and investment monitoring. Due to their unique business model, FSI member firms and their affiliated financial advisors are especially well positioned to provide Main Street Americans with the affordable financial advice, products, and services necessary to achieve their investment goals.

Discussion

The Project Groups requested public comment on all aspects of the proposed Model Rules. In response to the Project Groups specific questions:

1. Are there issues related to unpaid customer-initiated arbitration awards that the proposed rules would not address?

FSI is not aware of any issues related to unpaid arbitration claims that the rules would not address.

2. The “automatic stay” under the Bankruptcy Code generally stays any action to collect a debt owed by a person that has filed a bankruptcy petition. In light of this, is additional language necessary in the second provision to clarify that proposed rules do not interpret a bankruptcy filing as an attempt to avoid payment of any final judgment or arbitration award?

Yes. As discussed below in response to question 5, FSI believes the second paragraph of the Model, relating to attempts to avoid payment of an arbitration award, is unnecessary and the Projects Groups should consider dropping it from the Model. However, should the provision remain, we believe it would be helpful to clarify that proposed rules do not interpret a bankruptcy filing as an attempt to avoid payment of any final judgment or arbitration award. A

³ Cerulli Associates, Advisor Headcount 2016, on file with author.

⁴ The use of the term “financial advisor” or “advisor” in this letter is a reference to an individual who is a dually registered representative of a broker-dealer and an investment adviser representative of a registered investment adviser firm. The use of the term “investment adviser” or “advisor” in this letter is a reference to a firm or individual registered with the SEC or state securities division as an investment adviser.

registrant should not be constrained from utilizing this legitimate legal tool. Moreover, paragraph 1 of the Model provides for sanction if the arbitration award goes unpaid.

3. Does the broad reach of paragraph three undermine the focus on unpaid customer-initiated arbitration awards?

Paragraph 3 addresses the failure to pay and fully satisfy any fine, civil penalty, order of restitution, order of disgorgement, or similar monetary payment obligation. We note this paragraph does not relate to the core purpose of the Model, to address unpaid arbitration awards. On balance, FSI believes that without paragraph 3, the Model can still fully achieve its intended purpose of preventing those who fail to pay arbitration awards from continuing to operate as investment advisers or investment adviser representatives.

Should the Project Groups determine paragraph 3 remain part of the Model, FSI recommends it be modified so that it is triggered by a bright-line action from the relevant regulator. As drafted, state regulators adopting the model would potentially be making a determination as to whether the person or entity is complying with an order of another regulator. Besides the practical difficulty involved with making such a determination, it could lead to inconsistent regulatory action and confusion. For example, it would be an incongruous result if a state were to revoke a registration while the original sanctioning regulator does not deem revocation necessary or appropriate to address any non-compliance with its order.

In sum, if paragraph 3 is included, FSI believes it should be reliant on a formal finding by the original sanctioning authority for non-compliance with that authority's order or finding.

4. Are there other ways to address unpaid customer-initiated arbitration awards?

FSI believes the Model sufficiently addresses unpaid arbitration consistent with state regulatory authority.

5. What concerns do you have about the proposed rules?

As alluded to above, FSI believes paragraph 2, relating to attempts to avoid payment is unnecessary for the purpose of the Model.

The purpose of the Model is to "serve as bases for enforcement actions related to unpaid awards and allow member jurisdictions to prevent the registration of firms and individuals, whether as broker-dealers, agents, investment advisers, or investment adviser representatives, if the firm or individual has outstanding FINRA arbitration awards or other regulatory obligations."

We believe paragraph 2 would be difficult to rely upon in practice and would be unlikely to result in better compliance with payment obligations. Without paragraph 2, the Model has an unambiguous standard that is simple to judge and enforce. It codifies an objective standard that either enforces a very short-term conclusion (30 days), or a schedule that is agreed to by the harmed party.

Generally, FSI believes it would be a very rare, subjective, and evidence-intensive regulatory action that would demonstrate a registrant is "attempting to avoid" a payment. In most, if not all circumstances, a clear-cut resolution of payment or non-payment (paragraph 1) would likely precede and be more unassailable, than any action based on paragraph 2. We do not believe there would be any benefit to investors or regulators in sanctioning an attempt to avoid payment if the payment is otherwise actually made as required or agreed upon.

Therefore, we respectfully suggest paragraph 2 be excluded from the Model. In the alternative, as we also propose with respect to paragraph 3 of the Model, the trigger of the rule should be based upon the action of the original sanctioning body, in the interests of efficacy, fairness, and consistency.

Conclusion

FSI supports NASAA's proposed model to address unpaid arbitration awards. Reducing unpaid arbitration awards will foster confidence in the alternative dispute resolution system and, most importantly, help investors who have been harmed.

FSI believes paragraph 1 of the proposal (for both brokers and advisers) effectively addresses the issue of unpaid arbitration from a state regulatory standpoint. To the extent the Project Groups believe there is a need to address non-compliance issues beyond unpaid arbitration, we believe the Model should rely on determinations of the original sanctioning authority, which is best positioned to monitor and judge compliance.

Thank you for considering our comments. Should you have any questions, please contact my colleague Dan Barry at (202) 517-6464, or dan.barry@financialservices.org.

Respectfully submitted,

A handwritten signature in blue ink that reads "Robin M. Traxler". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robin Traxler
Senior Vice President, Policy & Deputy General Counsel