



November 4, 2021

Via E-Mail to NASAAComments@nasaa.org

North American Securities Administrators Association, Inc. (NASAA)
750 First Street, NE, Suite 1140
Washington DC 20002

**Re: SIFMA comment re: NASAA's Proposed
Model Rule for Unpaid Arbitration Awards**

Dear Sir / Madam:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on NASAA’s proposed model rules to address unpaid FINRA arbitration awards by broker-dealers and investment advisers (the “Model Rules”).² The Model Rules would add the following provisions to the dishonest or unethical business practices of broker-dealers and investment advisers:

- Failing to satisfy an arbitration award resulting from a client or customer-initiated arbitration;
- Attempting to avoid payment of any client or customer-initiated arbitration; and
- Failing to satisfy the terms of any order resulting from a regulatory action taken against the registrant.

The Model Rules would thereby serve as the bases for enforcement actions related to unpaid awards and allow member jurisdictions to prevent the registration of firms and individuals with outstanding FINRA arbitration awards or other regulatory obligations.

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate on legislation, regulation, and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² NASAA Proposed Model Rules for Unpaid Arbitration Awards (October 5, 2021), available at <https://www.nasaa.org/wp-content/uploads/2021/10/Request-For-Public-Comment-Unpaid-Arbitration-Awards-Model-Rules.pdf>.



The issue of unpaid FINRA arbitration awards is a legitimate concern that merits attention. SIFMA generally supports appropriately designed reforms intended to reduce the number of unpaid awards. Accordingly, we generally support NASAA's Model Rules, with recommendations to narrow them in certain respects, expand them in others, and clarify when and whether they apply, as set forth below.

Every industry has unpaid arbitration awards and/or court judgments.

As a threshold matter, it is important to establish that the issue of unpaid awards is not unique to FINRA arbitration or to our industry. Rather, the issue is common to all dispute resolution systems and all industries. Investors who recover judgments in court-based proceedings face the same exact collection issue. If our industry did *not* widely use pre-dispute arbitration agreements to ensure that most disputes are resolved in FINRA arbitration, then we would be faced with essentially the identical problem, in terms of number and dollar amount, of unpaid court judgments.

FINRA arbitration awards, however, are significantly easier to collect upon than court judgments. In fact, arbitration awards can be converted into court judgments and then enforced using the judicial system. Under the Federal Arbitration Act, an investor may sue in court to enforce the award and the court must confirm the award unless it finds there was corruption, fraud, evident partiality, misconduct, or the arbitrators exceeded their powers (all of which are rare). A court confirmation of a FINRA arbitration award has the same effect as a judgment recovered following a civil trial. Upon a court's confirmation, the investor can use all means available to a successful litigant in a judicial proceeding, including levying against the defendant's assets.

The Model Rules should be limited to unpaid arbitration awards, and should *not* extend to regulatory fines or relief.

The stated concern by NASAA is unpaid arbitration awards, supported by some data. NASAA does not present any evidence or argument that unpaid regulatory fines or relief is a concern that needs to be addressed. NASAA itself characterizes this third category as a "catchall provision" and explicitly questions whether "the broad reach of paragraph three undermine[s] the focus on unpaid [] arbitration awards."³ We think it does. It would also put arbitration awards in competition with regulatory fines for payment. Perhaps in many cases regulatory awards would be prioritized over arbitration awards, thereby undermining the central purpose of the Model Rules. The better course would be to focus the Model Rules exclusively on unpaid arbitration

³ Model Rules at pp. 5-6.



awards. If the Model Rules prove successful, and if unpaid regulatory fines are later shown to present a similar concern, then they can be addressed separately at that time.

The Model Rules should *not* be limited to customer awards, but should also extend to *all* unpaid awards, whether owed to a customer or industry claimant.

The Model Rules would apply only to “investment-related, customer-initiated” arbitration awards. The Model Rules are under-inclusive in this respect. If, for example, a firm brought an arbitration claim against a customer (e.g., to collect on margin debt), the customer counterclaimed and prevailed, and the firm failed to pay the award, then arguably that unpaid award would not be covered by the Model Rules because it was not “customer-initiated.” The Model Rules should be revised to cover such awards.

Moreover, there is no good reason why the Model Rules should not extend to cover *all* unpaid arbitration awards, including awards owed by customers or industry respondents to industry claimants. If a respondent avoids paying a valid award to a financial advisor or firm (often times a previous employer), that does not make their action any more excusable than when they fail to pay a valid award to a customer. They are all part of the same issue and concern that the Model Rules seek to address, i.e., unpaid arbitration awards. Accordingly, the Model Rules should be revised to cover all unpaid arbitration awards, whether owed to a customer or industry claimant.

The Model Rules should work within the existing construct of FINRA rules and procedures and should explicitly allow for appropriate defenses to ensure financial advisors and firms are not unfairly suspended.

Timing

Under FINRA rules, a respondent must pay a monetary award within 30 days of receipt, unless a motion to vacate has been filed with a court of competent jurisdiction.⁴ Thereafter, if a financial advisor or firm fails to pay the arbitration award, or a settlement agreement related to an arbitration award, then FINRA initiates an expedited proceeding under Rule 9554 and gives written notice to such financial advisor or firm that failure to comply within 21 days of service of the notice will result in a suspension or cancellation of firm membership or a suspension from associating with any member firm.⁵ The financial advisor or firm has the right to request a hearing, and must specify all defenses to the FINRA action.

⁴ FINRA Rule 12904(j).

⁵ FINRA Rule 9554 (Failure to Comply with an Arbitration Award).



The Model Rules should explicitly acknowledge the foregoing existing FINRA rules and procedures and accordingly, should provide that the Model Rules shall not take effect until 30 days following receipt of an arbitration award (which goes unpaid), and following the conclusion of any motion to vacate proceedings, and/or Rule 9554 expedited proceeding.

Defenses

In Rule 9554 expedited proceedings, there are a number of recognized defenses available to the respondent including.⁶

- the member or person paid the award in full⁷ or fully complied with the settlement agreement;
- the claimant has agreed to installment payments or has settled the matter;
- the member or person has filed a timely motion to vacate or modify the arbitration award; and
- the member or person has filed a petition in bankruptcy and the bankruptcy proceeding is pending or the award payment has been discharged by the bankruptcy court.

The Model Rules should explicitly acknowledge and incorporate these same defenses as reasonable and appropriate defenses under the Model Rules to failure to pay, or attempting to avoid payment of, an arbitration award.

* * *

⁶ See 75 Fed. Reg. 32,525-01 (June 8, 2010).

⁷ If the arbitration award is against the firm and the financial advisor, jointly and severally, and either the firm or the financial advisor pays the award in full, then the award should be considered paid-in-full as to both respondents.



If you have any questions regarding the foregoing, please contact the undersigned at 202.962.7300.

Sincerely,

A handwritten signature in black ink that reads "Kevin M. Carroll". The signature is written in a cursive style with a long horizontal flourish at the end.

Kevin M. Carroll
Managing Director and Associate General Counsel

cc: Robert W. Cook, President and CEO, FINRA
Robert L.D. Colby, Executive Vice President and Chief Legal Officer, FINRA
Richard Berry, Executive Vice President and Director, FINRA-DRS
Kristen Standifer, Project Group Chair, NASAA
Patrick Costello, Project Group Chair, NASAA
Stephen Brey, Project Group Chair, NASAA