

Accelerated Processing of Arbitration Proceedings

FINRA Requests Comment on a Proposed Rule to Accelerate Arbitration Proceedings for Seriously Ill or Elderly Parties

Comment Period Expires: May 16, 2022

Summary

FINRA seeks comment on a proposal to accelerate arbitration case processing when requested by parties who are seriously ill or are at least 75 years old. The proposal would help ensure that these parties are able to participate meaningfully in FINRA arbitration by shortening certain case processing deadlines for parties and arbitrators under the Codes.

The text of the proposed amendments is set forth in [Attachment A](#).

Questions regarding this *Notice* should be directed to:

- ▶ Victoria Crane, Vice President and Associate General Counsel, Office of General Counsel (OGC), at (202) 728-8104 or victoria.crane@finra.org;
- ▶ Thomas Kimbrell, Associate General Counsel, OGC, at (202) 728-6926 or thomas.kimbrell@finra.org; or
- ▶ Kristine Vo, Assistant General Counsel, OGC, at (212) 858-4106 or kristine.vo@finra.org.

Questions regarding the Economic Impact Assessment in this *Notice* should be directed to Matthew Kozora, Senior Economist, Office of the Chief Economist, at (202) 728-8804 or matthew.kozora@finra.org.

Action Requested

FINRA encourages all interested parties to comment. Comments must be received by May 16, 2022.

March 16, 2022

Notice Type

- ▶ Request for Comment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Registered Representatives
- ▶ Senior Management

Key Topics

- ▶ Arbitration
- ▶ Code of Arbitration Procedure
- ▶ Dispute Resolution
- ▶ Senior Investors

Referenced Rules & Notices

- ▶ FINRA Rule 12103
- ▶ FINRA Rule 12212
- ▶ FINRA Rule 12303
- ▶ FINRA Rule 12306
- ▶ FINRA Rule 12403
- ▶ FINRA Rule 12506
- ▶ FINRA Rule 12507
- ▶ FINRA Rule 12508
- ▶ FINRA Rule 12509
- ▶ FINRA Rule 13212
- ▶ FINRA Rule 13103
- ▶ FINRA Rule 13303
- ▶ FINRA Rule 13306
- ▶ FINRA Rule 13404
- ▶ FINRA Rule 13507
- ▶ FINRA Rule 13508
- ▶ FINRA Rule 13509

Comments must be submitted through one of the following methods:

- ▶ Online using FINRA's comment form for this *Notice*;
- ▶ Emailing comments to pubcom@finra.org; or
- ▶ Mailing comments in hard copy to:

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

To help FINRA process comments more efficiently, persons should use only one method to comment.

Important Notes: Comments received in response to *Regulatory Notices* will be made available to the public on the FINRA website. In general, comments will be posted as they are received.¹

Before becoming effective, a proposed rule change must be filed with the Securities and Exchange Commission (SEC) pursuant to Section 19(b) of the Securities Exchange Act of 1934 (SEA).²

Background & Discussion

FINRA currently offers a voluntary program to accelerate arbitration proceedings, upon request, for claimants who have a serious health condition or are at least 65 years old (current program).³ Under the current program, FINRA staff accelerates 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. In addition, the current program encourages arbitrators to be sensitive to the needs of the parties in making scheduling decisions and setting deadlines. The current program does not, however, provide for shortened, rule-based case processing deadlines for parties or provide arbitrators with instruction on how quickly the arbitration should be completed.

The current program has not resulted in meaningfully shortened case processing times. Cases that qualify for the current program close only slightly more quickly than cases that are not in the current program.⁴

Proposed Rule

FINRA is proposing to add a new rule to the Codes of Arbitration Procedure (Codes) to allow any party to request accelerated processing of an arbitration proceeding if they: (1) are at least 75 years old; or (2) certify that they have received a medical diagnosis and prognosis, and that based on that information they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration. The proposal would improve the ability of these parties—which FINRA anticipates will primarily be customer claimants—to participate meaningfully in a FINRA arbitration and obtain a fair outcome.

The Director of Dispute Resolution Services (Director) would make an objective determination as to whether the requesting party is at least 75 or has submitted the required certification.⁵ If the Director determines that the requesting party qualifies for accelerated processing, the proposal would shorten the timeframe to complete the arbitration as follows:

- ▶ **Turnaround Time.** The proposal would provide that a panel in an accelerated case shall endeavor to render the award within 10 months or less and set discovery, briefing and motions deadlines, and schedule hearing sessions, consistent with doing so. The current program encourages arbitrators to be sensitive to the needs of the parties in making scheduling decisions and setting deadlines but does not establish a timeframe by which the arbitration should be completed.
- ▶ **Serving an Answer.** The proposal would shorten the deadline for an answer to a statement of claim from 45 to 30 days.⁶
- ▶ **Responding to a Third-Party Claim.** The proposal would shorten the deadline for a response to a third-party claim from 45 to 30 days.⁷
- ▶ **Completing Arbitrator Lists.** Currently, parties must return the ranked arbitrator lists to FINRA staff no more than 20 days after the lists were sent to the parties.⁸ The proposal would shorten this deadline to 10 days.
- ▶ **Discovery in Customer Cases.** Currently, parties in customer cases are required to produce to all other parties documents that are described in the Document Production Lists on FINRA's website within 60 days of the date that the answer to the statement of claim is due; explain why specific documents cannot be produced within the required time; or object and file an objection with the Director.⁹ The proposal would shorten this deadline to 35 days.
- ▶ **Other Discovery Requests.** Currently, parties must respond within 60 days of receipt to requests for other documents or information.¹⁰ The proposal would shorten this deadline to 30 days.

The current provisions of the Codes authorizing the panel to rule on a party's objection to producing a requested document or information, extend or modify any deadline upon motion of a party, and decide discovery-related motions would still apply under the proposal, and would allow the panel to modify the default discovery deadlines under the proposal.¹¹

Case processing times are not expected to increase materially for parties who qualify under the current program, but would not qualify under the proposal, as they would retain their ability under the current program to ask that the panel consider their age and health in making scheduling decisions and setting deadlines.

Proposed 75-Year-Old Age Requirement

To limit the potential burden on the parties from the shorter deadlines, the proposal would restrict accelerated processing to those parties who are less likely to be able to fully participate in longer proceedings. Fourteen percent (285 of 2,103) of claimants in customer cases filed in 2020, or roughly half of the claimants who qualified under the current program, would have qualified under the proposal.¹²

FINRA is proposing a 75-year-old age requirement to focus on those parties who are most likely to need acceleration. Parties who are 75 or older are significantly more likely to become unable to participate in a hearing after a claim is filed than those who are 65 or older, as demonstrated by published rates of adverse health conditions and mortality.¹³ The impact of a 75-year-old age requirement on parties who would seek accelerated processing would be moderated by the fact that parties would be able to qualify on the basis of a medical diagnosis and prognosis irrespective of age.

Because the average likelihood of becoming unable to participate in a hearing at any given age may differ depending on sex, race and ethnicity, as indicated by differences in published average mortality rates, FINRA is seeking comment on ways that FINRA could implement the proposal in an equitable manner that could be effectively administered in the forum. However, the relatively higher average mortality rates for certain groups persist at every age between the ages of 65-74.¹⁴ This suggests that while lowering the age cutoff from 75 would provide a benefit to these groups as a result of their average higher mortality rates, it would not result in more equitable treatment across different groups.

Proposed Requirement for a Medical Diagnosis and Prognosis

The proposal attempts to balance concerns with individual privacy and the potential for abuse of the process. To establish that they qualify on the basis of illness, a party would be required to certify that they have received a medical diagnosis and prognosis and that based on that information they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration. They would not, however, be required to provide the specifics of their medical condition, medical records or a note from a physician. The certification would be made on a form provided by FINRA, which would be notarized and submitted when initiating the arbitration or filing the answer. The current provisions in the Codes relating to sanctions could apply if a party submitted a false certification to obtain faster case processing.¹⁵

Economic Impact Assessment

Regulatory Need

The proposal would address concerns that some parties may not be able to participate meaningfully in FINRA arbitration due to illness or age. The current program has not resulted in meaningfully shortened case processing times. For the parties who qualify, the proposal would shorten case deadlines and provide arbitrators with instruction on how quickly the arbitration should be completed. The proposal would thereby help improve the ability of these parties to meaningfully participate in FINRA arbitration.

Economic Baseline

The economic baseline is the current provisions under the Codes that address the administration of arbitration proceedings and the current program. Under the current program, claimants who have a serious health condition or are at least 65 may find it beneficial to request an accelerated proceeding when faster processing may allow them to participate more fully in the matter.

Relative to cases that are not in the current program, parties and arbitrators in cases that are in the current program may incur additional costs to meet the shortened case processing times. These additional costs may include slowing other business-related activities that require legal services or obtaining additional legal services. Since parties must request to participate in the current program, the parties who would request accelerated processing presumably anticipate that the benefits more than offset these costs.

Parties request the current program in approximately one-quarter of customer arbitrations. For example, from 2017 through 2021, 11,710 customer arbitrations closed where FINRA had served the statement of claim on respondents. A party requested accelerated processing in 27 percent of the arbitrations (3,152 of the 11,710 arbitrations). Ninety-nine percent, or 3,125 of the 3,152 requests, were granted. Parties either did not request or were not qualified in the remaining 8,585 arbitrations.¹⁶

Arbitrations in the current program closed only slightly faster than arbitrations not in the current program. The median time for the 3,125 customer arbitrations in the current program to close was approximately 13.4 months, and the median time for the 8,585 customer arbitrations not in the current program to close was approximately 15.2 months, or a difference of less than two months.¹⁷

Economic Impacts

Relative to the current program, the proposal would benefit parties who are seriously ill or at least 75 by codifying shorter arbitration deadlines. This would reduce the length of the arbitration and help these parties to meaningfully participate in the proceeding. The proposed acceleration of the arbitration process may still be insufficient for some parties to ensure that they are able to meaningfully participate throughout the arbitration process, especially those who are older or more seriously ill. However, more will likely benefit from participation in the proposed accelerated processing than under the current program.

The ability of parties to meaningfully participate may improve the efficiency of FINRA's arbitration forum to obtain outcomes that are more consistent with the merits of the case. This would include the large percentage of cases that settle, insofar as settlements reflect the full merits of the case.¹⁸ An increase in the efficiency of the forum may also increase the protections to customers from wrongdoing, and in particular those who are seriously ill or 75 or older, by helping to ensure that the potential liabilities of industry participants reflect their conduct.

The proposal, however, may also impose additional costs on parties and arbitrators to an arbitration. Parties between the ages of 65 and 74 who are seriously ill would not be able to rely on their age for accelerated processing. These parties may incur additional costs to certify that they have received a medical diagnosis and prognosis.

Parties and arbitrators may also incur additional costs to meet the shorter, rule-based deadlines. The parties who request accelerated processing would incur these costs at their own discretion. The types of costs parties incur may depend on how they manage their resources to meet the shortened deadlines. For example, parties may reallocate resources from other activities, possibly slowing them down; add resources such as additional staffing or outside counsel; or do a combination of

the two. How parties would meet the shortened deadlines is not known and may differ depending on their available resources.¹⁹ The additional costs, however, may be partly offset by the gains to efficiency from the shorter deadlines and a more focused effort on the associated tasks.

For parties who qualify for accelerated processing under the proposal, the magnitude of the benefits and costs would depend on the mandated reduction in time for proceedings relative to the time required under the baseline. Arbitrators would be instructed to render an award within 10 months or less. For the 3,125 customer arbitrations in the baseline sample that closed where parties were granted accelerated processing, 2,268 arbitrations (73 percent) were longer than 10 months. At the median, these 2,268 arbitrations would need to close six months sooner to meet the 10-month timeframe. The remaining 857 arbitrations (27 percent) would have met the 10-month timeframe.

To limit the potential costs, the proposal would not accelerate case processing for parties who are younger than 75. Relative to parties 75 or older, these parties are less likely to be seriously ill or experience adverse health conditions, and are therefore more likely to meaningfully participate in a longer proceeding.²⁰ From a hand-collected sample of 502 accelerated processing requests in customer arbitrations in 2020, less than half of the requests (217 requests or 43 percent) relate to parties who would not remain eligible under the proposal.²¹ The other 285 requests (57 percent) relate to parties who were seriously ill or 75 or older and, therefore, would be eligible to request accelerated processing under the proposal.

It is not expected, however, that the proposal would impose costs on those parties who qualify for accelerated processing under the current program but not under the proposal. These parties would retain the ability to ask that the panel consider their age and health in making scheduling decisions and setting deadlines. In addition, as discussed above, arbitrations in the current program closed only slightly faster than arbitrations not in the current program. FINRA therefore does not believe that processing times would materially change for these parties or have an effect on the efficiency of the forum to facilitate outcomes consistent with the full merits of the case. Similarly, FINRA does not believe that the proposal would have an economic effect on the other parties associated with these arbitrations.

The proposal would also not impose costs on parties who are younger than 65 and not seriously ill. These parties are not eligible for accelerated processing under the current program and would not be eligible under the proposal.

Alternatives Considered

An alternative to the proposal, similar to the current program, is for parties between the ages of 65 and 74 to be eligible for accelerated processing.²²

Parties between the ages of 65 and 74 who are seriously ill may benefit from a streamlined process to request accelerated processing without certifying that they have received a medical diagnosis and prognosis. Parties between the ages of 65 and 74 who are not seriously ill may also benefit from accelerated processing and reaching quicker resolution of the dispute.

Relative to the parties who are 75 or older, however, parties who are between the ages of 65 to 74 are less likely to be seriously ill or experience adverse health conditions that may reduce their ability to meaningfully participate. For example, for the U.S. population in 2018, whereas 19.1 percent of those between the ages of 65 and 74 report fair or poor health, 26.6 percent of those 75 or older report fair or poor health.²³ In addition, whereas the average annual mortality rate for those between the ages of 65 to 74 is 1.8 percent, the average annual mortality rate for those between the ages of 75 to 84 is 4.7 percent.²⁴ The lower likelihood of serious illness or adverse health conditions suggests that the aggregate benefits of providing accelerated processing to these parties when they are not currently seriously ill may not justify the aggregate costs imposed on other parties and arbitrators to meet the shorter, rule-based deadlines.

While parties who are between the ages of 65 and 74 are less likely to be seriously ill than parties who are 75 or older, some parties between the ages of 65 and 74 are more likely to be seriously ill or experience adverse health conditions or mortality than others in this age group. These differences can relate to sex or race. For example, the average annual mortality rate of the Black population (Black male population) for those between the ages of 65 and 74 is 2.6 percent (3.3 percent). Also, by way of example, the annual mortality rate of the Hispanic population (Hispanic female population) for those between the ages of 65 and 74 is 1.4 percent (1.1 percent).²⁵ Reducing the age at which an individual is eligible for accelerated processing to 65 may provide greater benefits to individuals in groups that are more likely to be seriously ill or experience adverse health conditions or mortality between the ages of 65 and 74. Below, we request comment on the potential importance of these differences for the proposal, as well as alternative ways to implement the proposal in an equitable manner.

Request for Comments

FINRA requests comment on all aspects of the proposal. FINRA requests that commenters provide empirical data or other factual support for their comments wherever possible. FINRA specifically requests comment concerning the following issues:

1. What has been your experience with the current program to accelerate arbitration proceedings, upon request, for parties who have a serious health condition or are at least 65 years old? What have been the economic impacts, including costs and benefits, from the current program?
2. What would be the impact of the proposed shortened, rule-based deadlines on case processing times and the costs to arbitrate a claim?
3. Would the existing provisions of the Codes governing discovery responses and allowing the panel to modify the discovery deadlines provide sufficient flexibility if the shortened deadlines could not be met in a particular case?
4. Is 75 the right age cutoff for parties to qualify for accelerated processing?
5. Are there alternative ways that FINRA could implement the proposal in an equitable manner that could be effectively administered in the forum? How could FINRA consider differences in the average likelihood that parties may become unable to participate in a hearing based on sex, race and ethnicity, as suggested by differences in published average mortality rates?
6. Should FINRA consider alternatives to the proposed requirement that the requesting party certify that they have received a medical diagnosis and prognosis, and that based on that information they have a reasonable belief that accelerated processing is necessary to prevent prejudicing their interest in the arbitration?
7. Under the proposal, the current provisions in the Codes relating to sanctions could apply if a party submitted a false certification to obtain faster case processing. Are there alternative approaches that FINRA should consider to limit potential abuse of the process?
8. What has been your experience with requesting and receiving a faster case processing in court or in a non-FINRA arbitration forum? What have been the economic impacts, including costs and benefits?
9. Are there other enhancements or alternative approaches not discussed in this *Notice* that FINRA should consider?

Endnotes

1. Parties should submit in their comments only personally identifiable information, such as phone numbers and addresses, that they wish to make available publicly. FINRA, however, reserves the right to redact, remove or decline to post comments that are inappropriate for publication, such as vulgar, abusive or potentially fraudulent comment letters. FINRA also reserves the right to redact or edit personally identifiable information from comment submissions.
2. See SEA Section 19 and rules thereunder. After a proposed rule change is filed with the SEC, the proposed rule change generally is published for public comment in the *Federal Register*. Certain limited types of proposed rule changes take effect upon filing with the SEC. See SEA Section 19(b)(3) and SEA Rule 19b-4.
3. Additional information about the current program is available on FINRA's [Expedited Proceedings for Senior or Seriously Ill Parties](#) web page.
4. See *infra* note 17 and accompanying text.
5. The Director may delegate this duty when it is appropriate, unless the Codes provide otherwise. See FINRA Rules 12103 and 13103.
6. See FINRA Rules 12303 and 13303.
7. See FINRA Rules 12306 and 13306.
8. See FINRA Rules 12403 and 13404.
9. See FINRA Rule 12506.
10. See FINRA Rules 12507 and 13507.
11. See FINRA Rules 12508, 12509, 13508 and 13509.
12. See the Economic Impact Assessment for further discussion of requests for accelerated processing in customer arbitrations filed in 2020.
13. See *infra* notes 23 and 24 and accompanying text.
14. See *infra* note 24 and accompanying text.
15. See FINRA Rules 12212 and 13212.
16. Accelerated processing was requested in few intra-industry arbitrations. For example, from 2017 through 2021, 6,636 intra-industry arbitrations closed where FINRA had served the statement of claim on respondents. A party requested accelerated processing in only 76 of the 6,636 arbitrations (one percent), and was granted accelerated processing in 70 of the 76 requests. For this reason, FINRA focuses on customer arbitrations, however the same economic effects may occur if an associated person requests and is granted accelerated processing.
17. Alternatively, FINRA can compare the length of customer arbitrations that went through the full arbitration process and closed by award after a hearing. Among the 11,710 customer arbitrations that closed during the sample period, 1,205 arbitrations closed by award after a hearing. Parties requested and were qualified for the current program in 291 arbitrations. Parties either did not request or were not qualified in the remaining 914 arbitrations. The median time for the 291 arbitrations in the current program to close was 13.0 months, and the median time for the 914 arbitrations not in the current program to close was 16 months, or a difference of three months.

18. Among the 11,710 customer arbitrations that closed from 2017 through 2021, 8,814 arbitrations (75 percent) resulted in settlements reached by the parties.
19. The magnitude of the costs for a party to comply with the shortened, rule-based deadlines may increase with their involvement in other, concurrent arbitrations. Industry parties, and in particular larger firms that provide services to a greater number of customers, may be more likely to incur the additional costs from adhering to multiple shortened timeframes. In the customer arbitrations in the baseline sample where parties qualified for the current program, 61 percent of the named firms were large, nine percent were mid-size, and 30 percent were small. Sixty-four percent of the large firms were concurrently involved in more than one arbitration in the current program. This percentage decreases to approximately 48 percent for mid-size firms and 30 percent for small firms. Also, 43 percent of the arbitrators appointed to customer arbitrations in the baseline sample where parties qualified for the current program were concurrently involved in more than one arbitration in the current program.
20. See *infra* notes 23 and 24 and accompanying text.
21. FINRA also identified 60 requests for accelerated processing in customer arbitrations where the request was based on age but information describing the age was not available. Depending on the age of the party, these requests may or may not be eligible under the proposal.
22. Among the hand-collected sample of accelerated processing requests, a similar number of requests were made by parties who were not seriously ill and 75 or older and by parties who were not seriously ill and between the ages of 65 and 74.
23. See [National Center for Health Statistics](#). Health, United States, 2019: Table 16.
24. See Elizabeth Arias and Jiaquan Xu, "[United States Life Tables, 2018](#)," National Vital Statistics Reports, Vol. 69, No. 12.
25. See *id.* The average annual mortality rate for the total male population (total female population) for those between the ages of 65 and 74 is 2.3 percent (1.5 percent).