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FINRA Opens Dispute Resolution to Non-Member Investment Advisers

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The **Financial Industry Regulatory Authority (FINRA)** recently published guidance[1] opening its arbitration forum to registered investment advisers. But investment advisers should weigh the pros and cons, discussed below, before deciding who should hear their disputes.

Typically, the agreements investment advisers enter into with their customers provide that disputes shall be arbitrated before the American Arbitration Association (AAA) or JAMS, or resolved through litigation in court. On a voluntary, case-by-case basis, however, investment advisers may now avail themselves of FINRA's system to resolve disputes with their customers — even though currently FINRA does not have regulatory authority over investment advisers.[2] To do so, the parties must submit both a post-dispute agreement to arbitrate as well as a special submission agreement that requires the parties to acknowledge the following:

- FINRA cannot enforce awards against investment advisers, although prevailing parties may enforce awards in court.
- Disputes will be administered pursuant to FINRA's Code of Arbitration Procedure.
- The final award will be publicly available.
- FINRA may bar an investment adviser from utilizing FINRA's forum in the future if an investment adviser fails to pay an award, settlement or FINRA fees.

Despite these conditions, investment advisers may view the FINRA forum as a more attractive alternative to AAA or JAMS for cost-related reasons. In most cases, each AAA and JAMS arbitrator sitting on a panel is paid an hourly rate for his/her arbitration services (typically $400/hour to $600/hour, but some arbitrators charge considerably more) whereas FINRA arbitration panels are paid a flat fee per three-hour hearing session (which can range from $50/session to $1,000/session, depending on the dollar amount at issue and the number of arbitrators on the panel). As part of the post-dispute agreement, however, the parties must decide which party or parties will be responsible for paying the FINRA forum fees.

Further, FINRA has established a somewhat streamlined discovery process (including voluntary document production under Rule 12506). And FINRA's arbitration process does not allow depositions, as do AAA and JAMS, which can be a costly phase of discovery.

Procedural (and cost) aspects aside, investment advisers must nonetheless consider other factors when deciding whether to submit to FINRA arbitration. One such factor is that FINRA awards are publicly available, whereas AAA and JAMS awards are typically not.

Also, it is Greenberg Traurig's experience that FINRA arbitration panels are more familiar with the legal and factual issues particular to broker-dealers, not investment advisers. One specific legal issue that arises in the investment adviser context is the fiduciary duty investment advisers owe to their customers. Further, FINRA arbitrators may not be as knowledgeable about an investment adviser's business as they likely are with regard to a broker-dealer's business.

Although this move may be viewed as part of FINRA's general push to assume oversight of investment advisers, which most investment advisers are resisting, it will nonetheless provide investment advisers with the opportunity to assess FINRA's arbitration system. FINRA has also made available its mediation services to investment advisers, also on a voluntary basis. Having handled many FINRA, AAA and JAMS arbitrations, Greenberg Traurig recognizes that investment advisers may have a difficult choice to make and we invite you to contact us for guidance regarding selecting the appropriate forum.

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[1] Available at http://www.finra.org/ArbitrationandMediation/Arbitration/SpecialProcedures/ P196162.

[2] Investment advisers who are dually registered as FINRA broker-dealers are subject to FINRA's jurisdiction and are required to arbitrate with FINRA.

As such, FINRA's new guidance is applicable only to those investment advisers who are not dually registered.

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