PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION

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Via Email Only @ Robert.Colby@finra.org

Robert L.D. Colby
Executive Vice President and Chief Legal Officer
FIRNA
1700 K Street NW
Washington, DC 20006

RE: Response to SIFMA Recommendations for FINRA Arbitration

Dear Mr. Colby:

We write on behalf of the Public Investors Advocate Bar Association ("PIABA"), an international bar association comprised of attorneys who represent investors in disputes with the securities industry. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and financial industry misconduct.

Our members and their clients have a strong interest in rules governing the FINRA arbitration forum. We share and strongly support FINRA's stated mission "to protect investors and safeguard the integrity of our vibrant capital markets to ensure that everyone can invest with confidence."[1]

We write to you to urge FINRA to stay faithful to its stated mission and reject the bulk of the recommendations provided to you by the Securities Industry and Financial Markets Association ("SIFMA") in their letter dated July 11, 2025.[2] Adopting SIFMA's recommendations would betray FINRA's investor protection mission and allow the securities industry to escape accountability for damages created by industry members.

Investor Protection Must Anchor FINRA's Decision-Making Process

PIABA's support for industry self-governance depends on a critical principle—the securities industry must internalize the costs of the harm it generates if it is to remain self-

[1] FINRA, About FINRA, https://www.finra.org/about (last visited July 22, 2025).
[2] Letter Alyssa Pompei and Kevin Carroll, Vice President & Assistant General Counsel and Kevil Carol, Deputy General Counsel, Securities Industry and Financial Markest Association, to Robert L.D. Colby, Executive Vice President and Chief Legal Officer, FINRA (July 11, 2025), https://www.sifma.org/resources/submissions/letters/recommendations-for-finra-arbitration/ (last visited July 22, 2025) (the "SIFMA Letter").

governing.[3] FINRA arbitration is the primary mechanism through which victims of industry misconduct seek accountability. If that forum fails to reliably hold firms responsible and transfer the costs of misconduct back to the investor, the justification for industry self-regulation collapses—along with the ability to police its own system.[4]

Although FINRA's independence has come under intense attack with calls to abolish FINRA or to have it declared unconstitutional, PIABA has remained supportive because it believed FINRA was committed to good-faith industry self-regulation.[5]

FINRA's recent actions have deeply undermined our confidence in its commitment to investor protection. On June 30, FINRA announced that it would return $50 million to its members on the theory that FINRA had experienced "material excess revenues."[6] However, FINRA ignored the industry's sustained default and failure to pay arbitration awards to customers.[7] FINRA's own statistics show that FINRA member firms have failed to pay over $75 million in customer awards between 2019 and 2023.[8] Rather than reserving funds to compensate victims of industry misconduct, who have gone through a full evidentiary hearing and received an award, FINRA chose to return the money to the securities industry—leaving the issue of unpaid arbitration awards unresolved.[9]

In another troubling decision, FINRA unilaterally changed its arbitrator qualification standards without meaningful notice or input from investor advocates.[10] The new criteria

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[3] John C. Coffee et al., SECURITIES REGULATION: CASES AND MATERIALS 690 (13th ed. 2015) (stating that the premise behind self-regulation is that "the industry has a strong incentive to police itself in order to maintain its quality."); William A. Birdthistle, M. Todd Henderson, *Becoming A Fifth Branch*, 99 CORNELL L. REV. 1, 8 (2013) ("The logic for the self-regulation of finance is based on the rational self-interest of market participants. Industry professionals have strong incentives to police their own, since many of the costs of misbehavior are born by all members of the profession while the benefits inure only to the misbehaving few.);

[4] *See* Benjamin P. Edwards, *The Dark Side of Self-Regulation*, 85 U. CIN. L. REV. 573, 600 (2017) ("When contractual relationships do not transfer the costs of misbehavior back to the industry, this incentive to self-police diminishes.").

[5] *See* Tracey Longo, Conservative Manifesto Project 2025 Says Finra Should Be Abolished, Financial Advisor, July 9, 2024, https://www.fa-mag.com/news/conservative-manifesto-project-25-says-finra-should-be-abolished-78740.html (last visited July 22, 2025); Benjamin P. Edwards, *Supreme Risk*, 74 FLA. L. REV. 543, 606 (2022) ("Congress, federal regulators, and SROs should prepare for the entirely foreseeable risk that courts will soon significantly interfere in the SRO model.").

[6] FINRA, Fee Rebate for Member Firms (June 30, 2005), https://www.finra.org/media-center/blog/fee-rebate-for-member-firms (last visited July 22, 2025).

[7] Hugh Berkson and David P. Meyer, FINRA Arbitration's Persistent Unpaid Award Problem, PIABA, Sept. 29, 2021, https://piaba.org/piaba-report-finra-arbitrations-persistent-unpaid-award-problem-september-29-2021/ (last visited July 22, 2025).

[8] FINRA, Statistics on Unpaid Customer Awards in FINRA Arbitration, https://www.finra.org/arbitration-mediation/dispute-resolution-statistics/statistics-unpaid-customer-awards-finra-arbitration (last visited July 22, 2025).

[9] Although the firms receiving rebates do not include any firms with unpaid awards, the return of funds allows the industry to remain indifferent to misconduct at other firms.

[10] Tracey Longo, *Investor Attorneys Cry Foul On Finra's Tougher Arbitrator Requirements*, FINANCIAL ADVISOR, June 2, 2025, https://www.fa-mag.com/news/investor-attorneys-cry-foul-on-finra-s-tougher-arbitrator-requirements-82754.html (last visited July 22, 2025).

exclude individuals without advanced education and professional experience, which will narrow the pool of public arbitrators. This action will also diminish the diversity of perspectives in these cases. Investors are already forced to waive their right to a jury trial simply to access the public financial markets. Now, even within FINRA's forum, they are less likely to have their disputes heard by peers and more likely to face panels that reflect the backgrounds of industry insiders rather than the investing public.

We encourage FINRA to remain steadfast in support of its mission to protect investors and not betray its reason for existence in the hope that appeasing the industry will allow it to escape political attacks from the industry.

FINRA Should Reject Dollar Thresholds Carve-Outs and Preserve Investor Access

FINRA should reject SIFMA's proposal to allow member firms to divert customer claims involving large dollar amounts to alternative arbitration forums. [11] This proposal is a transparent attempt to circumvent FINRA's established procedures – developed over decades with input from all stakeholders – and avoid liability in high stakes cases. Alternative forums often have no enforcement mechanism to force compliance with their rules, are more expensive and less transparent. Worse, FINRA has no process in place to monitor compliance with awards issued by these forums, nor would it retain authority to refer misconduct for enforcement. The result would be fragmentation, inconsistency, and a weakening of FINRA's oversight capacity.

The size of an investor's claim often reflects nothing more than the size of their loss and the strength of the claim, not the merit or complexity of their case. Under SIFMA's proposal, investors harmed by identical conduct would be split between systems: smaller claims in FINRA, larger claims dragged into unfamiliar and opaque forums, solely because the investor had more at stake. This isn't investor protection; it's forum shopping by the industry to avoid accountability.

Instead of ceding ground to industry interests, FINRA should empower retail investors. PIABA urges FINRA to adopt rules that allow investors to choose between FINRA and court. This approach would align with FINRA's investor protection mission and offer the critical option of seeking justice before a jury of peers.

In addition, PIABA strongly opposes any attempt to remove intra-industry cases from the FINRA forum. These cases are essential to FINRA's ability to detect patterns of misconduct, refer matters for discipline, and police its member firms. Voluntarily surrendering jurisdiction over internal disputes would undermine one of FINRA's core regulatory tools—and its claim to be an effective self-regulatory organization.

[11] SIFMA Letter at 3.

FINRA Should Reject Damage Limitations in the Forum

FINRA should reject SIFMA's request to impose new limitations on punitive or other forms of damages. There is no evidence that arbitrators are awarding excessive or inappropriate punitive damages. SIFMA's letter merely asserts—without citation—that "[r]ecent extreme outlier punitive damages awards" have occurred.[12] It provides no examples, no case analysis, and no basis for concluding that any damages awarded were improper. In fact, punitive damages are awarded in less than 1% of FINRA arbitrations. PIABA believes punitive damages are far too infrequent and often insufficient to accomplish the stated legal bases for punitive damages, including both punishment and deterrence goals.

If arbitrators are not capable of properly awarding punitive damages and following the law regarding punitive damages, then there is no reason to believe arbitrators could properly determine awards of other damages either. Simply, if customers are forced to bring their claims against the securities industry in arbitration, the arbitrators should be entitled to award any relief the customers would be entitled to if their claim was filed in court. In the past few years, the industry has prevailed in FINRA arbitrations at an alarming rate. The industry prevailed in over 75% of customer cases in 2023, 74% of the time in 2024, and 72% of the time Year-To-Date in 2025. The FINRA arbitration forum needs to expand access to justice for investors to provide an equitable and fair forum for investors.

Moreover, FINRA already provides comprehensive training on punitive damages. The FINRA Arbitrator Reference Guide clearly explains that punitive damages are meant to punish and deter egregious misconduct.[13] Arbitrators are well-trained to apply this standard and understand that punitive damages are only warranted in exceptional circumstances when the relevant legal standard is met. Stripping arbitrators of the ability to award such damages would shield serious industry misconduct from meaningful consequences—damages that would otherwise be available to investors in court. If FINRA is to take a step toward fairness, it should commission a study to determine why the investor win rate is lower than the industry win rate and how FINRA could help make the forum more equitable to investors – ensuring they win at least as often as the industry.

FINRA Should Not Create More Burden, Costs, and Inefficiency by Enabling or Expanding Motions to Dismiss

PIABA strongly opposes SIFMA's proposal to expand the grounds for motions to dismiss. FINRA arbitration is intended to be an equitable forum where investors, who are compelled into arbitration by industry contracts, must have the opportunity to present their claims to a panel. Authorizing additional motion practice would frustrate that purpose, increasing procedural hurdles and depriving investors of their chance to be heard. SIFMA's proposal appears to seek a motion to dismiss practice that would look more like the process under court codes of civil procedure and would result in significant additional costs and burdens and would result in delays due to disputes regarding pleading requirements and

[12] SIFMA Letter at 4.

[13] The FINRA Arbitrator Reference Guide at 69.

amendments to claims to cure alleged deficiencies or defects in filed claims. Instead of promoting the efficiency and cost-effectiveness of arbitration, SIFMA's proposal would likely add months of time on top of the FINRA Arbitration process and result in additional costs. Expansion of motions to dismiss without procedural protections offered to civil litigants would be patently unjust.

If any change is warranted, PIABA supports eliminating FINRA Rule 12206 entirely. This rule permits the industry to dismiss cases based on a six-year eligibility window, even after a claim is filed—effectively stripping investors of access to arbitration on arbitrary timing grounds. If the industry requires investors to arbitrate, then investors should be allowed to resolve their disputes in that forum—without being forced to litigate threshold issues at the industry's discretion in a forum chosen by the industry.

FINRA should not entertain the industry's request for additional motions to dismiss because FINRA has already analyzed and rejected SIFMA's request. In Regulatory Notice 09-07, FINRA explained with additional motions to dismiss would be improper.[14] In that notice, FINRA explained that it had:

> received complaints that parties were filing prehearing motions routinely and repetitively in an apparent effort to delay scheduled hearing sessions on the merits, increase customers' costs, and intimidate less sophisticated customers. As a result, FINRA believes customers are spending additional resources to defend against these motions, increasing the costs and processing times of the arbitration process.
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> FINRA also learned through an independent study that the number of motions to dismiss filed in customer cases had begun to increase over a two-year period starting in 2004. Even though most motions to dismiss are denied, FINRA became concerned that, if left unregulated, this type of motion practice would limit investors' access to the forum, either by making arbitration too costly or by denying customers their right to have their claims heard in arbitration.

When FINRA issued Regulatory Notice 09-07, it recognized the host of problems that the industry's proposal would create for investors. At that time, FINRA correctly stood on the side of investor protection. FINRA should reject the industry's invitation to subordinate investor interests to industry interests.

FINRA Should Not Limit Discovery

Access to discovery is essential for investors seeking to prove their claims. FINRA's Code of Customer Arbitration already substantially limits some of the traditional discovery tools available in court litigation including depositions, requests for admission, and interrogatories. Industry efforts to shield their internal documents and materials which will

[14] FINRA Regulatory Notice 09-07, https://www.finra.org/rules-guidance/notices/09-07 (last visited July 29, 2025).

reveal their misconduct would unfairly stack the deck against the customers who are often mom and pop retail investors and retirees seeking to recover losses of significant portions of their life savings.

FINRA should reject SIFMA's proposal to limit discovery or divert discovery disputes to a special master removed from the oversight of arbitrators who will be most familiar with the particularities of each investor's claims. FINRA should work with all stakeholders, and particularly the National Arbitration and Mediation Committee (NAMC) to consider any such issues and make formal recommendations to FINRA and the SEC in the normal course. All stakeholders, especially the interests of public investors, should be given a full opportunity to comment on any proposed changes.

SIFMA's suggestion to create a separate pool of arbitrators to handle discovery issues is both premature and counterproductive. Rather than promoting efficiency, such a move would increase complexity and delay, and SIFMA's request does not demonstrate a concrete need for such a drastic change. More fundamentally, FINRA should not reward industry misconduct by weakening discovery protections or by creating mechanisms that shield discovery abuses from arbitrators' scrutiny.

FINRA should instead deal more directly with the securities industry's abuse of the FINRA discovery process. PIABA members routinely experience frivolous boilerplate objections by brokerage firms of even the "presumptively discoverable" FINRA Discovery Guide under FINRA Rule 12506. The discovery abuse by the industry noted in FINRA's Notice To Members 03-70 more than two decades ago has continued to grow. FINRA should proactively address the industry's discovery abuses, frivolous objections, and delays in producing relevant documents and ensure customers are provided with a fair opportunity to obtain relevant documents and information.

FINRA Does Not Need to Micromanage Hearings for Arbitrators

SIFMA's suggestion of creating a "central contact point" to serve as a hidden "master hand" creates a grand canyon of issues and would almost certainly result in greater inefficiency and disorder and would erode the confidence in the FINRA Arbitration system by creating an opaque decision-maker that the parties would not be able to present their case, evidence, or arguments to. The needs of arbitration claims often differ greatly from claim to claim. Competent arbitrators have the ability to manage the unique needs of each individual case and should be most familiar with the facts and circumstances surrounding the case schedule and deadlines. SIFMA presents no concrete evidence of widespread problems in the management of case schedule and deadlines. PIABA members' experience suggest that the brokerage firm Respondents are consistently the culprit of case scheduling problems, delays, and the scheduling of hearings well past the deadlines suggested by FINRA.

PIABA suggests FINRA should continue to encourage arbitrators to efficiently manage the scheduling of hearings, but that should not require FINRA to appoint a babysitter for the FINRA Arbitrators who would require the arbitrators to take certain actions without the benefit knowing the unique needs of the case. SIFMA's suggestion of placing rules that

artificially limit the number of witnesses that can be called and the length of time they can testify would be patently unfair, significantly prejudicing customers and even the industry in many cases. SIFMA suggests that arbitration be treated like a game with a "chess clock" that would strictly limit time of presentation equally. FINRA Arbitrations are not a game for clients who have lost their retirement or life savings due to their Financial Advisor's fraud. SIFMA's suggestion ignores the reality of cases, particularly where the customers bear the burden of proof and may require substantially more time to present their claim than the brokerage firm. Limiting the customer's ability to present evidence would significantly prejudice customer's rights and create serious risk for the integrity of the awards FINRA arbitrators render. *See, e.g.*, 9 U.S.C. § 10 (authorizing vacatur of arbitration awards where arbitrators refuse "to hear evidence pertinent and material to the controversy").

FINRA Should Reject SIFMA's Push for Industry-Dominated Arbitration Panels

PIABA opposes the request to require arbitrators to have additional subject matter expertise and requests that FINRA consider requiring customers to submit their dispute to members of the industry. Members of juries do not have to have any relevant experience in the securities industry, and neither do state or federal court judges for that matter. Further, both parties in customer claims are currently permitted to rank and strike arbitrators, including non-public arbitrators. Efforts to create a more industry-tilted arbitrator pool will only further deteriorate the fairness of the forum where the industry presently wins nearly 75% of customer cases. However, PIABA supports reclassifying certain non-public arbitrators—such as PIABA members with no financial or business ties to the securities industry—as public arbitrators. This would expand the qualified public pool without compromising fairness.

Investors are entitled to dispute resolution before a neutral and balanced tribunal—not one engineered to protect the industry from accountability. FINRA must reject efforts that would turn its arbitration forum into a venue where the outcome is skewed before the case even begins.

FINRA Should Continue to Monitor Its Arbitration Forum

Although PIABA opposes SIFMA's requests to further tilt the playing field in the industry's favor, PIABA does agree that FINRA should effectively monitor its arbitration forum and address poorly performing arbitrators—either with additional training or removal from the arbitrator pool. Neither investors nor the industry benefit from arbitrators who fail to serve professionally, diligently, or impartially. FINRA should continue to monitor these issues and should consider developing a transparent process to address these issues.

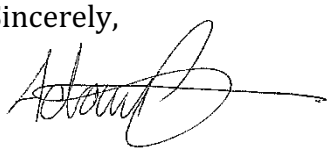
Conclusion

Ultimately, PIABA remains deeply concerned that FINRA's core mission is at risk if it continues to retreat from a strong investor protection posture. While FINRA may be mindful

of legislative efforts to shift its regulatory authority to the SEC, it must not sacrifice its principles out of political fear.[15]

PIABA urges FINRA to remain anchored in its investor protection mission and to resist pressure from industry groups seeking to dilute hard-won safeguards.

Sincerely,



Adam Gana, President
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Joe Wojciechowski, Vice President
Public Investors Advocate Bar Association

CC: Robert Cook, President and Chief Executive Officer
Richard Berry, Executive Vice President and Director of FINRA Dispute Resolution Services

[15] Congresswoman Lisa McClain, McClain Introduces Bill to End FINRA's Lack of Accountability and Transparency, April 10, 2025, https://mcclain.house.gov/2025/4/mcclain-introduces-bill-to-end-finra-s-lack-of-accountability-and-transparency (last visited July 22, 2025).